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REPORTS

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TABLE OF CONTENTS

Judges of the Court of Appeals	v
Table of Cases Reported	vii
Table of Cases Reported Without Published Opinions	viii
Opinions of the Court of Appeals	1-600
Headnote Index	601

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CASES REPORTED

	PAGE		PAGE
Allmond v. Goodnight	413	Krueger v. N.C. Criminal Justice Educ. & Training Standards Comm'n . . .	293
Atl. Coast Conf. v. Univ. of Md.	429		
Auto. Grp., LLC v. A1 Auto Charlotte, LLC	443	Lipinski v. Town of Summerfield . . .	305
Bank of Am., N.A. v. Rice	450	Mathis v. Dowling	311
Brown v. Cavit Sci., Inc.	460	Mills v. Triangle Yellow Transit	546
Busik v. N.C. Coastal Res. Comm'n . . .	148		
		Rockford-Cohen Grp., LLC v. N.C. Dep't of Ins.	317
Chaffins v. Tar Heel Capital Corp. . . .	156	Ross v. Ross	28
Charlotte Motor Speedway, LLC v. Cnty. of Cabarrus	1		
City of Asheville v. Resurgence Dev. Co., LLC	80	State v. Ashe	38
		State v. Blankenship	113
Davis v. Woodlake Partners, LLC	88	State v. Bryan	324
Dep't of Transp. v. Webster	468	State v. Call	45
Duplin Cnty. Dep't of Soc. Servs. ex rel. Pulley v. Frazier	480	State v. Chukwu	553
		State v. Davis	50
Estate of Gary Vaughn v. Pike Electric, LLC	485	State v. Grooms	56
Estate of Hurst v. Jones	162	State v. High	330
		State v. Holland	337
Farlow v. Brookbank	179	State v. James	346
First Fed. Bank v. Aldridge	187	State v. Malunda	355
Frazier v. Carolina Coastal Ry., Inc.	504	State v. Martin	571
		State v. Martinez	361
In re C.M.	193	State v. May	366
In re Cline	11	State v. Monroe	70
In re E.G.M.	196	State v. Northington	575
In re G.C.	511	State v. Phillips	382
In re J.L.H.	214	State v. Shannon	583
In re J.P.	523	State v. Simpson	119
In re M.M.	225	State v. Smith	387
In re McNeil	241	State v. Thomas	127
In re T.J.F.	531	State v. Williams	590
In re Town of Smithfield	252		
In re Twin Cnty. Motorsports, Inc. . . .	259	Washington v. Cline	396
Irving v. Charlotte Mecklenburg Bd. of Educ.	265		
		Zaldana v. Smith	134
Johnson v. Crossroads Ford, Inc. . . .	103		
Johnson v. Johnson	280		
JPMorgan Chase Bank v. Browning	537		

CASES REPORTED WITHOUT PUBLISHED OPINIONS

	PAGE		PAGE
Alston v. N.C. A & T State Univ.	143	In re D.C.	143
Americus Retail Holdings LLC		In re D.M.R.	598
v. Ball	140	In re E.G.	143
Atkinson v. Reikowsky	409	In re E.L.F.	598
		In re Gordon	140
Bass v. Harnett Cnty.	409	In re J.B.W.	598
BB&T v. Bing	143	In re J.C.	140
Bhathela v. Currie	409	In re J.D.M.	143
Branch Banking & Tr. Co.		In re J.N.M.	410
v. Harris	409	In re Jerrys Shell, LLC	410
		In re K.C.	598
Cebula v. Givens Est., Inc.	140	In re K.R.G.	410
Coats v. N.C. Dep't of Health		In re M.F.	598
& Hum. Servs.	409	In re M.R.	598
Coraldi v. Pickett	409	In re N.J.	140
		In re R.B.	140
Dep't of Transp. v. Ashcroft		In re R.C.	598
Commons, LLC	598	In re R.N.H.	143
Diamond v. Charlotte-Mecklenburg		In re Radisi	140
Cnty. Bd. of Educ.	140	In re S.E.W.	410
		In re S.J.S.	410
Elizabeth Townes Homeowners		In re S.R.	410
Ass'n, Inc. v. Jordan	140	In re T.F.	598
Ellis v. Ellis	143	In re T.R.C.	598
		In re Z.A.	140
Fed. Nat'l Mortg. Ass'n v. McLean ..	140	Irving v. Charlotte-Mecklenburg Bd.	
First Bank v. S&R Grandview, LLC ..	143	of Educ.	140
Foot Locker, Inc. v. Best	143		
Ford v. City of Wilson	143	Liberatore v. Liberatore	410
Fox v. City of Greensboro	140	Lynch v. Oak Island Beach Villa	
FSI, Inc. v. Andy Newson & Benton		Owners Ass'n, Inc.	143
& Parker Co., Inc.	409		
		McRavion v. N.C. Dep't of Corr.	598
Gentry v. Miller	598	Moore v. G & I VI Forest Hills	
Guilford Cnty. ex rel. James		GP, LLC	410
v. Sutton	409	Morales v. Morales	143
		Morgan v. Morgan	143
Harvell v. Wix Filtration, LLC	143		
Historical Pres. Action Comm., Inc.		Owen v. Hogsed	141
v. City of Reidsville	598		
Hollifield v. Commc'ns Installations		Powells Med. Facility, v. N.C. Dep't.	
Specialists	409	of Health & Human Servs.	410
In re A.D.	598	Quackenbush v. Steelman	410
In re A.N.V.	598		
In re A.S.B.	409	Raymond v. N.C. Police Benevolent	
In re B.G.A.S.	409	Ass'n, Inc.	141
In re B.O.	410	Robinson v. Discovery Ins. Co.	410

CASES REPORTED WITHOUT PUBLISHED OPINIONS

	PAGE		PAGE
Skanska USA Bldg., Inc. v. Blythe		State v. Lewis	145
Dev. Co.	144	State v. Lewis	411
Smith v. Parker	144	State v. Lillie	145
Smith v. Smith	144	State v. Long	411
State v. Adams	144	State v. Lukowitsch	145
State v. Allison	144	State v. Matthews	411
State v. Autery	144	State v. Mayweather	141
State v. Barnes	144	State v. McDonald	145
State v. Best	410	State v. McMillan	145
State v. Blackwell	144	State v. Meadows	141
State v. Bowman	410	State v. Miller	411
State v. Boykin	144	State v. Mills	145
State v. Bradley	410	State v. Moore	141
State v. Brown	599	State v. Mott	146
State v. Bryant	410	State v. Muir	412
State v. Carson	411	State v. Newson	599
State v. Carter	141	State v. Nicholas	599
State v. Carver	411	State v. Norris	412
State v. Chaplin	411	State v. Nunn	599
State v. Chester	141	State v. Ownbey	412
State v. Chestnut	141	State v. Parker	141
State v. Childress	411	State v. Patterson	146
State v. Church	599	State v. Rambert	142
State v. Coleman	144	State v. Ramos	142
State v. Collins	411	State v. Rich	146
State v. Cyr	141	State v. Rossi	599
State v. Earnhardt	144	State v. Salter	599
State v. El	144	State v. Samolinski	599
State v. Foote	145	State v. Scott	146
State v. Frye	141	State v. Shackelford	412
State v. Garner	145	State v. Smith	146
State v. Goldman	145	State v. Streater	599
State v. Goodwin	599	State v. Strickland	146
State v. Greene	411	State v. Sutton	142
State v. Gregory	145	State v. Thompson	146
State v. Gresham	145	State v. Tomlinson	146
State v. Haley	411	State v. Toomer	146
State v. Hall	411	State v. Troxler	146
State v. Harris	599	State v. Vaughn	147
State v. Hart	599	State v. Villanueva	146
State v. Holmes	141	State v. Walton	146
State v. Horn	145	State v. Wash	146
State v. Jackson	145	State v. Watkins	142
State v. Johnson	599	State v. Watts	142
State v. Jolly	145	State v. Weichelt	146
State v. Larson	411	State v. Wigfall	600
State v. Lawson	599	State v. Wiggins	412
State v. Lee	411	State v. Wiley	412

CASES REPORTED WITHOUT PUBLISHED OPINIONS

	PAGE		PAGE
State v. Williams	147	Walker v. N.C. Dep't of Corr.	142
State v. Wilson	600	Walker v. N.C. Dep't of Corr.	147
Stevens v. U.S. Cold Storage, Inc.	412	Ward v. Carmona	147
Thompson v. Gutierrez	412	WRI/Raleigh LP v. Richardson	147
Thornton v. City of Raleigh	600		

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

CHARLOTTE MOTOR SPEEDWAY, LLC AND
SPEEDWAY MOTORSPORTS, INC., PLAINTIFFS
v.
COUNTY OF CABARRUS, DEFENDANT

No. COA12-1361

Filed 1 October 2013

1. Trials—judicial notice—immaterial for Rule 12(b)(6) motion

Defendant's motion in a breach of contract case for the Court of Appeals to take judicial notice of several facts was denied. Generally, matters outside the complaint are not germane to a Rule 12(b)(6) motion.

2. Contracts—breach of contract—specific performance—motion to dismiss—sufficiency of evidence—void for indefiniteness

The trial court did not err by dismissing plaintiffs' claims for breach of contract and specific performance even though plaintiffs contended that the amended complaint alleged a valid contract between the parties, based on a 21 November letter, and that the contract was breached by defendant County. The 21 November letter's silence on several key terms rendered it void for indefiniteness.

3. Fraud—motion to dismiss—sufficiency of evidence

The trial court did not err by dismissing plaintiffs' fraud claim. There was no definite and specific representation that would be sufficient on these facts to support a claim for fraud.

CHARLOTTE MOTOR SPEEDWAY, LLC v. CNTY. OF CABARRUS

[230 N.C. App. 1 (2013)]

4. Fraud—negligence misrepresentation—motion to dismiss—sufficiency of evidence

The trial court did not err by dismissing plaintiffs’ negligent misrepresentation claim. Even assuming *arguendo* that defendant County owed plaintiffs a duty of care, there was no specific representation made by the County sufficient to form the basis for a negligent misrepresentation claim.

Appeal by Plaintiffs from order entered 21 March 2012 by Judge Robert C. Ervin in Cabarrus County Superior Court. Heard in the Court of Appeals 9 April 2013.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, William K. Diehl, Jr., and John R. Buric, for plaintiffs-appellants.

Erwin, Bishop, Capitano & Moss, P.A., by J. Daniel Bishop and Matthew M. Holtgrewe; and Law Offices of Richard M. Koch, by Richard M. Koch, Cabarrus County Attorney, for defendant-appellee.

DAVIS, Judge.

Charlotte Motor Speedway, LLC (“CMS”) and Speedway Motorsports, Inc. (“SMI”) (collectively “Plaintiffs”) appeal from the trial court’s order dismissing their amended complaint against Cabarrus County (the “County”). Plaintiffs primarily contend that they asserted a valid claim for breach of contract against the County in connection with an agreement between the parties concerning the continued presence of the Charlotte Motor Speedway (“the Speedway”) in Cabarrus County and the construction of an adjacent racing facility. After careful review, we affirm the trial court’s order.

Factual Background

In August 2007, O. Bruton Smith (“Smith”), the Chief Executive Officer of CMS and SMI, announced SMI’s intention to construct a National Hot Rod Association-approved racing facility known as the “Dragway” on land adjacent to the Speedway within the County. In October 2007, the Concord City Council amended Concord’s Unified Development Ordinance in a manner that would have prevented the Dragway from being built. Smith subsequently announced that SMI planned to relocate the Speedway — and construct the Dragway — outside of Cabarrus County.

CHARLOTTE MOTOR SPEEDWAY, LLC v. CNTY. OF CABARRUS

[230 N.C. App. 1 (2013)]

In response, the City Council repealed its zoning amendment so as to allow for the construction of the Dragway. On 20 November 2007, the County and Concord approached SMI and made a proposal to provide \$60 million in funds to improve the infrastructure surrounding the Speedway and future Dragway. SMI rejected this proposal.¹

On 21 November 2007, Robert Carruth (“Carruth”), the Chairman of the Cabarrus County Board of Commissioners, and Scott Padgett (“Padgett”), the Mayor of Concord, sent a letter dated 21 November 2007 (“the 21 November Letter”) to Smith which stated, in pertinent part, as follows:

Cabarrus County and the City of Concord are committed to providing \$80,000,000 through local efforts for the financing, design and construction of road, pedestrian, utility and noise attenuation projects. The City and Cabarrus County concur that SMI’s project list defines investments important to meeting your vision of creating the finest motorsports racing complex that includes a new drag strip facility and major improvements to Lowe’s Motor Speedway.

The commitment is to generate \$80,000,000 for funding related infrastructure and transportation investments. However, we need an additional 36 months to secure \$20,000,000 of this \$80,000,000 from the State of North Carolina. If the \$20,000,000 is not secured from the State in 36 months, our pledge is to provide it from other sources. Any contributions secured from the State or others, or projects that are constructed directly by the State, will be applied to the \$80,000,000 commitment and will not be in addition to this amount.

...

It is intended that the financing of some of these projects making up the \$80,000,000 be structured through a combination of tax based incentives and other incentive grants so SMI has the ability to impact the timing, cost and management of the construction projects. The balance will be funded by other City and County controlled revenues.

1. The amended complaint does not contain information regarding any additional terms of this proposal or the circumstances under which it was made. However, none of Plaintiffs’ claims stem from or relate to this original proposal.

CHARLOTTE MOTOR SPEEDWAY, LLC v. CNTY. OF CABARRUS

[230 N.C. App. 1 (2013)]

...

We understand that all parties anticipate that the \$80,000,000 will be formalized in an agreement that will also provide an outline of a schedule to prioritize projects and to identify the investment that SMI plans to make through the construction of the drag strip and improvements to Lowe's Motor Speedway.

...

[T]he Cabarrus County Board of Commissioners and the Concord City Council are committed to partnering with you to make the public improvements necessary to address the long term transportation needs faced by the speedway and the community around it.

That same day, Smith called Padgett and told him that "we have an agreement." Carruth was also contacted by Smith's staff and informed that SMI had accepted the 21 November 2007 proposal.

Plaintiffs proceeded to construct the Dragway, which opened on 20 August 2008. A document entitled "Proposed Formal Agreement" was ultimately submitted by the County and Concord to Plaintiffs the following day. The proposed agreement contained terms requiring SMI to expend "tens of millions of dollars within only three years . . . but . . . allow[ing] the [County and Concord] up to forty years to reimburse SMI." SMI summarily rejected the proposed agreement on the grounds that it contained terms that were "never agreed upon or discussed and are wholly unreasonable."

Based on their dissatisfaction with the proposed agreement, Plaintiffs filed a lawsuit in Cabarrus County Superior Court against the County and Concord containing causes of action for (1) specific performance; (2) breach of contract; and (3) fraud or, in the alternative, negligent misrepresentation. On 28 May 2010, Plaintiffs voluntarily dismissed their original complaint, and on 29 June 2011, Plaintiffs filed an amended complaint asserting the same causes of action but naming Cabarrus County as the sole defendant.² Plaintiffs attached the 21 November Letter to the amended complaint and incorporated its terms by reference.

On 29 August 2011, the County filed an answer and motion to dismiss in which it sought dismissal of Plaintiffs' amended complaint

2. For this reason, Concord is not a party to this appeal.

CHARLOTTE MOTOR SPEEDWAY, LLC v. CNTY. OF CABARRUS

[230 N.C. App. 1 (2013)]

pursuant to Rules 12(b)(1), (2), and (6) of the North Carolina Rules of Civil Procedure.

Following a hearing on the County's motion to dismiss, the trial court entered an order on 21 March 2012 granting the County's motion and dismissing all of Plaintiffs' claims with prejudice. Plaintiffs gave timely notice of appeal.

Judicial Notice

[1] The County has filed a motion requesting that this Court take judicial notice of the following: (1) "comprehensive financial data" and records of the County and Concord; (2) property tax rates and tax revenues for the County and Concord in 2008; and (3) the absence of records showing the taking of action by the Cabarrus County Board of Commissioners or the Concord City Council at a public meeting to approve the 21 November Letter or to delegate authority to Carruth or Padgett to make a binding agreement with Plaintiffs.

In its motion, the County contends that taking judicial notice of the items described above "will harmonize the facts the Court may properly consider in reviewing the trial court's dismissal order under Rule 12(b)(6)" However, it is well established that "[t]he only purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the pleading against which it is directed." *Weaver v. Saint Joseph of the Pines, Inc.*, 187 N.C. App. 198, 203, 652 S.E.2d 701, 707 (2007) (citation and quotation marks omitted).³ "As a general proposition, therefore, matters outside the complaint are not germane to a Rule 12(b)(6) motion." *Id.* Accordingly, we deny Defendant's request to take judicial notice of these facts.

Analysis**I. Contract Claims**

[2] We begin by addressing Plaintiffs' claims for breach of contract and specific performance. Plaintiffs contend that the trial court erred in dismissing these claims because the amended complaint alleged a valid contract between them and the County and that the contract was breached by the County.

3. The County's motion to dismiss was based on Rules 12(b)(1), (2), and (6), and the trial court's order does not specify which of these provisions of Rule 12 its order was based upon. However, as explained below, we believe that dismissal of this action was appropriate under Rule 12(b)(6), and we decline to address the County's arguments under Rules 12(b)(1) and (2).

CHARLOTTE MOTOR SPEEDWAY, LLC v. CNTY. OF CABARRUS

[230 N.C. App. 1 (2013)]

When reviewing an order of dismissal for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6), we assess the legal sufficiency of the complaint while taking all of the material factual allegations included therein as true. *Burgin v. Owen*, 181 N.C. App. 511, 512, 640 S.E.2d 427, 429, *appeal dismissed and disc. review denied*, 361 N.C. 425, 647 S.E.2d 98, *cert. denied*, 361 N.C. 690, 652 S.E.2d 257 (2007). “Legal conclusions, however, are not entitled to a presumption of validity.” *Guyton v. FM Lending Servs., Inc.*, 199 N.C. App. 30, 33, 681 S.E.2d 465, 469 (2009). An allegation that a valid contract exists between parties is a legal conclusion. *See Guarascio v. New Hanover Health Network, Inc.*, 163 N.C. App 160, 165, 592 S.E.2d 612, 614 (holding that employee’s assertion that valid employment contract existed between him and defendant was legal conclusion “not entitled to a presumption of truth”) (citation and quotation marks omitted), *disc. review denied*, 358 N.C. 375, 597 S.E.2d 130 (2004).

Plaintiffs’ claims for breach of contract and specific performance necessarily hinge on the threshold issue of whether a valid contract actually existed between them and the County. *See Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000) (“The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract.”); *McKinnon v. CV Indus., Inc.*, ___ N.C. App. ___, ___, 713 S.E.2d 495, 500 (“For a court to award specific performance, there must be a breach of a valid contract.”), *disc. review denied*, 365 N.C. 353, 718 S.E.2d 376 (2011).

Plaintiffs attached to their amended complaint the 21 November Letter — the document that they contend formed a contract between them and the County — and repeatedly discussed its terms in their pleading. Specifically, Plaintiffs alleged that the 21 November Letter “standing alone is a valid and enforceable contract” in which the parties agreed that “in exchange for the economic incentives set forth in the [21 November Letter], SMI agreed to keep the Speedway in Concord and move forward with the Dragway.” In ruling on the County’s motion to dismiss, the trial court was permitted to consider this document to determine whether a contract did, in fact, exist between the parties. *See Schlieper v. Johnson*, 195 N.C. App. 257, 261, 672 S.E.2d 548, 551 (2009) (“When documents are attached to and incorporated into a complaint, they become part of the complaint and may be considered in connection with a Rule 12(b)(6) motion without converting it into a motion for summary judgment.”). Under such circumstances, a “trial court may reject allegations that are contradicted by documents attached to the complaint.” *Id.* at 265, 672 S.E.2d at 553. Thus, in our review, we too

CHARLOTTE MOTOR SPEEDWAY, LLC v. CNTY. OF CABARRUS

[230 N.C. App. 1 (2013)]

must examine the 21 November Letter to determine whether it contains the terms sufficient to establish a binding contract under North Carolina law and may reject allegations in Plaintiffs' amended complaint that are contradicted by the Letter.

Under longstanding North Carolina law, a valid contract requires (1) assent; (2) mutuality of obligation; and (3) definite terms. *Id.* at 265, 672 S.E.2d at 553. "It is a well-settled principle of contract law that a valid contract exists only where there has been a meeting of the minds as to all essential terms of the agreement." *Northington v. Michelotti*, 121 N.C. App. 180, 184, 464 S.E.2d 711, 714 (1995); see *MCB, Ltd. v. McGowan*, 86 N.C. App. 607, 608, 359 S.E.2d 50, 51 (1987) ("In North Carolina, one of the essential elements of every contract is mutuality of agreement. . . . [The Parties] must assent to the same thing in the same sense, and their minds must meet as to all the terms.") (citation, quotation marks, and alterations omitted). Indeed, "[t]o be enforceable, the terms of a contract must be sufficiently definite and certain, and a contract that leav[es] material portions open for future agreement is nugatory and void for indefiniteness." *Miller v. Rose*, 138 N.C. App. 582, 587-88, 532 S.E.2d 228, 232 (2000) (internal citations and quotation marks omitted).

We conclude that the 21 November Letter's silence on several key terms renders it void for indefiniteness and that, for this reason, the trial court correctly granted the County's motion to dismiss as to Plaintiffs' claims for breach of contract and specific performance. Most notably, the 21 November Letter is silent as to any specific obligation on the part of Plaintiffs and is unclear as to precisely when Defendant would be required to expend the \$80 million. Moreover, the 21 November Letter itself notes the preliminary nature of the document by stating that "all parties anticipate that the \$80,000,000 will be formalized in an agreement that will also provide an outline of a schedule to prioritize projects and to identify the investment that SMI plans to make through the construction of the drag strip and improvements to Lowe's Motor Speedway."

Thus, "the writing itself shows its incompleteness by emphasizing its preliminary character." *Boyce v. McMahan*, 285 N.C. 730, 734, 208 S.E.2d 692, 695 (1974). Indeed, the document makes clear the parties' contemplation that a future agreement between them would provide key terms left unexpressed in the 21 November Letter.

Our Supreme Court's decision in *Boyce* is instructive. In *Boyce*, the document at issue concerned the purchase, sale, and development of land and manifested the parties' "desire to enter into a preliminary

CHARLOTTE MOTOR SPEEDWAY, LLC v. CNTY. OF CABARRUS

[230 N.C. App. 1 (2013)]

agreement setting out the main features as to the desires of both parties and to execute a more detailed agreement at a later date” *Id.* Our Supreme Court concluded that the writing did not amount to a valid contract because “a contract to enter into a future contract must specify all its material and essential terms, and leave none to be agreed upon as a result of future negotiations.” *Id.* The Court further explained that “[i]f any portion of the proposed terms is not settled, or no mode agreed on by which they may be settled, there is no agreement.” *Id.*

Our Court, citing *Boyce*, has similarly explained:

Generally, a contract, or offer to contract, which leaves material portions open for future agreement is nugatory and void for indefiniteness. The reason is that if a preliminary contract fails to specify all of its material and essential terms so that some are left open for future negotiations, then there is no way by which a court can determine the resulting terms of such future negotiations.

N.C. Nat'l Bank v. Wallens, 26 N.C. App. 580, 583, 217 S.E.2d 12, 15, *cert denied*, 288 N.C. 393, 218 S.E.2d 466 (1975).

Perhaps the most basic term left undefined in the 21 November Letter is the consideration to be provided by Plaintiffs. It is wholly unclear what Plaintiffs were bound to do, or not do, by virtue of this document. While Plaintiffs argue that they “remained in Concord/Cabarrus” as a result of the 21 November Letter, their decision to do so was not a result of any legally binding provision in the document. There is no language in the 21 November Letter placing limits on Plaintiffs’ ability to relocate or, for that matter, imposing any obligations on Plaintiffs at all. As the County notes, the 21 November Letter “does not identify any exchange, only the ‘commitment’ of the City and the County.” As a result, had Plaintiffs actually abandoned Cabarrus County in favor of a different locale at any point in time after the 21 November Letter was sent, they would have been fully within their legal rights to do so and the County would have been powerless to stop them. Thus, on this ground alone, we conclude that the 21 November Letter is too indefinite to constitute a binding contract.

The 21 November Letter is also unclear as to when the County was expected to provide the \$80 million in funding to Plaintiffs. Plaintiffs contend the County’s statement that “we need an additional 36 months to secure \$20,000,000 of this \$80,000,000 from the State of North Carolina” indicated that the first \$60,000,000 was “coming immediately.” However, we do not believe that this interpretation is supported by the actual

CHARLOTTE MOTOR SPEEDWAY, LLC v. CNTY. OF CABARRUS

[230 N.C. App. 1 (2013)]

language contained in the 21 November Letter. Rather, the language stating that “all parties anticipate that the \$80,000,000 will be formalized in an agreement that will also provide an outline of a schedule to prioritize projects and to identify the investment that SMI plans to make . . .” shows that the timing of the provision of funding was — like the project list — left subject to the future, formalized agreement.

Although Plaintiffs attempt to draw support from prior cases holding that “a contract that the parties expect to formalize is not rendered invalid simply because the parties do not subsequently execute such a formal agreement,” those cases still require the parties in the original contract to “assent to the same thing in the same sense, and their minds meet as to all terms.” *Smith v. Young Moving & Storage, Inc.*, 167 N.C. App. 487, 493, 606 S.E.2d 173, 177 (2004) (citation and quotation marks omitted); see *Lemly v. Colvard Oil Co.*, 157 N.C. App. 99, 103, 577 S.E.2d 712, 715 (2003) (discussing requirements of (1) a meeting of the minds as to all essential terms; and (2) “sufficiently definite and certain” terms when enforcing preliminary memorandum of settlement). That did not happen here. The 21 November Letter simply does not evidence a meeting of the minds as to basic terms that would have been fundamental to the existence of a valid contract under these circumstances.

We therefore conclude that Plaintiffs’ amended complaint and the document attached thereto disclose “fact[s] that necessarily defeat[] the claim.” *Peacock v. Shinn*, 139 N.C. App. 487, 492, 533 S.E.2d 842, 846, *appeal dismissed and disc. review denied*, 353 N.C. 267, 546 S.E.2d 110 (2000). Accordingly, Plaintiffs have failed to state claims for breach of contract or specific performance.

II. Plaintiffs’ Tort Claims

Plaintiffs also contend that the trial court erred in dismissing their tort claims for fraud or, in the alternative, negligent misrepresentation. In response, Defendant asserts that the trial court’s dismissal of these claims was proper because (1) Plaintiffs failed to adequately allege all of the essential elements of these claims for purposes of Rule 12(b)(6); and (2) the tort claims are barred by Defendant’s governmental immunity such that dismissal of these claims was proper pursuant to Rules 12(b)(1) and/or 12(b)(2). Because we hold that Plaintiffs have failed to state a valid claim for relief under Rule 12(b)(6) with regard to their tort claims, we need not address the issue of governmental immunity. See *Howard v. Cty. of Durham*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, 2013 WL 1878933 at *6 (May 7, 2013) (“Because we conclude that plaintiff has failed to state a claim [under Rule 12(b)(6)], we do not address the immunity issues raised by the parties.”).

CHARLOTTE MOTOR SPEEDWAY, LLC v. CNTY. OF CABARRUS

[230 N.C. App. 1 (2013)]

A. Fraud Claim

[3] The elements of a civil cause of action for fraud are (1) a false representation or concealment of a material fact (2) that is reasonably calculated to deceive (3) made with intent to deceive (4) which does in fact deceive and (5) results in damage to the injured party. *Jones v. Harrelson & Smith Contr'rs, LLC*, 194 N.C. App. 203, 214, 670 S.E.2d 242, 250 (2008), *aff'd per curiam*, 363 N.C. 371, 677 S.E.2d 453 (2009). “[I]n order to survive a motion to dismiss pursuant to Rule 12(b)(6), the complaint must allege with particularity all material facts and circumstances constituting the fraud, although intent and knowledge may be averred generally.” *Becker v. Graber Builders, Inc.*, 149 N.C. App. 787, 793, 561 S.E.2d 905, 910 (2002). Thus, “there is a requirement of specificity as to the element of a representation made by the alleged defrauder: The representation must be definite and specific.” *Hardin v. KCS Int'l, Inc.*, 199 N.C. App. 687, 702, 682 S.E.2d 726, 737 (2009) (citation, quotation marks, and alteration omitted).

Here, Plaintiffs’ amended complaint alleges that the County “made false representations of material fact and concealed material facts regarding the Local Governments’ ability to fund the promised amounts” by representing “that the Local Governments could and would allocate \$60 million in fewer or no more than 36 months and the additional \$20 million in approximately 36 months for public infrastructure related to the Speedway” However, as discussed above, the 21 November Letter — upon which Plaintiffs specifically base the allegations supporting their fraud claim — does not, in actuality, articulate a definitive time frame for the County’s funding contribution. As such, we are unable to discern any “definite and specific” representation therein that would be sufficient on these facts to support a claim for fraud. Accordingly, we conclude that the trial court correctly dismissed this claim.

B. Negligent Misrepresentation

[4] A cause of action for negligent misrepresentation arises “when (1) a party justifiably relies, (2) to his detriment, (3) on information prepared without reasonable care, (4) by one who owed the relying party a duty of care.” *Walker v. Town of Stoneville*, 211 N.C. App. 24, 31, 712 S.E.2d 239, 244 (2011) (citation and quotation marks omitted). In pleading their claim for negligent misrepresentation, Plaintiffs once more seek to rely on the 21 November Letter, arguing that the County — through Carruth — represented “that the Local Governments could and would allocate \$60 million in fewer and no more than 36 months and the additional

IN RE CLINE

[230 N.C. App. 11 (2013)]

\$20 million in approximately 36 months” and that Cabarrus “failed to exercise reasonable care or competence in obtaining or communicating [this] false information.” We disagree.

Here too, the actual language of the 21 November Letter dooms Plaintiff’s claim. The language in the 21 November Letter regarding funding was indefinite and lacked specificity regarding when the money would be paid and how it was to be spent. Thus, even assuming *arguendo* that the County owed Plaintiffs a duty of care, there was no specific representation made by the County sufficient to form the basis for a negligent misrepresentation claim. Therefore, this claim was likewise properly dismissed by the trial court.

Conclusion

For the reasons stated above, we affirm the trial court’s order dismissing Plaintiffs’ amended complaint.

AFFIRMED.

Judges McGEE and GEER concur.

IN THE MATTER OF TRACEY E. CLINE

No. COA12-964

Filed 1 October 2013

1. Courts—removal of district attorney—continuance denied

The trial court did not abuse its discretion by denying a second motion for a continuance by a district attorney in a proceeding to remove her from office. The statutory time frame for this type of proceeding is tight and the trial judge made accommodations for the district attorney.

2. Courts—removal of district attorney—discovery

A district attorney did not have a right to discovery in a proceeding to remove her from office in the absence of statutory or rule-based provisions. Moreover, the district attorney could not show prejudice because the trial court explicitly limited the evidence and the district attorney knew precisely what evidence could be brought against her.

IN RE CLINE

[230 N.C. App. 11 (2013)]

3. Courts—removal of district attorney—burden of persuasion

In a proceeding to remove a district attorney, the trial court did not err by failing to clearly delineate which party bore the burden of persuasion. It was clear from the trial court's formulation of the standard of proof required, and of the manner in which the hearing was conducted, that the burden of proof rested squarely upon the parties who instituted these proceedings.

4. Constitutional Law—procedural due process—removal of district attorney

The trial court did not err by denying a district attorney's motion to dismiss a removal proceeding against her for violations of procedural due process. The underlying issues were resolved against her elsewhere in the opinion.

5. Constitutional Law—removal of district attorneys—language not unconstitutionally vague

The language in N.C.G.S. § 7A-66(6) providing for the removal of district attorneys is not unconstitutionally vague.

6. Constitutional Law—free speech—removal of district attorney

The procedure for removing a district attorney from office did not violate her right to free speech under the First Amendment of the United States Constitution. Statements made with actual malice are not protected by the First Amendment.

7. Immunity—district attorney—civil defamation immunity—not applicable

Civil defamation immunity did not apply to a district attorney in a removal proceeding. While statements made in a judicial proceeding will not support a civil defamation action, there is no authority for applying civil defamation immunity to disciplinary proceedings. Furthermore, the trial court examined all of the district attorney's statements submitted as evidence of misconduct through the lens of qualified immunity and properly distinguished between statements which were not made with actual malice and those made with actual malice.

8. Constitutional Law—district attorney—actual malice—not protected speech

Speech by a district attorney that involved actual malice was not constitutionally protected and the district attorney did not receive

IN RE CLINE

[230 N.C. App. 11 (2013)]

the protection given to government employees for constitutionally protected speech.

9. Courts—removal of district attorney—lay opinion testimony

The trial judge did not err in a district attorney's removal proceeding by allowing lay witnesses to give opinion testimony on the subject of whether the district attorney's conduct brought her office into disrepute. The proceedings were conducted without a jury and the presumption was that the trial court based its judgment solely on the admissible evidence.

10. Appeal and Error—preservation of issues—constitutional issue—not raised at trial

A constitutional issue raised at oral argument but not at trial was not preserved for appeal.

Appeal by Tracey E. Cline from an order entered 2 March 2012 by Judge Robert H. Hobgood in Durham County Superior Court. Heard in the Court of Appeals 13 February 2013.

Patterson Harkavy, LLP, by Burton Craige and Narendra Ghosh, and Law Office of Kerstin Walker Sutton, PLLC, by Kerstin Walker Sutton, for appellee.

Van Camp, Meacham & Newman, PLLC, by James R. Van Camp and Patrick M. Mincey, for Tracey E. Cline.

STEELMAN, Judge.

In a proceeding pursuant to N.C. Gen. Stat. § 7A-66 for removal of a district attorney from office, the trial court did not err in denying appellant's motion to continue where statute mandated a specific time period within which the matter must be heard. Where N.C. Gen. Stat. § 7A-66 did not provide for discovery, and no other statute or rule created such a right, appellant was not entitled to discovery. Where the trial court defined the burden of proof as clear, cogent and convincing evidence, and it was clear from the proceedings that this burden was upon the party that initiated the proceedings, the trial court did not err. The trial court's rulings did not violate appellant's right to due process. The standard set forth in N.C. Gen. Stat. § 7A-66 of conduct prejudicial to the administration of justice which brings the office into disrepute is not unconstitutionally vague. Where the trial court found that appellant's speech was made with actual malice, it was not protected speech under

IN RE CLINE

[230 N.C. App. 11 (2013)]

the First Amendment. Where the matter was heard without a jury, it is presumed that the trial court considered only admissible evidence, and the trial court did not err in admitting lay testimony.

I. Factual and Procedural History

On 13 January 2012, Durham attorney Kerstin Sutton filed a sworn affidavit pursuant to N.C. Gen. Stat. § 7A-66 charging Tracey Cline (Cline), the elected District Attorney for Durham County, with numerous grounds for suspension or removal from office. On 27 January 2012, the trial court found probable cause to suspend Cline, and ordered that an inquiry be held pursuant to N.C. Gen. Stat. § 7A-66. The hearing was originally scheduled for 13 February 2012, but was continued until 20 February 2012 “to allow Ms. Cline time to recover from an illness and to employ an attorney.” On 17 February 2012, the trial court denied Cline’s second motion to continue the matter until the first Monday in March 2012. However, the trial court entered an order limiting evidence to “statements made by Tracey Cline in written court filings and in open court on the record as shown on transcripts of record[.]” and stated that Cline “would not be called upon to present evidence until Friday, 24 February 2012.”

On 20 February 2012, the trial court heard from Ms. Sutton, as well as the following additional witnesses: Staples Hughes, Director of the North Carolina Office of the Appellate Defender; Tracy Hillabrand, Durham County Deputy Clerk of Superior Court; Angela Kelly, Durham County Assistant Clerk of Superior Court; Thomas Maher, Director of the North Carolina Office of Indigent Defense Services; Cheri Patrick, Durham County private family law attorney; and David Ball, a jury consultant. The trial court took judicial notice of the cases cited by Ms. Sutton in her complaint, and admitted into evidence various filings by Cline and court transcripts in those cases.

At the conclusion of the evidence presented against her, Cline moved that the court define the burden and standard of proof. The court defined the burden of proof under N.C. Gen. Stat. § 7A-66 as “clear, cogent and convincing evidence[.]” Cline moved to dismiss for insufficiency of the evidence, for violations of substantive due process, for vagueness of the statute, and on the grounds of constitutionally protected speech. The trial court denied Cline’s motions to dismiss for due process and statutory vagueness, and withheld ruling on the protected speech issue.

On 24 February 2012, Cline testified, and was cross-examined on 27 February 2012. Additional witnesses testified on her behalf: Susan Perez-Trabis, a woman whose daughter was the victim of a crime

IN RE CLINE

[230 N.C. App. 11 (2013)]

that Cline prosecuted; Bill Cotter, a Durham County attorney; Chief District Court Judge Marcia Morey; and Durham Police Chief Jose Lewis Lopez, Sr.

On 29 February 2012, at the close of all of the evidence, Cline renewed her motions to dismiss. The trial court then heard the arguments from the parties as to the protected speech issue. The trial court denied Cline's motions to dismiss, but again reserved ruling on the protected speech issue.

On 2 March 2012, Judge Hobgood filed an order removing Cline from the office of District Attorney for Durham County. The trial court found that Cline's statements "made verbally and in written court documents about Judge Orlando F. Hudson, Jr.¹ that have been quoted in this Order are not supported by facts and have brought the office of the Durham County District Attorney into disrepute." The trial court further found that Cline's allegation of judicial corruption on the part of Judge Hudson was "not only false; it is inexcusable and clearly, cogently and convincingly demonstrates the personal animosity and ill will of Tracey E. Cline toward Judge Hudson and her actual malice in making the statements."

The trial court concluded that certain of Cline's statements, "though vehement, caustic and unpleasantly sharp in attacking Judge Hudson, and although untruthful, may well fall under the umbrella of protected speech under the First Amendment." Although those statements "violate North Carolina State Bar Rule of Professional Conduct 8.2 and are abusive and repetitive[,]" the trial court concluded that Cline had qualified immunity to utter them.

The trial court further found that certain of Cline's statements were not protected by the First Amendment, and constituted grounds for removal from office. The statements that the court found to be a basis for removal were:

19. "The District Attorney alleges, based on personal knowledge that this Honorable Court's [Judge Hudson] misconduct involves more than an error of judgment or a mere lack of diligence; this Court's actions encompasses conduct involving moral turpitude, dishonesty and corruption." Exhibit 1, page 1, Conflict of Interest Between the State and This Honorable Court, *State v. Dorman*.

...

1. Judge Hudson was the Senior Resident Superior Court Judge for Durham County.

IN RE CLINE

[230 N.C. App. 11 (2013)]

24. “The District Attorney may personally accept the planned purposeful personal attacks of this Court [Judge Hudson], but there are some sacrifices that are too great for the District Attorney to accept, kidnapping the rights of victims and their families, holding these rights for hostage until the prosecutor plays the game would bankrupt the credibility of our court system and Justice will not play that Game.” Exhibit 1, page 11.

...

28. “The intentional malicious misconduct of this Court [Judge Hudson] is covered by the robe, and rationally relied on by reporters and the public. Then media mayhem – another prosecutor withheld evidence; this shameful disgraceful conduct is unimaginable, but true with this Honorable Court. This is gross misconduct.” Exhibit 3, Pages 79-80 Paragraph 299.

...

39. “This Honorable Court [Judge Hudson] is in total and complete violation of the North Carolina Code of Judicial Conduct and ... will continue to violate the North Carolina Code of Judicial Conduct with regard to the rights of others, no regard of the constitutional protections of the victims of crime, and no regard to the simple difference between right and wrong.” Exhibit 5, Page 272, Paragraph 1014.

40. “Orders full of false findings are relayed to and relied upon by the press to agitate or ignite even more distrust in the prosecutors, law enforcement and the entire criminal justice system and for the root of this unjustified contempt to be conceived in the womb of justice, a judge, sworn to be fair and impartial, destroys the dignity of the office of this Honorable Court [Judge Hudson] and for those who use this Court for special situations outside the lines of right and wrong; don’t hide your dirty hands; and to those who have seen, and know, yet turn a blind eye, acknowledge your hands are covered with the blood of justice, And be ashamed.” Exhibit 5, Page 283.

These findings were specific statements made by Cline in the cases of *State v. Dorman*, 10 CRS 7851, (findings of fact 19 and 24) *State*

IN RE CLINE

[230 N.C. App. 11 (2013)]

v. Yearwood, 99 CRS 65452, 65460, 65461, and 65462, (finding of fact 28) and *State v. Peterson*, 01 CRS 24821 (findings of fact 39 and 40). The trial court concluded that the statements listed

in the findings of fact paragraph numbers 19: “misconduct . . . involving **moral turpitude, dishonesty and corruption**,” paragraph 24: “kidnapping the rights of victims and their families,” paragraph 28: “intentional malicious conduct,” paragraph 39: “this Court is in total and complete violation of the North Carolina Code of Judicial Conduct,” and paragraph 40: “the root of this contempt to be conceived in the womb of justice, a judge, . . . acknowledge that your hands are covered with the blood of justice, and be ashamed” are not protected by any guarantees of free speech under the First Amendment, nor did Tracey E. Cline possess a qualified immunity to make those untruthful statements with reckless disregard for the truth. This false, malicious, direct attack on Judge Orlando F. Hudson, Jr., to which Judge Hudson, under the Code of Judicial Conduct, cannot respond publicly, goes far beyond any protected speech under the First Amendment and cannot be and is not supported by any facts in the record or which can be reasonably inferred from the record. These specific statements were made with actual malice and with reckless disregard for the truth.

The trial court concluded that Cline made these statements with actual malice, removing them from the protections of the First Amendment and qualified immunity, which brought the office of the Durham County District Attorney “into disrepute as set forth in N.C. Gen. Stat. § 7A-66(6).” The trial court further concluded that “the statements of Tracey Cline in findings of facts paragraphs 19, 24, 28, 39 and 40 of this Order has [sic] impeded the efficient flow of work in the Superior Courts of Durham County. The falsity of the statements and the reckless manner in which they were made without regard to their truth afford no constitutional free speech protection to Tracey Cline for their utterance.” The trial court ordered Cline removed from the office of District Attorney for Durham County pursuant to N.C. Gen. Stat. § 7A-66(6).

Cline appeals.

II. Denial of Motion to Continue

In her first argument, Cline contends that the trial court erred in denying her motion to continue. We disagree.

IN RE CLINE

[230 N.C. App. 11 (2013)]

A. Standard of Review

Denial of a motion to continue is reviewed for abuse of discretion. *Kimball v. Vernik*, 208 N.C. App. 462, 466, 703 S.E.2d 178, 181 (2010). “Continuances are generally disfavored, and the burden of demonstrating sufficient grounds for continuation is placed upon the party seeking the continuation.” *In re J.B.*, 172 N.C. App. 1, 10, 616 S.E.2d 264, 270 (2005).

B. Analysis

[1] Removal of a district attorney is a rare occurrence in this state; there is only one prior case where a district attorney was removed from office: *In re Spivey*, 345 N.C. 404, 480 S.E.2d 693 (1997).² *Spivey* held that a proceeding under § 7A-66 is “an inquiry; it is neither a civil suit nor a criminal prosecution.” *Id.* at 418, 480 S.E.2d at 701. “A proceeding resulting in the removal of an individual from public office must accord that individual due process of law.” *Id.* at 417, 480 S.E.2d at 700.

N.C. Gen. Stat. § 7A-66 provides that “[i]f a hearing, with or without suspension, is ordered, the district attorney should receive immediate written notice of the proceedings and a true copy of the charges, and the matter shall be set for hearing not less than 10 days nor more than 30 days thereafter.” N.C. Gen. Stat. § 7A-66 (2011); *see also Spivey*, 345 N.C. at 418, 480 S.E.2d at 701.

The trial court found that there existed probable cause to remove Cline from office on 27 January 2012. Cline was served with a copy of the Order of Suspension that set the matter for hearing on 13 February 2012 on 30 January 2012. The trial court was therefore required by statute to hold the hearing between 9 February 2012 and 29 February 2012.

On 13 February 2012, Cline filed a motion seeking a continuance, dated 10 February 2012, seeking a postponement of the scheduled 13 February 2012 hearing until the maximum time allowed by statute. This motion cited personal illness and the inability of Cline to procure counsel as the basis for the motion. On 13 February 2012, the trial court continued the hearing until 20 February 2012. On 16 February 2012, Cline’s counsel filed a notice of appearance, a motion to continue the 20 February 2012 hearing, and a request for an emergency hearing on 17 February 2012. On 17 February 2012, the trial court denied Cline’s motion to continue the hearing until the first Monday in March of 2012.

2. There is a second case, *In re Hudson*, 165 N.C. App. 894, 600 S.E.2d 25 (2004), where there was an affidavit filed alleging misconduct on the part of the district attorney. The trial court declined to remove or suspend the district attorney, and that ruling was upheld on appeal.

IN RE CLINE

[230 N.C. App. 11 (2013)]

At that time, the trial court held that “[t]he only relevant evidence would be related to statements made by Tracey E. Cline. That is the inquiry of the Court.” Recognizing that Cline’s counsel had only recently come into the case, the trial court ruled that Cline would not be required to present evidence prior to Friday morning, 24 February 2012.

N.C. Gen. Stat. § 7A-66 states that “the matter *shall* be set for hearing not less than 10 days nor more than 30 days thereafter.” N.C. Gen. Stat. § 7A-66 (emphasis added). The use of the word “shall” in a statute is mandatory. *See Multiple Claimants v. N.C. Dep’t of Health & Human Servs.*, 361 N.C. 372, 378, 646 S.E.2d 356, 360 (2007) (citing *State v. Johnson*, 298 N.C. 355, 361, 259 S.E.2d 752, 757 (1979); *State Farm Mut. Auto. Ins. Co. v. Fortin*, 350 N.C. 264, 269, 513 S.E.2d 782, 784–85 (1999); *Pearson v. Nationwide Mut. Ins. Co.*, 325 N.C. 246, 255, 382 S.E.2d 745, 749 (1989)). Taking into account the tight time frame for this type of proceeding prescribed by statute, and the accommodations that the trial judge made for Cline (postponing the hearing from 13 February 2012 until 20 February 2012, restricting the scope of the hearing to statements made by Cline, and not requiring that Cline present evidence prior to 24 February 2012) we cannot say that the trial court abused its discretion in denying Cline’s second motion for a continuance until March 2012.

This argument is without merit.

III. Denial of Discovery

[2] In her second argument, Cline contends that she was denied discovery. We disagree.

Both civil and criminal proceedings in North Carolina courts explicitly provide discovery procedures. N.C. R. Civ. P. 26; N.C. Gen. Stat. § 15A-902; N.C. Gen. Stat. § 15A-903. *See e.g. Young v. Kimberly-Clark Corp.*, ___ N.C. App. ___, ___, 724 S.E.2d 552, 559-60 (2012); *State v. Jones*, 295 N.C. 345, 356-57, 245 S.E.2d 711, 718 (1978). Under *Spivey*, an inquiry considering the possible removal of a district attorney is neither a civil proceeding nor a criminal proceeding. *Spivey*, 345 N.C. at 418, 480 S.E.2d at 701. N.C. Gen. Stat. § 7A-66 makes no provision for discovery. Cline correctly notes that this proceeding is similar to those proceedings before the Judicial Standards Commission. While the rules governing Judicial Standards Commission proceedings provide for discovery, N.C. Judicial Standards Comm’n R. 15, there is no such provision for proceedings pursuant to N.C. Gen. Stat. § 7A-66. Cline has cited no statutory or case law to this Court which would suggest that discovery is mandated in proceedings pursuant to N.C. Gen. Stat. § 7A-66, and we have been unable to find such. Further, given the time limits imposed

IN RE CLINE

[230 N.C. App. 11 (2013)]

by the statutory framework, it is not practicable for discovery to take place. We hold that, in the absence of a statutory or rule-based provision for discovery in proceedings under N.C. Gen. Stat. § 7A-66, Cline did not have a right to discovery.

Cline contends nonetheless that she was denied discovery, and that therefore she was deprived of a fair hearing. However, despite the lack of a right to discovery, the trial court explicitly defined the limits of the evidence – specifically, the trial court limited admissible evidence to “statements made by Tracey Cline in written court filings and in open court on the record as shown on transcripts of record.” The trial court further limited the applicable cases to those cited in Ms. Sutton’s affidavit. As such, Cline knew precisely what evidence could be brought against her, and should have been able to prepare a defense accordingly. Cline cannot show prejudice as a result of the trial court’s actions.

This argument is without merit.

IV. Failure to Define the Burden of Persuasion

[3] In her third argument, Cline contends that the trial court erred in failing to clearly delineate which party bore the burden of persuasion. We disagree.

In Cline’s “Motion to Define Burden and Standard of Proof” on 24 February 2012, she noted that N.C. Gen. Stat. § 7A-66 does not define which party bears the burden of proving “the conduct was prejudicial to the administration of justice which brings the office into disrepute.” In response to that motion, the trial court held that it would “apply clear, cogent and convincing evidence as the standard that must be met.” On appeal, Cline asserts that she could not determine which party bore the burden of persuasion, which is the argumentative component of the burden of proof, to convince the trial court that Cline had engaged in conduct that supported her suspension or removal from office.

N.C. Gen. Stat. § 7A-66 provides that “grounds for suspension of a district attorney or for his removal from office[.]” include “[c]onduct prejudicial to the administration of justice which brings the office into disrepute[.]” N.C. Gen. Stat. § 7A-66(6). The purpose of the hearing is for “the superior court judge [to] hear evidence and make findings of fact and conclusions of law and if he finds that grounds for removal exist, he shall enter an order permanently removing the district attorney from office, and terminating his salary. If he finds that no grounds exist, he shall terminate the suspension, if any.” N.C. Gen. Stat. § 7A-66.

IN RE CLINE

[230 N.C. App. 11 (2013)]

It is clear from the trial court's formulation of the standard of proof required, and of the manner in which the hearing was conducted, that the burden of proof rested squarely upon the parties who instituted these proceedings. At no point was there even the slightest indication that the trial court was placing upon Cline the burden of proving by "clear, cogent and convincing evidence" a negative proposition; namely that she had not engaged in "conduct prejudicial to the administration of justice which brings the office into disrepute." The trial court required the parties initiating the proceedings to present their evidence first. This was a clear indication that they bore the burden of proof. At the conclusion of the evidence by the parties initiating the proceedings, Cline moved that the proceedings be dismissed. That motion was denied by the trial court. As part of that ruling, the trial court stated that it would "apply clear, cogent and convincing evidence as the standard that must be met."

On appeal, Cline argues that the trial court erred by failing to define the burden of proof. We hold that the trial court did not so err. The transcript of the hearing clearly shows that the burden of proof was placed solely upon those persons who initiated the proceedings, and further that they were to be held to the heightened standard of "clear, cogent and convincing evidence[.]"

This argument is without merit.

V. Denial of Cline's Motion to Dismiss for Violations of
Procedural Due Process

[4] In her fourth argument, Cline contends that the trial court erred by denying her motion to dismiss for violations of procedural due process. Specifically, Cline contends that she was forced to conduct the hearing without knowledge of the witnesses against her, the substance of their testimony, the applicable rules and balancing of evidence, and which party would carry the burden of persuasion.

These issues have been resolved in the previous portions of this opinion. We have addressed the fact that Cline was not entitled to discovery, and that the trial court's definition and allocation of the burden of proof was proper.

This argument is without merit.

VI. Denial of Motion to Dismiss for Statutory Vagueness

[5] In her fifth argument, Cline contends that the trial court erred in failing to dismiss the proceedings due to the unconstitutional vagueness of N.C. Gen. Stat. § 7A-66. We disagree.

IN RE CLINE

[230 N.C. App. 11 (2013)]

A. Standard of Review

This Court reviews alleged violations of constitutional rights *de novo*. *State v. Williams*, 208 N.C. App. 422, 424, 702 S.E.2d 233, 236 (2010).

B. Analysis

The United States Supreme Court and the North Carolina Supreme Court have adopted similar tests for determining whether a statute is unconstitutionally vague. [A] statute is unconstitutionally vague if it either: (1) fails to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited; or (2) fails to provide explicit standards for those who apply [the law]. Although a statute must satisfy both prongs of this test, impossible standards of statutory clarity are not required by the constitution. As long as a statute provides an adequate warning as to the conduct it condemns and prescribes boundaries sufficiently distinct for judges and juries to interpret and administer it uniformly, constitutional requirements are fully met.

Malloy v. Cooper, 162 N.C. App. 504, 507, 592 S.E.2d 17, 20 (2004) (citations and quotations omitted).

The statute authorizing the removal of district attorneys sets forth seven specific bases for removal. The trial court's decision rested upon only one of the provisions of N.C. Gen. Stat. § 7A-66: "[c]onduct prejudicial to the administration of justice which brings the office into disrepute[.]" N.C. Gen. Stat. § 7A-66(6). Cline contends that "[this provision] is nebulous, unduly tentative and its prohibitions left entirely to conjecture." She further contends that "7A-66 is silent as to what *evidence* sufficiently constitutes a district attorney office's alleged 'disrepute.'"

Similar language is found in other statutes. N.C. Gen. Stat. § 7A-376(b) provides that a judge may be disciplined for "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." In *In re Nowell*, 293 N.C. 235, 242–43, 237 S.E.2d 246, 251 (1977), our Supreme Court rejected a challenge to this statute as being vague and overbroad. This standard is "no more nebulous or less objective than the reasonable and prudent man test which has been a part of our negligence law for centuries." *Nowell*, 293 N.C. at 243, 237 S.E.2d at 251.

We hold that the Supreme Court's ruling in *Nowell* is determinative of this argument. The language contained in N.C. Gen. Stat. § 7A-66(6) is not unconstitutionally vague.

IN RE CLINE

[230 N.C. App. 11 (2013)]

This argument is without merit.

VII. Violation of Free Speech

[6] In her sixth argument, Cline contends that the procedure for removing her from office violates her right to free speech under the First Amendment of the United States Constitution. We disagree.

A. Standard of Review

This Court reviews alleged violations of constitutional rights *de novo*. *State v. Williams*, 208 N.C. App. 422, 424, 702 S.E.2d 233, 236 (2010).

B. Analysis

Cline contends that her statements that were the basis of her removal from office were protected by the First Amendment of the United States Constitution.

The First Amendment precludes a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice. Actual malice means knowledge of, or reckless disregard for, the falsity of a statement. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80, 11 L. Ed. 2d 686, 706 (1964). Lawyers who make derogatory remarks about judges are similarly protected from civil or criminal liability unless actual malice is shown. *Garrison v. Louisiana*, 379 U.S. 64, 74, 13 L. Ed. 2d 125, 132 (1964). However, these principles only offer immunity from a civil suit for damages, not from other forms of discipline. *Imbler v. Pachtman*, 424 U.S. 409, 428-29, 47 L. Ed. 2d 128, 142 (1976). The First Amendment does not afford protection to the utterer for all statements made. *See e.g. Spivey*, 345 N.C. at 414-15, 480 S.E.2d at 698-99 (holding that the First Amendment does not protect “the use of racial invective by a public official against a member of the public in a bar.”).

Judge Hobgood’s order contained the following finding of fact:

51. The conduct of Tracey Cline and her statements, written and oral, in public documents as itemized in Findings of Fact Paragraphs 19 through 24, 26 through 30 and 32 through 42 of this Order are not supported by facts, are inflammatory in nature and bring the office of the Durham County District Attorney into disrepute. The fact that Tracey E. Cline stated that Judge Orlando F. Hudson, Jr. is “corrupt” is not only false; it is inexcusable and clearly, cogently and convincingly demonstrates the personal

IN RE CLINE

[230 N.C. App. 11 (2013)]

animosity and ill will of Tracey E. Cline toward Judge Hudson and her actual malice in making the statements.

Based upon this ultimate finding of fact, and the evidentiary findings referenced therein, the trial court made the following conclusions of law:

22. The statements of Tracey E. Cline, verbal and written, as set forth in this Order in the findings of fact paragraph numbers 19: “misconduct . . . involving **moral turpitude, dishonesty and corruption**,” paragraph 24: “kidnapping the rights of victims and their families,” paragraph 28: “intentional malicious conduct,” paragraph 39: “this Court is in total and complete violation of the North Carolina Code of Judicial Conduct,” and paragraph 40: “the root of this contempt to be conceived in the womb of justice, a judge, . . . acknowledge that your hands are covered with the blood of justice, and be ashamed” are not protected by any guarantees of free speech under the First Amendment, nor did Tracey E. Cline possess a qualified immunity to make those untruthful statements with reckless disregard for the truth. This false, malicious, direct attack on Judge Orlando F. Hudson, Jr., to which Judge Hudson, under the Code of Judicial Conduct, cannot respond publicly, goes far beyond any protected speech under the First Amendment and cannot be and is not supported by any facts in the record or which can be reasonably inferred from the record. These specific statements were made with actual malice and with reckless disregard for the truth.

23. The statements of Tracey E. Cline, verbal and written, as set forth in the findings of fact paragraphs 19, 24, 28, 39 and 40 in this Order were made with actual malice, for which she has no qualified immunity and which are not protected speech under the First Amendment, constitute conduct by her that is prejudicial to the administration of justice which brings the office of the Durham County District Attorney into disrepute as set forth in N.C. Gen. Stat. § 7A-66(6).

Pursuant to our *de novo* review, we hold that the findings of fact supported the trial court’s conclusion that Cline acted with actual malice. Statements made with actual malice are not protected by the First

IN RE CLINE

[230 N.C. App. 11 (2013)]

Amendment. *New York Times*, 376 U.S. at 279-80, 11 L. Ed. 2d at 706. Cline's speech was not protected under the First Amendment.

[7] Cline further contends that she is entitled to qualified immunity, as the statements were made in the context of her duties as District Attorney for Durham County.

Defamatory statements made in the due course of judicial proceedings are absolutely privileged and will not support a civil action for defamation, even though they be made with express malice. *Jarman v. Offutt*, 239 N.C. 468, 472, 80 S.E.2d 248, 251 (1954). However, this immunity applies to defamation actions, designed to make a victim of defamation whole by seeking money damages from the alleged slanderer. The proceeding before us is a proceeding for the removal of a district attorney, not a suit for monetary damages. Cline has cited no case or statutory authority that applies the rules of civil defamation immunity to a disciplinary proceeding, nor can we find any. We hold that this immunity does not provide a shield for Cline in this proceeding.

We further note that the trial court examined all of Cline's statements submitted as evidence of misconduct through the lens of qualified immunity. "Generally, qualified immunity protects public officials from personal liability for performing discretionary functions to the extent that such conduct " 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Moore v. Evans*, 124 N.C. App. 35, 48, 476 S.E.2d 415, 425 (1996) (quoting *Corum v. Univ. of N.C.*, 330 N.C. 761, 772-73, 413 S.E.2d 276, 284 (1992)). When the defense of qualified immunity is raised, the burden is on the opposing party to present evidence of actual malice in order to negate the defense. *Kroh v. Kroh*, 152 N.C. App. 347, 356, 567 S.E.2d 760, 766 (2002).

The trial court concluded that "Tracey E. Cline had qualified immunity to make [the statements cited in fifteen findings of fact] in this Order, **but only as it relates to this inquiry under N.C. Gen. Stat. § 7A-66.**" By contrast, the trial court found that the statements set forth in findings of fact 19, 24, 28, 39, and 40 "are not protected by any guarantees of free speech under the First Amendment, nor did Tracey E. Cline possess a qualified immunity to make those untruthful statements with reckless disregard for the truth." We hold that the trial court properly distinguished between Cline's statements which were not made with actual malice, and thus were protected by qualified immunity, and those made with actual malice.

IN RE CLINE

[230 N.C. App. 11 (2013)]

[8] Cline further contends that N.C. Gen. Stat. § 7A-66 does not survive strict scrutiny under First Amendment analysis, because it restricts constitutionally protected speech. However, as previously noted, Cline’s speech involved actual malice, and was not protected. We note that, in the *Spivey* case, unprotected speech formed the basis of the removal of Spivey as district attorney. *See Spivey*, 345 N.C. at 414-15, 480 S.E.2d at 698-99 (holding that the use of racial invective by Spivey constituted unprotected speech).

[9] Cline further contends that a government employee cannot be removed due to her constitutionally protected speech. However, unprotected speech does not receive this benefit. *See Henry v. Dep’t of Navy*, 902 F.2d 949, 953 (Fed. Cir. 1990 (upholding dismissal of public employee for making “patently false and unfounded accusations”). Since Cline’s speech was not constitutionally protected, this argument is not applicable to this case.

This argument is without merit.

VIII. Admission of Lay Testimony

[9] In her seventh argument, Cline contends that the trial court erred in admitting lay testimony during the proceedings. We disagree.

A. Standard of Review

We review the trial court’s admission of lay opinion testimony for abuse of discretion. *State v. Collins*, ___ N.C. App. ___, ___, 716 S.E.2d 255, 259 (2011).

B. Analysis

Cline contends that the trial court erred in allowing lay witnesses to give opinion testimony on the subject of whether Cline’s conduct brought her office into disrepute. Cline contends that admitting this evidence “converted the courtroom inquiry into a polling station: the affiant called [witnesses] to testify about their opinion of the reputation of the District Attorney’s Office, thereby obligating Ms. Cline to call witnesses who testified to the contrary.”

We find the Supreme Court’s decision in *Spivey* dispositive of this issue. In *Spivey*, the conduct that triggered the removal proceeding was the use of racial epithets in a bar by the district attorney. On appeal, Spivey contended “that the hearing consisted of a stream of witnesses who, through personal anecdotes and opinions, described in detail the history of the mistreatment of African–Americans.” *Spivey*, 345 N.C. at 416, 480 S.E.2d at 700. Our Supreme Court agreed, but noted that:

IN RE CLINE

[230 N.C. App. 11 (2013)]

it is crucial to note that this matter was heard without a jury. In this context, we cannot say the trial court erred in allowing the African-American citizens who testified to give anecdotal testimony relating to the pain and frustration they had felt as a result of long-past acts of racism. Where, as here, the trial judge acted as the finder of fact, it is presumed that he disregarded any inadmissible evidence that was admitted and based his judgment solely on the admissible evidence that was before him. *Bizzell v. Bizzell*, 247 N.C. 590, 604–06, 101 S.E.2d 668, 678–79, *cert. denied*, 358 U.S. 888, 3 L.Ed.2d 115 (1958). The ultimate finding of the superior court, that Spivey’s conduct giving rise to this inquiry was conduct prejudicial to the administration of justice which brings the office into disrepute, is supported by the evidence and the other findings. The statute itself compels removal upon a finding of one of the enumerated grounds and leaves no discretion in this regard with the superior court. N.C.G.S. § 7A–66. Therefore, this assignment of error must be overruled.

Id. at 416-17, 480 S.E.2d at 700.

Our Supreme Court held that, given the fact that these proceedings are conducted without a jury, and given the presumption that the trial court based its judgment solely on admissible evidence, a challenge to the admission of lay witness testimony in a proceeding for the removal of a district attorney must fail.

This argument is without merit.

IX. Facial Challenge

[10] At oral argument, Cline contended that N.C. Gen. Stat. § 7A-66(6) was facially unconstitutional. “A constitutional issue not raised at trial will generally not be considered for the first time on appeal.” *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002). Since this argument was not raised before the trial court, it is not properly before us on appeal.

X. Conclusion

For the foregoing reasons, the order of the trial court is

AFFIRMED.

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

ROSS v. ROSS

[230 N.C. App. 28 (2013)]

KENNETH E. ROSS, PLAINTIFF

v.

LINDA O. ROSS (NOW OSBORNE), DEFENDANT

No. COA12-1141

Filed 1 October 2013

1. Divorce—equitable distribution—valuation of house and lot

The trial court did not err in an equitable distribution action by using the source of funds theory to value a lot and house as a single asset rather than determining separate appreciation. Plaintiff did not cite in his brief to any part of the record where he offered evidence regarding the separate values of the lot and the house.

2. Divorce—equitable loan—repayment of loan—marital

The trial court erred in an equitable distribution action by classifying the repayment of a loan as part marital and part separate where plaintiff's purchase of a lot prior to the marriage was partially financed by a loan which was satisfied during the marriage. When the undisputed evidence showed that the loan was paid off during the marriage, the burden shifted to plaintiff to present evidence establishing the portion of the loan reduction that was his separate property because it was paid before the marriage. This he did not do.

3. Divorce—equitable distribution—post-separation loan payments

An equitable distribution final judgment was reversed and remanded with instructions that the amount of defendant's post-separation payments characterized as divisible property be reduced by the amount of a loan received by defendant rather than going to pay off a marital debt.

4. Divorce—equitable distribution—post-separation loan payments—appreciation of property

An equitable distribution final judgment was remanded where the trial court erred in its treatment of defendant's post-separation payments on a real property debt, which allowed her to increase her ownership interest in the property itself after the date of separation. In determining the amount of passive appreciation in the marital portion of the property, the trial court should have valued the marital and separate portions of the property as of the date of separation.

ROSS v. ROSS

[230 N.C. App. 28 (2013)]

5. Appeal and Error—preservation of issues—no authority cited

A contention in an equitable distribution appeal for which plaintiff cited no authority was deemed abandoned.

Appeal by Plaintiff from judgment entered 15 March 2012 by Judge Paul Quinn in Carteret County District Court. Heard in the Court of Appeals 10 April 2013.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene and Tobias S. Hampson, for Plaintiff.

Judith K. Guibert, for Defendant.

DILLON, Judge.

Kenneth Ross (“Plaintiff”) appeals from orders classifying and valuing property in an action for equitable distribution against Linda O. Ross (now, Osborne) (“Defendant”) and ordering that the property be sold. We affirm the trial court’s orders in part and reverse and remand in part.

Plaintiff commenced this action eleven years ago against Defendant to end their eleven-year marriage. This appeal is the fourth filed by Plaintiff in this action. We stated the factual background of this dispute in detail in our opinion addressing Plaintiff’s first appeal (“*Ross I*”), which dealt with the actual merits of the claims at issue between the parties, including those involving equitable distribution. *Ross v. Ross*, 193 N.C. App. 247; 666 S.E.2d 889 (2008) (COA07-981) (unpublished), *disc. reviewed denied*, 363 N.C. 656, 685 S.E.2d 106 (2009). In that appeal, Plaintiff argued, *inter alia*, that the trial court erred in classifying a single-family house and lot in Emerald Isle (the “Property”) entirely as marital in nature given that, while Plaintiff had purchased the lot prior to the marriage, the parties had constructed a house upon the lot during the marriage. We held that the Property was dual in nature, part separate and part marital, and remanded the matter “for an appropriate reclassification and valuation of [the Property].” *Id.*

On remand, the trial court entered two orders on 15 March 2012. The first order addressed the classification and valuation of the Property (the “Final Judgment”), and the second order directed that the Property be sold (the “Order”). From these orders, Plaintiff appeals.¹

1. Plaintiff’s second and third appeals were filed and considered by this Court in the interim. The second appeal (“*Ross II*”) addressed the trial court’s order setting the bond required to stay its equitable distribution judgment pending the first appeal. *Ross v. Ross*,

ROSS v. ROSS

[230 N.C. App. 28 (2013)]

I. Factual Background

The evidence of record tends to show that in 1987, Plaintiff purchased the lot for \$86,000.00; in 1990, the parties married; sometime thereafter, they constructed a home on the lot; the parties separated in January 2002; and between the time Plaintiff purchased the lot in 1987 and the date of the Final Judgment in 2011, the parties had either individually or jointly taken out seven loans secured by the Property.

On remand from *Ross I*, the trial court calculated the marital and separate portions of the Property based on the source of funds that had been contributed by the parties towards the Property. The trial court considered Defendant's down payment for the lot; payments made to reduce debt on the Property; and certain post-separation payments made by Defendant for expenses associated with the Property. Specifically, the trial court found the following: (1) Plaintiff contributed \$39,200.00 in equity prior to the marriage from his down payment and loan principal payments, which the trial court characterized as Plaintiff's separate property; (2) the parties contributed \$115,942.27 during the marriage and prior to separation towards reducing debt on the Property, which the trial court characterized as marital property; (3) Plaintiff contributed \$25,020.73 after separation towards reducing marital debt on the Property, which the trial court characterized as Plaintiff's divisible property; and (4) Defendant contributed \$40,351.77 in post-separation payments, which the trial court characterized as Defendant's divisible property. The trial court allocated the marital and separate portions of the Property based on the above four categories of payments. Specifically, the trial court found that 53% of the Property was marital by dividing the amount paid during marriage and prior to separation (\$115,942.27) by the total payments made across all four categories (\$220,514.77). The trial court found that 29% of the Property was Plaintiff's separate property by adding Defendant's pre-marriage contribution (\$39,200.00) and post-separation divisible payments (\$25,020.73), and then dividing the resulting sum (\$64,220.73) by the total payments made across all four categories (\$220,514.77). The trial court found 18% of the Property was Defendant's separate property by dividing the amount of post-separation divisible payments she made (\$40,351.77) by the total payments made across all four categories (\$220,514.77). Based on these calculations, the trial court determined that Plaintiff was entitled to 55.5%

194 N.C. App. 365, 669 S.E.2d 828 (2008), *disc. review denied*, 363 N.C. 656, 685 S.E.2d 106 (2009). The third appeal ("*Ross III*") addressed three orders by the trial court involving discovery issues and the imposition of discovery sanctions. *Ross v. Ross*, __ N.C. App. __, 715 S.E.2d 859 (2011).

ROSS v. ROSS

[230 N.C. App. 28 (2013)]

of the Property's equity², calculated by adding his separate percentage (29%) and one-half of the marital percentage (26.5%); and that Defendant was entitled to 44.5% of the Property's equity, calculated by adding her separate share (18%) and one-half of the marital percentage (26.5%).

The trial court also found that the Property had appreciated significantly from the date of separation to the date of the Final Judgment, and that all of the post-separation appreciation was passive in nature. The trial court essentially allocated the value of the Property as a whole, including the post-separation passive appreciation, based on the parties' respective interests which, as described above, the trial court calculated based on the source of funds contributed by the parties towards the Property.

II. Analysis

On appeal, Plaintiff contends that the trial court erred by failing to classify and value the Property as mandated by this Court in *Ross I* and by authorizing the sale of the Property based on the terms of the offer to purchase that had been received. For the reasons set forth below, we affirm in part and reverse and remand in part.

A. Classification and Valuation of the Property

Plaintiff argues that the trial court failed to follow our mandate in *Ross I* which stated that “[t]hat part of the real property consisting of the unimproved property owned by [Plaintiff] prior to marriage should be characterized as separate and that part of the property consisting of the additions and equity acquired during marriage should be considered marital in nature.” *Ross I, supra*. Plaintiff makes three arguments challenging the trial court's methodology. We address each argument below.

N.C. Gen. Stat. § 50-20 (2011), requires the trial judge to follow a three-step procedure in deciding equitable distribution matters: (1) all property must be classified as marital or separate, and when property has dual character, the component interests of the marital and separate estates must be identified; (2) the net value of marital property must be determined; and (3) marital property must then be distributed equally or, if equal division would be inequitable, distributed unequally in light

2. The trial court determined that a certain loan taken out by Plaintiff after separation (referred to as “Loan #6” in the Final Judgment) was his separate debt and that another certain loan taken out by Defendant after separation (referred to as “Loan #7” in the Final Judgment) was her separate debt. Accordingly, the Property's equity, as determined by the trial court, does not include any reduction for either of these two loans. Neither party, however, has challenged the trial court's characterization of these particular loans.

ROSS v. ROSS

[230 N.C. App. 28 (2013)]

of the factors set out in N.C. Gen. Stat. § 50-20(c). *See generally, Cable v. Cable*, 76 N.C. App. 134, 137, 331 S.E.2d 765, 767 (1985), *disc. review denied*, 315 N.C. 182, 337 S.E.2d 856 (1985). A “party claiming that property is marital has the burden of proving beyond a preponderance of the evidence” that the property was acquired by either or both spouses, during the marriage, before the date of separation, and is presently owned.” *Lilly v. Lilly*, 107 N.C. App. 484, 486, 420 S.E.2d 492, 493 (1992) (citation and quotation marks omitted). “If the party meets this burden, then the burden shifts to the party claiming the property to be separate to show by a preponderance of the evidence that the property meets the definition of separate property.” *Id.* (citation and quotation marks omitted).

1. Source of Funds Approach

[1] Plaintiff first contends that since the passive appreciation of the Property was largely attributable to the passive appreciation of the lot which he purchased prior to the marriage, rather than from any passive appreciation in the value of the house constructed during the marriage, his separate estate is entitled to a greater share of the passive appreciation. In other words, Plaintiff argues that the trial court erred by not determining how much the lot and the improvements had separately appreciated.

In this case, the trial court treated the lot and house as a single asset and made no findings regarding the values or amounts of appreciation in the value of the lot or house separately, which is not incongruent with existing precedent. *See, e.g., Wade v. Wade*, 72 N.C. App. 372, 382, 325 S.E.2d 260, 270, *disc. review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985) (stating that “the house and land are one asset.”) The trial court applied a “source of funds” theory in valuing the marital and separate portions of the Property. *Id.* at 382, 325 S.E.2d at 269. We do not believe the trial court erred in applying the “source of funds” theory as its valuation methodology. *See Ross I, supra; Stewart v. Stewart*, 141 N.C. App. 236, 247, 541 S.E.2d 209, 217 (2000) (holding that the trial court’s classification of property will not be disturbed “as long as there is competent evidence to support that determination”) (citation omitted). We note that Plaintiff did not cite in his brief to any part of the record where he offered evidence regarding the separate values of the lot and house. He merely states that *Defendant’s* expert, who testified that the Property had a value of \$590,000.00, stated that the lot by itself would be worth \$410,000.00 if it were vacant and if it had a well and septic facility, and further that the house by itself was worth \$200,000.00. However, the asset that the trial court classified and directed to be sold was a lot with a house on it. Further, Plaintiff does not cite to any evidence concerning

ROSS v. ROSS

[230 N.C. App. 28 (2013)]

whether there a was well or septic facility on the Property prior to the marriage. Accordingly, this argument is overruled.

2. Plaintiff's Pre-marriage Contribution

[2] Plaintiff next challenges the trial court's classification of the repayment of a certain \$65,000.00 loan as part marital and part separate. We conclude the trial court erred in making this determination.

In its Final Judgment, the trial court determined that Plaintiff purchased the lot *prior* to the marriage for \$86,000.00, partially financed by a \$65,000.00 loan. The evidence shows that the loan was satisfied *during* the marriage; however, there was no evidence showing how much the loan balance was reduced prior to the marriage and how much the loan balance was reduced during the marriage. Rather, since the deed of trust securing the \$65,000.00 loan was cancelled 147.5 months after it was taken out and since 28% of the time that the loan was outstanding was prior to the marriage, the trial court *found* that 28% of the \$65,000.00 loan principal (or \$18,200.00) was paid down prior to the marriage; and, therefore, this portion of the loan was Plaintiff's separate property. The trial court further *found* that since 72% of the time the loan was outstanding was during the marriage, 72% of the equity achieved by the pay down of the loan was marital.

Plaintiff argues that this allocation by the trial court was error since there was no evidence to support the trial court's determination that an equal amount of principal was paid each month towards the satisfaction of the \$65,000.00 loan. Plaintiff further argues that since Defendant failed to present evidence to establish *what portion* of the \$65,000.00 loan was paid down prior to the marriage and what portion was paid down during the marriage, she failed to meet her burden of establishing what portion should be classified as marital; and, therefore, the trial court should have characterized the entire \$65,000.00 loan as separate, as if it had been paid off prior to the marriage. We agree that there is insufficient evidence in the record to support the trial court's finding that an equal amount of principal was paid each month towards the \$65,000.00 loan. However, we believe that based on the evidence before the trial court, the entire \$65,000.00 loan pay off should be treated as marital property rather than Plaintiff's separate property.

In *Ross I*, we stated the following:

A party claiming that property is marital has the burden of proving beyond a preponderance of the evidence that the property was acquired by either or both spouses, during

ROSS v. ROSS

[230 N.C. App. 28 (2013)]

the marriage, before the date of separation, and is presently owned.

If the party meets this burden, then the burden shifts to the party claiming the property to be separate to show by a preponderance of the evidence that the property meets the definition of separate property.

If both parties meet their burdens, the property is considered separate.

Ross I, supra (citing *Lilly v. Lilly*, 107 N.C. App. 484, 486, 420 S.E.2d 492, 493 (1992), and *Ciobanu v. Ciobanu*, 104 N.C. App. 461, 466, 409 S.E.2d 749, 752 (1991) (internal quotation marks omitted)). We have also held that financial contributions made during marriage which reduce a mortgage are active increases in equity and shall, therefore, be treated as marital property. *Rice v. Rice*, 159 N.C. App. 487, 497, 582, S.E.2d 317, 324 (2003) (holding that “there is no difference between financial contributions to reduce the mortgage principal and those to improve the property itself” and that “both types of active contributions entitle the marital estate to a proportionate return on its investment”).

In this case, the only evidence regarding the reduction of the \$65,000.00 loan was documentation surrounding the cancellation of the deed of trust securing the loan. As the trial court found and Plaintiff concedes in his brief, this documentation showed that the loan was paid off and the deed of trust was cancelled in July 1999. We believe this evidence – standing alone – establishes “beyond a preponderance of the evidence” that the payoff of the \$65,000.00 loan was made during the marriage. The burden, therefore, then shifted to Plaintiff to present evidence establishing what portion, if any, of the \$65,000.00 loan was reduced prior to the marriage and was, therefore, his separate property. *See Lilly*, 107 N.C. App. at 486, 420 S.E.2d at 493. However, Plaintiff did not present any evidence regarding the pre-marital payments towards the note, and he refused to provide this information during discovery. *See Ross III, supra* (affirming the trial court’s order sanctioning Plaintiff for providing evasive or incomplete responses to discovery requests and for “flatly refus[ing] to answer” a discovery request that “directly addressed the one remaining issue” for “[a]ny and all documents upon which you have relied, or intend to rely, to support your contention that the land and/or the residential building . . . is your separate property”). Defendant argues in her brief that since “[P]laintiff failed to demonstrate that he retained any separate property interest,” the increase in equity in the Property resulting in the payoff of the \$65,000.00 loan “must be classified as entirely marital.” We agree. Accordingly, the trial court’s finding that 28% of the \$65,000.00

ROSS v. ROSS

[230 N.C. App. 28 (2013)]

loan reduction, or \$18,200.00, is Defendant's separate property – a finding that is not supported by sufficient evidence – is error. Rather, the entire \$65,000.00 loan reduction is marital property. We, therefore, reverse and remand the Final Judgment to be modified accordingly.

3. Post-Separation Payments

Plaintiff makes two arguments concerning the trial court's treatment of certain post-separation payments made by Defendant. The trial court characterized these payments, which total \$40,351.77, as divisible property but then awarded this entire amount to Defendant as a separate property interest in the Property. The trial court likewise characterized post-separation payments made by Plaintiff to reduce marital debt in the amount of \$25,020.73 as divisible property but then awarded this entire amount to Plaintiff as a separate property interest in the Property.

a. Characterization of Post-Separation Payments

[3] Plaintiff argues that a *small portion* of \$40,351.77 post-separation payments made by Defendant should not have been classified as divisible property by the trial court. Defendant's post-separation payments which the trial court found to be divisible property include, in part, payments on a loan procured by Defendant following separation. The trial court found that the proceeds from her loan were used to pay off a marital loan, and therefore Defendant was entitled to treat the reduction of principal in her loan as divisible. Plaintiff, however, contends that a small portion of the proceeds from this loan did *not* go to pay off marital debt but rather was received by Defendant at closing. Defendant concedes in her brief that she did, in fact, receive \$2,163.00 as a cash out from her loan which is supported by the evidence. Otherwise, neither party challenges the trial court's decision to divide this divisible property unequally based on the amount that each party contributed towards the establishment of the divisible property. *Stovall v. Stovall*, 205 N.C. App. 405, 413, 698 S.E.2d 680, 686 (2010) (holding that it was not an abuse of discretion to award a spouse all of the divisible property attributable to his post-separation payments which reduced marital debt). Accordingly, we reverse and remand the Final Judgment, directing that it be modified by reducing the amount of Defendant's post-separation payments characterized as divisible property by \$2,163.00.

b. Post-Separation Payments Affecting Property Ownership

[4] Plaintiff argues that the trial court erred in its *treatment* of Defendant's post-separation payments which allowed her to increase her ownership interest in the Property itself after the date of separation.

ROSS v. ROSS

[230 N.C. App. 28 (2013)]

Plaintiff argues that this treatment allowed Defendant to enjoy a greater share of the post-separation appreciation in the Property than she was entitled to. We agree.

Post-separation appreciation in marital property which is passive in nature is divisible property and is to be distributed by the trial court. N.C. Gen. Stat. § 50-20(b)(4)a. (2011). In determining the amount of passive appreciation in the marital portion of the Property, the trial court should have valued the marital and separate portions of the Property *as of the date of separation*. N.C. Gen. Stat. § 50-20(b)(1), (2), and (4).

Applying the trial court's "source of funds" methodology, there was \$155,142.27 contributed towards the Property *as of the date of separation*. Of this amount, Plaintiff contributed 13.5% or \$21,000.00, in the form of his down payment for the lot, prior to the marriage, which is, therefore, his separate property. The remaining 86.5% is marital. Accordingly, Plaintiff is entitled to a 56.75% share (which is the sum of 13.5% and one-half of 86.5%) in the Property's equity as of the date of distribution. Defendant is entitled to a 43.25% share in the Property's equity as of the date of separation. We, therefore, reverse and remand the Final Judgment, directing that it be modified by changing the allocation Plaintiff's share in the Property as of the date of separation from 55.5% to 56.75% and Defendant's share in the Property from 44.5% to 43.25%.³

3. This error by the trial court did not result in a significant change in ownership percentages in this case since both parties made post-separation payments. However, the error could be significant where only one party makes post-separation payments. Consider an example where a house was the only marital asset in a marriage and had a value of \$100,000.00 with \$90,000.00 of indebtedness at the date of separation. Assume that between the date of separation and the date of distribution, the husband reduced the debt by another \$30,000.00 to \$60,000.00, *and* the house doubled in value to \$200,000.00. As a result, the house hypothetically has \$140,000.00 in equity as of the date of distribution. The debt reduction which occurred during marriage would be marital property. The husband's post-separation debt reduction would be divisible property. The post-separation, passive appreciation would also be divisible property. Assume that the trial court determined that the husband was entitled to all of the divisible property represented by his post-separation debt reduction and that the parties were otherwise entitled to an equal distribution of the divisible property represented by the post-separation appreciation of the house, as well as an equal distribution of the marital estate. If the house were in fact sold for \$200,000.00, resulting in \$140,000.00 to be distributed after the loan was satisfied, the husband would hypothetically receive \$30,000.00 for his post-separation debt reduction and the husband and wife would evenly split the remaining \$110,000.00. As a result, the husband would receive \$85,000.00 and the wife, \$55,000.00. If, however, the trial court's erroneous methodology were employed, such that post-separation payments affected the ownership percentages, the husband would be deemed to own 75% of the house as his separate property and the remaining 25% would be marital property, since the debt was reduced by \$10,000.00 during marriage and by \$30,000.00 after separation by the husband. As a result, applying the trial court's erroneous rationale, the husband would receive \$122,500.00 (or 87.5% of the equity); and the wife would only receive \$17,500.00 (or 12.5% of the equity).

ROSS v. ROSS

[230 N.C. App. 28 (2013)]

B. Order Directing the Sale of the Property

[5] Plaintiff argues in his brief that the trial court erred in ordering the sale of the Property “upon completion of the appellate process. . . .” However, Plaintiff cites no authority for his argument, merely contending that “[a]ny sale of the property should be halted until there has been a proper equitable distribution of the parties’ separate, marital and divisible property with respect to the [Property].” Accordingly, we deem that Plaintiff has abandoned this argument, and we leave the trial court’s Order undisturbed. *See* N.C.R. App. P. 28(b)(6).

II. Conclusion

For the foregoing reasons, we affirm in part and reverse and remand in part, directing the trial court to modify the Final Judgment (1) to classify the \$65,000.00 loan taken out by Plaintiff prior to marriage as entirely marital; (2) to characterize 86.5% of the Property as of the date of separation as marital property and 13.5% of the Property as of the date of separation as Plaintiff’s separate property; (3) to characterize the passive appreciation of the Property subsequent to the date of separation as divisible property and distribute said property between Plaintiff and Defendant; (4) to characterize the \$25,020.73 post-separation payments made by Plaintiff to reduce debt on the Property *and* \$38,188.77 of the \$40,351.77 of post-separation payments made by Defendant to reduce debt and pay certain expenses associated with the Property as divisible property and distribute said property between Plaintiff and Defendant⁴; and (5) after making the above adjustments, to enter a new distribution award.

AFFIRMED, in part; REVERSED and REMANDED, in part.

Judge CALABRIA and Judge ERVIN concur.

4. We note that N.C. Gen. Stat. § 50-20(4)(d) (2011), was amended to include within the definition of divisible property post-separation reductions in marital debt which were made after 11 October 2002. *See Warren v. Warren*, 175 N.C. App. 509, 517, 623 S.E.2d 800, 805 (2006); 2002 N.C. Sess. Laws ch. 159, sec. 33.5. Here, the parties separated a January 2002. Therefore, any post-separation, debt-reduction payments made prior to 11 October 2002 should technically not be characterized as divisible property. However, Plaintiff does not argue that the trial court erred by mischaracterizing, in this particular way, the post-separation payments made by the parties as divisible property. Nonetheless, we hold that any error regarding the trial court’s characterization of any such payments as divisible property to be harmless. *See Cooke v. Cooke*, 185 N.C. App. 101, 107-08, 647 S.E.2d 662, 667 (2007), *disc. review denied*, 362 N.C. 175, 657 S.E.2d 888 (2008) (holding that it was error, but not error necessitating remand, for a trial court to mischaracterize post-separation payments made prior to 11 October 2002 towards marital debt as divisible property and to distribute all such payments to the party who made them).

IN THE COURT OF APPEALS

STATE v. ASHE

[230 N.C. App. 38 (2013)]

STATE OF NORTH CAROLINA

v.

SHANNON DEVON ASHE, DEFENDANT

No. COA13-298

Filed 1 October 2013

**Constitutional Law—due process—competency to stand trial—
substantial evidence of incompetence—new trial**

Where there was substantial evidence before the trial court indicating that defendant might be incompetent to stand trial both at the time of his initial trial for assault on a person employed at a state detention facility and having attained habitual felon status, and at his habitual felon retrial, the trial court erred and violated defendant's due process rights by not ordering a competency hearing *sua sponte*. Defendant's convictions were reversed and a new trial was ordered.

Appeal by defendant from Judgment entered on or about 19 December 2012 by Judge C. Winston Gilchrist in Superior Court, Harnett County. Heard in the Court of Appeals 9 September 2013.

Attorney General Roy A. Cooper III by Assistant Attorney General Kathleen N. Bolton, for the State.

Sue Genrich Berry, for defendant-appellant.

STROUD, Judge.

Shannon Ashe ("defendant") appeals from the judgment entered on 19 December 2012 after he was found guilty of assault inflicting serious injury on a person employed at a state detention facility and having attained habitual felon status. For the following reasons, we order a new trial on both charges.

I. Background

On 25 June 2012, defendant was indicted for assault on a person employed at a state detention facility and having attained habitual felon status. Defendant pled not guilty and proceeded to jury trial in Harnett County on 15 October 2012. At trial, the State's evidence tended to show the following:

STATE v. ASHE

[230 N.C. App. 38 (2013)]

On 12 November 2011, Robert Roy was employed as a correctional officer with the North Carolina Department of Correction (now Department of Public Safety), assigned to the Harnett Correctional Institution (HCI) in Lillington. On that date, defendant was an inmate at HCI. Around 9:30 a.m., defendant was lifting weights at the weight pile in HCI's "O Yard." As Mr. Roy was observing the inmates around the weight pile, defendant became aggressive toward Mr. Roy, balling his fist and loudly saying "the fucking police can't tell me what to do, the fucking police can't tell me to put my shirt down, and the fucking police can't tell me to unwrap my pants."

In response, Officer Roy ordered defendant to accompany him to the N dormitory. When they reached the entrance to the N dormitory, Officer Roy asked defendant for his identification card. Defendant gave Officer Roy his identification card and followed him inside the dormitory, toward the holding cell. When they approached the holding cell, Officer Roy told defendant that he was going to be handcuffed and placed in the holding cell until the sergeant could speak with him. Defendant responded that he did not want to be handcuffed or put in the holding cell.

As Officer Roy reached for defendant's wrist to handcuff him, defendant punched him in the face and then repeatedly hit Officer Roy in the face and head. Other correctional officers responded and subdued defendant. Officer Roy bled profusely from the assault and suffered a concussion, a broken nose, and a number of cuts and bruises, including a ruptured blood vessel in his right eye.

The jury returned a verdict of guilty as to the lesser offense of assault inflicting physical injury on a person employed at a detention facility. The trial court then proceeded to the habitual felon portion of the trial. The jury deadlocked and the court declared a mistrial as to the habitual felon charge. On 19 October 2012, defendant was re-tried solely on the habitual felon issue and the second jury found that defendant had attained habitual felon status. The trial court then sentenced defendant to a term of 101-131 months imprisonment and ordered that he receive a mental health evaluation and treatment during his incarceration. Defendant gave notice of appeal in open court.

II. Defendant's Competence to Stand Trial

Defendant first argues that the trial court erred when it failed to *sua sponte* order a hearing to evaluate defendant's competence to stand trial at both the initial trial and at defendant's habitual felon re-trial.

STATE v. ASHE

[230 N.C. App. 38 (2013)]

Defendant contends that the trial court's failure to hold such a hearing was in violation of N.C. Gen. Stat. § 15A-1001, *et seq.*, and his constitutional right to due process of law. We agree and order a new trial.

N.C. Gen. Stat. § 15A-1001 provides:

No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner.

N.C. Gen. Stat. § 15A-1001(a) (2011). "The question of the capacity of the defendant to proceed may be raised at any time on motion by the prosecutor, the defendant, the defense counsel, or the court." N.C. Gen. Stat. § 15A-1002(a)(2011).

In applying these statutory provisions, [our Supreme] Court has recognized that the trial court is only required to hold a hearing to determine the defendant's capacity to proceed *if* the question is raised. Therefore, the statutory right to a competency hearing is waived by the failure to assert that right at trial.

State v. Badgett, 361 N.C. 234, 259, 644 S.E.2d 206, 221 (citations and quotation marks omitted), *cert. denied*, 552 U.S. 997, 169 L.Ed. 2d 351 (2007). Here, no one requested a hearing on his capacity to stand trial. Thus, defendant waived his statutory right to such a hearing.

Nevertheless, "[i]t has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." *Drope v. Missouri*, 420 U.S. 162, 171, 43 L.Ed. 2d 103, 112-13 (1975).

[U]nder the Due Process Clause of the United States Constitution, a criminal defendant may not be tried unless he is competent. As a result, a trial court has a constitutional duty to institute, *sua sponte*, a competency hearing if there is substantial evidence before the court indicating that the accused may be mentally incompetent. In enforcing this constitutional right, the standard for competence to stand trial is whether the defendant has sufficient present ability to consult with his lawyer with a reasonable

STATE v. ASHE

[230 N.C. App. 38 (2013)]

degree of rational understanding and has a rational as well as factual understanding of the proceedings against him.

Badgett, 361 N.C. at 259, 644 S.E.2d at 221. (citations, quotation marks, and brackets omitted).

Here, the trial court was presented with substantial evidence establishing that defendant may have been incompetent to stand trial at the time of both the assault trial and the re-trial on the habitual felon charge. Defendant proffered evidence of his extensive mental health treatment history and testimony from a treating psychiatrist. According to those records and the psychiatrist's testimony, defendant has been diagnosed with paranoid schizophrenia, anti-social personality disorder, and cocaine dependency in remission. While he is medicated, most of defendant's symptoms disappear and he has long periods of lucidity. At other times, however, and especially when he is not properly medicated, he suffers from active psychosis, auditory and visual hallucinations, as well as extreme paranoia.¹

Additionally, defendant's conduct before and during trial suggests that defendant may not have been competent to proceed. Before trial, defendant refused to put his clothes on for court until his trial counsel and mother convinced him to do so. Defendant's trial counsel initially requested that he be kept in both arm and leg chains because of previous disruptive behavior and his mental health history. The trial court itself concluded that such steps would be prudent in light of defendant's mental health history, his recent actions, and the concerns expressed by defense counsel. Ultimately, defendant's trial counsel withdrew his request for additional restraints and the trial court agreed. Nevertheless, at the outset of trial, it was clear that neither defendant's trial counsel nor the trial court knew whether defendant would comport himself properly during trial in light of his mental illnesses.

Even though defendant mostly did not act in a disruptive manner during the guilt phase of his assault trial, defendant did nonsensically interrupt the testimony of one witness and began muttering. Defendant also interrupted the voir dire of his treating psychiatrist to say "good morning." Further, it is telling that when the trial court noted defendant's presence for the record before delivering the final jury instructions,

1. The fact that the mental health evidence before the trial court was generally diagnostic and treatment-oriented, rather than a forensic evaluation, does not render such evidence irrelevant to determining whether there was substantial evidence that defendant may have been incompetent. *See Drope*, 420 U.S. at 176, 43 L.Ed. 2d at 115-16.

STATE v. ASHE

[230 N.C. App. 38 (2013)]

defendant interjected “Not nearly present at all. Elsewhere. You can continue, your Honor.”²

Moreover, during the assault trial, defendant never had an extended colloquy with the trial court or testified in a manner that demonstrated his understanding of the nature of the proceedings or his ability to assist in his own defense. *Cf. State v. Staten*, 172 N.C. App. 673, 679-84, 616 S.E.2d 650, 655-58 (2005) (holding that there was not substantial evidence of the defendant’s incompetence where the defendant and trial court engaged in a lengthy voluntariness colloquy wherein the defendant’s responses were “lucid and responsive” and the defendant’s testimony was largely rational), *app. dismissed and disc. rev. denied*, 360 N.C. 180, 626 S.E.2d 838 (2005), *cert. denied*, 547 U.S. 1081, 164 L.Ed. 2d 537 (2006); *State v. Snipes*, 168 N.C. App. 525, 530, 608 S.E.2d 381, 384 (2005) (holding that there was not substantial evidence of the defendant’s incompetence where his testimony, though somewhat rambling, showed that he was “accurately oriented regarding his present circumstances” and “knew the offenses with which he was charged.” (citation omitted)).

Contrary to the State’s argument, the fact that defendant responded “good morning” or “good afternoon” when greeted by the trial court is not dispositive as to whether there was substantial evidence regarding defendant’s competence. In *Pate*, the U.S. Supreme Court remarked that a defendant’s intelligible and unremarkable exchanges with the trial judge were insufficient to overcome the “uncontradicted testimony of [the defendant’s] history of pronounced irrational behavior.” *Pate v. Robinson*, 383 U.S. 375, 385, 15 L.Ed. 2d 815, 822 (1966). The Court went on to state that “[w]hile [the defendant’s] demeanor at trial might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to dispense with a hearing on that very issue.” *Id.*

The Court later explained:

The import of our decision in *Pate v. Robinson* is that evidence of a defendant’s irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors

2. The U.S. Supreme Court has noted that “Some have viewed the common-law prohibition [against trial of an incompetent defendant] as a by-product of the ban against trials *in absentia*; the mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no opportunity to defend himself.” *Drope*, 420 U.S. at 171, 43 L.Ed. 2d at 113 (citation and quotation marks omitted).

STATE v. ASHE

[230 N.C. App. 38 (2013)]

standing alone may, in some circumstances, be sufficient. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated. That they are difficult to evaluate is suggested by the varying opinions trained psychiatrists can entertain on the same facts.

Drope, 420 U.S. at 180, 43 L.Ed. 2d at 118.

Defendant's conduct at his habitual felon re-trial only added to the evidence that he may have been incompetent. At the outset, defendant addressed the court at length, but in a rambling, incoherent manner. Defendant also asked the trial court to remove his counsel, again in a largely incoherent manner. When the trial court responded to his requests, defendant refused to make eye contact with the judge or respond, though eventually he said that he was "fine as wine." During voir dire, defendant also interrupted to ask a potential juror whether she had previously been "an MP."³

Defendant's trial counsel noted that he had not been medicated in the two weeks prior to trial on the habitual felon charge. Although defendant mostly comported himself properly during the guilt phase of both trials, he failed to do so during sentencing. Indeed, during sentencing, he continually interrupted the prosecutor—at one point, when the prosecutor noted that defendant was a prior record level five offender, defendant interjected "and an all star." Finally, in the longest dialogue with the trial court throughout these proceedings, defendant gave a long, rambling, and incoherent statement that did not clearly demonstrate his understanding of the proceedings, though he did use several phrases relevant to sentencing.

In light of the evidence before the trial court, especially his extensive history of mental illness, including periods of psychosis, the concerns expressed both by the trial court and defense counsel as to defendant's ability to control himself during the proceedings due to his mental illness, and defendant's conduct during trial and sentencing, we conclude that there was substantial evidence before the trial court indicating that defendant might be incompetent to stand trial both at the time of his initial trial and his habitual felon re-trial. Therefore, we hold that the trial

3. The juror had mentioned that she had served in the Army.

STATE v. ASHE

[230 N.C. App. 38 (2013)]

court erred and violated defendant's due process rights by not ordering a competency hearing *sua sponte*.

As this Court has noted, the two remedies for the trial court's failure to order a competency hearing are either a new trial or a retrospective competency hearing. *See State v. McRae*, 163 N.C. App. 359, 367, 594 S.E.2d 71, 77 (2004) (*McRae II*). In some cases where we have determined that the trial court should have held a hearing on the defendant's competence, we have remanded for a determination of whether a retrospective assessment of the defendant's competence was possible, noting that "[t]he trial court is in the best position to determine whether it can make such a retrospective determination of defendant's competency." *State v. McRae*, 139 N.C. App. 387, 392, 533 S.E.2d 557, 560-61 (2000) (*McRae I*), *cert. denied*, 356 N.C. 442, 573 S.E.2d 160 (2002).

Nevertheless, retrospective assessments of competence are a disfavored alternative remedy to a new trial. *McRae II*, 163 N.C. App. at 368, 594 S.E.2d at 77. In *McRae I*, we specifically noted that we were remanding to the trial court to determine whether a retrospective hearing could be held because that defendant "was afforded several hearings before trial, and each time the trial court followed the determination made in the corresponding psychiatric evaluation." *McRae I*, 139 N.C. App. at 391, 394, 533 S.E.2d at 560, 562. In this case, defendant's competence has *never* been assessed, let alone at a relevant time. Thus, it is clear that a retrospective determination of defendant's competence would not be possible here and we do not need to remand for the trial court to make such a determination.

Because defendant's competence to stand trial has never been evaluated and "[g]iven the inherent difficulties of such a *nunc pro tunc* determination under the most favorable circumstances, we cannot conclude that such a procedure would be adequate here." *Drope*, 420 U.S. at 183, 43 L.Ed. 2d at 119-20 (citations omitted); *see also Dusky v. United States*, 362 U.S. 402, 403, 4 L.Ed. 2d 824, 825 (1960) (per curiam) (recognizing the difficulty of "retrospectively determining the [defendant's] competency as of more than a year ago" and ordering a new trial and hearing as to the defendant's *present* competence). Accordingly, we reverse defendant's convictions for assault on a person employed at a state detention facility and having attained habitual felon status and order a new trial.⁴

4. Given our resolution of this issue, we need not address defendant's remaining arguments.

STATE v. CALL

[230 N.C. App. 45 (2013)]

III. Conclusion

There was substantial evidence before the trial court indicating that defendant might not have been competent to proceed at both his initial trial and at the habitual felon re-trial. Therefore, the trial court erred in failing to order a competency hearing *sua sponte* and we order a new trial.

NEW TRIAL.

Chief Judge MARTIN and Judge GEER concur.

STATE OF NORTH CAROLINA
v.
JERRY KENNETH CALL, JR.

No. COA13-266

Filed 1 October 2013

Constitutional Law—right to cross-examine witnesses—non-testimonial evidence—no violation

The trial court did not err in a larceny case by denying defendant's motion for a mistrial. Defendant's argument that two pieces of evidence admitted at trial violated his Sixth Amendment right to cross-examine witnesses was without merit because the contested evidence was non-testimonial.

Appeal by defendant from judgment entered 13 September 2012 by Judge W. Douglas Albright in Rockingham County Superior Court. Heard in the Court of Appeals 26 August 2013.

Attorney General Roy Cooper, by Assistant Attorney General Robert K. Smith, for the State.

Attorney Mary March Exum, for defendant.

Elmore, Judge.

On 12 September 2012, a jury found Jerry Kenneth Call, Jr. (defendant) guilty of Larceny from a Merchant pursuant to N.C. Gen. Stat §14-72.11(4). On 13 September 2012, defendant was sentenced to 18-31

STATE v. CALL

[230 N.C. App. 45 (2013)]

months imprisonment in the North Carolina Department of Corrections. Defendant now appeals and raises as error the trial court's denial of his motion to dismiss and motion for a mistrial. However, on 13 August 2013, defendant conceded that the trial court did not err in denying his motion to dismiss and voluntarily withdrew this issue on appeal. After careful consideration, we conclude that the trial court did not err in denying defendant's motion for a mistrial.

I. Facts

On 12 January 2010, Officer Daniel Abruscato of the Eden Police Department was notified to be on the lookout for a green Ford Expedition, the suspect getaway vehicle of an alleged larceny occurring at Wal-Mart in Eden. Officer Abruscato spotted the vehicle traveling westbound on Stadium Drive, and initiated a traffic stop on Washington Street, less than two miles from the Wal-Mart. Officer Abruscato observed seven passengers in the vehicle, including defendant, and he saw numerous Wal-Mart bags containing over 50 cans of baby formula in the rear passenger area. After instructing the occupants to sit on a nearby sidewalk, Officer Abruscato searched the vehicle and ultimately arrested passenger Sabrina Cobbler. Defendant was neither detained nor questioned at the scene.

Thereafter, Officer Abruscato confiscated the baby formula and contacted the Wal-Mart to verify whether the store was missing formula. He then took the formula to the Eden Police Department.

Later that same day, Officer Abruscato met with Billy Dunn, an assistant manager at the Wal-Mart. Dunn confirmed that the cans of baby formula belonged to his Wal-Mart store. Officer Abruscato and Dunn then signed a "Receipt For Evidence And/Or Property" form (Receipt for Evidence), which listed the exact type and amount of baby formula that was obtained from the traffic stop. The Receipt for Evidence showed that cans of baby formula were released by Officer Abruscato on 12 January 2010 and given to Dunn. Dunn then notified Wal-Mart's Protection Coordinator, Mr. Fred Pedone, about a "loss of product." As a result, Pedone launched an internal investigation, which led to a formal investigation by the Eden Police Department. On 13 January 2010, Officer Abruscato reviewed the Wal-Mart in-store camera recording of the alleged larceny, which showed defendant and other individuals taking cans of baby formula from the store past the point of sale without paying for the items. Officer Abruscato subsequently took out a criminal warrant on defendant for several charges, including Larceny From a Merchant.

STATE v. CALL

[230 N.C. App. 45 (2013)]

Dunn died on 25 April 2011 and was unavailable to testify at defendant's trial on 10 September 2012. The trial court denied defendant's pre-trial motion *in limine* to prevent the State from "making reference to reports, statements or conclusions" of Dunn. At trial, Dunn's statements to Pedone about the lost product and the Receipt for Evidence were admitted into evidence over defendant's objection. As a result of the aforementioned admitted evidence, defendant made a motion for a mistrial, which was denied by the trial court.

II. Analysis

Defendant argues that the trial court erred in denying his motion for a mistrial. Specifically, defendant contends that two pieces of evidence admitted at trial violated his Sixth Amendment right to cross-examine witnesses and resulted in an unfair and prejudiced trial. We disagree.

It is within the sole direction of the trial court whether to grant a mistrial. *State v. Wood*, 168 N.C. App. 581, 583, 608 S.E.2d 368, 370 (2005) (citations omitted). This Court has recognized that "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." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted); *see also White*, 312 N.C. at 777, 324 S.E.2d at 833 ("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."). A mistrial should be granted only when "there are such serious improprieties as would make it impossible to attain a fair and impartial verdict under the law." *State v. Blackstock*, 314 N.C. 232, 243-44, 333 S.E.2d 245, 252 (1985) (citation omitted).

"Our review of whether defendant's Sixth Amendment right of confrontation was violated is three-fold: (1) whether the evidence admitted was testimonial in nature; (2) whether the trial court properly ruled the declarant was unavailable; and (3) whether defendant had an opportunity to cross-examine the declarant." *State v. Clark*, 165 N.C. App. 279, 283, 598 S.E.2d 213, 217 (2004) (citation omitted). "[A] trial court must consider two factors in determining whether statements made to the police constitute testimonial evidence: (1) the stage of the proceedings at which the statement was made and (2) the declarant's knowledge,

STATE v. CALL

[230 N.C. App. 45 (2013)]

expectation, or intent that his or her statements would be used at a subsequent trial.” *State v. Huu The Cao*, 175 N.C. App. 434, 437, 626 S.E.2d 301, 303 (2006) (citation omitted). Statements become testimonial “when police questioning shifts from mere preliminary fact-gathering to eliciting statements for use at a subsequent trial[.]” *Id.* (citations and quotations omitted). Such statements include “response[s] to structured police questioning.” *State v. Morgan*, 359 N.C. 131, 156, 604 S.E.2d 886, 901 (2004) (citation and quotations omitted). Testimonial evidence “indicate[s] that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” *State v. Lewis*, 361 N.C. 541, 546, 648 S.E.2d 824, 828 (2007) (citation and quotation omitted). However, a statement made to a private citizen that “was not prior testimony or made to a police officer during the course of an interrogation[.]” is non-testimonial. *State v. Calhoun*, 189 N.C. App. 166, 170, 657 S.E.2d 424, 427 (2008).

First, defendant alleges that it was error for the trial court to have allowed Pedone to testify about a statement made to him by Dunn regarding a loss of product at the Wal-Mart store when defendant never had the opportunity to cross-examine Dunn. Thus, our inquiry is limited to whether Dunn’s declarations were testimonial in nature. At trial, the following colloquy occurred:

STATE: Did you recall anything unusual on or about that date, sir?

PEDONE: Yes, sir.

STATE: To your knowledge, what was that, sir?

PEDONE: I was informed by Billy Dunn that we had a loss of –

DEFENDANT: Objection.

TRIAL COURT: Overruled.

PEDONE: I was informed by Billy Dunn that we had a loss of product. With that information, I initiated an investigation to determine the amount of loss and what the property was.

Dunn’s statement was not made in direct response to police interrogation or at a formal proceeding while testifying. Rather, Dunn privately notified his colleague, Pedone, about a loss of product at the Wal-Mart store. This statement was made outside the presence of police and before

STATE v. CALL

[230 N.C. App. 45 (2013)]

defendant was arrested and charged. Thus, the statement falls outside the purview of the Sixth Amendment. *See Calhoun, supra*. Furthermore, Dunn's statement was not aimed at defendant, and it is unreasonable to believe that his conversation with Pedone would be relevant two years later at trial since defendant was not a suspect at the time this statement was made. Thus, Dunn's statement was non-testimonial, and the trial court did not violate defendant's Constitutional right to cross-examine the witness by admitting it. *See State v. Lawson*, 173 N.C. App. 270, 276, 619 S.E.2d 410, 414 (2005) (citations and internal quotations omitted) (holding that evidence is non-testimonial in nature when made in the course of a private conversation, outside the presence of law enforcement, and without the reasonable expectation "to be used prosecutorially at a later trial."); *cf. Clark*, 165 N.C. App. at 284, 598 S.E.2d at 217 (citations and quotations omitted) (recognizing that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.").

Second, defendant avers that the trial court erred in admitting the Receipt for Evidence signed by Dunn. Defendant objected when the State asked to admit State's Exhibit 7, which included the Receipt for Evidence that was given by Officer Abbruscato to Dunn:

STATE: Now, handing you what has been marked as State's Exhibit 7, if you could describe what this or these documents are, sir?

PEDONE: There is [sic] actually two documents on this. The first one is . . . the release of property to the sheriff's department coming from Eden. And [the second one is] the actual training receipt[.]

. . .

STATE: The State would seek to admit Number 7.

DEFENDANT: I will object.

TRIAL COURT: Let me see it. Did you, just for clarification, did you testify as to the signatory reported to be that of Dunn?

PEDONE: Yes, it does.

TRIAL COURT: Do you recognize that to be, in fact, his signature?

STATE v. DAVIS

[230 N.C. App. 50 (2013)]

PEDONE: I do.

TRIAL COURT: Overruled.

Dunn signed the Receipt for Evidence and received the baby formula cans during the initial stages of Officer Abbruscato's investigation. The purpose of the meeting was simply to release property from the Eden Police Department to Wal-mart, not to formally question Dunn about a criminal investigation. At the time Dunn signed the Receipt for Evidence, defendant was not even a suspect. The form in no way connects defendant to the alleged stolen property. In fact, the Receipt for Evidence indicates that the property was obtained from Nikki Denny and Cobbler. The receipt's purpose was to establish ownership, quantity, and type of baby formula that was released to Wal-Mart.

Accordingly, we conclude that Dunn's assertions contained in the Receipt for Evidence were non-testimonial, and thus the trial court did not err in denying defendant's motion for a mistrial.

III. Conclusion

In sum, the trial court did not err in denying defendant's motion for a mistrial because the contested evidence was non-testimonial.

No Error.

Chief Judge MARTIN and HUNTER, JR., Robert N., concur.

STATE OF NORTH CAROLINA
v.
JEVON ARVIN DAVIS

No. COA13-317

Filed 1 October 2013

1. Public Assistance—food stamp fraud—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of food stamp fraud. Viewing the evidence in the light most favorable to the State, the evidence created a reasonable inference that defendant knowingly submitted a fraudulent wage verification form to obtain food benefits to which he was not entitled. Further, there was sufficient evidence to indicate that

STATE v. DAVIS

[230 N.C. App. 50 (2013)]

defendant obtained or aided or abetted another person to obtain food benefits to which he was not entitled.

2. Public Assistance—food stamp fraud—jury instruction—acting in concert—no plain error

The trial court did not commit plain error in a food stamp fraud case by its jury instruction on acting in concert. The State was not required to use the theory of acting in concert in order to prove that defendant violated N.C.G.S. § 108A-53, and therefore, defendant could not establish prejudice.

On writ of certiorari from judgment entered 23 August 2012 by Judge Lucy N. Inman in Superior Court, Alamance County. Heard in the Court of Appeals 10 September 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Michael T. Wood, for the State.

Edward Eldred for Defendant.

McGEE, Judge.

Jevon Arvin Davis (“Defendant”) was indicted for food stamp fraud, medical assistance recipient fraud, public assistance fraud, common law forgery, and common law uttering. Nannetta Davis (“Ms. Davis”), Defendant’s wife, worked for the Alamance County Department of Social Services (“DSS”). Ms. Davis pleaded guilty, in a separate case, to “three fraud charges, the medical recipient fraud, the food stamp fraud[,] and the public assistance fraud.” Defendant was convicted of food stamp fraud. Defendant appeals.

I. Sufficiency of the Evidence of Food Stamp Fraud

[1] Defendant argues that the trial court erred in denying his motion to dismiss the charge of food stamp fraud. We disagree.

A. Standard of Review

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

STATE v. DAVIS

[230 N.C. App. 50 (2013)]

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.” *Bradshaw*, 366 N.C. at 92, 728 S.E.2d at 347. “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.* at 93, 728 S.E.2d at 347 (internal citations and quotation marks omitted).

B. Analysis

Whoever knowingly obtains or attempts to obtain, or aids or abets any person to obtain by means of making a willfully false statement or representation or by impersonation or by failing to disclose material facts or in any manner not authorized by this Part or the regulations issued pursuant thereto, transfers with intent to defraud any electronic food and nutrition benefit to which he is not entitled in an amount more than four hundred dollars (\$400.00) shall be guilty of a Class I felony.

N.C. Gen. Stat. § 108A-53(a) (2011).

Defendant first contends that “the indictment should not charge a party disjunctively or alternatively, but rather must charge in such a manner as to make certain what is relied on as the accusation against the defendant.” The indictment in the present case reads:

The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above [D]efendant named above unlawfully, willfully and feloniously did knowingly obtain from the Food and Nutrition Services program of the Alamance County Department of Social Services, an electronic food and nutrition benefit in the amount of \$3,743.00, to which [D]efendant was not entitled[.]

The indictment does not charge disjunctively or in the alternative. The indictment alleges that Defendant “unlawfully, willfully and feloniously did knowingly obtain” a food benefit to which he was not entitled, in violation of N.C.G.S. § 108A-53. Defendant further contends that, because the indictment alleges that Defendant “did knowingly obtain” a food benefit, the State is limited to proving that Defendant “obtained” benefits, not that Defendant “attempted to obtain” or “aided or abetted”

STATE v. DAVIS

[230 N.C. App. 50 (2013)]

another person to obtain benefits. Defendant cites *State v. Brooks*, 138 N.C. App. 185, 530 S.E.2d 849 (2000) in support of his argument.

In *Brooks*, the defendant argued “that the trial court committed plain error in allowing him to be convicted of kidnapping under a theory not supported by the bill of indictment.” *Brooks*, 138 N.C. App. at 190, 530 S.E.2d at 853. N.C. Gen. Stat. § 14-39(a) (2011) enumerates six possible purposes for a kidnapping.

(a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:

(1) Holding such other person for a ransom or as a hostage or using such other person as a shield; or

(2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or

(3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person; or

(4) Holding such other person in involuntary servitude in violation of G.S. 14-43.12.

(5) Trafficking another person with the intent that the other person be held in involuntary servitude or sexual servitude in violation of G.S. 14-43.11.

(6) Subjecting or maintaining such other person for sexual servitude in violation of G.S. 14-43.13.

N.C.G.S. § 14-39(a) (emphasis added).

N.C.G.S. § 108A-53 is easily distinguished from N.C.G.S. § 14-39. N.C.G.S. § 14-39 lists six different purposes for a kidnapping. N.C.G.S. § 108A-53 gives no list of purposes for which Defendant obtained food benefits. Defendant cites no authority in support of his contention that “attempted to obtain” and “aided or abetted” constitute different theories of guilt under N.C.G.S. § 108A-53. Indeed, in the context of other offenses, this Court has held that “[b]ecause aiding and abetting is not a substantive offense but just a theory of criminal liability, allegations of aiding and abetting are not required in an indictment[.]” *State v. Baskin*, 190 N.C. App. 102, 110, 660 S.E.2d 566, 573 (2008) (breaking or entering

STATE v. DAVIS

[230 N.C. App. 50 (2013)]

a motor vehicle and larceny); *see also State v. Ainsworth*, 109 N.C. App. 136, 143, 426 S.E.2d 410, 415 (1993) (first-degree rape).

Defendant further contends that the “only theory that could have supported [Defendant’s] conviction for obtaining food stamps was concerted action.” However, Defendant does not assert as error on appeal any variance between the indictment and the evidence at trial. We review the record for sufficient evidence of “obtained,” “attempted to obtain,” or “aided or abetted” another person to obtain food benefits.

Defendant worked at Cox Toyota in Burlington. After Defendant suffered medical issues, Ms. Davis spoke with Kelly Thomas (“Ms. Thomas”), a supervisor at DSS, about applying for food and nutrition services and crisis intervention. Ms. Davis was “asked to provide documentation about [Defendant’s] income” and admitted that she “provided false information to DSS[.]” Ms. Davis testified as follows:

So I called [Defendant] and I said fax me over a letterhead, okay? That night I went – or I can’t remember the exact sequence of it, but I typed the letter at home and I basically brought it into work, taped it to the top of the Cox Toyota sheet and photocopied it.

Ms. Thomas testified that she received the letter by fax machine. Defendant concedes that “[a]rguably, the caseworker’s testimony that she retrieved the 8 February 2011 letter from the fax machine created a reasonable inference that [Defendant] himself typed the letter and sent it to DSS.” The evidence indicates that, regardless of the method of delivery, Defendant aided or abetted Ms. Davis in obtaining food benefits by providing the Cox Toyota letterhead necessary to create a fraudulent letter from Defendant’s employer. Even assuming *arguendo*, without deciding, that this evidence is insufficient, the State presented additional evidence.

Ms. Thomas provided Ms. Davis a “wage verification form for [Ms. Davis] to have Cox Toyota fill out and return to” Ms. Thomas. Ms. Davis testified that she completed the form and wrote “Cindy Harrison/Payroll Clerk” at the bottom. Ms. Davis then asked Defendant to fax the form to Ms. Thomas. Ms. Davis testified that Defendant complied. The faxed form in the record indicates that it is from “Cox Toyota.” Ms. Davis further testified that Defendant knew they were receiving food stamps. Defendant admitted to an officer that he used the food stamps.

Viewing the evidence in the light most favorable to the State, the above evidence creates a reasonable inference that Defendant knowingly submitted the fraudulent wage verification form to obtain food

STATE v. DAVIS

[230 N.C. App. 50 (2013)]

benefits to which he was not entitled. There is sufficient evidence to indicate that Defendant obtained or aided or abetted another person to obtain food benefits to which he was not entitled. The trial court did not err in denying Defendant's motion to dismiss.

II. Jury Instructions

[2] Defendant next argues the trial court committed plain error in its jury instructions. We disagree.

A. Standard of Review

Because Defendant did not object to the jury instructions at trial, we review for plain error. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012).

[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. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (alterations in original) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982) (footnotes omitted)).

To show 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.” *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (internal citation and quotation marks omitted).

B. Analysis

The trial court gave the following instruction in this case:

For a person to be guilty of a crime, it is not necessary they personally do all of the acts necessary to constitute the

STATE v. GROOMS

[230 N.C. App. 56 (2013)]

crime. If two or more persons join in a common purpose to commit a crime, each of them is actually or constructively present, is guilty of that crime if the other person commits the crime and also guilty of any other crime committed by the other in pursuance of the common purpose or the natural or probable consequence thereof. (emphasis added).

Defendant contends that the trial court relieved the State of its burden, under the theory of acting in concert, to prove that Defendant was present at the scene of the crime. However, even assuming *arguendo* that the instruction was erroneous, Defendant must show prejudice resulting from the error.

As discussed in Section I above, the State presented sufficient evidence showing Defendant obtained food benefits or aided or abetted another person to obtain food benefits to which he was not entitled. The State was not required to use the theory of acting in concert in order to prove that Defendant violated N.C.G.S. § 108A-53. Defendant therefore cannot establish prejudice resulting from this error. The trial court's instructions did not rise to the level of plain error.

No error.

Judges McCULLOUGH and DILLON concur.

STATE OF NORTH CAROLINA
v.
THOMAS HOWARD GROOMS, JR., DEFENDANT

No. COA12-1183

Filed 1 October 2013

1. Evidence—prior crimes or bad acts—driving while impaired—malice—no prejudicial error

The trial court did not commit prejudicial error in a driving while impaired case by admitting evidence of defendant's drinking habits and of prior incidents in which defendant drank alcohol while driving. Challenged testimony regarding an incident two months earlier was properly admitted as evidence of malice and the trial court did not abuse its discretion in admitting the evidence under Rule 403.

STATE v. GROOMS

[230 N.C. App. 56 (2013)]

Further, any error in admitting the remaining challenged testimony was not prejudicial, given the State's evidence.

2. Homicide—second-degree murder—malice—sufficient evidence

The trial court did not err in a driving while impaired case by denying defendant's motion to dismiss a second-degree murder charge where there was sufficient evidence of each element of the offense, including malice.

Appeal by defendant from judgments entered 28 March 2012 by Judge Paul L. Jones in New Hanover County Superior Court. Heard in the Court of Appeals 26 March 2013.

Attorney General Roy Cooper, by Assistant Attorney General Kathryn E. Hathcock, for the State.

Duncan B. McCormick for defendant-appellant.

GEER, Judge.

Defendant Thomas Howard Grooms, Jr. appeals from his conviction of two counts of second degree murder and possession of an open container of an alcoholic beverage in the passenger area of a motor vehicle. On appeal, defendant primarily contends that the trial court erred under Rule 404(b) of the Rules of Evidence in admitting evidence of defendant's drinking habits and of prior incidents in which defendant drank alcohol while driving. We hold that the trial court properly admitted as evidence of malice testimony regarding an incident two months earlier on the same road in which defendant's impaired driving badly frightened his female passenger who forced him to pull over his car and who expressed substantial concern about his driving while impaired. With respect to the remaining challenged testimony, we hold that any error was not prejudicial. Given the State's evidence, there is no reasonable possibility that the jury would have reached a different verdict in the absence of the challenged evidence.

Facts

The evidence viewed in the light most favorable to the State tended to show the following facts. On 2 April 2011, defendant met Joan Grady for a date at a restaurant in Holden Beach, North Carolina. When Ms. Grady arrived at the restaurant at approximately 6:00 or 7:00 p.m., defendant was sitting at the bar with a scotch and soda. Defendant finished

STATE v. GROOMS

[230 N.C. App. 56 (2013)]

his drink and had another at the bar. The two ate dinner, during which defendant had a glass of wine, and they left the restaurant around 8:30 or 9:00 p.m.

Subsequently, defendant drove to Wilmington, North Carolina for a date with another woman, Pat Martin. Ms. Martin asked defendant if she could borrow \$100.00 to repay a loan to a friend. Defendant agreed and drove Ms. Martin to the friend's house, stopping on the way to purchase food from an Arby's restaurant at 11:12 p.m. Ms. Martin entered her friend's house, but a few minutes later returned to defendant's car. Defendant then drove Ms. Martin to a pub in Wilmington where they stayed until 2:00 a.m. Defendant had another scotch and soda at the pub.

After the pub closed, defendant drove to Ms. Martin's apartment where he drank a 12 ounce glass of Bacardi 151 rum. Ms. Martin pulled out a clear plastic bag containing a white powdery substance and offered it to defendant. Defendant snorted some of the powder through a straw, knowing that it was an impairing substance. Ms. Martin explained to defendant that she had actually used his \$100.00 to buy the powder and asked defendant to drive her back to buy more. Defendant agreed, stopped by the ATM to get cash, gave Ms. Martin another \$100.00 to buy more powder, and drove to the house they had visited earlier. Defendant snorted more powder in his car after Ms. Martin made the second purchase.

Defendant then drove back to Ms. Martin's apartment where he drank a second 12 ounce glass of Bacardi 151 rum. Defendant left in the morning to drive home and, at approximately 9:15 or 9:20 a.m., was driving south on River Road. At that point, defendant had been awake for 24 hours straight.

The weather conditions were clear and sunny, and there was very light traffic on River Road. River Road has a four foot wide bicycle lane on the right side of the roadway in each direction of travel. There is also at least a 15 foot wide grass and dirt shoulder on each side of the road except for three locations where there are small bridges. Many bicyclists train on River Road, and from the beginning of River Road at its northernmost point heading south, there are 22 signs on the right side of the road warning of the bike lane.

Defendant passed three bicyclists riding in a line within the bicycle lane on River Road and drove unusually close – within an arm-and-a-half's length – to one of the bicyclists, alarming the bicyclist. Shortly after passing the bicyclists, defendant "swerved" off the paved roadway

STATE v. GROOMS

[230 N.C. App. 56 (2013)]

to the right – defendant’s right tires were completely in the grass shoulder of the road and his left tires were completely in the bicycle lane. Defendant continued driving off the roadway for five to six seconds and then reentered his proper lane of travel. After returning to the paved road, defendant’s car weaved back over into the bicycle lane.

While still travelling south on River Road, defendant twice more swerved off the roadway onto the grass shoulder, each time travelling with his right tires completely off the road and his left tires in the bicycle lane for two to three seconds, with it then taking defendant another three to four seconds to reenter his proper lane. These three incidents all happened within one and a quarter miles of each other.

Robert Miller was driving his Jeep directly in front of defendant’s silver Buick. At approximately 9:29 a.m., on a completely straight section of River Road, Mr. Miller moved over into the opposite lane of travel, which was clear, to give a wide berth to two bicyclists – Ronald David Doolittle II (“David”) and his 17-year-old son, Ronald David Doolittle III (“Trey”) – who were riding south in the bicycle lane. At that same time, defendant picked up his cell phone and made a call to Ms. Grady.

Seconds later, as Mr. Miller looked into his rearview mirror to reenter the southbound lane, he saw defendant’s car, traveling at approximately 55 miles per hour, run into David. David’s head struck and shattered defendant’s windshield. Immediately thereafter, defendant hit Trey, sending him flying into the air. At the time of the collisions, 90% of defendant’s car was outside of the proper lane of travel, and the car was partially on the grass shoulder.

Defendant did not brake before, during, or immediately after the collisions. Defendant simply continued driving south on River Road until Mr. Miller, who had stopped some 50 to 100 yards down the roadway, flagged down defendant and directed him to stop and return to the scene of the accident. Defendant then made a U-turn and parked on the northbound shoulder of River Road roughly 15 feet from the victims. Defendant got out of his car and walked over to the victims, but did not attempt to render aid or even call 911. Rather, defendant returned to his car where he calmly sat, appearing, according to Mr. Miller, as if he had “[n]ot a care in the world.”

David died immediately following the collision. Trey was still taking shallow breaths and was rushed to New Hanover Regional Medical Center where doctors attempted to save his life. Because of the severity of his injuries, they were unable to do so.

STATE v. GROOMS

[230 N.C. App. 56 (2013)]

At the accident scene, defendant remained in his car until approached by Trooper Brian Phillips with the North Carolina Highway Patrol. Defendant's responses to the trooper's questions were "very slow and delayed," and defendant appeared "very relaxed, dazed, and kind of carefree." Defendant had red, glassy, droopy eyes, and there was a mild odor of alcohol on his breath. When defendant exited his car to walk to the trooper's patrol car, defendant staggered three times and almost fell over.

When Trooper Phillips asked about the odor of alcohol on his breath, defendant claimed he had not been drinking that day, had drunk three alcoholic beverages with dinner the night before, and had been working all night. In the patrol car, defendant was unable to keep his head still, as instructed, during the horizontal gaze nystagmus ("HGN") field sobriety test.

Defendant's blood was drawn on the scene at 11:14 a.m. Later chemical analysis of defendant's blood revealed that at 11:14 a.m., defendant's blood had an alcohol concentration of .13 grams of alcohol per 100 milliliters of whole blood. Calculations using retrograde extrapolation showed that, at the time of the collision, defendant's blood alcohol concentration was .16 grams of alcohol per 100 milliliters of whole blood.

Officers searched defendant's car and found, on the front driver's side floorboard, a straw with a white powdery substance at one end. Officers additionally found one nearly empty bottle of Southern Comfort liquor and one three-fourths-full bottle of Bacardi 151 liquor in the back seat, two bottles of Mountain Dew in the passenger area, and an empty bottle of Bella Sera wine in the trunk.

Trooper Phillips took defendant to the Highway Patrol office in Wilmington. Lieutenant Todd Radabaugh of the North Carolina Wildlife Resources Commission, a drug recognition expert, began an evaluation of defendant at the Highway Patrol office at 12:00 p.m. Lieutenant Radabaugh administered sobriety tests on defendant including the Romberg balance test, the walk-and-turn test, the one-leg-stand test, the finger-to-nose test, and the HGN test. Defendant exhibited clues of impairment on every test. Based on his observations, Lieutenant Radabaugh determined defendant had consumed a sufficient amount of alcohol to appreciably impair his physical and mental faculties.

In addition, defendant exhibited clues of impairment by a central nervous system stimulant, including having body tremors, a dry mouth, an extremely fast internal clock (when asked to perform exercises for

STATE v. GROOMS

[230 N.C. App. 56 (2013)]

a certain amount of time), dilated pupils in various lighting conditions, and high blood pressure. When defendant was placed in a dark room with a black light, officers observed a white powdery substance on his mustache just beneath his right nostril, on his left cheek, and on his shirt. Accordingly, Lieutenant Radabaugh further determined that defendant “ingested alcohol and a central nervous system stimulant to the extent that his mental and physical faculties were appreciably impaired.”

The State presented evidence that when a central nervous system depressant such as alcohol is mixed with a central nervous system stimulant, the effects of the two drugs can be compounded rather than neutralized such that the user is more impaired than the user would be on either drug alone. At the Highway Patrol office, defendant denied taking any stimulants in the 48 hours prior to the collision. Defendant stated that the previous day, at 2:00 p.m., he had taken a Percocet for pain even though he did not have a prescription for Percocet. Percocet would, however, have the opposite effect on the central nervous system from that of a stimulant. Defendant also stated that he took Zolofit for anxiety the night before the collision.

Trooper Phillips then took defendant to the New Hanover County detention center where a swabbing was obtained of defendant’s right nostril. Subsequent laboratory testing of the swab from defendant’s right nostril, as well as laboratory testing on the straw located on defendant’s floorboard, revealed the presence of mephedrone, a psychoactive stimulant and a chemical analogue of the controlled substance cathinone. Cathinone was a Schedule I controlled substance for years prior to 3 April 2011; mephedrone became a controlled substance on 1 June 2011, roughly two months after the collision at issue in this case. However, as a chemical analogue of a controlled substance prior to 1 June 2011, mephedrone – marketed as a “bath salt” – was legal *only* if not intended for human consumption.

On 25 April 2011, defendant was indicted for the second degree murders of David and Trey. In a separate indictment, defendant was indicted for felony death by motor vehicle of David, driving while impaired, reckless driving, possession of an open container of an alcoholic beverage in the passenger area of a motor vehicle, and possession of drug paraphernalia.

At trial, defendant testified in his own defense. He acknowledged drinking two alcoholic beverages while with Ms. Grady, a third drink with Ms. Martin at a pub, and two 12 ounce glasses of Bacardi 151 rum at Ms. Martin’s apartment. In addition, he admitted snorting the white

STATE v. GROOMS

[230 N.C. App. 56 (2013)]

substance Ms. Martin purchased, knowing it was an impairing substance. Defendant claimed that, upon leaving Ms. Martin's apartment to drive from Wilmington to Carolina Beach, he felt "extremely tired," but did not feel too impaired to drive. He admitted that, in retrospect, he was "obviously" appreciably impaired and that he was "legally intoxicated with alcohol" at the time of the collision.

Although defendant also admitted his driving caused the victims' deaths, he denied running off the road three times prior to the collision. Rather, defendant claimed he ran off the road only once prior to the collision and that it was due to his tiredness. Defendant believed that the witnesses who testified to him driving off the road multiple times prior to the accident had "over-exaggerated" – he claimed that the witnesses were "ganging-up" on him.

The jury found defendant guilty of two counts of second degree murder, felony death by vehicle,¹ driving while impaired, reckless driving, possession of an open container of an alcoholic beverage in the passenger area of a motor vehicle, and possession of drug paraphernalia. The State then dismissed the charges of driving while impaired and possession of drug paraphernalia, and the trial court arrested judgment on the guilty verdicts for felony death by vehicle and reckless driving.

The trial court sentenced defendant to a presumptive-range term of 144 to 182 months imprisonment for one count of second degree murder and a consecutive, presumptive-range term of 144 to 182 months imprisonment for the second count of second degree murder and for possession of an open container of an alcoholic beverage in the passenger area of a motor vehicle. Defendant timely appealed to this Court.

I

[1] Defendant first argues that the trial court erred in admitting the testimony of Thelma Shumaker, a woman defendant dated for a period of time, regarding a specific incident in which defendant drove while impaired on River Road two months before the collision, as well as her testimony that defendant habitually drank alcohol, drank alcohol while driving 20 times, and drove while impaired one or two additional times. Defendant contends this evidence was not admissible under Rule 404(b)

1. The verdict sheet incorrectly states the victim in the felony death by vehicle charge was "Ronald David Doolittle III" when the indictment alleged, with respect to that offense, the death of "Ronald David Doolittle II." However, defendant does not raise this issue on appeal and the trial court arrested judgment on that conviction, rendering any error harmless.

STATE v. GROOMS

[230 N.C. App. 56 (2013)]

of the Rules of Evidence. “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).

With respect to the specific incident, Ms. Shumaker testified that on 6 February 2011, Super Bowl Sunday, she went on a date with defendant. Prior to picking up Ms. Shumaker in Carolina Beach and driving her to Wilmington for the date, defendant had been drinking alcohol. On the drive from Carolina Beach to Wilmington, defendant drank one cup of Mountain Dew mixed with vodka. The two attended a play in Wilmington that began at 1:00 p.m., but left at the intermission and drank Mountain Dew mixed with vodka in defendant’s car. Defendant then drove Ms. Shumaker to a restaurant in Wilmington, where they ate and had two glasses of wine apiece.

After dinner, Ms. Shumaker and defendant walked to a bar where they each drank two or three vodka martinis. They next walked to a different bar, where they each drank a glass of red wine. Defendant’s speech was slow and slightly slurred and his movements were slow. Ms. Shumaker believed “a hundred percent” that defendant was impaired and should not have been driving. Defendant then drove Ms. Shumaker back to Carolina Beach on River Road.

As they traveled down River Road, Ms. Shumaker began to feel “panicky.” Defendant weaved within his lane and, at times, weaved slightly into the wrong lane of travel. Ms. Shumaker testified that there were several times where “if a car was coming we might have been in trouble.” Ms. Shumaker believed defendant was driving too fast. At one point, defendant nearly hit a mailbox on the right side of the road. Ms. Shumaker finally told defendant: “[S]top the car, I’m having a panic attack, I need to breathe.’”

Defendant pulled over, and Ms. Shumaker got out and walked to the back of the car. Defendant also got out, apologized to Ms. Shumaker, and told her he did not want her to be scared. Ms. Shumaker told him “[b]asically that we’ve had a lot to drink, and you really should drive much slower than you were.” Ms. Shumaker was upset, angry, and fearful, and “[d]efinitely” expressed those feelings to defendant. With respect to riding in the car with defendant that night, she told him that she “had made a mistake, and [she] wanted to live.” Defendant told her he would drive slower, and the two then traveled without incident the remainder of the way to Ms. Shumaker’s residence.

We hold that this testimony was relevant to malice, an element of the second degree murder charges. *See State v. Locklear*, 159 N.C. App. 588,

STATE v. GROOMS

[230 N.C. App. 56 (2013)]

591, 583 S.E.2d 726, 729 (2003) (“Second-degree murder is defined as the unlawful killing of a human being with malice but without premeditation and deliberation.” (quoting *State v. Rick*, 342 N.C. 91, 98, 463 S.E.2d 182, 186 (1995))), *aff’d per curiam*, 359 N.C. 63, 602 S.E.2d 359 (2004). In *Locklear*, as in this case, the defendant, who was driving while impaired, was charged with second degree murder following a fatal collision. This Court explained that malice in such cases may be proven by a showing that the “defendant had the intent to perform the act of driving in such a reckless manner as reflects knowledge that injury or death would likely result, thus evidencing depravity of mind.” *Id.* at 592, 583 S.E.2d at 729. This Court concluded that a prior DWI conviction is evidence that tends to show malice because it shows that the defendant was “on notice as to the serious consequences of driving while impaired.” *Id.*

For the same reason, our appellate courts have also upheld the admission of evidence of a defendant’s pending charge for DWI to show malice when the circumstances surrounding the pending charge were sufficiently similar to those surrounding the charged offense. *State v. Jones*, 353 N.C. 159, 173, 538 S.E.2d 917, 928 (2000) (“While we recognize that such evidence may not be used to show a defendant’s propensity to commit a crime, we agree with the State’s contention that the circumstances attendant to the pending DWI charge – defendant was speeding on the wrong side of the road and ran another motorist off the road while impaired – demonstrate that defendant was aware that his conduct leading up to the collision at issue here was reckless and inherently dangerous to human life. Thus, such evidence tended to show malice on the part of defendant and was properly admitted under Rule 404(b).” (internal citation omitted)).

In this case, Ms. Shumaker’s description of defendant’s impaired driving only two months before the fatal collision was similar to the events that gave rise to the second degree murder charges. In both instances, after drinking a substantial amount of alcohol, defendant traveled down River Road, weaving and leaving his lane of travel. On 6 February 2011, defendant crossed the center line into the opposing lane and weaved over to the right, almost hitting a mailbox. Prior to the fatal collision, defendant repeatedly weaved off the right side of the road, leaving his lane of travel and crossing over the bike lane, so his right tires were on the shoulder. He also just missed hitting another bicyclist.

The evidence of this prior incident of impaired driving was relevant to malice because Ms. Shumaker’s reaction to his driving – forcing him to stop – and her remarks to him about the amount he had had to drink, his driving, and her fear put defendant on notice, only two months

STATE v. GROOMS

[230 N.C. App. 56 (2013)]

earlier, of the dangers of driving while impaired on River Road. Indeed, Ms. Shumaker specifically said to defendant that she had made a mistake in riding with him because she wanted to live.

While defendant points to some factual distinctions between the two incidents, we believe that the events are sufficiently similar to allow a jury to find that Ms. Shumaker's fear about his driving and her comments to him showed that he acted with malice when, two months later, he again drove down River Road while significantly impaired. *See Locklear*, 159 N.C. App. at 594-95, 583 S.E.2d at 731 (finding substantial similarity between prior DWI arrest and events leading to second degree murder charge when both incidents involved the defendant driving with blood alcohol level over legal limit and defendant causing collision by making "unsafe" turn). We, therefore, hold that the trial court properly admitted this testimony under Rule 404(b) of the Rules of Evidence.

Defendant further argues that, even if evidence of the 6 February 2011 incident was relevant to show malice, the trial court abused its discretion in admitting the evidence under Rule 403 of the Rules of Evidence because the danger of unfair prejudice substantially outweighed the evidence's probative value. We review "the trial court's Rule 403 determination for abuse of discretion." *Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159.

Prior to admitting Ms. Shumaker's testimony, the trial court heard voir dire testimony from Ms. Shumaker and an investigator, Jeffrey Hedge, who had taken a prior statement by Ms. Shumaker and who corroborated her voir dire testimony. In its written order concluding that the evidence was admissible, the court found that "[t]he probative value discussed above -- i.e., the relevance of Ms. Schumaker's [sic] testimony to proving malice -- is not substantially outweighed by danger of unfair prejudice, since there is little danger that a jury might seek to punish the defendant for those prior bad acts themselves, instead of using such prior bad acts to judge the defendant's state of mind at the time of the crime being prosecuted."

The order further provided:

3. The State has produced sufficient evidence to prove that the extrinsic act at issue was committed by the defendant in that the State has shown that:
 - a. Ms. Schumaker [sic] was apparently well-situated to know the dangerousness of defendant's driving

STATE v. GROOMS

[230 N.C. App. 56 (2013)]

on prior instances when defendant drove after consuming alcohol;

- b. There are indicia of reliability contained in Ms. Schumaker's [sic] statements, in part because she knows things that would not be known by casual observation, rumor, or reputation; and
- c. There were multiple photographs of Ms. Schumaker [sic] possessed by defendant, which indicated a relationship that gave Ms. Schumaker [sic] a unique opportunity to see, hear, and know the facts about which she would be called to testify[.]

After the Rule 404(b) evidence was admitted during the direct examination of Ms. Shumaker, the trial court gave a limiting instruction to the jury. The court gave another appropriate Rule 404(b) limiting instruction in its final charge to the jury.

Given the probative value of the evidence of the 6 February 2011 incident to show malice, the careful process employed by the trial court in deciding the issue, the court's weighing of any unfair prejudice, the fact that no accident occurred during the prior incident (thus lessening the chance that the jury would seek to punish defendant for his behavior during the prior incident), and the limiting instructions, the trial court did not abuse its discretion in admitting the evidence under Rule 403. *See id.* at 133, 726 S.E.2d at 160–61 (finding no abuse of discretion given relevance of evidence to proper purpose and given trial court's careful handling of issue, including hearing testimony of Rule 404(b) witness outside presence of jury, hearing arguments of counsel, considering Rule 403, and giving a limiting instruction).

With respect to the additional testimony by Ms. Shumaker that defendant "always" had alcohol in his possession while driving, that she was with him when he drank while driving 20 times, that he drove while impaired an additional one or two times, that he kept liquor and mixers in his car, and that he typically mixed and consumed drinks both before and while driving, defendant contends that this evidence "improperly indicated that [defendant] had a propensity to drive while drinking and that he therefore must have been drinking while driving on the morning of the accident." Even assuming, without deciding, that this evidence was inadmissible, we hold that defendant cannot show a reasonable possibility that the jury would have reached a different verdict in the absence of that evidence. *See* N.C. Gen. Stat. § 15A-1443(a) (2011).

STATE v. GROOMS

[230 N.C. App. 56 (2013)]

At trial, the issue was not whether defendant had been drinking while driving on the morning of the accident. There was no dispute that defendant had been drinking substantial amounts of alcohol and ingesting a controlled substance that was a stimulant, further impairing him, throughout the hours leading up to the collision. It was undisputed that defendant had, since the prior evening, consumed at least three scotches and soda, a glass of wine, and 24 ounces of rum and had twice snorted mephedrone (also known as bath salts, a stimulant that increases the level of impairment from alcohol). In addition, defendant had open, partially-consumed bottles of rum and Southern Comfort in his car. He had a blood alcohol level of .16 at the time of the accident, staggered three times when walking to the Highway Patrol Trooper's car, and nearly fell over.

Witnesses saw defendant repeatedly weaving into the bike lane and off onto the shoulder, with him almost hitting another bicyclist. Defendant then was picking up his cell phone and making a call when he struck the two victims with his car while entirely out of his lane of travel. He never braked and had to be flagged down by another motorist. At the scene, defendant did not call 911 or attempt to provide aid. He just sat in his car. When questioned by officers, he lied.

Moreover, less than two months earlier, he had so scared his girlfriend while driving impaired on the same road in a similar manner that she told him that she had made a bad decision to drive with him because she wanted to live. Ms. Shumaker, who had two DWI convictions herself prior to the time she dated defendant, testified that she had talked to defendant about the dangers of drinking and driving:

Q. And you had, in fact, pled guilty to driving while impaired offenses. You knew the dangers of that, didn't you?

A. (Nods head affirmatively.)

Q. Did you ever talk to [defendant] about the dangers of drinking and driving?

A. Yes.

Q. What did he tell you about that?

A. "Maybe I should look for help."²

2. While defendant mentions this testimony in his Rule 404(b) argument, it does not appear that he is challenging it on appeal. We note, in any event, that this evidence of a conversation between Ms. Shumaker and defendant either does not amount to testimony about a prior bad act by defendant or is evidence relevant to malice since it shows again that he was aware of the dangers of drinking and driving prior to the date of the collision.

STATE v. GROOMS

[230 N.C. App. 56 (2013)]

Finally, defendant admitted at trial that he was driving while “legally intoxicated” and that he was “obviously” appreciably impaired on the morning of the charged offenses, even though he claimed he did not feel impaired at the time. Although defendant claimed the witnesses at trial were ganging up on him, he also admitted that he ran off the road once prior to hitting the victims, that he had been awake for 24 hours prior to attempting to drive home, and that he felt “extremely tired and sleepy” while driving.

Given this evidence, we cannot conclude that there was any reasonable possibility that the jury would have reached a different verdict if Ms. Shumaker’s testimony about defendant’s habitual drinking while driving had been excluded. In sum, we conclude that evidence of defendant’s impaired driving on 6 February 2011 was admissible to show malice under Rule 404(b), and the court did not abuse its discretion under Rule 403 in admitting that evidence. The admission of the remaining evidence, even if erroneous, amounted to harmless error.

II

[2] Defendant next argues that the trial court erred in denying his motion to dismiss the second degree murder charges for insufficient evidence of malice. “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 (2000) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). “In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor.” *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

Here, the evidence showing malice included (1) Ms. Shumaker warning defendant of the dangers of drinking and driving; (2) a prior incident of drinking and driving on the same road that led Ms. Shumaker to panic and fear for her life; (3) defendant’s blood alcohol level of .16,

STATE v. GROOMS

[230 N.C. App. 56 (2013)]

twice the legal limit; (4) defendant's consumption of an illegal controlled substance that he knew was impairing; (5) defendant's swerving off the road three times prior to the collision, giving defendant notice that his driving was dangerous; (6) despite the swerving, defendant's failure to watch the road because he was making a phone call immediately before the collision; (7) defendant's failure to brake before or after the collision; and (8) defendant's failure to call 911 and attempt to provide aid to the victims.

Our courts have found comparable evidence of malice sufficient to defeat a motion to dismiss. *See, e.g., State v. Davis*, 197 N.C. App. 738, 743, 678 S.E.2d 385, 389 (2009) (holding evidence of malice sufficient for trial court to properly deny motion to dismiss in second degree murder case stemming from crash caused by impaired driving where evidence showed defendant had a “.13 BAC”; “ran over a sign and continued driving” and, at that point, should have known that he was a danger to the safety of others; continued driving and weaving side to side; eventually ran off road; and, without braking or otherwise attempting to avoid collision, hit another truck), *aff'd in part, rev'd in part on other grounds*, 364 N.C. 297, 698 S.E.2d 65 (2010); *State v. McDonald*, 151 N.C. App. 236, 243, 565 S.E.2d 273, 277 (2002) (holding State presented substantial evidence of malice in second degree murder case resulting from impaired driving based, in part, on evidence that defendant “was driving without looking at the road in order to pick up a lit cigarette he had dropped” when defendant's truck “literally flew across the intersection”); *State v. McAllister*, 138 N.C. App. 252, 260, 530 S.E.2d 859, 864-65 (2000) (holding trial court properly denied motion to dismiss for insufficient evidence of malice in second degree murder case resulting from impaired driving based, in part, on evidence that “defendant drove his pickup truck erratically, swerved off the road, and struck the victim's bicycle while he was traveling at a speed of approximately 35 to 40 miles per hour”). *See also State v. Norman*, 213 N.C. App. 114, 127, 711 S.E.2d 849, 859 (holding State presented substantial evidence of malice for second degree murder charge resulting from impaired driving collision when defendant had four prior DWI convictions, defendant's blood alcohol level was .08, defendant admitted speeding, defendant was impaired on alcohol and cocaine, and State presented expert testimony as to correlation between effects of cocaine and high-risk driving), *disc. review denied*, 365 N.C. 360, 718 S.E.2d 401 (2011).

In arguing that the evidence of malice was insufficient, defendant points to the fact that he had no prior DWI or other driving-related convictions, he was not speeding, and he did not cross the center line of

STATE v. MONROE

[230 N.C. App. 70 (2013)]

River Road at any time. While these factors are relevant to malice, the State, in this case, presented other evidence equally sufficient to prove malice. Ms. Shumaker's testimony showed the same kind of notice that prior driving convictions supply. There is no material difference between swerving across the center line into the oncoming traffic lane and swerving across a solid line into the bike lane where bicyclists are riding. And, an absence of speeding is immaterial when the driver is repeatedly weaving over the bike lane and onto the shoulder, when the driver comes within an arm-and-a-half's length of a bicyclist, and when an impaired driver stops looking at the road in order to make a phone call.

Defendant also argues that Ms. Shumaker's warning to him about his driving on 6 February 2011 was related to speeding and not to his impairment, that mephedrone was not a controlled substance until 1 June 2011, that there are no scientific studies showing how it interacts with alcohol, and that the mephedrone – which defendant knew was an impairing substance – caused him not to feel impaired. These arguments all go to the weight and credibility of the evidence, issues for the jury that could not be resolved on a motion to dismiss. Because the State presented substantial evidence that defendant acted with malice, the trial court properly denied defendant's motion to dismiss.

No error.

Judges McGEE and DAVIS concur.

STATE OF NORTH CAROLINA
v.
PARNELL MONROE III

No. COA13-232

Filed 1 October 2013

1. Evidence—prior crimes or bad acts—criminal record—drug use

The trial court did not err in a robbery with a dangerous weapon and possession of stolen goods case by denying defendant's motion to redact the videotaped interrogation referencing his prior criminal record and drug use. The pertinent statement was relevant under

STATE v. MONROE

[230 N.C. App. 70 (2013)]

Rule 402 and its probative value was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

2. Criminal Law—prosecutor’s argument—feelings of sympathy for defendant

The trial court did not err in a robbery with a dangerous weapon and possession of stolen goods case by overruling defendant’s objection to the prosecutor’s closing argument. The prosecutor’s challenged statement merely implored the jury not to allow feelings of sympathy to overshadow the application of the law to the evidence presented.

3. Possession of Stolen Property—failure to instruct on lesser-included offense—non-felonious possession

The trial court did not err in a robbery with a dangerous weapon and possession of stolen goods case by denying defendant’s request for a jury instruction on the lesser-included offense of non-felonious possession of stolen goods. There was no other evidence presented that either stolen van could be valued at \$1,000.00 or less.

Appeal by defendant from judgments entered 8 August 2012 by Judge William Z. Wood, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 28 August 2013.

Attorney General Roy Cooper, by Assistant Attorney General Laura E. Parker, for the State.

Marilyn G. Ozer for defendant-appellant.

BRYANT, Judge.

Where the trial court denied defendant’s motion to redact portions of a videotaped interview, we find no prejudicial error. Where the trial court overruled defendant’s objection to the prosecutor’s closing argument and denied defendant’s request for a jury instruction on the lesser-included offense of non-felonious possession of stolen goods, we find no error.

On 28 November 2011, defendant Parnell Monroe III was indicted on two counts of felony possession of stolen goods, common law robbery, and robbery with a dangerous weapon. Defendant was also indicted on attaining habitual felon status and attaining violent habitual felon status.

STATE v. MONROE

[230 N.C. App. 70 (2013)]

On 2 August 2012, the charge of common law robbery was dismissed by the State. Defendant's jury trial commenced during the 6 August 2012 criminal session of Forsyth County Superior Court, the Honorable William Z. Wood, Jr., Judge presiding.

The evidence presented at trial tended to show that in October 2011, two white, fifteen passenger vans – a 2003 Ford and a 2000 Dodge – were discovered missing from Freedom Cathedral Children's Academy, a daycare business, located at 945 Cleveland Avenue, Winston-Salem. On 8 October 2011, a store clerk working at the In and Out Convenience Store and Sunoco gas station located at 110 South Broad Street observed a person walk into the convenience store wearing a wig and a black coat, holding an eleven-inch knife. The assailant said, "Open the drawer and give me the money." The store clerk testified that the assailant took \$2,448.00 from the cash register, then exited the store and entered a white, ten-to-fifteen passenger van. A video of the encounter taken from the convenience store surveillance system was played for the jury.

On 12 October 2011, a patrol officer with the City of Winston-Salem Police Department observed defendant in the parking lot of the Southgate Apartment Complex located in the 900 block of East Second Street. The officer observed defendant tampering with the license plate of one of two white fifteen passenger vans parked next to each other. In a conversation with the officer, defendant explained that he was switching the vehicle license tags. Defendant stated that he had been paid fifty dollars to start the vehicles daily for a couple of weeks. Then defendant volunteered that he believed the vehicles were probably stolen. The officer ran the vehicle information through a police database and both vans, one a Ford and one a Dodge, had been reported stolen. Defendant was arrested and placed in the back of the police car. Later, in the back of that police car, the officer found a torn-up registration card for the Ford van.

At the police station, defendant was given his Miranda warnings, agreed to talk, and a detective conducted an interview which was videotaped. During the course of the interview, defendant was questioned about a break-in that involved two vehicles. Defendant denied participating in any break-in, stating that "I don't do store break-ins. . . . Now, if I was down here for some robberies . . . if I am down here for some robberies, then I'm guilty." A second detective then questioned defendant about the robbery of the Sunoco gas station by an assailant wearing a wig and a long black coat, driving a white van. A videotape of the interview with defendant was admitted into evidence and played for the jury.

STATE v. MONROE

[230 N.C. App. 70 (2013)]

On 8 August 2012, the jury returned verdicts finding defendant guilty of robbery with a dangerous weapon, and two counts of possession of stolen goods. During a second phase of the trial, the jury found defendant guilty of being a violent habitual felon. Defendant pled guilty to attaining habitual felon status, reserving his right to appeal either the underlying substantive convictions or the determination of his status as a violent habitual felon. The trial court entered judgment in accordance with the jury verdicts and guilty plea. Consolidating for entry of judgment the charges of robbery with a dangerous weapon and attaining violent habitual felon status, the trial court sentenced defendant to life in prison without the possibility of parole. Consolidating for entry of judgment one count of possession of stolen goods and attaining habitual felon status, the trial court sentenced defendant to 110 to 141 months. On the second count of possession of stolen goods, defendant was sentenced to a term of 110 to 141 months. Defendant appeals.

On appeal, defendant raises the following issues: whether the trial court erred by (I) denying his motion to redact the videotaped interrogation; (II) overruling his objection to the prosecutor's closing argument; and (III) denying his request for jury instruction.

I

[1] Defendant first argues the trial court erred when it overruled his objections and allowed the jury to hear references to his prior criminal record and drug use. Specifically, defendant contends that the statements admitted “were irrelevant under Rule 402, prejudicial under Rule 403, that prior convictions cannot come in under Rule 609 and that the prior bad acts and other robberies were not similar to the current charge under Rule 404(b).” We disagree.

During trial, a video of defendant's 12 October 2011 interview with police detectives was played for the jury.¹ On the video recording, defendant describes how he came into possession of the vans. Defendant states that he received the keys to the vans along with fifty dollars from an acquaintance he met first in 2001. Defendant states to law enforcement officers that the acquaintance asked defendant to look after the vans and start them up occasionally. Defendant states that he believed

1. In his brief on appeal, defendant acknowledges that portions of the videotape were redacted to exclude any statement made prior to the reading of defendant's Miranda rights.

STATE v. MONROE

[230 N.C. App. 70 (2013)]

the vans were probably stolen. When asked how he knew the acquaintance, defendant stated, “I used to go down to his house to get high.” During the interview, defendant made statements denying any involvement in the theft of the vans. “I don’t do breaking and enterings.” “That’s not me, see my record.” And, “if it’s robbery I am guilty, that’s what I did in the past[.]” Detectives subsequently questioned defendant about robberies at the Sunoco gas station on Broad Street and a BP gas station. Defendant stated “at both the BP & Sunoco I was wearing a wig[.]” Defendant objected to the admission of these statements at trial.

Evidence of prior drug use

During defendant’s videotaped interview with law enforcement officers, defendant states “I used to go down to his house to get high[.]” On appeal, defendant argues that this statement was not relevant to any issue and was inadmissible pursuant to Rules of Evidence 402 (“Relevant evidence generally admissible; irrelevant evidence inadmissible”), 403 (“Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time”) and 404(a) (“Character evidence generally.”).

Defendant’s indictment on two counts of possession of stolen goods alleged that he unlawfully, willfully and feloniously possessed a white 2003 Ford Econoline and a white 2000 Dodge Ram Wagon. In his videotaped interview with police detectives, defendant states that the vans were parked in a lot across the street from his apartment and that an acquaintance named “Fast Hands” handed him the keys to the vans along with fifty dollars and instructions to turn the vans on occasionally. Defendant further states his belief that the vans were stolen. When asked how he knew Fast Hands, defendant stated that in 2001, “I used to go down to his house to get high[.]”

Pursuant to our Rules of Evidence, codified under Chapter 8C of the North Carolina General Statutes, “ ‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” N.C. Gen. Stat. § 8C-1, Rule 801(c) (2011). However, “[a] statement is admissible as an exception to the hearsay rule if it is offered against a party and it is [] his own statement . . .” N.C.G.S. § 8C-1, Rule 801(d). We hold that defendant’s video recorded statement to law enforcement officers illustrates the relationship between defendant and Fast Hands such that Fast Hands would entrust defendant with the vans and provides some background for defendant’s comment that he believed the vans were stolen. Therefore, we hold the statement is relevant under Rule 402 and its probative value is not substantially outweighed by the danger of unfair

STATE v. MONROE

[230 N.C. App. 70 (2013)]

prejudice, confusion of the issues, or misleading the jury, as required under Rule 403. *See* N.C. Evid. R. 402 and 403.

On appeal, defendant also mentions that “[e]vidence of a person’s character is not admissible for the purposes of proving he acted in conformity therewith.” Defendant cites Rules of Evidence, Rule 404(a). As we are unable to discern how in this context defendant’s admission that he used to “get high” supports the assertion that he acted in conformity therewith in feloniously possessing stolen goods or committing robbery with a dangerous weapon, we overrule this argument and affirm the trial court’s admission of defendant’s statement.

Evidence of defendant’s criminal record and other robberies

During his interview with police detectives regarding his possession of the vans and the theft from Freedom Cathedral Children’s Academy, defendant stated, “I don’t do break-ins’s. Look at my record. I do robberies.” Subsequently, while being questioned about the robbery of the Sunoco gas station, defendant described his actions in robbing both the Sunoco station on Broad Street and a BP station. The State acknowledged to the trial court that defendant was not currently being tried for the robbery of the BP station.

On appeal, defendant contends that the admission of these statements, one referencing a prior record for robbery and the other admitting defendant’s involvement in a robbery for which he was not on trial, violated Rules of Evidence 404(b) and 609.

Pursuant to Rule 404(b),

[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).

Pursuant to Rule 609, “[f]or the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a felony . . . shall be admitted if elicited from the witness or established by public record during cross-examination or thereafter.” N.C.G.S. § 8C-1, Rule 609 (2011).

We note that pursuant to North Carolina General Statutes, section 15A-1443,

STATE v. MONROE

[230 N.C. App. 70 (2013)]

[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. The burden of showing such prejudice under this subsection is upon the defendant.

N.C. Gen. Stat. § 15A-1443(a) (2011).

Applying this standard to the facts presented on appeal, we cannot say that the jury would have reached a different verdict on the charges of felonious possession of stolen goods or robbery with a dangerous weapon. There was substantial evidence presented that defendant possessed two stolen vans and that prior to his arrest he believed them to be stolen. As to the charge of robbery with a dangerous weapon, the unchallenged admission of evidence includes portions of defendant's interview with police detectives during which defendant admitted to robbing the Sunoco gas station on Broad Street in a manner consistent with the testimony of the store clerk who described the robbery: defendant entered the store wearing a wig; he had a knife; defendant opened the cash register and took the money tray out, then seeing the larger bills under the money tray, defendant opened the cash register again and removed the bills of larger denomination; defendant then exited the store. Accordingly, we overrule defendant's argument.

II

[2] Defendant next argues that the trial court erred by overruling his objection to the State's prediction that defendant would ask the jurors to ignore the evidence and instead base their verdict on sympathy. Defendant asserts that for this reason he is entitled to a new trial on the charge of attaining violent habitual felon status. We disagree.

It is well settled in North Carolina that counsel is allowed wide latitude in the argument to the jury. Even so, counsel may not place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs and personal opinions not supported by the evidence. The control of the arguments of counsel must be left largely to the discretion of the trial judge, and the appellate courts ordinarily will not review the exercise of the trial judge's discretion in this regard unless the impropriety of counsel's remarks is extreme and is clearly calculated to prejudice the jury in its deliberations.

STATE v. MONROE

[230 N.C. App. 70 (2013)]

State v. Johnson, 298 N.C. 355, 368-69, 259 S.E.2d 752, 761 (1979) (citations omitted).

Following the return of the jury verdicts finding defendant guilty of felonious possession of stolen goods and robbery with a dangerous weapon, a second trial phase began during which defendant was tried on the charge of attaining violent habitual felon status, as defined under North Carolina General Statutes, section 14-7.7.² The State presented evidence that defendant pled guilty to robbery with a dangerous weapon on 25 April 1995, having committed the crime on 20 December 1994, and that defendant pled guilty to robbery with a dangerous weapon on 12 July 2003, having committed the offense on 10 September 2002.

During the prosecutor's closing argument on the charge of attaining violent habitual felon status, defendant challenged the following:

[Prosecutor]: Now Ladies and Gentlemen, I'm standing first. So I have to try to anticipate what the defense might say to you to try to persuade you to simply ignore the evidence that's right in your hand. To simply ask for a little sympathy, perhaps, a little – just something just to kind of – to ignore it. The sentence is too much. He's got to go to jail.

[Defense counsel]: Objection. Improper argument.

THE COURT: Overruled.

On appeal, defendant argues that the prosecutor had no reason to anticipate that in delivering his closing argument, defense counsel would not follow the guidelines set out by case law and rules of professional conduct.

[In his brief submitted to this Court, defendant acknowledged that the prosecutor is] allowed “anticipatory rebuttal of various issues, either legal or factual, that might be raised by the defendant during his closing argument.” *State v. Walls*, 342 N.C. 1, 48-49, 463 S.E.2d 738, 763 (1994). But asserting that the defense counsel will violate the permissible parameters of argument and instead urge the jurors to ignore the evidence and the law goes beyond permissible anticipatory rebuttal.

2. N.C. Gen. Stat. § 14-7.7(a) (2011). “Any person who has been convicted of two violent felonies in any federal court, in a court of this or any other state of the United States, or in a combination of these courts is declared to be a violent habitual felon.”

STATE v. MONROE

[230 N.C. App. 70 (2013)]

We do not believe the prosecutor's comments were improper: we do not believe the comment diminished the jury's sense of responsibility to follow the law. *See State v. Frye*, 341 N.C. 470, 506, 461 S.E.2d 664, 683 (1995). Also, defendant has failed to present any authority which precludes a prosecutor from addressing the potential for sympathy for a defendant in a closing argument. *See generally, id.* (“[P]rosecutors may properly argue to the sentencing jury that its decision should be based not on sympathy, [or] mercy . . . but on the law.” (citation omitted)). *See also, United States v. Lighty*, 616 F.3d 321, 360 (4th Cir. 2010) (The defendant challenged on appeal the following comment by the Assistant United States Attorney made during closing argument: “Counsel ended his closing argument by asking you for mercy. What he’s asking you to do is feel sorry for, feel sorry for [the defendant], and in some way use that sympathy to not do what the law in this case requires you to do” The Court held that the Assistant United States Attorney’s argument was a fair response to the defendant’s request for mercy.). *Compare State v. Scott*, 314 N.C. 309, 312, 333 S.E.2d 296, 298 (1985) (The Court held the prosecutor’s statement during closing argument improper where it “went outside the record and appealed to the jury to convict the defendant because impaired drivers had caused other accidents.”).

Here, the prosecutor’s challenged statement implores the jury not to allow feelings of sympathy to overshadow the application of the law to the evidence presented. We further note that in the context of the prosecutor’s argument, she advocated for the jurors to “follow the law and the facts. . . . There is no reasonable doubt here, and a reasonable doubt is not a doubt that is based on sympathy” We hold that the trial court did not abuse its discretion in overruling defendant’s objection to the prosecutor’s closing argument. *See Johnson*, 298 N.C. at 368-69, 259 S.E.2d at 761. Accordingly, we hold no error.

III

[3] Lastly, defendant argues that he is entitled to a new trial based on the trial court’s denial of his request to include an instruction on non-felonious possession of stolen property. Specifically, defendant contends that he was charged with felonious possession of two stolen vans. If the jury could infer that one or both of the vans was worth less than \$1,000.00, the jury could have found defendant guilty of non-felonious possession of stolen goods. We disagree.

“A defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.” *State v. Tillery*, 186

STATE v. MONROE

[230 N.C. App. 70 (2013)]

N.C. App. 447, 450, 651 S.E.2d 291, 294 (2007) (citation and quotations omitted). Here, defendant was indicted on two counts of felonious possession of stolen goods. In order for the possession to be felonious, the fair market value of the stolen property must exceed \$1,000.00 at the time of the theft. *State v. Davis*, 198 N.C. App. 146, 151, 678 S.E.2d 709, 713 (2009). “The State is not required to produce direct evidence of [] value to support the conclusion that the stolen property was worth over \$1,000.00, provided that the jury is not left to speculate as to the value of the item.” *State v. Rahaman*, 202 N.C. App. 36, 47, 688 S.E.2d 58, 66 (2010) (citation and quotations omitted).

Here, testimony on the value of vans was given by Cynthia Blackmon, the registered owner of the 2003 Ford Econoline Van and an owner of Freedom Cathedral Christian Ministries, Inc., a daycare which owned the 2000 Dodge Ram Wagon. Blackmon testified that both vans were purchased over six years prior to trial and each van cost between \$12,000.00 and \$15,000.00. She estimated that the Ford van was worth between \$10,000.00 and \$12,000.00 when it was stolen and that the Dodge was worth \$7,000.00. Mrs. Blackmon’s husband, Timothy Blackmon, a co-owner of Freedom Cathedral Christian Ministries, Inc., also testified that the Ford van was worth between \$10,000.00 and \$11,000.00 and that the Dodge van was worth between \$7,000.00 and \$8,000.00.

As there was no other evidence presented that either van could be valued at \$1,000.00 or less, the trial court did not err in denying defendant’s request to instruct the jury on non-felonious possession of stolen goods as a lesser-included offense of felonious possession of stolen goods. Accordingly, we overrule defendant’s argument.

No prejudicial error; no error.

Judges STEPHENS and DILLON concur.

CITY OF ASHEVILLE v. RESURGENCE DEV. CO., LLC

[230 N.C. App. 80 (2013)]

CITY OF ASHEVILLE, A NORTH CAROLINA MUNICIPALITY, PLAINTIFF

v.

RESURGENCE DEVELOPMENT COMPANY, LLC, DEFENDANT

No. COA13-341

Filed 15 October 2013

1. Appeal and Error—interlocutory orders and appeals—eminent domain—substantial right affected

An order in an eminent domain action finding facts and concluding that the easement was for a public purpose was interlocutory because the order the issue of just compensation was not resolved. However, orders under N.C.G.S. § 40A-47 are immediately appealable as affecting a substantial right.

2. Eminent Domain—extension of sewer service—affordable housing—public use or benefit

An expansion of sewer service constituted an action for the public use or benefit under N.C.G.S. § 40A-3 and plaintiff could validly exercise its power of eminent domain to condemn a sewer easement over defendant's land. An extension of sewer lines to allow the development of the land owned by the City of Asheville facilitated the construction of affordable housing, which was to the benefit of the public.

Appeal by defendant from Order entered on or about 10 September 2012 by Judge Robert C. Ervin in Superior Court, Buncombe County. Heard in the Court of Appeals 9 September 2013.

Ferikes & Bleynt, PLLC, by Joseph A. Ferikes, for plaintiff-appellee.

Adams, Hendon, Carson, Crow & Saenger, P.A., by George W. Saenger, for defendant-appellant.

STROUD, Judge.

Resurgence Development Company, LLC, (“defendant”) appeals from an order entered pursuant to N.C. Gen. Stat. § 40A-47 (2011) wherein the trial court determined that the City of Asheville’s proposed condemnation of an easement over defendant’s land was for a public purpose. For the following reasons, we affirm.

CITY OF ASHEVILLE v. RESURGENCE DEV. CO., LLC

[230 N.C. App. 80 (2013)]

I. Background

Defendant owns approximately 5.3 acres of land in Buncombe County, North Carolina. Plaintiff owns an adjacent tract of approximately 16 acres. Plaintiff and defendant both purchased their land at the same foreclosure sale. Plaintiff purchased the 16 acres to protect its interest in two loans it had made to the previous owner of both tracts of land—another company for which defendant's member/manager was also member/manager. Plaintiff had made the loans to help finance the development of affordable housing, but the prior owner defaulted.

On 15 October 2010, plaintiff entered into a contract with the Asheville-Area Habitat for Humanity ("Habitat"), a non-profit corporation, to sell plaintiff's 16 acres so that Habitat could build 55 single-family homes and thereby provide affordable housing to area residents. As a condition of the sale, Habitat required that the property be connected to the public sewer system.

When defendant bought its property, there was already a sewer pump station on the property capable of serving 310 units. Defendant's property can only support 42 units. Plaintiff's property, however, had no access to the sewer system. To access the sewer pump station, there would need to be an additional line running from plaintiff's property, across defendant's land (along the existing sewer easement), to the station. The sewer pump station and its associated lines are owned by the Metropolitan Sewerage District of Buncombe County (MSD), a public body. The existing easement did not authorize an additional sewer line, so MSD refused to construct it without an additional easement area.

Plaintiff filed this eminent domain action to condemn a permanent easement of 435 square feet and a temporary construction easement of 474 square feet. Plaintiff stated that once it acquired the easement and constructed the line, it would be transferred to MSD and operated in conjunction with the existing sewer system. Defendant answered, contending that plaintiff's intended condemnation was not for a public purpose. Plaintiff then moved for a determination of all issues other than damages under N.C. Gen. Stat. § 40A-47.

The trial court entered an order on 10 September 2012 finding the above facts and concluding that plaintiff's proposed use of the easement was for a public purpose. Defendant filed timely written notice of appeal.

II. Appellate Jurisdiction

[1] We first note that this appeal is interlocutory because the order from which defendant appeals does not resolve the issue of just compensation.

CITY OF ASHEVILLE v. RESURGENCE DEV. CO., LLC

[230 N.C. App. 80 (2013)]

City of Winston-Salem v. Slate, 185 N.C. App. 33, 37, 647 S.E.2d 643, 646 (2007).

Generally, there is no right to appeal from an interlocutory order. Nevertheless, this Court has held on multiple occasions that orders under N.C. Gen. Stat. § 40A-47 are immediately appealable as affecting a substantial right. *See, e.g., Piedmont Triad Reg'l Water Auth. v. Unger*, 154 N.C. App. 589, 591, 572 S.E.2d 832, 834 (2002) (trial court's determination under N.C. Gen.Stat. § 40A-47 "affect[ed] a substantial right"), *disc. review denied*, 357 N.C. 165, 580 S.E.2d 695 (2003).

Id. (citation omitted). Therefore, defendant's appeal is properly before this Court.

III. Public Use or Benefit

[2] Defendant argues that the trial court erred in concluding that plaintiff's condemnation of an easement to expand the sewer lines that run across his property is for a public purpose. We disagree.

The trial court, sitting without a jury, made a number of relevant findings of fact and concluded that plaintiff's proposed condemnation is for a public purpose and is therefore both constitutional and authorized by statute.

It is well settled in this jurisdiction that 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. Findings of fact by the trial court in a non-jury trial have the force and effect of a jury verdict and are conclusive on appeal if there is evidence to support those findings. A trial court's conclusions of law, however, are reviewable *de novo*.

Mecklenburg County v. Simply Fashion Stores, Ltd., 208 N.C. App. 664, 668, 704 S.E.2d 48, 52 (2010) (citations and quotation marks omitted), *app. dismissed*, 365 N.C. 187, 707 S.E.2d 231 (2011). The trial court's findings of fact are conclusive on appeal because defendant has not challenged any as unsupported by the evidence. *Id.* We review the trial court's conclusion that plaintiff's proposed use of eminent domain is "for a public purpose" *de novo*. *Id.*

CITY OF ASHEVILLE v. RESURGENCE DEV. CO., LLC

[230 N.C. App. 80 (2013)]

“Eminent domain is the power of the nation or of a sovereign state to take, or to authorize the taking of, private property for a public use without the owner’s consent and upon payment of just compensation.” *Carolina Tel. & Tel. Co. v. McLeod*, 321 N.C. 426, 429, 364 S.E.2d 399, 400 (1988) (citation omitted). Plaintiff, a municipality of the state, is authorized by statute to exercise that power. N.C. Gen. Stat. § 40A-3(b) (2011).

While delegation of the power of eminent domain is for the legislature, the determination of whether the condemnor’s intended use of the land is for “the public use or benefit” is a question of law for the courts. This task has not proven easy. While it is clear that the power of eminent domain may not be employed to take private property for a purely private purpose, it is far from clear just how “public” is public enough for purposes of N.C.G.S. § 40A-3. As we have stated on numerous occasions, the statutory phrase “the public use or benefit” is incapable of a precise definition applicable to all situations. Rather, because of the progressive demands of an ever-changing society and the perpetually fluid concept of governmental duty and function, the phrase is elastic and keeps pace with changing times.

However, judicial determination of whether a condemnor’s intended use is an action for “the public use or benefit” under N.C.G.S. § 40A-3 is not standardless. On the contrary, courts in this and other states have employed essentially two approaches to this problem. The first approach—the public use test—asks whether the public has a right to a definite use of the condemned property. The second approach—the public benefit test—asks whether some benefit accrues to the public as a result of the desired condemnation.

Carolina Tel. & Tel. Co., 321 N.C. at 429-30, 364 S.E.2d at 401 (citations omitted).

Municipal use of eminent domain to establish and expand access to sewer systems has long been upheld as proper by the courts of this state.¹

1. See, e.g., *Cook v. Town of Mebane*, 191 N.C. 1, 5, 131 S.E. 407, 409 (1926) (observing that the Town of Mebane could take land through its power of eminent domain for the establishment of sewer systems); *Harmon v. Town of Bessemer City*, 200 N.C. 690, 691, 158 S.E. 255, 255 (1931) (noting the right of a municipality to establish an easement through condemnation “for sewerage purposes”), *Glace v. Town of Pilot Mountain*, 265 N.C. 181, 183,

CITY OF ASHEVILLE v. RESURGENCE DEV. CO., LLC

[230 N.C. App. 80 (2013)]

Additionally, the Legislature has specifically authorized local public condemnors to exercise eminent domain in order to “[e]stablish[], extend[], enlarg[e], or improv[e] . . . sewer and septic tank lines and systems.” N.C. Gen. Stat. § 40A-3(b)(4) (2011). Nevertheless, “whether a condemnor’s intended use of the property is for ‘the public use or benefit’ is a question of law for the courts” that we must consider under the particular facts presented here. *Tucker v. City of Kannapolis*, 159 N.C. App. 174, 178, 582 S.E.2d 697, 699 (2003).

Under the public use test, the question is “whether the general public has a right to a definite use of the property sought to be condemned.” *Carolina Tel. & Tel. Co.*, 321 N.C. at 430, 364 S.E.2d at 401.

The public use required need not be the use or benefit of the whole public or state, or any large portion of it. It may be for the inhabitants of a small or restricted locality; but the use and benefit must be in common, not to particular individuals or estates.

City of Charlotte v. Heath, 226 N.C. 750, 756, 40 S.E.2d 600, 605 (1946) (citations and quotation marks omitted). Thus, where the City of Charlotte condemned a right-of-way to extend sewer lines to several dozen residents outside of the city limits, our Supreme Court upheld the condemnation as a public use despite arguments that the benefit was limited to those residents. *Id.* at 755-56, 40 S.E.2d at 604-05.²

Here, the trial court specifically found that “[i]n addition to the 55 homes planned to be built by Habitat and subject to access and the capacity of the sewer pumping station, the sewer easement area will be available to the public at large in accordance with the appropriate rules, regulations and standards of MSD.” Defendant has not challenged this finding.

As our Supreme Court observed in *Heath*:

If there was in the record any evidence to sustain the theory that the use of the sewer line was intended to be confined, or could be confined in the future, to the 65 or

143 S.E.2d 78, 79 (1965) (stating that “a municipality has the right to condemn property for the construction and operation of sewage systems and related facilities.”); *Stout v. City of Durham*, 121 N.C. App. 716, 718-19, 468 S.E.2d 254, 257 (1996) (holding that use of condemned land to expand sewer systems sufficient to support planned private development was both a public use and for public benefit).

2. Indeed, our Supreme Court, applying *Heath*, held that use of eminent domain to provide telephone service to a single individual was a “public use.” *McLeod*, 321 N.C. at 431-32, 364 S.E.2d at 400, 402.

CITY OF ASHEVILLE v. RESURGENCE DEV. CO., LLC

[230 N.C. App. 80 (2013)]

70 persons presently dwelling in the area to be served, and was not now, nor could hereafter be accessible to the general public who seek residence there, the case might be different. But there is no such evidence, and the inferences are to the contrary.

Heath, 226 N.C. at 755, 40 S.E.2d at 604.

As in *Heath*, there is no indication here that access to the sewer system will be somehow restricted to plaintiff, Habitat, or the initial residents on plaintiff's property. Indeed, the record evidence and the trial court's finding shows that the sewer easement will be useable by the public. Therefore, as our Supreme Court did in *Heath*, we conclude that plaintiff's proposed use here is a "public use."

Second, we must consider whether plaintiff's proposed condemnation satisfies the "public benefit" test. *See Town of Midland v. Morris*, 209 N.C. App. 208, 218, 704 S.E.2d 329, 337 ("Despite the disjunctive language of this statutory requirement, our Courts have determined the propriety of a condemnation under section 40A-3 based on the condemnation's satisfaction of both a 'public use test' and a 'public benefit test.'"), *app. dismissed and disc. rev. denied*, 365 N.C. 198, 710 S.E.2d 1, 1, 3 (2011).

Generally, under the public benefit test, a given condemnor's desired use of the condemned property in question is for "the public use or benefit" if that use would contribute to the general welfare and prosperity of the public at large. However, judicial decisions in this and other states reveal that not just any benefit to the general public will suffice under this test. Rather, the taking must furnish the public with some necessity or convenience which cannot readily be furnished without the aid of some governmental power, and which is required by the public as such.

Carolina Tel. & Tel. Co., 321 N.C. at 432, 364 S.E.2d at 402 (citations and quotation marks omitted).

Here, using the eminent domain power to connect plaintiff's property to the sewer pump station under defendant's property benefits the public. Currently, there is no sewer access on plaintiff's property. Extending the sewer lines will allow the development of the land currently owned by the City of Asheville, whether this development is ultimately performed by Habitat for Humanity or some other entity, thereby increasing the availability of affordable housing in the area. The sewer line under defendant's property has more than sufficient capacity to

CITY OF ASHEVILLE v. RESURGENCE DEV. CO., LLC

[230 N.C. App. 80 (2013)]

service plaintiff's land. Indeed, when the sewer lines were initially set up, the pump station on defendant's property was designed to service both plaintiff's property and defendant's. The separation of the ownership of the two properties is simply the fortuitous result of the sale of the two properties at foreclosure to two different buyers. Requiring plaintiff to construct a sewer pump station on its property—which is what defendant contends plaintiff ought to do—would result in wasteful and unnecessary duplication of resources.³

The facts under consideration here are indistinguishable from those in *Stout v. City of Durham*, 121 N.C. App. 716, 468 S.E.2d 254, *disc. rev. allowed*, 344 N.C. 637, 477 S.E.2d 54 (1996), *disc. rev. withdrawn*, 345 N.C. 353, 484 S.E.2d 93 (1997). In *Stout*, the City of Durham intended to acquire private property through eminent domain in order to expand the sewer lines and thereby facilitate the private development of a shopping center. 121 N.C. App. at 718-19, 468 S.E.2d at 257. Despite the obvious benefits that would accrue to the private developers of the shopping center and the fact that the desired private construction motivated the sewer expansion, we concluded that the intended use was both a “public use” and for “public benefit” because it fostered economic growth. *Id.*

As in *Stout*, we conclude that the expansion of the sewer system to plaintiff's property through the condemnation of an easement over defendant's land is for public benefit. The fact that some benefit might also accrue to a private party does not change that conclusion. *See Carolina Tel. & Tel. Co.*, 321 N.C. at 431, 364 S.E.2d at 402 (“The mere fact that the advantage of the use inures to a particular individual will not deprive it of its public character.” (citation, quotation marks, and ellipses omitted)).

Finally, we must decide whether that public benefit is paramount to or merely incidental to the private benefit. *See id.* at 719, 468 S.E.2d at 257. We conclude that the development of affordable housing for the Asheville area is the predominant interest at stake. Here, regardless of whether one considers some private benefit as accruing to the City of Asheville, Habitat, or both, it is clear from the trial court's findings and the record evidence that condemning a sewer easement over defendant's land will facilitate the construction of affordable housing, which is to the benefit of the public. *See id.* Even the loan that plaintiff hopes to recoup in part through the sale of the land in question was intended to facilitate the construction of affordable housing. To the extent there are

3. We also note the proposed permanent easement is entirely within the pre-existing easement owned by MSD.

CITY OF ASHEVILLE v. RESURGENCE DEV. CO., LLC

[230 N.C. App. 80 (2013)]

any private interests here, they all ultimately relate back to the purpose of building affordable housing for citizens in need. Condemnation of the easement here furthers that legitimate public interest.⁴

We hold that the expansion of sewer service here constitutes an action for “the public use or benefit” under N.C. Gen. Stat. § 40A-3 and that plaintiff may validly exercise its power of eminent domain to condemn a sewer easement over defendant’s land. Therefore, we affirm the trial court’s order.

IV. Conclusion

For the foregoing reasons, we hold that plaintiff’s proposed condemnation of an easement over defendant’s land is for the public use or benefit. We therefore affirm the trial court’s order.

AFFIRMED.

Chief Judge MARTIN and Judge GEER concur.

4. Defendant also argues that plaintiff’s plan violates N.C. Gen. Stat. § 160A-279(a) (2011), which forbids the transfer of property acquired by eminent domain through a private sale. Plaintiff asserts, however, and the trial court found that plaintiff intends to convey the easement to MSD, not to sell it to Habitat or some other private party. Therefore, the prohibition contained in § 160A-279(a) is not applicable.

IN THE COURT OF APPEALS

DAVIS v. WOODLAKE PARTNERS, LLC

[230 N.C. App. 88 (2013)]

PAUL B. DAVIS AND AGNES GIOCONDA, PLAINTIFFS

v.

WOODLAKE PARTNERS, LLC, DEFENDANT

No. COA13-236

Filed 15 October 2013

1. Statutes of Limitation and Repose—single agreement executed under seal—contracts—summary judgment

The trial court did not err in a breach of contract action by granting summary judgment in favor of plaintiffs even though defendant contended the pertinent statute of limitations had expired. The contractual documents executed by the parties constituted a single agreement executed under seal, and thus, were subject to the ten-year statute of limitations set out in N.C.G.S. § 1-47(2).

2. Contracts—breach—failure to make deposit—not a condition precedent—summary judgment

The trial court did not err in a breach of contract case by granting summary judgment in plaintiffs' favor even though they failed to make a \$2,500 deposit. Nothing in the language of the Infrastructure Agreement in any way tended to suggest that plaintiffs had to make the required \$2,500 payment before defendant became obligated to obtain the installation of the required facilities.

McGEE, Judge, dissenting.

Appeal by defendant from order entered 24 July 2012 and judgment entered 12 September 2012 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 4 June 2013.

Robbins May & Rich, LLP, by P. Wayne Robbins and Neil T. Oakley, for Plaintiffs-Appellees.

Gill & Tobias, LLP, by Douglas R. Gill, for Defendant-Appellant.

ERVIN, Judge.

Defendant Woodlake Partners, LLC, appeals from an order entered by the trial court granting summary judgment in favor of Plaintiffs Paul B. Davis and Agnes Gioconda with respect to the issue of whether Defendant had breached its contract with Plaintiffs and from a judgment

DAVIS v. WOODLAKE PARTNERS, LLC

[230 N.C. App. 88 (2013)]

entered by the trial court sitting without a jury ordering Defendant to pay \$191,000 in compensatory damages, plus the costs, to Plaintiffs. On appeal, Defendant argues that the trial court erred by granting summary judgment in favor of Plaintiffs with respect to the issue of liability on the grounds that Plaintiffs' claim was barred by the applicable statute of limitations and because Plaintiffs failed to satisfy a condition precedent set out in the contract between the parties. After careful consideration of Defendant's challenges to the trial court's order and judgment in light of the record and the applicable law, we conclude that the challenged order and judgment should be affirmed.

I. Factual BackgroundA. Substantive Facts

Plaintiffs, who resided in St. Louis, Missouri, purchased a tract of real property located in Moore County from Defendant upon which they planned to build their "Dream Retirement" home. In the first of the three documents executed by the parties in connection with this transaction, which was titled "Vacant Lot Offer to Purchase and Contract," Plaintiffs agreed to buy, and the Defendant agreed to sell, Section 5, Lot 510, in the Woodlake subdivision for a total purchase price of \$200,000. According to the Purchase Contract, Defendant was to deliver a general warranty deed to Plaintiffs at the time of closing. In addition, the Purchase Contract stated that:

14. OTHER PROVISIONS AND CONDITIONS: (ITEMIZE ALL ADDENDA TO THIS CONTRACT AND ATTACH HERETO). Additional Provisions Addendum and Agreement from Developer with attached addendum amending that letter are attached. Earnest money will be sent within five days of acceptance of offer when the signed hard copies are returned.

At the immediate right of each of the signatures contained in the Purchase Contract, the word "[SEAL]" appears in brackets.

The second document executed by the parties was an agreement in which Defendant obligated itself to provide certain facilities to the property being purchased by Plaintiffs. More specifically, the Infrastructure Agreement provided that, "[i]n consideration of the [Plaintiffs'] . . . obligations set forth below, [Defendant] . . . herewith provide[s] [Plaintiffs] with a commitment to provide infrastructure of roads, water and sewer" "by December 31, 2006." In return for this commitment, the Infrastructure Agreement imposed four obligations on Plaintiffs, one of

which required Plaintiffs, “[a]t closing, [to pay] Twenty Five Hundred and No/Dollars (\$2,500.00) for [their] share of the estimated line installation cost,” with “[t]hese funds [to] be held in escrow by [Defendant] solely for the purposes of defraying the cost of installation of the sewer lines.” The word “seal” does not appear next to the signatures affixed to the Infrastructure Agreement.

The third document, which is entitled “Addendum to Offer to Purchase and Contract Dated September 27, 2004 with Paul B. Davis and Wife, Agnes Gioconda as Buyers and Woodlake Partners, LLC as Sellers for the Property Known as Lot 510 Sec 5 Woodlake,” altered some of the obligations imposed upon Plaintiffs by the Infrastructure Agreement. Once again, the word “seal” does not appear at any point on the Addendum.

The three documents in which the parties’ obligations to each other were embodied were not executed simultaneously. Instead, Defendant signed the Infrastructure Agreement on 23 September 2004; Plaintiffs signed the Purchase Contract, the Infrastructure Agreement, and the Addendum on 28 September 2004; and Defendant signed both the Purchase Contract and the Addendum on 4 October 2004. The purchase “closed” on or about 25 October 2004.

Although Plaintiffs were, as required in the relevant contractual provision, ready to build a residence on the property in 2011, they determined at that time that the roads leading to their property had not been paved and the sewer facilities had not been installed. On the other hand, Plaintiffs were told that the water lines required by the Infrastructure Agreement had been provided. According to Defendant, an unpaved road provided access to Plaintiffs’ property. In addition, Defendant asserted that several residences had been built in the relevant section of the Woodlake development despite the absence of a paved road. Similarly, despite the fact that plans had been made to install sewer lines to Plaintiffs’ property, Defendant asserted that the installation of those facilities had been delayed due to limited interest on the part of other property owners and the collapse of the real estate market. Although Defendant indicated that other purchasers in the Woodlake development had installed used septic systems, the condition of the soil on Plaintiffs’ lot precluded the use of such a system. Finally, even though Plaintiffs acknowledged that the \$2,500 payment required in the Infrastructure Agreement had never been made, Defendant did not mention the payment of this fee at closing and had not sought to have this fee paid at any time thereafter. Moreover, many of the property owners who had made the required \$2,500 payment had received a refund from Defendant.

DAVIS v. WOODLAKE PARTNERS, LLC

[230 N.C. App. 88 (2013)]

B. Procedural History

On 28 September 2011,¹ Plaintiffs filed a verified complaint asserting that Defendant had breached the contract between the parties by failing to provide the required infrastructure and seeking either an order of specific performance or an award of damages. On 2 December 2011, Defendant filed an answer in which it responded to the material allegations of Plaintiffs' complaint and asserted that Plaintiffs' claims were barred by the applicable statute of limitations and by Plaintiffs' failure to make the \$2,500 payment required by the Infrastructure Agreement.

On 6 June 2012, Plaintiffs filed a motion seeking the entry of summary judgment in their favor. On 24 July 2012, the trial court entered an order denying a motion for summary judgment filed by Defendant,² denying Plaintiffs' summary judgment motion with respect to their specific performance claim, allowing Plaintiffs' summary judgment motion with respect to their damages claim, and ordering that an evidentiary hearing be convened for the purpose of determining the amount of damages which should be awarded to Plaintiffs for Defendant's breach of contract. After holding the evidentiary hearing contemplated by the 24 July 2012 order, the trial court entered a judgment awarding Plaintiffs \$191,000 in compensatory damages, plus the costs, on 12 September 2012. Defendant noted an appeal to this Court from the 24 July 2012 order and the 12 September 2012 judgment.³

II. Substantive Legal Analysis

In its brief, Defendant argues that the trial court erred by granting summary judgment in favor of Plaintiffs on the grounds that Plaintiffs' underlying breach of contract claim was barred by the applicable statute of limitations and on the grounds that Plaintiffs' failure to make the \$2,500 deposit constituted a failure to comply with a condition precedent to the effectiveness of any obligation which Defendant might otherwise have had to construct the facilities in question. We do not find either of these arguments persuasive.

1. Plaintiffs' complaint was filed approximately four years and ten months after the date by which the facilities required by the Infrastructure Agreement were supposed to have been installed.

2. As a result of the fact that Defendant's summary judgment motion does not appear in the record on appeal, we do not know the date upon which that motion was filed.

3. As a result of the fact that both of the arguments advanced in Defendant's brief rest upon challenges to the 24 July 2012 order, Defendant has abandoned any separate challenge which it might have otherwise made to the 12 September 2012 judgment. N.C.R. App. P. 28(b)(6).

DAVIS v. WOODLAKE PARTNERS, LLC

[230 N.C. App. 88 (2013)]

A. Standard of Review

An evaluation of the correctness of a trial court's decision to grant a summary judgment motion requires a determination of "(1) whether there is a genuine issue of material fact and (2) whether the movant is entitled to judgment as a matter of law." *NationsBank of N.C. v. Parker*, 140 N.C. App. 106, 109, 535 S.E.2d 597, 599 (2000) (citations omitted). A decision to enter summary judgment in favor of a particular party is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c). We review trial court orders granting or denying a summary judgment motion utilizing a *de novo* standard of review. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

B. Validity of Defendant's Challenges to the Trial Court's Order1. Statute of Limitations

[1] In its initial challenge to the trial court's summary judgment order, Defendant contends that Plaintiffs' breach of contract claim was barred by the applicable statute of limitations. The extent to which a particular claim is barred by the applicable statute of limitations "is a mixed question of law and fact, [with] the plaintiff having the burden of proving that his action was brought within the time allowed by the applicable statute, but having the right to offer such proof." *Ports Authority v. Roofing Co.*, 294 N.C. 73, 80, 240 S.E.2d 345, 349 (1978) (citations omitted). In seeking to persuade us that Plaintiffs' breach of contract claim was time-barred, Defendant relies upon "the three-year limitation period" set out in N.C. Gen. Stat. § 1-52(1). In response, Plaintiffs argue that "[t]he correct statute of limitations in the instant case is N.C. Gen. Stat. § 1-50(a)(5)."⁴ Although neither party argued that the agreement between the parties constituted a sealed instrument, we conclude that the trial court correctly declined to enter summary judgment in favor of Defendant on statute of limitations grounds given that the contractual documents

4. N.C. Gen. Stat. § 1-50 is actually a statute of repose rather than a statute of limitations. According to well-established North Carolina law, statutes of repose, such as N.C. Gen. Stat. § 1-50(a)(5), do "not serve to extend the time for bringing an action otherwise barred by the three year statute" set out in N.C. Gen. Stat. § 1-52(1). *Bolick v. American Barnmag Corp.*, 306 N.C. 364, 368, 293 S.E.2d 415, 418 (1982). As a result, in the event that N.C. Gen. Stat. § 1-50(a)(5) has any application to this case, Plaintiffs' complaint must have been filed within the time limits specified by both N.C. Gen. Stat. § 1-50(a)(5) and the applicable statutes of limitations.

DAVIS v. WOODLAKE PARTNERS, LLC

[230 N.C. App. 88 (2013)]

executed by the parties constitute a single agreement executed under seal subject to the ten-year statute of limitations set out in N.C. Gen. Stat. § 1-47(2).

a. N.C. Gen. Stat. § 1-50(5) and N.C. Gen. Stat. § 1-52(1)

According to N.C. Gen. Stat. § 1-52(1), “an action upon a contract, . . . express or implied, except those mentioned in the preceding sections or in [N.C. Gen. Stat.] § 1-53(1),” must be brought “within three years.” N.C. Gen. Stat. 1-50(a)(5), one of the “preceding sections” referenced in N.C. Gen. Stat. § 1-52, provides an outside limit of six years within which an action subject to that provision must be brought. *Whittaker v. Todd*, 176 N.C. App. 185, 187, 625 S.E.2d 860, 861, *disc. review denied*, 360 N.C. 545, 635 S.E.2d 62 (2006). N.C. Gen. Stat. § 1-50(a)(5)a provides that:

No 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.

The statutorily defined category of actions “arising out of the defective or unsafe condition of an improvement to real property” includes “[a]ctions to recover damages for breach of a contract to construct or repair an improvement to real property.” N.C. Gen. Stat. § 1-50(a)(5)b.1. As a result of the fact that the present case arises from Defendant’s failure to construct certain improvements to real property and the fact that Plaintiffs’ complaint was filed within six years of the date upon which the facilities specified in the Infrastructure Agreement were supposed to have been constructed, Plaintiffs’ claim is not barred by the six-year statute of repose set out in N.C. Gen. Stat. § 1-50(a)(5).

In light of our determination that Plaintiffs’ breach of contract claim is not barred by the six-year statute of repose set out in N.C. Gen. Stat. § 1-50(a)(5), we must next address Defendant’s contention that Plaintiffs’ claim is barred by the three-year statute of limitations set out in N.C. Gen. Stat. § 1-52(1). The first step in that process is determining the date upon which Plaintiffs’ claim accrued.

For purposes of the three-year limitation prescribed by [N.C. Gen. Stat. §] 1-52, a cause of action based upon or arising out of the defective or unsafe condition of an improvement to real property shall not accrue until the

injury, loss, defect or damage becomes apparent or ought reasonably to have become apparent to the claimant.

N.C. Gen. Stat. § 1-50(a)(5)f. As a result, the extent to which Plaintiffs' claim was barred by the three-year statute of limitations set out in N.C. Gen. Stat. § 1-52(a) "requires a determination of when the alleged defect or damage became apparent, or ought reasonably to have become apparent[,] to plaintiffs." *Everts v. Parkinson*, 147 N.C. App. 315, 320, 555 S.E.2d 667, 671 (2001).

According to Defendant, Plaintiffs' claim accrued on 31 December 2006. Defendant reached this conclusion based on the fact that 31 December 2006 was the date specified in the Infrastructure Agreement by which the relevant facilities were due to be completed. In the event that we were to accept Defendant's contention concerning the date upon which Plaintiffs' claim accrued, their claim would be barred by the three-year statute of limitations set out in N.C. Gen. Stat. § 1-52(3). The record in the present case is, however, essentially silent concerning the date upon which Defendant's failure to procure the construction of the facilities in question became, or reasonably should have become, apparent, to Plaintiffs. In their complaint, and in a subsequent affidavit, Plaintiffs stated that, after closing on the property in October 2004, they visited the property in 2011, at which point they "determined" that the infrastructure promised in the Infrastructure Agreement had not been constructed. After alleging that it lacked sufficient information to admit or deny this allegation in its answer, Defendant failed to advance any argument or adduce any contrary evidence concerning the date upon which Plaintiffs knew, or reasonably should have learned, that the facilities specified in the Infrastructure Agreement had not been constructed. Instead, Defendant has simply asserted that Plaintiffs' claim accrued on the date by which Defendant was supposed to have completed the required facilities. Although Plaintiffs' evidentiary forecast concerning the date upon which they learned that the facilities in question had not been constructed might suffice to raise a genuine issue of material fact concerning the date upon which Plaintiffs' breach of contract claim accrued for purposes of the three-year statute set out in N.C. Gen. Stat. § 1-52(1), we need not resolve that issue given our determination that Plaintiffs' claim constitutes an action on a sealed instrument subject to the ten-year statute of limitations set out in N.C. Gen. Stat. § 1-47(2) and is not, for that reason, barred by the applicable statute of limitations.

b. N.C. Gen. Stat. § 1-47(2)

According to N.C. Gen. Stat. § 1-47(2), which is one of the "preceding sections" mentioned in N.C. Gen. Stat. § 1-52(1), an action "upon

DAVIS v. WOODLAKE PARTNERS, LLC

[230 N.C. App. 88 (2013)]

a sealed instrument” must be brought within ten years. The extent to which a particular contract constitutes a sealed instrument is, generally speaking, a question of law for the court. *Square D Co. v. C. J. Kern Contractors, Inc.*, 314 N.C. 423, 426, 334 S.E.2d 63, 65 (1985). “[I]f it appears without ambiguity on the face of the contract that a party signed under seal, it is held as a matter of law that the contract is under seal.” *Central Systems, Inc. v. General Heating & Air Conditioning Co.*, 48 N.C. App. 198, 201-02, 268 S.E.2d 822, 824, cert. denied, 301 N.C. 400, 273 S.E.2d 445 (1980). As a result, in the event that the bracketed word “seal” appears on a contractual document adjacent to each of the parties’ signatures, the instrument in question has been executed under seal. *Biggers v. Evangelist*, 71 N.C. App. 35, 39, 321 S.E.2d 524, 527 (1984) (citations omitted), disc. review denied, 313 N.C. 327, 329 S.E.2d 384 (1985).

As we have already noted, the Purchase Agreement provided, among other things, that:

14. OTHER PROVISIONS AND CONDITIONS: (ITEMIZE ALL ADDENDA TO THIS CONTRACT AND ATTACH HERETO). Additional Provisions Addendum and Agreement from Developer with attached addendum amending that letter are attached. Earnest money will be sent within five days of acceptance of offer when the signed hard copies are returned.

In view of the fact that the word “[SEAL]” appears adjacent to each of the signatures affixed to the Purchase Contract, we have no difficulty in concluding that the Purchase Contract was executed under seal. In addition, we conclude that the only reasonable understanding of the reference to “other provisions and conditions” contained in Section 14 of the Purchase Contract is as a reference to the Infrastructure Agreement and the Addendum.

In “interpreting a contract the intent of the parties is our polar star . . . ,” *Bicycle Transit Authority, Inc. v. Bell*, 314 N.C. 219, 227, 333 S.E.2d 299, 304 (1985), with the parties’ intentions to be ascertained from “the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time.” *McDowell Motor Co. v. N.Y. Underwriters Ins. Co.*, 233 N.C. 251, 254, 63 S.E.2d 538, 540 (1951) (citations omitted). A careful examination of the relevant contractual documents indicates that the Purchase Agreement, the Infrastructure Agreement, and the Addendum were each understood by the parties as part of a single overall agreement. For example, in the

DAVIS v. WOODLAKE PARTNERS, LLC

[230 N.C. App. 88 (2013)]

Purchase Contract, the parties expressly stated that the Infrastructure Agreement and the Addendum were attached and should be understood as addenda to the Purchase Contract. Similarly, the Addendum, which amends several provisions contained in the Infrastructure Agreement, is titled, in pertinent part, “Addendum to [Purchase Contract] . . . with [Plaintiffs][.]” Although Defendant denied that the three documents constituted a single contract during the discovery process, it has never suggested any manner in which the relevant language can be interpreted other than the one outlined in this paragraph, and none occurs to us. As a result, given this clear and unambiguous contractual language, we hold that, as a matter of law, the parties intended that the Purchase Contract, the Infrastructure Agreement, and the Addendum form a single agreement and that, given the presence of a seal on the Purchase Contract, the entire agreement constitutes an instrument executed under seal, rendering the present action subject to the ten-year statute of limitations set out in N.C. Gen. Stat. § 1-47(2).

Although our dissenting colleague does not explicitly disagree with our determination that the language of the relevant documents establishes that the parties entered into a single contract, rather than multiple contracts, she concludes that the trial court’s summary judgment order and judgment should be reversed and that this case should be remanded to the trial court for further proceedings on the grounds that the record reveals the existence of a genuine issue of material fact concerning the extent, if any, to which the parties intended that the Infrastructure Agreement and the Addendum should be treated as sealed instruments. In concluding that such a factual issue exists, our dissenting colleague relies upon decisions such as *Security National Bank v. Educators Mut. Life Ins. Co.*, 265 N.C. 86, 96, 143 S.E.2d 270, 277 (1965) (holding that the record revealed the existence of a factual issue concerning whether the instrument in question had been executed under seal given that the particular contract in question bore three signatures, only one of which was affixed adjacent to the word “(Seal)”); *Pickens v. Rymer*, 90 N.C. 282, 283-84 (1884), and *Yarborough v. Monday*, 14 N.C. 420, 420-21 (1832) (both of which hold that, in a situation in which an instrument contained two signatures and only one seal, the extent to which the instrument in question had been executed under seal was a question of fact).⁵ We do not believe that the decisions upon which our dissenting colleague relies

5. Although our dissenting colleague does not explicitly cite *Security National Bank*, *Pickens*, or *Yarborough* in her separate opinion, she does reference them indirectly given that they constitute the “three cases” cited in *Mobil Oil Corp. v. Wolfe*, 297 N.C. 36, 38-39, 252 S.E.2d 809, 810-11 (1979), upon which she does rely.

DAVIS v. WOODLAKE PARTNERS, LLC

[230 N.C. App. 88 (2013)]

provide any assistance in properly resolving the present issue given that each of them addresses a situation in which the extent to which a particular party had actually adopted a seal at all is subject to reasonable dispute. The present case involves a very different issue, which is the extent, if any, to which attachments or addenda that have effectively been incorporated into an instrument clearly executed under seal should be treated as non-sealed solely because they are not separately sealed. After careful review of the relevant authorities, we have been unable to identify any decisions, and none have been cited by our dissenting colleague, holding that, although a principal contract has clearly been executed under seal, each attachment or addenda incorporated into that contract must also bear a seal in order for the ten-year statute of limitations set out in N.C. Gen. Stat. § 1-47(2) to apply to claims arising from language contained in those attachments or addenda.

The decisions that do touch upon similar issues suggest, without directly holding, that the approach that we have adopted, rather than the approach suggested by our dissenting colleague, is the correct one. For example, in *Mobil Oil Corp.*, 297 N.C. at 38-39, 252 S.E.2d at 810-11 (1979), the Supreme Court distinguished cases in which there was conflicting evidence concerning whether all of the parties to a particular contract had adopted a seal from those in which no such issue arose and held that the defendants were precluded from “introduc[ing] parol testimony that they did not intend to adopt the seals on the instruments.” In reaching this conclusion, the Supreme Court stated that:

Defendants argue vigorously that they should be allowed to testify that they did not intend to adopt the printed seals[.] . . . This was a commercial transaction. Defendants have made no claim of misrepresentation, overreaching or undue influence. Thus even if they did not understand all the terms in the instrument, they are bound by those which are unambiguous.

Id. at 39, 252 S.E.2d at 811 (citing *Fidelity & Casualty Co. of N.Y. v. Nello L. Teer Co.*, 250 N.C. 547, 550-51, 109 S.E.2d 171, 173 (1959), and *Howland v. Stitzer*, 240 N.C. 689, 696, 84 S.E.2d 167, 172 (1954)). Similarly, in *Bank of North Carolina, N.A. v. Cranfill*, 297 N.C. 43, 44, 253 S.E.2d 1, 1 (1979), the Court stated that:

Defendants contend that they did not intend to adopt the printed seals as their own. It follows, according to their argument, that the instruments were not under seal; that the 10-year statute of limitations of [N.C. Gen. Stat §]

DAVIS v. WOODLAKE PARTNERS, LLC

[230 N.C. App. 88 (2013)]

1-47(2) is not applicable; and that the 3-year statute of limitations of [N.C. Gen. Stat. §] 1-52 had run. The trial court entered summary judgment in favor of plaintiff. The Court of Appeals reversed, finding that there was a genuine issue of material fact as to whether defendants adopted the printed seal. In so doing, it relied primarily on *Bank v. Insurance Co.*, 265 N.C. 86, 143 S.E. 2d 270 (1965). For the reasons stated in *Oil Corporation v. Wolfe, supra*, this reliance was misplaced.

As a result, these decisions clearly hold that oral testimony to the effect that a particular litigant did not intend to adopt a seal is inadmissible in the event that the sealed nature of the contract is apparent from the face of the parties' agreement. In light of our holding, with which our dissenting colleague does not explicitly disagree, that the three documents at issue here constitute components of a single contract, we are unable to discern any basis on which to reconcile the decisions discussed in this paragraph, which clearly preclude the admission of evidence concerning the extent to which a party "intended" to adopt a seal which appears on a written instrument in situations in which the sealed nature of the relevant instrument is clear, with the position adopted by our dissenting colleague, which would appear to allow a party to introduce evidence to the effect that, despite having clearly executed the principal contractual document under seal, it did not intend for attachments or addenda which have effectively been incorporated into that explicitly sealed instrument to be treated as sealed instruments.

Moreover, in light of the language used in both the relevant statutory provisions setting out the limitations periods applicable in contract actions and in cases such as *Central Systems*, all of which treat a contract as a singular rather than a multi-part entity, we believe that the General Assembly intended that the ten-year statute of limitations applicable to sealed instruments applies equally to all "provisions and conditions" of the overall contract, regardless of whether the signatures affixed to those additional "provisions and conditions" make any reference to the use of a seal. In the event that we were to adopt the approach suggested by our dissenting colleague, different statutes of limitation would apply to claims arising under different provisions of the same contract, a result that lacks support in the reported decisions in this jurisdiction and that would lead to considerable and undesirable uncertainty in the enforcement of contractual provisions.⁶ As a result, given that the

6. Our dissenting colleague argues that the Supreme Court recognized the possibility that different statutes of limitation would apply to different parties to the same contract in

DAVIS v. WOODLAKE PARTNERS, LLC

[230 N.C. App. 88 (2013)]

principal basis for our dissenting colleague's conclusion that the record reflects the existence of a genuine issue of material fact concerning the extent to which the parties intended that the Infrastructure Agreement and the Addendum be treated as sealed instruments⁷ stems from the fact that these documents lack a separate reference to a seal and given our belief that this fact, standing alone, does not in any way create any issue of fact concerning the extent to which the Infrastructure Agreement and the Addendum are or are not instruments executed under seal for purposes of the statute of limitations set out in N.C. Gen. Stat. § 1-47(2), we conclude that the trial court, albeit for a reason not addressed by the parties, correctly concluded that Plaintiffs' claim against Defendant was not barred by the applicable statute of limitations.⁸

Security National Bank. Although the decision in question does recognize the possibility that one signatory to a particular contract may have intended to execute the agreement in question under seal while another did not, we understand the Supreme Court to have held in *Security National Bank* that the effect of a determination that less than all of the signatories to the contract had adopted a seal would be to simply preclude a determination that the contract in question had been executed under seal rather than to necessitate a determination that the relevant contract was a sealed instrument as to one party and not to another. As a result, we are unable to read *Security National Bank* in the same manner as our dissenting colleague.

7. In her separate opinion, our dissenting colleague treats the fact that the various components of the overall agreement between the parties were executed on different dates as equivalent to the situation addressed in *Security National Bank*, *Pickens*, and *Yarborough* and suggests that the adoption of the position which we have deemed appropriate would effectively allow a party to place a seal on subsequently executed documents, thereby retroactively converting an originally unsealed instrument into an agreement executed under seal. The fact that the various documents that make up the overall contract between the parties in this case were executed at different times does not, in our opinion, undercut the validity of the position adopted in the text of this opinion given that those documents were executed at approximately the same time and, when read in context, clearly constitute a single agreement. The situation at issue here is very different from those about which our dissenting colleague expresses concern given that such situations do not involve multiple documents entered into in a roughly contemporaneous manner and which form part of a single agreement. As a result, we do not believe that the fact that the Purchase Contract, the Infrastructure Agreement, and the Addendum were not executed simultaneously has any tendency to indicate that the Infrastructure Agreement and Addendum should not be treated as parts of an instrument executed under seal for purposes of this case.

8. Admittedly, neither party has argued that the ten-year statute of limitations set out in N.C. Gen. Stat. § 1-47(2) applies in the present case and the record does not contain any indication that the trial court relied upon N.C. Gen. Stat. § 1-47(2) in denying Defendant's summary judgment motion. However, "[i]f the correct result has been reached [in the trial court], the judgment will not be disturbed even though the trial court may not have assigned the correct reason for the judgment entered." *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989).

DAVIS v. WOODLAKE PARTNERS, LLC

[230 N.C. App. 88 (2013)]

2. Condition Precedent

[2] In its second challenge to the trial court's order, Defendant argues that the trial court erred by granting summary judgment in Plaintiffs' favor on the grounds that the \$2,500 deposit required by the Infrastructure Agreement, which Plaintiffs never paid, constituted a condition precedent which had to be satisfied before Defendant had any obligation to construct the relevant facilities. We do not find this argument persuasive.

In the process of negotiating and entering into a contract, parties "may impose any condition precedent, a performance of which condition is essential before the parties become bound by the agreement." *Federal Reserve Bank v. Manufacturing Co.*, 213 N.C. 489, 493, 196 S.E. 848, 850 (1938).

Whether covenants are dependent or independent . . . depends entirely upon the intention of the parties shown by the entire contract as construed in the light of the circumstances of the case, the nature of the contract, the relation of the parties thereto, and other evidence which is admissible to aid the court in determining the intention of the parties.

Wade v. Lutterloh, 196 N.C. 116, 120, 144 S.E. 694, 696 (1928) (citing Page on the Law of Contracts, Vol. 5, 2nd Ed., s. 2948). As a result of the fact that such provisions are disfavored, a contractual provision will be construed as a condition precedent only "where the clear and plain language of the agreement dictates such construction." *Handy Sanitary Dist. v. Badin Shores Resort Owners Ass'n, Inc.*, ___ N.C. App. ___, ___, 737 S.E.2d 795, 801 (2013) (citing *Stewart v. Maranville*, 58 N.C. App. 205, 206, 292 S.E.2d 781, 782 (1982) (citation omitted)). "The weight of authority is to the effect that the use of such words as 'when,' 'after,' 'as soon as,' and the like, gives clear indication that a promise is not to be performed except upon the happening of a stated event." *In re Foreclosure of Goforth Properties, Inc.*, 334 N.C. 369, 376, 432 S.E.2d 855, 859 (1993) (quoting *Jones v. Realty Co.*, 226 N.C. 303, 306, 37 S.E.2d 906, 908 (1946)).

A careful examination of the relevant contractual language demonstrates that the making of the \$2,500 deposit was not a condition precedent to the effectiveness of Defendant's obligation to construct the necessary facilities. After clearly stating that Defendant would provide certain road, sewer, and water facilities, the Infrastructure Agreement provided that Plaintiffs "will also pay" \$2,500 into escrow, an amount which was intended to assist in covering the cost of installing the

DAVIS v. WOODLAKE PARTNERS, LLC

[230 N.C. App. 88 (2013)]

required infrastructure. Nothing in the language of the Infrastructure Agreement in any way tends to suggest that Plaintiffs had to make the required \$2,500 payment before Defendant became obligated to obtain the installation of the required facilities. Instead, we believe that the two obligations were independent and could each be enforced separately. As a result, given that the trial court correctly concluded that the record did not reveal the existence of any genuine issue of material fact with respect to this issue and that Plaintiffs were entitled to judgment with respect to this issue as a matter of law, Defendant is not entitled to relief from the trial court's judgment on the basis of this contention.

III. Conclusion

Thus, for the reasons set forth above, neither of Defendant's challenges to the trial court's judgment have merit. As a result, the trial court's summary judgment order and the subsequent judgment should be, and hereby are, affirmed.

AFFIRMED.

Judges STEELMAN concurs.

McGEE, Judge, dissenting.

I respectfully dissent from the majority's holding that, as a matter of law, the parties intended the Infrastructure Agreement and the Addendum to have been executed under seal by virtue of listing them as addenda to the Purchase Contract, a sealed instrument. I would find that the trial court's grant of summary judgment was improper, and remand the case for the trier of fact to determine the intent of the parties.

Plaintiffs signed all three documents, the Purchase Contract, the Infrastructure Agreement, and the Addendum, on 28 September 2004. Defendant signed the Infrastructure Agreement, which was not under seal, on 23 September 2004. Eleven days later, on 4 October 2004, Defendant signed the Purchase Contract, which was under seal, and the Addendum, which was not.

Our Supreme Court has held that when the word "seal" in an agreement appears beside one signatory, but not all, a question of intent arises. *See generally, Oil Corp v. Wolfe*, 297 N.C. 36, 38-39, 252 S.E.2d 809, 810-11 (1979) (discussing three cases in which there were "special circumstances" transforming whether or not a party adopted a seal into a jury question). I would contend that the question of intent similarly arises

DAVIS v. WOODLAKE PARTNERS, LLC

[230 N.C. App. 88 (2013)]

when separate agreements, signed on different days, and not all under seal, are incorporated into a single contract. Clearly, Defendant did not sign the Infrastructure Agreement under seal. The majority holds that Defendant, through the language included in the Purchase Agreement stating that “Additional Provisions Addendum and Agreement from Developer with attached addendum amending that letter are attached,” intended for its signature on the Infrastructure Agreement to be converted to “under seal” on 4 October 2004 – the date it signed the Purchase Agreement. I disagree, and do not believe this question should be answered as a matter of law.

My concern with the majority approach is that documents not executed under seal will be deemed to have been executed under seal, through incorporation, even though they were signed weeks, months, or even years, before or after the incorporating document. On the facts before us, what if the Infrastructure Agreement had been signed under seal, but neither the Purchase Agreement nor the Addendum had been? I do not believe we should, as a matter of law, allow an addendum to a contract to convert that contract to one “under seal” without reasonable certainty that such was the intent of the parties. Absent some mechanism to inquire into intent, a “plaintiff” could revive a contract action otherwise defeated by the three-year statute of limitations by convincing the “defendant” to sign some minor addendum to that contract including the word “seal” next to the “defendant’s” signature. It is true that the case before us is not that case, but the majority’s holding allows for this outcome, so long as the addendum is considered part of the underlying contract – which it, by definition, would be. I find this rigid and potentially unfair outcome more troublesome than the potential that, on occasion, different statutes of limitations might apply to different provisions in a contract. Case law already permits different statutes of limitations to apply to different signatories of a single contract. *See Bank v. Insurance Co.*, 265 N.C. 86, 143 S.E.2d 270 (1965). When there are, for instance, three signatories to an agreement, but only one seal, “[w]hether the defendant[s] adopted the seal is a question for the jury.” *Oil Corp.*, 297 N.C. at 38, 252 S.E.2d at 810. If the jury determines that one defendant adopted the seal but two did not, the clear implication is that the ten-year statute of limitations will apply to one defendant, but not to the other two.

My dissent does not address the strength or weakness of Defendant’s argument that it did not intend for the Infrastructure Agreement to be under seal, as I believe that is a question for the trier of fact. I dissent because, in my opinion, the question of whether one document under

JOHNSON v. CROSSROADS FORD, INC.

[230 N.C. App. 103 (2013)]

seal transforms another document not under seal into one that is under seal, constitutes a special circumstance more appropriately decided by the trier of fact. *See Oil Corp.*, 297 N.C. at 38-39, 252 S.E.2d at 810-11 (discussing three cases in which there were “special circumstances” transforming whether or not a party adopted a seal into a jury question).

ARNOLD FLOYD JOHNSON, PLAINTIFF
v.
CROSSROADS FORD, INC., DEFENDANT

No. COA13-173

Filed 15 October 2013

1. Evidence—affidavit—summary judgment—erroneously excluded—abuse of discretion

The trial court abused its discretion in a wrongful termination case by excluding an affidavit presented by plaintiff prior to a summary judgment hearing. The affidavit from the individual hired to replace plaintiff was timely served upon defendant, the substance of the affidavit did not contradict any previous sworn testimony of the affiant, and the contents of the affidavit were not contradictory to plaintiff’s complaint.

2. Employer and Employee—wrongful termination—correct evidentiary standard—genuine issue of material fact—summary judgment erroneous

The trial court erred in a wrongful termination case by granting summary judgment in favor of defendant employer. Although the trial court did not use the wrong evidentiary standard as set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, plaintiff’s evidence created a genuine issue of material fact as to whether plaintiff’s age was the reason for his termination.

Appeal by plaintiff from order entered 21 August 2012 by Judge Howard E. Manning in Wake County Superior Court. Heard in the Court of Appeals 14 August 2013.

Glenn, Mills, Fisher & Mahoney, P.A., by Stewart W. Fisher, for plaintiff-appellant.

JOHNSON v. CROSSROADS FORD, INC.

[230 N.C. App. 103 (2013)]

Cranfill Sumner & Hartzog LLP, by Paul H. Derrick and Sara B. Warf, by defendant-appellee.

North Carolina Advocates for Justice, by Winslow Wetsch, PLLC, by Laura J. Wetsch, amicus curiae.

McCULLOUGH, Judge.

Plaintiff Arnold Floyd Johnson appeals from the trial court's order, granting summary judgment in favor of defendant Crossroads Ford, Inc. and dismissing plaintiff's claim that he was wrongfully terminated based on his age in violation of the North Carolina Equal Employment Practices Act (section 143-422.1, *et seq.*, of the North Carolina General Statutes) with prejudice. After careful review, we reverse and remand the trial court's order.

I. Background

On 17 February 2011, plaintiff Arnold Floyd Johnson filed a complaint against defendant Crossroads Ford, Inc., a North Carolina Corporation operating numerous car dealerships within North Carolina and Virginia, alleging wrongful termination. Specifically, plaintiff alleged he was wrongfully terminated by defendant based on his age in violation of the North Carolina Equal Employment Practices Act, section 143-422.1, *et seq.*, of the North Carolina General Statutes.

The complaint alleged the following: Plaintiff was born on 9 April 1950. In March 2000, plaintiff was hired by defendant as a salesperson. Defendant's president and principal owner Glenn Boyd ("President Boyd") stated "that he could promote [plaintiff], so [p]laintiff should let [President Boyd] know what he was interested in doing, but that this was 'a young man's business.'" During his employment, plaintiff was promoted to Finance and Insurance Manager, then Business and Development Center Manager, and then Sales Manager at Crossroads Ford of Cary ("Crossroads Ford"). In 2007, plaintiff was promoted to the position of General Manager at Crossroads Ford.

Plaintiff alleged that after he became General Manager, defendant's Vice-President Allen Boyd would repeatedly refer to plaintiff in "an age-related derogatory manner," call plaintiff "old man" up to five or six times in a single day, and say plaintiff could not hear a ringing telephone because of plaintiff's age when he did not have a hearing problem. In 2009, defendant hired Noah Woods, a thirty-five (35) year old male to

JOHNSON v. CROSSROADS FORD, INC.

[230 N.C. App. 103 (2013)]

replace plaintiff as General Manager of Crossroads Ford. Plaintiff was demoted to the position of Director of Sales and Service.

Plaintiff further alleged that on 26 April 2010, a salesman named Patrick Rowe approached plaintiff and informed him that a customer was interested in purchasing a used Mustang convertible. Rowe wanted to sell plaintiff's wife's car, a Mustang convertible that had been sitting in the back lot of Crossroads Ford since April 2010. Plaintiff agreed to sell his wife's car "but told [Rowe] that they would have to work it out with Vice-President Boyd to determine Rowe's commission and how to complete the sale." The customer gave plaintiff a check for the vehicle but the vehicle was not tendered to the customer because plaintiff wanted to wait until he talked to Vice-President Boyd about the transaction. On or about 31 April 2010¹, Vice-President Boyd informed plaintiff by phone that he was terminated for stealing. Plaintiff alleged that defendant's reason for terminating plaintiff was false and pre-textual.

On 5 January 2012, defendant filed an amended answer, denying many of plaintiff's allegations. The amended answer admitted that Rowe advised customers that plaintiff was selling his wife's used vehicle that was sitting in defendant's employee parking lot based on Rowe's "understanding of corporate policy and his belief that Plaintiff had obtained authorization to sell his vehicle through the dealership[.]" Rowe heard plaintiff quote a sales price of \$17,500.00 to one of the customers and "[t]hinking that the customer was going to finance the vehicle through the dealership, [Rowe] presented the customer with a credit application." Plaintiff interceded, told Rowe that the credit application was not necessary, and told the customers to write a check payable to plaintiff personally. Defendant admitted that Vice-President Boyd confirmed to plaintiff that "his employment had been terminated for taking a corporate opportunity; selling his personal vehicle at the dealership to [a] customer of the dealership on company time with no benefit to the company and without authorization."

On 11 June 2012, defendant filed a motion for summary judgment. On 18 July 2012, plaintiff gave notice of filing of several documents including numerous depositions, an affidavit of Noah Woods, and several exhibits. On 20 July 2012, defendant filed a motion to strike the affidavit of Noah Woods and also filed numerous affidavits in support of its summary judgment motion.

1. Plaintiff would have been sixty years old at the time of his termination.

JOHNSON v. CROSSROADS FORD, INC.

[230 N.C. App. 103 (2013)]

Following a hearing held on 23 July 2012, the trial court granted defendant's motion for summary judgment and dismissed plaintiff's case with prejudice. From this order, 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) (citation and quotation marks omitted).

The moving party bears the burden of establishing the lack of a triable issue of fact. If the movant meets its burden, the nonmovant is then required to produce a forecast of evidence demonstrating that the [nonmoving party] will be able to make out at least a *prima facie* case at trial. Furthermore, the evidence presented by the parties must be viewed in the light most favorable to the non-movant.

Thompson v. First Citizens Bank & Trust Co., 151 N.C. App. 704, 706, 567 S.E.2d 184, 187 (2002) (internal citations and quotation marks omitted).

III. Discussion

Plaintiff presents the following issues on appeal: (A) whether the trial court erred by disregarding the affidavit of Noah Woods and (B) whether the trial court erred by granting summary judgment in favor of defendant.

A. Affidavit of Noah Woods

[1] Plaintiff argues that the trial court erred by disregarding the affidavit of Noah Woods and finding that it was "presented at the 11th hour," "inherently incredible," and "inconsistent" with plaintiff's complaint. We agree.

On 18 July 2012, plaintiff filed and served upon defense counsel the affidavit of Noah Woods, the thirty-five (35) year old who was hired by defendant to serve as General Manager of Crossroads Ford in 2009. Woods' affidavit provided he was hired to replace plaintiff. It also stated the following, in pertinent part:

8. During the time that [plaintiff] and I worked together . . . , I observed that Allen Boyd appeared to give [plaintiff]

JOHNSON v. CROSSROADS FORD, INC.

[230 N.C. App. 103 (2013)]

a hard time and to needle him. On several occasions I heard Allen refer to [plaintiff] as “old man.”

9. Allen Boyd did not use “old man” as a term of endearment.

10. Based upon my observations of the interactions between [plaintiff] and Allen Boyd, I would say that Allen Boyd knew that [plaintiff] did not like to be referred to as “old man” and that Allen Boyd could see that it was humiliating to [plaintiff.]

...

13. I am aware of the circumstances surrounding [plaintiff’s] termination from the company.

...

17. As the General Manager, I was fully aware of the sale. [Plaintiff] did not try to deceive anyone or hide the fact that he was selling the car. I approved of him selling the car to the customers.

18. [Plaintiff] was willing to pay a commission from the sale to Crossroads Ford and I did not think that there was anything wrong with his selling the car to the customers.

19. [Plaintiff] was going to let Allen Boyd know about the sale and work out a cut for Crossroads Ford with Allen.

20. On Friday, April 30, 2010, Allen Boyd called me and told me he wanted me to fire [plaintiff] for selling his car.

21. Although I disagreed with Allen’s decision, it was clear that Allen had already made up his mind[.]

...

24. I think Allen Boyd used the sale of [plaintiff’s] car as a pretext to fire him. One of the principal reasons that Allen Boyd removed [plaintiff] from the position of General Manager and terminated him from his job was because of [plaintiff’s] age.

On 20 July 2012, defendant filed a motion to strike the affidavit of Noah Woods. Although the trial court stated that it was not going to

JOHNSON v. CROSSROADS FORD, INC.

[230 N.C. App. 103 (2013)]

strike Woods' affidavit during the 23 July 2012 hearing, in the 21 August 2012 summary judgment order, the trial court stated that

[t]he Court finds that Woods' affidavit is *inherently incredible*, presented at the 11th hour and therefore, does not create a material issue of fact to bootstrap [plaintiff] over the motion for summary judgment. Had Woods in fact approved of the sale as he now contends, the complaint would have contained these alleged facts.

...

[Plaintiff] is simply using Woods as a "straw man" to put forth a last ditch yarn that is inconsistent with the complaint and his sworn deposition testimony. It is crystal clear that a party opposing a summary judgment motion cannot create an issue of fact by filing an affidavit that is in conflict with his prior sworn testimony. Woods' affidavit is merely a surrogate for [plaintiff's] inconsistent and newly created story that he had authority to sell the car from Woods. . . . *Cousart v. The Charlotte-Mecklenburg Hospital Authority*, 704 S.E.2d 540, 543-44 (2011); *Carter v. West Am. Ins. Co.*, 190 N.C. App. 532, and *Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4th Cir. 1984). Reduced to essentials, Woods' last minute affidavit is incredible, contradictory to [plaintiff's] complaint and his sworn deposition testimony and cannot be used to create an issue of fact to forestall summary judgment.

(emphasis added).

In determining whether the trial court properly disregarded Woods' affidavit, "[w]e review an order striking an affidavit for abuse of discretion." *Waterway Drive Prop. Owners' Ass'n v. Town of Cedar Point*, __ N.C. App. __, __, 737 S.E.2d 126, 135-36 (2012) (citation omitted).

First, we note that Woods' affidavit was filed and served on defense counsel on 18 July 2012, five days prior to the 23 July 2012 hearing. This was in compliance with rule 6(d) of the North Carolina Rules of Civil Procedure which states that "opposing affidavits shall be served at least two days before the hearing." N.C. Gen. Stat. § 1A-1, Rule 6(d) (2011). At the 23 July 2012 hearing, defense counsel stated that Woods' affidavit "was timely filed and served on me. I don't dispute that." Therefore, the trial court erred by finding that because Woods' affidavit was presented at the "11th hour," it was inherently incredible.

JOHNSON v. CROSSROADS FORD, INC.

[230 N.C. App. 103 (2013)]

Further, all three of the cases cited by the trial court in its summary judgment order stand for the well-established proposition that “a party opposing a motion for summary judgment cannot create a genuine issue of material fact by filing an affidavit contradicting *his prior sworn testimony*.” *Cousart v. Charlotte-Mecklenburg Hosp. Auth.*, 209 N.C. App. 299, 304, 704 S.E.2d 540, 543 (2011) (citation omitted) (emphasis added); *See Carter v. West Am. Ins. Co.*, 190 N.C. App. 532, 539, 661 S.E.2d 264, 270 (2008) and *Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4th Cir. 1984). These cases specifically state that a party cannot survive a motion for summary judgment by merely filing an affidavit that contradicts their own personal, prior sworn testimony. In the case before us, however, the substance of Noah Woods’ affidavit did not contradict any previous sworn testimony of Noah Woods. Therefore, we hold that *Cousart*, *Carter*, and *Barwick* are not applicable to the facts in this case and that the trial court abused its discretion in finding Woods’ affidavit inherently incredible.

Next, we address whether it was improper for the trial court to find that Woods’ affidavit was inherently incredible because it was “inconsistent with [plaintiff’s] complaint” and “contradictory to [plaintiff’s] complaint.” Viewing the evidence in the light most favorable to plaintiff, Woods’ affidavit indicated that as General Manager of Crossroads Ford, Woods was aware of and approved the sale of plaintiff’s wife’s vehicle. The affidavit also showed that Woods believed that Vice-President Boyd used the sale of plaintiff’s wife’s vehicle as a pretext to terminate plaintiff. Woods believed that “[o]ne of the principal reasons [Vice President Boyd] removed [plaintiff] from the position of General Manager and terminated him from the job was because of [plaintiff’s] age.” The content of Woods’ affidavit was not contradictory to plaintiff’s complaint as the trial court’s summary judgment order states. Rather, it supported plaintiff’s claim that he was wrongfully terminated by defendant based on his age in violation of the North Carolina Equal Employment Practices Act. We hold that the trial court abused its discretion by disregarding Woods’ affidavit based on the belief that it was inconsistent with plaintiff’s complaint.

B. Summary Judgment Order

[2] Plaintiff argues that the trial court erroneously relied on the holding in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L.Ed.2d 668 (1973), and applied an incorrect burden of proof – placing the burden upon plaintiff to disprove defendant’s affirmative defense – in considering defendant’s motion for summary judgment. Furthermore, plaintiff argues that the trial court erroneously granted summary judgment in

JOHNSON v. CROSSROADS FORD, INC.

[230 N.C. App. 103 (2013)]

favor of defendant where plaintiff's evidence created a genuine issue of material fact as to whether plaintiff's age was the reason for his termination. We address each of these arguments in turn.

Plaintiff's complaint alleged that defendant terminated him because of his age, in violation of North Carolina public policy as set forth in the Equal Employment Practices Act ("EEPA"), N.C. Gen. Stat. § 143-422.1, *et seq.* The EEPA provides that

[i]t is the public policy of this State to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race, religion, color, national origin, age, sex or handicap by employers which regularly employ 15 or more employees.

N.C.G.S. § 143-422.2 (2011). "Our Supreme Court has directed that we look to federal decisions for guidance in establishing evidentiary standards and principles of law to be applied in discrimination cases." *Youse v. Duke Energy Corp.*, 171 N.C. App. 187, 193, 614 S.E.2d 396, 401 (2005) (quotations omitted) (citing *Dept. of Correction v. Gibson*, 308 N.C. 131, 136, 301 S.E.2d 78, 82 (1983)).

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L.Ed.2d 668 (1973), Green, a black citizen of St. Louis, who had previously worked for McDonnell Douglas Corporation, an aerospace and aircraft manufacturer, as a mechanic and laboratory technician from 1956 until 28 August 1964 was "laid off in the course of a general reduction in [McDonnell Douglas Corp.'s] work force." *Id.* at 794, 36 L.Ed.2d at 673. Green was a long-time civil rights activist and during the time he was laid off, "protested vigorously that his discharge and the general hiring practices of [McDonnell Douglas Corp.] were racially motivated." *Id.* Three weeks following these activities, McDonnell Douglas Corp. publicly advertised for qualified mechanics and Green promptly applied for re-employment. *Id.* at 796, 36 L.Ed.2d at 674. McDonnell Douglas Corp. denied Green employment basing its rejection on Green's protest activities. *Id.* Thereafter, Green filed an action under Title VII of the Civil Rights Act of 1964, alleging that McDonnell Douglas Corp. had "refused to rehire him because of his race and persistent involvement in the civil rights movement[.]" *Id.*

The Supreme Court of the United States in *McDonnell Douglas* established evidentiary standards to be applied "governing the disposition of an action challenging employment discrimination[.]" *Id.* at 798,

JOHNSON v. CROSSROADS FORD, INC.

[230 N.C. App. 103 (2013)]

36 L.Ed.2d at 675. First, the claimant carries the initial burden of establishing a prima facie case of discrimination. *Id.* at 802, 36 L.Ed.2d at 677. “The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.” *Id.* at 802, 36 L.Ed.2d at 678. If a legitimate, nondiscriminatory reason has been articulated, the claimant has the opportunity to show that the employer’s stated reason for the claimant’s rejection was in fact pretext. *Id.* at 804, 36 L.Ed.2d 679.

“[T]he North Carolina Supreme Court has explicitly adopted the Title VII evidentiary standards in evaluating a state claim under § 143-422.2 insofar as they do not conflict with North Carolina statutes and case law.” *Hughes v. Bedsole*, 48 F.3d 1376, 1383 (4th Cir. 1995) (citation omitted). *N.C. Dep’t of Correction v. Gibson*, 308 N.C. 131, 301 S.E.2d 78 (1983), was an employment discrimination case based on race and our Supreme Court applied the *McDonnell Douglas* evidentiary standards in evaluating a claim brought under N.C. Gen. Stat. § 143-422.2. In *N.C. Dep’t of Crime Control & Pub. Safety v. Greene*, 172 N.C. App. 530, 616 S.E.2d 594 (2005), our Court applied the *McDonnell Douglas* “scheme by which employees may prove [age] discrimination in employment.” *Id.* at 537, 616 S.E.2d at 600. Our Court noted that “[t]he ultimate burden of persuading the trier of fact that the [employer] intentionally discriminated against the [employee] remains at all times with the [employee].” *Id.* at 538, 616 S.E.2d at 600 (citing *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 147 L.Ed.2d 105 (2000)). Based on the foregoing, we hold that the trial court did not err by utilizing the *McDonnell Douglas* evidentiary standards.

Next, plaintiff argues that the trial court erred by granting summary judgment in favor of defendant where plaintiff’s evidence created a genuine issue of material fact as to whether plaintiff’s age was the reason for his termination. We agree.

In order to establish a prima facie case of disparate treatment pursuant to N.C.G.S. § 143-422.2, plaintiff must show by a preponderance of the evidence that:

- (1) [he] is a member of a protected class;
- (2) [he] was qualified for [his] job and [his] job performance was satisfactory;
- (3) [he] was fired; and
- (4) other employees who are not members of the protected class were retained under apparently similar circumstances.

Hughes, 48 F.3d at 1383 (citation omitted).

JOHNSON v. CROSSROADS FORD, INC.

[230 N.C. App. 103 (2013)]

To support his claim, plaintiff's forecast of evidence established that he was born on 9 April 1950, making him 60 years old at the time of his termination. Plaintiff began working for defendant in 2000 as a Salesman and quickly became one of the top salesmen for defendant. President Boyd commended plaintiff for his "good work" but then stated that this was "a young man's business." Plaintiff was promoted numerous times but after plaintiff was promoted to General Manager in 2007, Vice-President Boyd repeatedly referred to plaintiff in an age-related derogatory manner by calling him "old man," poking him with a cane, and teasing him about not being able to hear well. Plaintiff was then demoted to Director of Sales and Service in 2009 when thirty-five (35) year old Noah Woods was hired to replace him. In April 2010, a fellow salesman, Patrick Rowe, approached plaintiff about selling his wife's vehicle which had been sitting in the Crossroads Ford parking lot to a customer. Plaintiff agreed to sell his wife's vehicle but explained that he "would have to work it out with Vice-President Boyd to determine Rowe's commission and how to complete the sale." Plaintiff received a check from the customer but did not tender his wife's vehicle because he was waiting to talk to Vice-President Boyd about the transaction. Plaintiff's evidence also showed that he was terminated on 31 April 2010 by Vice-President Allen Boyd who told plaintiff that the reason behind his termination was for "stealing." Plaintiff asserted that defendant had no written policy prohibiting sales of personal vehicles to customers and that another of defendant's employees, by the name of Bob Esau, had sold his personal truck to a customer and had not been terminated. Based on the aforementioned evidence, viewed in the light most favorable to plaintiff, plaintiff was able to establish a prima facie case.

Defendant rebutted plaintiff's case by producing evidence of a legitimate, nondiscriminatory reason for plaintiff's dismissal: that plaintiff knew it was a violation of company policy to sell a personal vehicle to a company customer without the express authorization of defendant or otherwise, by stealing a corporate opportunity.

Plaintiff was able to create a genuine issue of material fact regarding whether defendant's proffered reason was pretext by showing the following through Woods' affidavit: Vice President Boyd referred to plaintiff as an "old man;" Vice President Boyd knew that plaintiff did not like to be referred to as "old man" and that it was humiliating to plaintiff; as general manager, Woods was fully aware of the sale of plaintiff's wife's vehicle and gave approval to plaintiff to sell the vehicle to the customer; plaintiff did not try to hide the transaction nor deceive anyone about the

STATE v. BLANKENSHIP

[230 N.C. App. 113 (2013)]

transaction; Vice President Boyd made management decisions based on his own personal preferences which included an age-related bias; and, that Vice President Boyd used the sale of the vehicle as a pretext to terminate him.

Taking the foregoing evidence in the light most favorable to plaintiff, we hold that plaintiff has produced sufficient evidence to withstand summary judgment. Accordingly, we reverse the order of the trial court and remand this case for further proceedings.

Reversed and remanded.

Judges HUNTER, ROBERT C., and GEER concur.

STATE OF NORTH CAROLINA
v.
SETH BRADEN BLANKENSHIP

No. COA12-1560

Filed 15 October 2013

Search and Seizure—warrantless investigatory stop—anonymous tip—insufficient indicia of reliability—no corroboration

The trial court erred in a driving while impaired case by denying defendant's motion to suppress evidence. The officers did not have reasonable suspicion to conduct a warrantless investigatory stop since the anonymous tip did not possess sufficient indicia of reliability and the officers did not corroborate the tip.

Appeal by defendant from judgment entered 21 September 2012 by Judge Marvin P. Pope in Buncombe County Superior Court. Heard in the Court of Appeals 15 August 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Angel E. Gray, for the State.

Charlotte Gail Blake, for defendant-appellant.

CALABRIA, Judge.

STATE v. BLANKENSHIP

[230 N.C. App. 113 (2013)]

Seth Braden Blankenship (“defendant”) appeals from the trial court’s denial of his motion to suppress evidence obtained from a warrantless search and seizure. We reverse and remand.

At approximately 2:00 a.m. on 15 July 2012, Officer Travis Jones (“Officer Jones”) and Officer Kanupp of the Asheville Police Department (“APD”) had just completed an investigation on Patton Avenue in Asheville, North Carolina when they received a be-on-the-lookout (“BOLO”) message from the Asheville communications and dispatch operator (“911 operator”). A taxicab driver anonymously contacted 911 via his personal cellular telephone. At that time, the 911 operator did not ask the taxicab driver his name or phone number. However, when an individual calls 911, the 911 operator can determine the phone number used to make the call. Therefore, the 911 operator was later able to identify the taxicab driver as John Hutchby (“Hutchby”). Hutchby reported that he observed a red Mustang convertible with a black soft top (“the Mustang”) driving erratically, running over traffic cones and continuing west on Patton Avenue. Hutchby followed the Mustang westbound to the intersection of Patton Avenue and Louisiana Avenue and provided the 911 operator with the Mustang’s license plate letters and numbers, “XXT-9756.”

Less than two minutes after the BOLO was broadcast, a red Mustang with a black soft top and an “X” in the license plate passed directly in front of Officers Jones and Kanupp, heading westbound on Patton Avenue. The officers jumped in their vehicles to attempt to follow the Mustang. When the officers caught up to the vehicle, they observed the driver turning left onto Asheville School Road. The Mustang approached a security gate that was blocking the entrance to the Asheville Private School’s (“the school”) campus. As the Mustang’s driver, defendant, attempted to open the gate, the officers activated their blue lights and stopped defendant. Although the officers did not observe defendant violating any traffic laws or see any evidence of improper driving that would suggest impairment, when Officer Jones spoke to defendant he detected a strong odor of alcohol and asked defendant to perform field sobriety tests. Based on defendant’s performance on the tests, Officer Jones placed defendant under arrest. After defendant’s performance on a chemical analysis test, Officer Jones charged him with driving while impaired (“DWI”).

Defendant pled guilty to DWI in Buncombe County District Court. The trial court sentenced defendant to a 60-day suspended sentence and placed him on unsupervised probation for twelve months. Defendant appealed the judgment to Superior Court on 21 August 2011.

STATE v. BLANKENSHIP

[230 N.C. App. 113 (2013)]

Defendant filed a motion to suppress the evidence obtained from a warrantless search and seizure (“motion to suppress”), claiming Officer Jones did not have reasonable suspicion to stop the vehicle. The trial court denied defendant’s motion to suppress, finding that the arresting officers had reasonable suspicion to stop defendant’s vehicle. On 21 September 2012, defendant pled guilty to DWI but reserved the right to seek appellate review of the denial of his motion to suppress. The trial court sentenced defendant to a 30-day suspended sentence and placed him on supervised probation for twelve months. Defendant appeals.

Defendant argues that the trial court erred by denying his motion to suppress because the officers did not have reasonable suspicion to conduct a warrantless, investigatory stop. 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. Peele*, 196 N.C. App. 668, 670, 675 S.E.2d 682, 684 (2009) (citations and quotations omitted). “The trial court’s conclusions of law . . . are fully reviewable on appeal.” *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

“[I]n order to conduct a warrantless, investigatory stop, an officer must have reasonable and articulable suspicion of criminal activity.” *Id.* at 206-07, 539 S.E.2d at 630.

The stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. The only requirement is a minimal level of objective justification, something more than an unparticularized suspicion or hunch.

State v. Washington, 193 N.C. App. 670, 676, 668 S.E.2d 622, 626 (2008) (internal quotations and citations omitted). The officer’s reasonable suspicion must arise from his “knowledge prior to the time of the stop.” *State v. McRae*, 203 N.C. App. 319, 322, 691 S.E.2d 56, 58 (2010).

“An informant’s tip may provide the reasonable suspicion necessary for an investigative stop.” *State v. Hudgins*, 195 N.C. App. 430, 434, 672 S.E.2d 717, 719 (2009) (internal citations omitted). When “the informant is known or where the informant relays information to an officer face-to-face, an officer can judge the credibility of the tipster firsthand and thus confirm whether the tip” possesses sufficient indicia of reliability.

STATE v. BLANKENSHIP

[230 N.C. App. 113 (2013)]

Id. (internal citations omitted). When “[t]here was no indication that the informant had been previously used and had given accurate information” the Court treated the informant as an anonymous informant. *McRae*, 203 N.C. App. at 325, 691 S.E.2d at 60-61 (citation omitted). “An anonymous tip can provide reasonable suspicion” to justify a warrantless stop “as long as it exhibits sufficient indicia of reliability ... and if it does not, then there must be sufficient police corroboration of the tip before the stop may be made.” *Peele*, 196 N.C. App. at 672, 675 S.E.2d at 685 (internal citations and quotations omitted).

As an initial matter, the officers did not have the opportunity to judge Hutchby’s credibility firsthand or confirm whether the tip was reliable, because Hutchby had not been previously used and the officers did not meet him face-to-face. Since the officers did not have an opportunity to assess his credibility, Hutchby was an anonymous informant. Therefore, to justify a warrantless search and seizure, either the tip must have possessed sufficient indicia of reliability or the officers must have corroborated the tip. *See id.*

In the instant case, there is no dispute that the officers did not corroborate the tip. At the suppression hearing, the court found that the officers “did not have sufficient time to observe the vehicle being operated by [] defendant ... due to [] defendant’s actions in turning left and going into the actual school property.” When they caught up to defendant and observed him approaching the security gate, they activated their blue lights and stopped him because they did not have the access code to the school. Since they did not observe him violating any traffic laws, they were unable to corroborate the tip and the only issue to determine is whether Hutchby’s tip exhibited sufficient “indicia of reliability” to provide the officers with reasonable suspicion to stop defendant.

To create the requisite reasonable suspicion, an anonymous tip must “be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.” *State v. Harwood*, ___ N.C. App. ___, ___, 727 S.E.2d 891, 899 (2012) (citation omitted). In *State v. Coleman*, the defendant was stopped by an officer after an anonymous caller reported to 911 “that there was a cup of beer in a gold Toyota sedan” parked at a specific gas station and provided the location and license plate number for the vehicle. *State v. Coleman*, ___ N.C. App. ___, ___, 743 S.E.2d 62, 64 (2013). At the defendant’s suppression hearing the State presented evidence, *inter alia*, that the 911 communications center obtained the caller’s name and phone number. *Id.* The trial court denied the defendant’s motion to suppress. *Id.* This Court held on appeal that:

STATE v. BLANKENSHIP

[230 N.C. App. 113 (2013)]

[w]hile the fact that [the caller's] tip provided the license plate number and location of defendant's car may have provided some limited indicia of reliability, [the caller] did not describe defendant, did not provide any way for [the] Officer ... to assess [the caller's] credibility, failed to explain [the caller's] basis of knowledge, and did not include any information concerning defendant's future actions. Accordingly ... [the caller's] anonymous tip lacked the sufficient indicia of reliability necessary to establish reasonable suspicion.

Id. at ___, 743 S.E.2d at 67.

We find the instant case has some limited but insufficient indicia of reliability analogous to *Coleman*. In both cases, the anonymous caller described defendant's vehicle and the car's license plate letters and numbers. Just as the anonymous caller in *Coleman* was unable to describe the defendant, Hutchby also was unable to describe defendant, or indicate whether the driver was a male or a female. *See id.* at ___, 743 S.E.2d at 67. In addition, Hutchby did not provide any way for the officers to assess his credibility. Although Hutchby did relay to the 911 operator the location of the vehicle and the direction the Mustang was traveling, he did not include any information concerning defendant's future actions. At the suppression hearing, the court specifically made "no finding of fact as to what could or might have occurred at the Asheville School if [] defendant was able to access the security gate and elude the officers on Asheville School property." While the direction of travel can provide some indicia of reliability to support a stop, the North Carolina Supreme Court has held that a tipster's confirmation that a defendant was heading in a general direction "is simply not enough detail in an anonymous tip situation." *Hughes*, 353 N.C. at 210, 539 S.E.2d at 632.

The State relies on *State v. Maready* to support the trial court's decision. In *Maready*, the Court held that officers had reasonable suspicion to stop the defendant after the officers

observed an intoxicated man stumbling across the roadway to enter [a] silver Honda; saw [a] minivan, with its emergency flashers activated, driving unusually slowly and eventually coming to a halt immediately in front of the Honda; responded after being flagged down by the minivan driver, who seemed to be distressed; and obtained information in a face-to-face encounter that the driver of

STATE v. BLANKENSHIP

[230 N.C. App. 113 (2013)]

the Honda, whom the minivan driver had apparently been in a position to observe, had been running stop signs and stop lights.

362 N.C. 614, 620, 669 S.E.2d 564, 568 (2008). The State asserts that the instant case is similar to *Maready* because in both cases the informant provided their location, the description as well as the path of travel of the suspect vehicle, and a specific description of the driver's erratic behavior. The State is mistaken.

In *Maready*, the officers personally observed an intoxicated man enter a vehicle then drive away. In addition, the Court noted that the informant put her anonymity at risk by flagging down the officers. *Id.* Furthermore, the officers in *Maready* personally observed the driver of the minivan that stopped in front of the Honda. *Id.* Since the officers personally observed both the intoxicated man and the driver of the minivan, they were able to judge the informant's credibility and confirm firsthand that the tip possessed sufficient indicia of reliability. *Id.*; compare, also *Hudgins*, 195 N.C. App. at 431, 435, 672 S.E.2d at 718, 720 (2009) (where this Court found sufficient indicia of reliability where the 911 caller indicated that he was being followed and that the driver of the other car was pointing a gun at him, and the caller remained on the line with dispatch until an officer was able to intercept the vehicles, exited the vehicle and identified the driver as the man who had been following him).

In the instant case, Officers Jones and Kanupp did not personally observe any unlawful behavior by defendant or have the opportunity to meet Hutchby prior to the stop. Since the 911 operator was able to establish Hutchby's identity by tracking the personal cell phone he used to make the call, the officers later discovered Hutchby's identity. The officers were also unable to judge Hutchby's credibility and to confirm firsthand that the tip possessed sufficient indicia of reliability. Since Hutchby's anonymous tip did not possess sufficient indicia of reliability, Officers Jones and Kanupp did not possess reasonable, articulable suspicion to stop defendant's car. *See Peele*, 196 N.C. App at 668, 674-75, 675 S.E.2d at 682, 687 (holding that an anonymous tip describing a specific make and color of a car, the erratic driving of the vehicle, and a description of the direction in which the vehicle was traveling, without further corroboration, did not give the officer reasonable suspicion to lawfully stop the vehicle).

Consequently, the trial court improperly denied defendant's motion to suppress. Defendant also argues that several of the trial court's findings of fact were not supported by competent evidence in the record. It

STATE v. SIMPSON

[230 N.C. App. 119 (2013)]

is unnecessary to address defendant's argument, however, because even assuming, *arguendo*, the facts were supported by competent evidence, the facts do not support a conclusion that the officers had reasonable suspicion to stop the vehicle and the trial court should have granted defendant's motion to suppress evidence obtained from a warrantless search and seizure.

Reversed.

Judges STROUD and DAVIS concur.

STATE OF NORTH CAROLINA
v.
LADONN EDWARD SIMPSON

No. COA13-253

Filed 15 October 2013

1. Drugs—maintaining a vehicle for keeping or selling methamphetamine—insufficient evidence

The trial court erred in denying defendant's motion to dismiss the charge of maintaining a vehicle for keeping or selling methamphetamine. The evidence was insufficient to show that defendant allowed others to resort to his vehicle to use controlled substances.

2. Drugs—manufacturing methamphetamine—trafficking in methamphetamine by manufacture charges—jury instructions—element of intent—no plain error

The trial court did not commit plain error in a drugs case by failing to instruct the jury on the intent element of manufacturing methamphetamine and trafficking in methamphetamine by manufacture charges. Even assuming *arguendo* that the trial court's omission of an instruction on intent to distribute was erroneous, the omission did not rise to the level of plain error as defendant failed to show prejudice.

3. Constitutional Law—double jeopardy—separate charges based on same substance—stare decisis

Bound by the decisions in *State v. Pipkins*, 337 N.C. 431, and *State v. Perry*, 316 N.C. 87, the Court of Appeals held that the trial court did not deprive defendant of his right against double jeopardy

STATE v. SIMPSON

[230 N.C. App. 119 (2013)]

by sentencing him for three trafficking in methamphetamine charges, manufacturing methamphetamine, and possession of methamphetamine based on the same illegal substance.

Appeal by Defendant from judgments entered 9 February 2012 by Judge Jack W. Jenkins in Superior Court, Onslow County. Heard in the Court of Appeals 27 August 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Thomas M. Woodward, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender David W. Andrews, for Defendant.

McGEE, Judge.

Ladonn Edward Simpson (“Defendant”) was found guilty on 9 February 2012 of manufacturing methamphetamine, exceeding pseudoephedrine limits, felony conspiracy to manufacture methamphetamine, maintaining a vehicle that was resorted to by persons using controlled substances or that was used for keeping or selling controlled substances, possession of an immediate precursor chemical used to manufacture methamphetamine, possession of methamphetamine, and three counts of trafficking in methamphetamine. Defendant appeals.

I. Sufficiency of the Evidence of Maintaining a Vehicle for Keeping or Selling Methamphetamine

[1] Defendant argues the trial court erred in denying his motion to dismiss the charge of maintaining a vehicle for keeping or selling methamphetamine. We agree.

A. Standard of Review

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.”

STATE v. SIMPSON

[230 N.C. App. 119 (2013)]

Id. at 92, 728 S.E.2d at 347. “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.* at 93, 728 S.E.2d at 347 (internal citations and quotation marks omitted).

B. Analysis

It shall be unlawful for any person . . . [t]o knowingly keep or maintain any . . . vehicle . . . which is resorted to by persons using controlled substances in violation of this Article for the purpose of using such substances, or which is used for the keeping or selling of the same in violation of this Article[.]

N.C. Gen. Stat. § 90-108(a)(7) (2011). “[T]his Article” refers to Article 5, the North Carolina Controlled Substances Act.

The statute provides two ways to show a violation. “The first statutory alternative requires that the State prove defendant knowingly allowed others to resort to his dwelling to consume controlled substances.” *State v. Thompson*, 188 N.C. App. 102, 105, 654 S.E.2d 814, 816 (2008). Under the first alternative, the State must prove Defendant knowingly allowed others to resort to his vehicle to use controlled substances.

“The second statutory alternative requires that defendant knowingly used the dwelling for the keeping or selling of controlled substances.” *Id.* at 105, 654 S.E.2d at 817. Under this alternative, the State must prove Defendant knowingly used the vehicle for the keeping or selling of controlled substances.

Jeremy Cox (“Mr. Cox”), an acquaintance of Defendant, testified for the State. Portions of his testimony follow:

[Defense Attorney]. . . . [Y]ou told the detectives that you contacted [Defendant] to get more meth, shortly after you got out of jail.

[Mr. Cox]. . . . As I remember, I saw him and he said he had some work. He was a framer or construction man, and he said he had some concrete work, but it never came through. We ended up riding around, getting high.

[Defense Attorney]. So you get into trouble for making methamphetamine, and you get out on bond; and then, by your admission, allegedly, you get together with this

STATE v. SIMPSON

[230 N.C. App. 119 (2013)]

man and drive around getting high on meth? (Indicating [Defendant].)

[Mr. Cox]. That's correct.

Mr. Cox further testified as follows:

[The State]. You said that you would ride around, getting high. Were you referring to [Defendant] being present during that time?

[Mr. Cox]. I'm not sure what you're referring to.

[The State]. . . . Have you ever gotten high with [Defendant], on methamphetamines?

[Mr. Cox]. Yes.

[The State]. Have you ever done so in his vehicle?

[Mr. Cox]. Yes.

Defendant contends that, even if Mr. Cox used methamphetamine in the vehicle, “the State did not establish that anyone else resorted to [the] truck to use methamphetamine.” Evidence shows that only Mr. Cox and Defendant used methamphetamine in the vehicle. However, the statute “requires that the State prove defendant knowingly allowed others to resort to” his vehicle to consume controlled substances. *Thompson*, 188 N.C. App. at 105, 654 S.E.2d at 816 (emphasis added). Defendant cannot allow himself to “resort to” his vehicle. Our Supreme Court has noted that it does “not believe the General Assembly intended ‘resorted to,’ as used in this statute [N.C.G.S. § 90-108(a)(7)], to include persons who live in the dwelling.” *State v. Rich*, 87 N.C. App. 380, 384, 361 S.E.2d 321, 324 (1987). Similarly, we do not believe the General Assembly intended “resorted to,” as used in N.C.G.S. §90-108(a)(7), to include persons who own the vehicle at issue.

The State presented no evidence, as to the second alternative, that Defendant used the vehicle for the keeping or selling of controlled substances. As to the first alternative, the evidence shows only that Defendant and Mr. Cox used controlled substances in Defendant's vehicle. This evidence is insufficient to show that Defendant allowed others to resort to his vehicle to use controlled substances. The trial court therefore erred in denying Defendant's motion to dismiss the charge of maintaining a vehicle that was resorted to by persons using controlled substances or that was used for keeping or selling controlled substances.

STATE v. SIMPSON

[230 N.C. App. 119 (2013)]

II. Jury Instructions

[2] Defendant next argues the trial court committed plain error in failing to instruct the jury on the intent element of the manufacturing methamphetamine and the trafficking in methamphetamine by manufacture charges. We disagree.

A. Standard of Review

Because Defendant did not object to the jury instructions at trial, we review for plain error. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012).

[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. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (alterations in original) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982) (footnotes omitted)).

To show 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.” *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (internal citation and quotation marks omitted).

B. Analysis

The trial court must “instruct the jury on the law arising on the evidence. This includes instruction on the elements of the crime.” *State v. Watterson*, 198 N.C. App. 500, 503, 679 S.E.2d 897, 899 (2009).

N.C. Gen. Stat. § 90-87 defines “manufacture” as:

STATE v. SIMPSON

[230 N.C. App. 119 (2013)]

the production, preparation, propagation, compounding, conversion, or processing of a controlled substance by any means, whether directly or indirectly, artificially or naturally, or by extraction from substances of a natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis; and ‘manufacture’ further includes any packaging or repackaging of the substance or labeling or relabeling of its container except that this term does not include the preparation or compounding of a controlled substance by an individual for his own use[.]

N.C. Gen. Stat. § 90-87(15) (2011).

Our Supreme Court held that “the offense of manufacturing a controlled substance does not require an intent to distribute unless the activity constituting manufacture is preparation or compounding.” *State v. Brown*, 310 N.C. 563, 568, 313 S.E.2d 585, 588 (1984). When the activity is “preparation” or “compounding,” *Brown* indicates that the offense of manufacturing requires an intent to distribute.

The trial court instructed the jury on the charge of trafficking in methamphetamine by manufacture as follows:

[D]efendant has been charged with trafficking in methamphetamine, or any liquid mixture containing methamphetamine, which is the unlawful manufacturing of 200 grams or more, but less than 400 grams. . . .

For you to find [D]efendant guilty of this offense, the state must prove two things, beyond a reasonable doubt: First, that [D]efendant, acting either by himself or acting together with another person, manufactured methamphetamine or any liquid mixture containing methamphetamine.

The manufacture of methamphetamine is the production, preparation, propagation, compounding, conversion or processing of methamphetamine, a controlled substance, either by extraction from substances of natural origin or by chemical synthesis. (emphasis added).

The trial court instructed the jury on the manufacture of methamphetamine as follows:

[D]efendant has been charged with manufacture of methamphetamine, a controlled substance. For you to

STATE v. SIMPSON

[230 N.C. App. 119 (2013)]

find [D]efendant guilty of this offense, the state must prove, beyond a reasonable doubt, that [D]efendant manufactured methamphetamine by producing, preparing, propagating, compounding, converting or processing methamphetamine, a controlled substance, either by extraction from substances of natural origin or by chemical synthesis. (emphasis added).

Defendant contends that the trial court “never explained that the State bore the burden of proving that [Defendant] acted with an intent to distribute if the jury determined that [Defendant] manufactured methamphetamine by preparation or compounding.”

Despite the inclusion of “preparing,” “compounding,” and “preparation” in its instructions, the trial court did not instruct on intent to distribute. Even assuming *arguendo* that this omission was error, the omission does not rise to the level of plain error. The evidence indicates that Defendant sold methamphetamine and possessed more than 200 grams of a liquid containing methamphetamine and items consistent with the manufacture of methamphetamine.

Mr. Cox testified that Defendant asked, on 26 January 2011, for help making methamphetamine. Mr. Cox explained to the jury how to make methamphetamine, using ammonium nitrate, lye, drain cleaner, propane, pseudoephedrine, and batteries. Mr. Cox testified he smelled propane when Defendant picked Mr. Cox up in Defendant’s vehicle. They went to several stores to purchase ingredients, including Sudafed, Coleman fuel, filters, and batteries. When officers stopped Mr. Cox and Defendant, Mr. Cox and Defendant had all the ingredients for methamphetamine.

Officers found “a white powder in a plastic bag” in Mr. Cox’s pocket. Mr. Cox indicated he purchased the methamphetamine from Defendant. A State Bureau of Investigation agent searched the vehicle the next day. The agent found a syringe, spoon, bag with white powder residue, bucket, propane tank, drain opener, funnel, filtration mask, plastic baggies, a shopping bag containing “empty boxes and boxes of pseudoephedrine[,]” receipts for pseudoephedrine dated 26 January 2011, loose pseudoephedrine pills, and a glass jar containing “kind of a clear liquid[.]” The jar held 210 grams of liquid containing methamphetamine. Also in the vehicle was a notebook with Defendant’s name written inside the cover. The notebook contained a picture of a “cooking synthesis” for methamphetamine.

The evidence of manufacturing methamphetamine and trafficking in methamphetamine by manufacture was overwhelming. In light of this

STATE v. SIMPSON

[230 N.C. App. 119 (2013)]

overwhelming evidence, Defendant failed to demonstrate the requisite “prejudice—that, after examination of the entire record, the error had a probable impact on the jury’s finding that the defendant was guilty.” *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (internal quotation mark omitted). The trial court did not commit plain error in failing to instruct on the intent to distribute.

III. Sentencing

[3] Defendant’s final argument is that the trial court deprived Defendant “of his right against double jeopardy” by sentencing him for three trafficking in methamphetamine charges, manufacturing methamphetamine, and possession of methamphetamine based on the same illegal substance.

The State argues, without citation to authority, that Defendant failed to preserve his right to appeal the conviction for trafficking by transport because Defendant failed to list it in his proposed issues on appeal. “The proposed issues on appeal listed in the record on appeal shall not limit the scope of the issues that an appellant may argue in its brief.” N.C.R. App. P. 28(b)(2). This argument is without merit.

Defendant acknowledges the holdings regarding double jeopardy of our Supreme Court in *State v. Pipkins*, 337 N.C. 431, 446 S.E.2d 360 (1994), and *State v. Perry*, 316 N.C. 87, 340 S.E.2d 450 (1986). “[T]he Supreme Court of the United States has held that, where a legislature clearly expresses its intent to proscribe and punish exactly the same conduct under two separate statutes, a trial court *in a single trial* may impose cumulative punishments under the statutes.” *Pipkins*, 337 N.C. at 433-34, 446 S.E.2d at 362 (alteration in original).

“An examination of the subject, language and history of the statutes indicates that the legislature intended that these offenses be punished separately, even where the offenses are based on the same conduct.” *Id.* at 434, 446 S.E.2d at 362 (no double jeopardy in separate punishments for felonious possession of cocaine and trafficking in cocaine by possession).

“[P]ossessing, manufacturing, and transporting heroin are separate and distinct offenses.” *Perry*, 316 N.C. at 103, 340 S.E.2d at 461. A defendant may be punished separately “for trafficking in heroin by possessing 28 grams or more of heroin, trafficking in heroin by manufacturing 28 grams or more of heroin, and trafficking in heroin by transporting 28 grams or more of heroin even when the contraband material in each separate offense is the same heroin.” *Id.* at 104, 340 S.E.2d at 461. Like

STATE v. THOMAS

[230 N.C. App. 127 (2013)]

heroin, methamphetamine is a controlled substance. N.C. Gen. Stat. § 90-95(b) (2011).

Being bound by the decisions in *Pipkins* and *Perry*, we hold the trial court did not err in sentencing Defendant separately for trafficking in methamphetamine, manufacturing methamphetamine, and possession of methamphetamine.

Reversed in part; no error in part.

Judges STEELMAN and ERVIN concur.

STATE OF NORTH CAROLINA
v.
DANNY LAMONT THOMAS

No. COA13-175

Filed 15 October 2013

Jury—use of peremptory challenge after trial began—examination reopened—no questions by defense

The trial court erred in a prosecution for first-degree murder and other charges by not allowing a juror to be removed with a peremptory challenge after the trial had begun. The trial reopened examination of the juror when it allowed defendant and the State to re-question the juror, and defendant was not required to ask any questions to preserve his right to use a remaining peremptory challenge.

Appeal by Defendant from judgments entered 18 May 2011 by Judge Thomas H. Lock in Superior Court, Columbus County. Heard in the Court of Appeals 10 September 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Jonathan P. Babb, for the State.

Jarvis John Edgerton, IV for Defendant.

McGEE, Judge.

Danny Lamont Thomas (Defendant) was convicted of multiple criminal charges, including four counts of first-degree murder, on 5 May

STATE v. THOMAS

[230 N.C. App. 127 (2013)]

2011. The basic issue argued in Defendant's appeal involves a juror who sat on the panel that convicted Defendant.

Jury *voir dire* was conducted, and the jury was impaneled on 20 April 2011. Heather Hinson (Hinson) was juror number eight. On the third day of the evidentiary portion of the trial, during a break in the testimony of the State's ninth witness, Centia Wilson (Wilson), Hinson informed a court official that she knew Wilson from high school. Hinson had not recognized Wilson's name, partly because it had changed since high school. The trial court informed Defendant and the State, and Hinson was called for questioning outside the presence of the other jurors.

The trial court asked Hinson a number of questions concerning the nature of her relationship with Wilson. Hinson testified that Wilson was a high school acquaintance, but they were not true friends in high school, and had not kept in touch after graduation from high school in 1993. Hinson testified she could remain fair and impartial, and that her past acquaintance with Wilson would not affect her ability to serve as a juror. The trial court then asked both the Assistant District Attorney and Defendant's counsel if they had any questions for Hinson. Both the State and Defendant declined to question Hinson further, but Defendant moved to excuse Hinson for cause or, failing that, to be allowed to use a remaining peremptory challenge to remove Hinson from the jury. The trial court denied Defendant's motions and the trial continued with Hinson on the jury. Defendant was convicted on all charges. Defendant appeals.

I.

The relevant issue on appeal is whether the trial court erred in refusing to allow Defendant to use a remaining peremptory challenge to remove Hinson from the jury. We are compelled to hold that there was error.

II.

A.

The outcome of this appeal is controlled by *State v. Holden*, 346 N.C. 404, 488 S.E.2d 514 (1997). In *Holden*,

[a]fter the close of all the evidence, the prosecutor informed the court that he had received information concerning [a juror]. The prosecutor advised the court that he had learned that [the juror] had in the last few years presented an argument against the death penalty in which she had asserted that no person had the right to take the life

STATE v. THOMAS

[230 N.C. App. 127 (2013)]

of another person, that too many black defendants were receiving the death penalty, and that something should be done about this. The prosecutor told the court that his source was “an officer of the court.”

Holden, 346 N.C. at 428, 488 S.E.2d at 527. The trial court reopened *voir dire*, and the juror was questioned by the trial court, the prosecutor, and defense counsel. *Id.* Following this *voir dire*, the prosecutor asked the trial court to remove the juror for cause. The trial court declined, so the prosecutor asked to use a remaining peremptory challenge to remove the juror, even though all evidence had already been presented. The trial court allowed the prosecutor to use a peremptory challenge to remove the juror. *Id.* The defendant argued on appeal that the trial court abused its discretion by reopening *voir dire* after the close of all the evidence based only on information obtained from an unnamed “officer of the court.” *Id.* The defendant further argued the trial court erred “by permitting the State to exercise a peremptory challenge to excuse a juror after the jury was impaneled.” *Id.* at 428, 488 S.E.2d at 526-27.

Our Supreme Court acknowledged that the relevant statute did not address reopening questioning of a juror *after* the jury had been impaneled, stating:

While not addressed by [the relevant] statute, [N.C. Gen. Stat. § 15A-1214(g)], this Court has held that the trial court may reopen the examination of a juror after the jury is impaneled and that this decision is within the sound discretion of the trial court. *State v. McLamb*, 313 N.C. 572, 575–76, 330 S.E.2d 476, 479 (1985); *State v. Kirkman*, 293 N.C. 447, 452–54, 238 S.E.2d 456, 459–60 (1977).

Holden, 346 N.C. at 429, 488 S.E.2d at 527. N.C. Gen. Stat. § 15A-1214(g) states:

If at any time after a juror has been accepted by a party, and before the jury is impaneled, it is discovered that the juror has made an incorrect statement during *voir dire* or that some other good reason exists:

- (1) The judge may examine, or permit counsel to examine, the juror to determine whether there is a basis for challenge for cause.
- (2) If the judge determines there is a basis for challenge for cause, he must excuse the juror or sustain any challenge for cause that has been made.

STATE v. THOMAS

[230 N.C. App. 127 (2013)]

- (3) If the judge determines there is no basis for challenge for cause, any party who has not exhausted his peremptory challenges may challenge the juror.

Any replacement juror called is subject to examination, challenge for cause, and peremptory challenge as any other unaccepted juror.

N.C. Gen. Stat. § 15A-1214(g) (2011). Having held that existing law allowed the trial court discretion to reopen *voir dire* for a juror after the jury was impaneled, our Supreme Court in *Holden* then simply adopted the statutory standard for challenging a juror after the juror had been accepted, but before the full jury had been impaneled, as codified in N.C.G.S. § 15A-1214(g). See *Holden*, 346 N.C. at 429, 488 S.E.2d at 527.

Our Supreme Court cited an earlier opinion which interpreted N.C.G.S. § 15A-1214(g), in the pre-impaneling context, for the proposition that “[o]nce the trial court reopens the examination of a juror, each party has the absolute right to exercise any remaining peremptory challenges to excuse such a juror.” *Holden*, 346 N.C. at 429, 488 S.E.2d at 527 (citing *State v. Womble*, 343 N.C. 667, 678, 473 S.E.2d 291, 297 (1996)). In *Holden*, our Supreme Court held that this absolute right to use a remaining peremptory challenge to remove a juror applied even after the jury had been impaneled (or, on the facts of *Holden*, even after the evidentiary portion of the trial had been concluded), so long as the trial court had not abused its discretion in reopening the examination of the juror. *Id.*

B.

Allowing, as an absolute right, the removal of a juror with a peremptory challenge before the jury has been impaneled serves legitimate goals and results in limited disruption in the trial process. However, serious questions arise when this “right” is removed from the context in which it was established in N.C.G.S. § 15A-1214(g), and applied after the jury has been impaneled.

Possible troubling scenarios include: (1) near the end of a trial the defense believes is going against the defendant, a concern is raised about the conduct of multiple jurors. The trial court allows *voir dire* of those jurors and determines no improprieties were involved. The trial court refuses to excuse those jurors for cause, but the defendant has three remaining peremptory challenges and uses them all. The trial must start anew; (2) or the State believes a juror has appeared sympathetic to the defendant during trial. An unnamed officer of the court tells

STATE v. THOMAS

[230 N.C. App. 127 (2013)]

the prosecutor that the juror may have violated an instruction from the judge. The trial court allows *voir dire* to investigate, but finds no cause to remove the juror. The State uses a peremptory challenge to remove the one juror who could have prevented a conviction.

Further, it seems likely that, after a trial has started, a trial court will be reluctant to allow questioning of jurors whose actions are in question in order to avoid the opportunity for the use of peremptory challenges. However, trial courts should be encouraged to allow thorough investigations of jurors, when needed, to determine if there is reason to excuse them for cause.

C.

In this case, after the jury had been impaneled and trial had started, Hinson informed the trial court that she had attended high school with the State's witness, Wilson, who was currently testifying. The trial court stated: "I need to – consistent with what I did with the last juror who knew a witness, we need to talk with her on the record outside the presence of the other jurors." The trial court further stated that "when we return from lunch, we'll send for Ms. Hinson first, and chat with her about the nature of her acquaintance with this witness, Ms. Wilson. After we've done that and heard you on that, we'll bring Ms. Wilson back to the stand and resume her testimony."

The trial court questioned Hinson outside the presence of the remainder of the jury concerning her relationship with the State's witness. Hinson testified that she was little more than a friendly acquaintance of Wilson in high school, that she had not really spoken to Wilson since graduating from high school in 1993, and that she felt her prior acquaintance with Wilson would not influence her ability to consider Defendant's case fairly at trial. The trial court then asked if there were any questions by the State or the defense "concerning this limited area of inquiry[.]" Both the State and Defendant indicated they did not need to question Hinson beyond the questioning already conducted by the trial court.

Hinson left the courtroom, and the trial court asked if the State or Defendant had anything to say outside Hinson's presence. The State answered "no," but Defendant challenged Hinson for cause, which was denied. Defendant then requested to use a peremptory challenge to exclude Hinson:

MR. PAYNE: We move to reopen *voir dire* on [Hinson], and that we would have used a peremptory challenge had we known that [Hinson's relationship to Ms. Wilson].

STATE v. THOMAS

[230 N.C. App. 127 (2013)]

THE COURT: Well, now, I gave you the opportunity to reopen voir dire. That's what I was doing.

....

MR. PAYNE: Judge, we don't wish to ask any further questions. The request for the reopening of voir dire is to exercise a peremptory challenge –

THE COURT: I see. Procedural.

MR. PAYNE: – that we would have used if we had known that.

The trial court denied Defendant's motion to "reopen voir dire" and use a remaining peremptory challenge to remove Hinson from the jury. However, as held in *Holden*:

While not addressed by statute, this Court has held that the trial court may reopen the examination of a juror after the jury is impaneled and that this decision is within the sound discretion of the trial court. *State v. McLamb*, 313 N.C. 572, 575–76, 330 S.E.2d 476, 479 (1985); *State v. Kirkman*, 293 N.C. 447, 452–54, 238 S.E.2d 456, 459–60 (1977). "[O]nce the trial court reopens the examination of a juror, each party has the absolute right to exercise any remaining peremptory challenges to excuse such a juror." *Womble*, 343 N.C. at 678, 473 S.E.2d at 297.

Holden, 346 N.C. at 429, 488 S.E.2d at 527.

The State contends that, because Defendant did not ask any questions when given the opportunity to do so, the trial court did not reopen the examination of the juror. We must disagree. In *State v. Kirkman*, 293 N.C. 447, 238 S.E.2d 456 (1977), cited above in *Holden*, the State moved the trial court to reopen examination of a juror after the jury had been impaneled. "In its discretion, the court permitted this and called the juror back for further examination. *Without further questioning*, the District Attorney 'in the interest of time' exercised one of his remaining three peremptory challenges, and the court, in its discretion, allowed the challenge[.]" *Kirkman*, 447 N.C. at 453, 238 S.E.2d at 459 (emphasis added). Once the trial court has reopened examination of a juror, it is not necessary for a party to ask questions simply to activate the right to use a remaining peremptory challenge. *Id.* In *Kirkman*, we note that our Supreme Court stated that the trial court, in its discretion, granted the State's peremptory challenge. *Id.* To the extent that granting

STATE v. THOMAS

[230 N.C. App. 127 (2013)]

a peremptory challenge after the reopening of examination of a juror was discretionary in *Kirkman*, our Supreme Court in *Holden* appears to have overruled *Kirkman*. *Holden*, 346 N.C. at 429, 488 S.E.2d at 527 (“[o]nce the trial court reopens the examination of a juror, each party has the absolute right to exercise any remaining peremptory challenges’ ”) (citation omitted).

In the present case, we hold that, once the trial court allowed Defendant and the State to re-question Hinson, it reopened examination of Hinson for the purpose of *Holden*. At that point, Defendant was not required to ask any questions in order to preserve his right to use a remaining peremptory challenge to remove Hinson. We are compelled by *Holden* and *Kirkman* to reverse and remand for a new trial. See also *State v. Hammonds*, __ N.C. App. __, __, 720 S.E.2d 820, 821 (2012) (“Under [*Holden* and *State v. Thomas*, 195 N.C. App. 593, 673 S.E.2d 372, *disc. review denied*, 363 N.C. 662, 685 S.E.2d 800 (2009)], because the trial court reopened voir dire [after the jury was impaneled] and because defendant had not exhausted all of his peremptory challenges, the trial court was required to allow defendant to exercise a peremptory challenge to excuse the juror. Defendant is, under *Holden* and *Thomas*, entitled to a new trial.”).

In light of our holding above, we do not address Defendant’s additional argument.

New trial.

Judges McCULLOUGH and DILLON concur.

ZALDANA v. SMITH

[230 N.C. App. 134 (2013)]

JULIO ALBERTO MARTINEZ ZALDANA, EMPLOYEE-PLAINTIFF

v.

HORACE SMITH D/B/A CAROLINA CONSTRUCTION COMPANY, EMPLOYER-DEFENDANT,
AND/OR AUTO OWNERS INSURANCE COMPANY, ALLEGED CARRIER-DEFENDANT, AND/OR
DARGAN CONSTRUCTION COMPANY (GALLAGHER BASSET SERVICES, INC.,
THIRD-PARTY ADMINISTRATOR), DEFENDANTS

No. COA13-318

Filed 15 October 2013

Workers' Compensation—expired policy—non-renewal procedures—not applicable

The Industrial Commission correctly determined in a workers' compensation case that Auto-Owners Insurance Company (Auto Owners) was not providing plaintiff with workers' compensation insurance on the date of his accident and thus was not responsible for plaintiff's compensation. Since the employer never attempted to renew the policy, Auto-Owners necessarily could not have indicated its unwillingness to renew it and the procedures governing a refusal to renew in the policy and N.C.G.S. § 58-36-110(a) were inapplicable.

Appeal by plaintiff from opinion and award entered 24 October 2012 by the North Carolina Industrial Commission. Heard in the Court of Appeals 29 August 2013.

Lanier Law Group, P.A., by Michael F. Roessler, for plaintiff-appellant.

McAngus, Goudelock, & Courie, P.L.L.C., by Daniel L. McCullough and Layla T. Santa Rosa, for defendant-appellee Auto-Owners Insurance Company.

CALABRIA, Judge.

Julio Alberto Martinez Zaldana ("plaintiff") appeals from an opinion and award by the Full Commission of the North Carolina Industrial Commission ("the Commission"). The opinion and award concluded that defendant Auto-Owners Insurance Company ("Auto-Owners") was not liable for any benefits owed to plaintiff pursuant to the Workers' Compensation Act. We affirm.

On 9 December 2008, defendant Horace Smith d/b/a Carolina Construction Company ("Smith") obtained a workers' compensation

ZALDANA v. SMITH

[230 N.C. App. 134 (2013)]

insurance policy (“the policy”) from Auto-Owners with an effective date of 4 December 2008. The policy expired 4 December 2009. Smith initially made a down payment equal to two months of the insurance premium at the time Auto-Owners issued the policy, but failed to make any further premium payments.

On 12 February 2009, Auto-Owners sent written notice of cancellation to Smith that Auto-Owners would cancel the workers’ compensation insurance policy, effective 4 March 2009, if Smith failed to make his past due premium payments. While the policy was never formally cancelled, Smith failed to make any additional premium payments and did not request to have the policy renewed after its 4 December 2009 expiration date.

On 22 December 2009, plaintiff suffered a compensable injury by accident while working for Smith. Plaintiff was laying block around the elevators on the second floor of a hotel when the elevator came down from a higher floor and crushed him while he was leaning into the shaft to complete his work. Plaintiff sustained multiple injuries which required extensive medical care.

Plaintiff timely filed a claim and request for hearing with the Commission, seeking workers’ compensation from Smith, Auto-Owners, and Dargan Construction Company (“Dargan”), the general contractor for the job plaintiff was working on at the time he sustained his injuries.¹ Deputy Commissioner Adrian A. Phillips (“Deputy Commissioner Phillips”) held a hearing regarding plaintiff’s claim on 23 June 2011.

On 29 March 2012, Deputy Commissioner Phillips entered an opinion and award which concluded, *inter alia*, that, because Auto-Owners failed to properly terminate the policy issued to Smith, it was still in effect at the time of plaintiff’s compensable injuries. As a result, Auto-Owners was responsible for paying plaintiff’s workers’ compensation benefits. Auto-Owners appealed to the Full Commission.

On 24 October 2012, the Full Commission entered an opinion and award which reversed Deputy Commissioner Phillips’s conclusion that the policy was still in effect at the time plaintiff was injured. The Full Commission concluded that only Smith was liable for paying plaintiff’s workers’ compensation benefits.² Plaintiff appeals.

1. Plaintiff and Dargan entered into a settlement agreement regarding plaintiff’s claim and consequently Dargan is not a party to this appeal.

2. Smith did not appeal from the Full Commission’s opinion and award and is not a party to this appeal.

ZALDANA v. SMITH

[230 N.C. App. 134 (2013)]

Review of an opinion and award of the Industrial Commission “is limited to consideration of whether competent evidence supports the Commission’s findings of fact and whether the findings support the Commission’s conclusions of law.” *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008). “The Commission’s conclusions of law are reviewed *de novo*.” *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

Plaintiff argues that the Commission erred by concluding the policy issued by Auto-Owners was not in effect when he sustained his workplace injuries. Specifically, plaintiff contends that Auto-Owners failed to follow the nonrenewal procedures established by the policy and by N.C. Gen. Stat. § 58-36-110 (2011), and further contends that this failure caused the policy to automatically renew. We disagree.

Plaintiff relies upon similar provisions in the policy and N.C. Gen. Stat. § 58-36-110 to support its argument that the policy was still in effect at the time of his accident. The policy provided that “[Auto-Owners] may refuse to renew this policy: (a) if this policy is for a term of one year or less, we must provide you with notice of nonrenewal at least 45 days prior to the expiration date of the policy.” The policy additionally provided that any nonrenewal attempted or not made in compliance with paragraph (a) was not effective.

The policy’s quoted language was based upon the language of N.C. Gen. Stat. § 58-36-110, which provides:

(a) No insurer shall refuse to renew a policy of workers’ compensation insurance or employers’ liability insurance written in connection with a policy of workers’ compensation insurance except in accordance with the provisions of this section, and any nonrenewal attempted or made that is not in compliance with this section is not effective. This section does not apply if the policyholder has obtained insurance elsewhere, has accepted replacement coverage, or has requested or agreed to nonrenewal.

(b) An insurer may refuse to renew a policy that has been written for a term of one year or less at the policy’s expiration date by mailing written notice of nonrenewal to the insured not less than 45 days prior to the expiration date of the policy.

N.C. Gen. Stat. § 58-36-110 (2011). Thus, under both the policy and the statute, Auto-Owners could only “refuse to renew” Smith’s policy if it

ZALDANA v. SMITH

[230 N.C. App. 134 (2013)]

provided him with notice of nonrenewal at least 45 days prior to the expiration date of the policy.

In the instant case, the main dispute is over the interpretation of the term “refuse to renew.” The Commission concluded that the term “contemplate[s], at a minimum, an antecedent request to renew by the insured and payment of the premium necessary to effectuate renewal[.]” Based upon this interpretation, the Commission further concluded that Auto-Owners was not providing Smith with workers’ compensation coverage at the time of plaintiff’s accident.

Plaintiff contends that the Commission’s interpretation of the phrase “refuse to renew” is erroneous. Instead, plaintiff interprets that phrase to mean that “Auto-Owners was binding itself such that it could only give effect to its unwillingness to continue to offer the insurance policy if the company followed the procedure” included in the policy and the statute. Thus, under plaintiff’s proposed interpretation, an insurer that had never discussed the possibility of renewing a fixed term workers’ compensation policy with its insured would be considered perpetually liable for that insurance, even after its expiration, unless it followed the statutory procedures. This would be true even if the insured failed to make any payment towards a renewed policy and never otherwise indicated any desire to renew. Plaintiff is mistaken.

No prior published opinion from this Court has interpreted the phrase “refuse to renew” included in N.C. Gen. Stat. § 58-36-110. However, that phrase has been interpreted in the context of another insurance statute which uses it in a similar context. In *Associates Fin. Servs. Of Am. v. N.C. Farm Bureau Mut. Ins. Co.*, this Court analyzed the meaning of “refuse to renew” as used in N.C. Gen. Stat. § 58-41-20:

Because this statute does not define the phrase “refuse to renew,” we must construe this phrase in accordance with its plain meaning to determine the intent of the legislature. *See Electric Supply Co. v. Swain Electrical Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991). The plain meaning of “refuse” is “to indicate unwillingness to do.” *The American Heritage College Dictionary* 1148 (3rd ed. 1993). An insurer, therefore, “refuses to renew” a policy *when the insurer indicates an unwillingness to renew the policy.*

137 N.C. App. 526, 531, 528 S.E.2d 621, 624 (2000)(emphasis added). This definition, based upon the plain meaning of the phrase, can be equally applied to the instant case. If the evidence before the Commission demonstrated that Auto-Owners indicated to Smith an unwillingness to renew

ZALDANA v. SMITH

[230 N.C. App. 134 (2013)]

his policy, then it was refusing to renew the policy and required to follow the procedure set out in the policy and in N.C. Gen. Stat. § 58-36-110.

The definition for “refuse to renew” set out in *Associates* is inconsistent with plaintiff’s contention that the policy must automatically renew if Auto-Owners did not follow the refusal to renew procedure. An insurer cannot “indicate an unwillingness” to renew a policy merely by letting it expire under its own express terms. At a minimum, an insurer must, by word or action, specifically indicate to the insured that it is unwilling to renew the policy at issue. This requires the insured to actually seek renewal in such a way that the insurer can refuse to agree to it. Plaintiff’s interpretation could only satisfy this requirement by impermissibly rewriting both the policy and the statute to include an automatic renewal provision for all fixed-term workers’ compensation policies. See *Hartford Accident & Indem. Co. v. Hood*, 226 N.C. 706, 710, 40 S.E.2d 198, 201 (1946) (“The Court, under the guise of construction, cannot reject what the parties inserted or insert what the parties elected to omit.”); *Ferguson v. Riddle*, 233 N.C. 54, 57, 62 S.E.2d 525, 528 (1950) (“We have no power to add to or subtract from the language of the statute.”). Since the parties did not address renewal in the policy in the instant case, Auto-Owners could not refuse to renew unless Smith initiated a renewal attempt separate and apart from the policy itself that Auto-Owners then refused.

In its opinion and award, the Commission made the following findings regarding Auto-Owners’ actions with respect to the renewal of the policy:

8. Defendant Auto-Owners Insurance Company, through its authorized agents at Bradsher & Bunn Insurance Agency, Inc., issued a workers’ compensation insurance policy to Defendant Horace Smith d/b/a Carolina Construction Company on December 18, 2008. The policy indicated that the policy period was “from 12:01 A.M. 12-04-2008 TO 12:01 A.M. 12-04-2009.”

...

12. After failing to make any monthly premium payments on the policy covering the period from December 4, 2008 to December 4, 2009, Defendant Smith never sought to have the policy renewed and did not make any payments towards a renewal. Defendant Smith never requested that the policy be renewed and never took any action evincing a desire that the policy be renewed.

ZALDANA v. SMITH

[230 N.C. App. 134 (2013)]

. . .

14. There being no evidence of record that Defendant Auto-Owners Insurance Company would have refused to renew the fixed term policy had Defendant Smith requested renewal and made the necessary premium payment, the Full Commission finds that there has been no refusal to renew the policy on the part of Defendant Auto-Owners Insurance Company.

Based upon these findings, which plaintiff has not challenged, the Commission concluded that:

Defendant Auto-Owners Insurance Company was not on the risk and did not provide workers' compensation insurance for Defendant Smith on December 22, 2009. The policy of workers' compensation insurance that Defendant Smith obtained in December 2008 covered a fixed period and did not automatically renew at the end of the policy period. The Full Commission interprets the phrase "refuse to renew" in N.C. Gen. Stat. § 58-36-110(a) to contemplate, at a minimum, an antecedent request to renew by the insured and payment of the premium necessary to effectuate renewal[.] . . . Defendant Smith undertook absolutely no actions to keep coverage in effect after he obtained the policy, let alone undertaking any actions to seek renewal of the policy.

Thus, the Commission's unchallenged findings, which are binding on appeal, indicate that the policy was only for a fixed term and that Smith never made any attempt to have the policy renewed prior to the expiration of that fixed term. Since Smith never attempted to renew the policy, Auto-Owners necessarily could not have indicated its unwillingness to renew it. Therefore, the Commission's findings supported its conclusion that the procedures governing a refusal to renew in the policy and N.C. Gen. Stat. § 58-36-110(a) were both inapplicable. Accordingly, the Commission correctly determined that Auto-Owners was not providing Smith with workers' compensation insurance on the date of his accident and thus was not responsible for plaintiff's compensation. The Commission's opinion and award is affirmed.

Affirmed.

Judges STROUD and DAVIS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 1 OCTOBER 2013)

AMERICUS RETAIL HOLDINGS, LLC v. BALL No. 13-281	Mecklenburg (10CVS4711)	Reversed
CEBULA v. GIVENS EST., INC. No. 13-242	Buncombe (12CVS373)	Dismissed
DIAMOND v. CHARLOTTE- MECKLENBURG CNTY. BD. OF EDUC. No. 12-690-2	Mecklenburg (11CVS19276)	Affirmed
ELIZABETH TOWNES HOMEOWNERS ASS'N, INC. v. JORDAN No. 13-262	Mecklenburg (11CVS5323)	Affirmed
FED. NAT'L MORTG. ASS'N v. MCLEAN No. 13-364	Buncombe (12CVD3975)	Affirmed
FOX v. CITY OF GREENSBORO No. 13-171	Guilford (12CVS4940)	Dismissed
IN RE GORDON No. 13-322	Chatham (98CRS3356-58) (98CRS3363-65)	Dismissed
IN RE J.C. No. 13-136	Mecklenburg (12JB201)	Affirmed
IN RE N.J. No. 13-53	Durham (11JB87)	Affirmed in part; vacated and remanded in part
IN RE R.B. No. 13-503	Brunswick (12JA160) (12JA161)	Reversed
IN RE RADISI No. 13-285	Iredell (12SP244)	Dismissed
IN RE Z.A. No. 13-457	Durham (10JT285-287)	Affirmed
IRVING v. CHARLOTTE- MECKLENBURG BD. OF EDUC. No. 13-34	Mecklenburg (12CVS6149)	Affirmed

OWEN v. HOGSED No. 13-157	N.C. Industrial Commission (W85154)	Dismissed
RAYMOND v. NC POLICE BENEVOLENT ASS'N, INC. No. 13-192	Buncombe (08CVS4456)	Dismissed
STATE v. CARTER No. 12-1550	Mecklenburg (11CRS230416-17) (11CRS54377)	No Error
STATE v. CHESTER No. 12-1487	Catawba (11CRS8023)	No Error
STATE v. CHESTNUT No. 13-32	Columbus (10CRS53818-20)	No Error
STATE v. CYR No. 13-183	Wake (10CRS227200-01) (11CRS12776)	Dismissed
STATE v. FRYE No. 12-1507	Durham (11CRS50309) (11CRS5819)	NO ERROR, in part; JUDGMENT ARRESTED, in part; and REMANDED.
STATE v. HOLMES No. 12-1580	Cumberland (09CRS65623-25) (10CRS50518)	No Error
STATE v. MAYWEATHER No. 13-316	New Hanover (11CRS57410-11)	Affirmed
STATE v. MEADOWS No. 12-1539	Onslow (11CRS52980)	Reversed and Remanded
STATE v. MOORE No. 13-135	Anson (10CRS1744)	No Error
STATE v. PARKER No. 13-97	Nash (11CRS54616-17)	No Error in Part; Reversed and Remanded in Part

STATE v. RAMBERT No. 12-1558	Onslow (11CRS55123)	AFFIRMED, in part, REVERSED and REMANDED, in part.
STATE v. RAMOS No. 13-255	Guilford (11CRS91417-18)	No Error
STATE v. SUTTON No. 13-229	Carteret (11CRS55947-48) (12CRS341)	No Error
STATE v. WATKINS No. 13-56	Wake (08CRS20841) (08CRS38000-02) (12CRS5593-95)	No Error
STATE v. WATTS No. 13-24	Union (11CRS52696)	Remanded for Resentencing
WALKER v. N.C. DEPT OF CORR. No. 13-189	N.C. Industrial Commission (TA-21910)	Affirmed

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 15 OCTOBER 2013)

ALSTON v. N.C. A & T STATE UNIV. No. 13-137	N.C. Industrial Commission (X08915) (X11898)	Affirmed
BB&T v. BING No. 13-184	Wilson (12CVS643)	Affirmed
ELLIS v. ELLIS No. 13-351	Durham (11CVD709)	Dismissed
FIRST BANK v. S&R GRANDVIEW, L.L.C. No. 13-343	Montgomery (11CVS74)	Dismissed in part; affirmed in part
FOOT LOCKER, INC. v. BEST No. 13-248	Wake (11CVD13709)	Reversed and remanded
FORD v. CITY OF WILSON No. 13-376	Wilson (12CVS1214)	Dismissed
HARVELL v. WIX FILTRATION, LLC No. 13-100	N.C. Industrial Commission (W78766)	Affirmed
IN RE D.C. No. 13-502	Chatham (10JT46)	Reversed and Remanded
IN RE E.G. No. 13-538	Mecklenburg (12JA378)	Reversed and Remanded
IN RE J.D.M. No. 13-491	Rowan (08JT82)	Affirmed
IN RE R.N.H. No. 13-506	Yadkin (11JT53-54)	Affirmed
LYNCH v. OAK ISLAND BEACH VILLA OWNERS ASS'N, INC. No. 13-177	Brunswick (12CVS1532)	Dismissed
MORALES v. MORALES No. 13-406	Pitt (07CVD2177)	Dismissed
MORGAN v. MORGAN No. 13-134	Onslow (11CVD4056)	Affirmed

SKANSKA USA BLDG., INC. v. BLYTHE DEV. CO. No. 13-314	Wake (11CVS13406)	Dismissed
SMITH v. PARKER No. 13-269	Mecklenburg (12CVS13805)	Dismissed
SMITH v. SMITH No. 13-459	Craven (12CVD620)	Affirmed
STATE v. ADAMS No. 13-153	Durham (12CRS3906) (12CRS50223-24)	No Error
STATE v. ALLISON No. 13-129	Gaston (12CRS51932)	Affirmed
STATE v. AUTERY No. 13-348	Guilford (12CRS24406) (12CRS76503-04)	No Error
STATE v. BARNES No. 13-354	Wake (12CRS6364-66)	Affirmed
STATE v. BARNES No. 13-417	Wayne (11CRS4610) (11CRS52979)	No Error
STATE v. BLACKWELL No. 13-296	Person (12CRS297-299) (12CRS50170-72)	AFFIRMED in part; VACATED and REMANDED in part
STATE v. BOYKIN No. 13-487	Sampson (10CRS3226) (10CRS3232) (10CRS52386-87) (10CRS52636) (10CRS704864)	Remanded for resentencing.
STATE v. COLEMAN No. 13-373	Alamance (11CRS57670) (12CRS4779)	No Error
STATE v. EARNHARDT No. 12-1441	Rowan (09CRS56355-56)	No Error
STATE v. EL No. 13-295	Wake (10CRS220290-93)	No Error

STATE v. FOOTE No. 13-334	Rockingham (11CRS125-126)	No error; remanded for resentencing
STATE v. GARNER No. 13-182	Wayne (10CRS54888)	No error in part; remand for correction of clerical error in part.
STATE v. GOLDMAN No. 12-1509	Forsyth (11CRS17156)	New Trial
STATE v. GREGORY No. 13-416	Wake (10CRS223677)	No Error
STATE v. GRESHAM No. 13-326	Martin (10CRS50245) (11CRS40)	No Error
STATE v. HORN No. 13-141	Wayne (10CRS52590)	Dismissed
STATE v. JACKSON No. 13-357	Durham (12CRS5265)	Affirmed
STATE v. JOLLY No. 12-1389	Cleveland (11CRS1911-15) (11CRS1917-18) (11CRS2111)	No error in part; remanded in part
STATE v. LEWIS No. 13-309	Forsyth (11CRS26774)	No Error
STATE v. LILLIE No. 13-390	Durham (11CRS50268-69) (11CRS50273)	No Error
STATE v. LUKOWITSCH No. 13-133	Mecklenburg (11CRS218296)	No Error
STATE v. McDONALD No. 13-210	Sampson (11CRS53331)	No Error
STATE v. McMILLAN No. 13-527	Alleghany (11CRS50487)	Affirmed
STATE v. MILLS No. 13-497	McDowell (09CRS51654)	Dismissed

STATE v. MOTT No. 13-88	Henderson (11CRS702596)	Dismissed
STATE v. PATTERSON No. 13-114	Avery (08CRS50357)	Reversed and Remanded
STATE v. RICH No. 13-299	Haywood (11CRS54230-31)	No Error
STATE v. SCOTT No. 13-345	Davidson (12CRS3711)	Affirmed
STATE v. SMITH No. 13-473	Randolph (10CRS16-25)	No Error
STATE v. STRICKLAND No. 13-484	Robeson (10CRS55960) (10CRS55964) (11CRS827)	Remanded for new sentencing hearing.
STATE v. THOMPSON No. 13-438	Bladen (11CRS50176)	Vacated
STATE v. TOMLINSON No. 13-398	Edgecombe (11CRS53674) (11CRS53677)	Vacated in part; no error in part; motion for appropriate relief allowed in part and dismissed in part.
STATE v. TOOMER No. 13-541	Durham (10CRS60247-49)	No Error
STATE v. TROXLER No. 13-79	Guilford (11CRS24722) (11CRS84512) (12CRS24018)	No Error
STATE v. VILLANUEVA No. 13-116	Alamance (12CRS52914)	Reversed
STATE v. WALTON No. 13-203	Mecklenburg (10CRS240514-17) (10CRS58159)	No Error
STATE v. WASH No. 13-108	Craven (11CRS52536-37) (12CRS330-333)	No Error
STATE v. WEICHELT No. 13-111	Moore (11CRS53120)	Affirmed

STATE v. WILLIAMS No. 13-47	Mecklenburg (12CRS18886)	Affirmed
STATE v. VAUGHN No. 11-751-2	Wake (09CRS203672) (09CRS203694) (09CRS204802) (09CRS55870)	No Error
WALKER v. N.C. DEP'T OF CORR. No. 13-477	N.C. Industrial Commission (TA-22147)	Affirmed
WALKER v. N.C. DEP'T OF CORR. No. 13-476	N.C. Industrial Commission (TA-22024)	Affirmed
WARD v. CARMONA No. 13-258	Wake (11CVD4051)	No Error
WRI/RALEIGH LP v. RICHARDSON No. 13-291	Wake (10CVS13451)	Affirmed in Part and Reversed in Part

BUSIK v. N.C. COASTAL RES. COMM'N

[230 N.C. App. 148 (2013)]

KEVAN BUSIK, PETITIONER

v.

NORTH CAROLINA COASTAL RESOURCES COMMISSION; NORTH CAROLINA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, NORTH CAROLINA
DIVISION OF COASTAL MANAGEMENT, RESPONDENTS AND 1118 LONGWOOD AVENUE
REALTY CORPORATION, RESPONDENT-INTERVENOR

No. COA12-1491

Filed 5 November 2013

1. Environmental Law—Coastal Area Management Act—oceanfront construction setbacks—regulatory interpretation

The trial court did not err in a case involving the interpretation and application of certain rules governing oceanfront construction setbacks contained in 15A NCAC 7H. 0306 by concluding, as a matter of law, that there was no error in applying a 60-foot setback from the ocean's vegetation line. This interpretation comported with the plain meaning of the regulations.

2. Appeal and Error—argument moot

Petitioner's argument the North Carolina Coastal Resources Commission's (Commission) interpretation of 15A NCAC 7H. 0306 was not entitled to deference as a matter of law "because it [was] erroneous" was moot where the Court of Appeals determined that the Commission's application of the regulations was consistent with the plain meaning of the text.

3. Administrative Law—North Carolina Coastal Resources Commission—review of administrative law judge's decision—changes to legal conclusions

The North Carolina Coastal Resources Commission (Commission) did not err in its review of an administrative law judge's (ALJ) decision by adopting certain new findings of fact and striking other findings of fact instead of remanding the matter back to the ALJ, as required by N.C.G.S. § 150B-36(d). The Commission made changes to legal conclusions and not factual findings.

Appeal by Petitioner from order and judgment entered 20 April 2012 by Judge James Gregory Bell in Brunswick County Superior Court. Heard in the Court of Appeals 5 June 2013.

Shanklin & Nichols, LLP, by Kenneth A. Shanklin, and Cynthia W. Baldwin, for Petitioner.

BUSIK v. N.C. COASTAL RES. COMM'N

[230 N.C. App. 148 (2013)]

Attorney General Roy Cooper, by Special Deputy Attorney General Mary L. Lucasse and Assistant Attorney General Christine A. Goebel, and Wessell & Raney, LLP, by William A. Raney, Jr., for Respondents and Respondent-Intervenor.

DILLON, Judge.

Petitioner appeals from an order in which the trial court concluded, as a matter of law, that there was no error in applying a 60-foot setback from the ocean's vegetation line, instead of a 120-foot setback, in connection with a proposed development. We affirm the order of the trial court.

I. Background and Procedural History

This matter involves a dispute regarding the interpretation and application of certain rules governing oceanfront construction setbacks as contained in 15A NCAC 7H. 0306 (the "Setback Rules") to the proposed development of a single-family residence and appurtenant structures (the "Proposed Development") on an oceanfront lot located on Bald Head Island (the "Property"). The portions of the Setback Rules relevant to the issues in this case provide, in part, that "[a] building or structure less than 5,000 square feet requires a minimum setback [from the ocean's vegetation line] of 60 feet" and that "[a] building or structure [between] 5,000 square feet [and] 10,000 square feet requires a minimum setback of 120 feet[.]" 15A NCAC 7H. 0306(a)(2)(A)-(B) (2010). The central issue is whether the Setback Rules require that the Proposed Development is subject to a setback distance from the ocean vegetation line of 60 feet or of 120 feet.

The Property is owned by 1118 Longwood Avenue Realty Corporation ("Longwood"). Longwood's Proposed Development consists of a 4,292 square-foot single-family residence; a 586 square-foot crofter/garage apartment; a 150 square-foot elevated mechanical platform; and a 800 square-foot raised deck parking area. Because of the location of the Proposed Development, Longwood was required to obtain a Minor Development Permit (the "CAMA Permit")¹ from the North Carolina Coastal Resources Commission (the "Commission") to ensure, in part, that the Proposed Development complied with the Setback Rules. Since no structure within the Proposed Development was to exceed 5,000

1. "CAMA" refers to the Coastal Area Management Act. N.C. Gen. Stat. § 113A-100, *et seq.*

BUSIK v. N.C. COASTAL RES. COMM'N

[230 N.C. App. 148 (2013)]

square feet, Longwood sought the CAMA Permit based on a setback of 60 feet.

On 16 April 2010, the CAMA Local Permit Officer (the “LPO”) for Bald Head Island² issued the CAMA Permit to Longwood for the Proposed Development, requiring a setback of 60 feet from the ocean vegetation line, based on her interpretation of the Setback Rules.

On 6 December 2010, Kevan Busik (“Petitioner”), who owns a single-family residence on the lot next to the Property, filed a contested case hearing in the Office of Administrative Hearings (“OAH”) against the Commission, arguing that the LPO should have issued a permit requiring a setback of 120 feet from the vegetation line since the *combined* size of the four structures within the Proposed Development would exceed 5,000 square feet.³ As the permittee, Longwood was allowed to intervene. Sometime thereafter, both Petitioner and the Commission filed motions for summary judgment with the Administrative Law Judge (the “ALJ”).

On 1 July 2011, the ALJ entered an Order and Decision granting Petitioner’s Motion for Summary Judgment, concluding that, as a matter of law, the LPO acted erroneously in not including all proposed appurtenances in her determination of the setback required by the Setback Rules and that, therefore, the Proposed Development is subject to a setback of 120 feet, rather than 60 feet. According to the law in effect at the time, the ALJ was required to submit his recommended decision, including findings of fact and conclusions of law, to the Commission, who was responsible for making the final decision.

On 21 October 2011, the Commission issued its Final Agency Decision reversing the decision of the ALJ and concluding, as a matter of law, that the LPO did *not* err in issuing the Permit requiring a setback of 60 feet. From this Final Agency Decision, Petitioner filed a Petition for Judicial Review with the Brunswick County Superior Court.

On 20 April 2012, the Superior Court issued its Order and Judgment agreeing with the decision of the Commission and concluding, as a

2. The Proposed Development is a “minor development” as defined in N.C. Gen. Stat. § 113A-118 (2011). A CAMA permit may be issued for a minor development under an expedited procedure “from the appropriate city or county[,]” as was done here. N.C. Gen. Stat. § 113A-118(b) (2011).

3. Petitioner had initially sought to file a contested case hearing with the North Carolina Coastal Resource Commission regarding this matter, a request which was denied by the Commission. However, on appeal, the Superior Court reversed the Commission’s decision and granted Petitioner’s right to file a contested case hearing.

BUSIK v. N.C. COASTAL RES. COMM'N

[230 N.C. App. 148 (2013)]

matter of law, that the LPO did not err in applying a 60-foot setback in connection with the Proposed Development. From this Order and Final Judgment, Petitioner appeals to this Court.

II. Analysis

On appeal, Petitioner argues (1) that the Superior Court erred in its interpretation of the Setback Rules, (2) that the Commission's interpretation of the Setback Rules is not entitled to deference and (3) that there are disputed issues of fact that make the entry of summary judgment improper.

A. Interpretation of Setback Rules

[1] The Setback Rules were established by the Commission pursuant to its authority granted under the Coastal Area Management Act of 1974 ("CAMA"). N.C. Gen. Stat. § 113A-100, *et seq.* Specifically, the Legislature mandated that the Commission "be responsible for the preparation, adoption, and amendment of the State guidelines" regarding, *inter alia*, standards to be followed in the development of certain land within the coastal area. N.C. Gen. Stat. § 113A-107(b). Pursuant to its authority, the Commission has promulgated certain rules pertaining to coastal development, primarily found in Title 15A, Chapter 7 of the North Carolina Administrative Code. The Setback Rules are found in 15A NCAC 07H .0306 and state as follows:

(a) In order to protect life and property, all development not otherwise specifically exempted or allowed by law or elsewhere in the CRC's Rules shall be located according to whichever of the following is applicable:

(1) The ocean hazard setback for development is measured in a landward direction from the vegetation line, the static vegetation line or the measurement line, whichever is applicable. The setback distance is determined by both the size of development and the shoreline erosion rate as defined in 15A NCAC 07H .0304. Development size is defined by total floor area for structures and buildings or total area of footprint for development other than structures and buildings. Total floor area includes the following:

(A) The total square footage of heated or air-conditioned living space;

(B) The total square footage of parking elevated above ground level; and

BUSIK v. N.C. COASTAL RES. COMM'N

[230 N.C. App. 148 (2013)]

(C) The total square footage of non-heated or non-air-conditioned areas elevated above ground level, excluding attic space that is not designed to be load bearing.

Decks, roof-covered porches and walkways are not included in the total floor area unless they are enclosed with material other than screen mesh or are being converted into an enclosed space with material other than screen mesh.

Id.

15A NCAC 07H .0306 further states the following:

(2) With the exception of those types of development defined in 15A NCAC 07H .0309, no development, including any portion of a building or structure, shall extend oceanward of the ocean hazard setback distance. This includes roof overhangs and elevated structural components that are cantilevered, knee braced, or otherwise extended beyond the support of pilings or footings. The ocean hazard setback is established based on the following criteria:

(A) A building or other structure less than 5,000 square feet requires a minimum setback of 60 feet or 30 times the shoreline erosion rate, whichever is greater;

(B) A building or other structure greater than or equal to 5,000 square feet but less than 10,000 square feet requires a minimum setback of 120 feet or 60 times the shoreline erosion rate, whichever is greater;⁴

Id.

Petitioner argues that based on certain phrases in subsection (1) of the Setback Rules – most notably the provision that the setback distance shall be determined “by the size of development” and the provision defining “total floor area” – the plain meaning of the Setback Rules is that all structures within a development are to added together to determine the required setback distance.

4. In addition to parts (A) and (B), subsection (2) contains nine other parts regarding setback requirements for buildings larger than 10,000 square feet as well as for parking lots and other infrastructure. 15A NCAC 07H .0306(2)(C) through (2)(K).

BUSIK v. N.C. COASTAL RES. COMM'N

[230 N.C. App. 148 (2013)]

The Commission's stance and Longwood's argument is that the language of subsection (1) is merely meant to describe what portions of a particular structure are to be included when determining its square footage and that the plain language of subsection (2) is clear that the setback distance is to be applied separately for each "building or structure."

After carefully reviewing the text of the Setback Rules, we agree with the interpretation propounded by Longwood and adopted by the Commission. The portion of the Setback Rules which sets forth the actual setback distances is provided by subsection (2). The plain reading of subsection (2)(A) — which provides that "[a] building or structure less than 5,000 square feet requires a minimum setback of 60 feet" — and of subsection (2)(B) — which provides that "[a] building or other structure [between 5,000 and 10,000 square feet] requires a minimum setback of 120 square feet" — is that the setback criteria is based on the size of the individual building or structure involved. 15A NCAC 07H .0306; *see also HCA Crossroads Residential Ctrs. v. North Carolina Dep't of Human Resources*, 327 N.C. 573, 578, 398 S.E.2d 466, 470 (1990) (stating that "a statute must be construed, if possible, to give meaning and effect to all of its provisions"). If the Commission had intended that the required setback distance for a project with multiple structures be calculated by adding the square footage of all the structures, it could easily have employed the phrase "a development" or "a development project" in subsection (2)(A) and (2)(B). However, the Commission chose to employ the phrase "[a] building or other structure." 15A NCAC 07H .0306(2)(A) and (2)(B).

Further, we believe the Commission's decision to base the required setback for any development, in part, on the size of each building or structure is consistent with CAMA's goal to "provide a management system capable of preserving and managing the natural ecological conditions of the . . . barrier dune system, and the beaches, so as to safeguard and perpetuate their natural productivity and their biological, economic and esthetic values." N.C. Gen. Stat. § 113A-102(b)(1) (2011). In other words, we believe it is consistent with the goals of CAMA that the Commission promulgate rules requiring larger structures to be farther from the shoreline.

We also believe that the interpretation propounded by Petitioner could lead to inconsistent results. For instance, if a developer sought a CAMA permit to build five 1,000 square-foot rental homes on a single 5-acre tract of land, he would have to build each home 120 feet from the ocean vegetation line, since the size of the "development" would be 5,000 square feet. However, if he obtained approval from the town to

BUSIK v. N.C. COASTAL RES. COMM'N

[230 N.C. App. 148 (2013)]

subdivide his land into five 1-acre lots, then he could apply for five separate CAMA permits and build five 4,999 square-foot homes, each with only a 60-foot setback.

B. Commission Deference

[2] Petitioner next argues that the Commission's interpretation of the Setback Rules is not entitled to deference as a matter of law "because it is erroneous." Petitioner cites our Supreme Court for the proposition that "courts consider, but are not bound by, the interpretations of administrative agencies and boards." *Morris Communications Corp. v. City of Bessemer City Zoning Bd. of Adjustment*, 365 N.C. 152, 156, 712 S.E.2d 868, 871 (2011). However, because we hold that the Commission applied the Setback Rules consistent with the plain meaning of the text, Petitioner's argument is moot.

C. Appropriateness of Summary Judgment

[3] In his final argument, Petitioner contends that the Commission erred in its review of the ALJ's decision. Petitioner contends that the Commission did not follow the procedure set forth in N.C. Gen. Stat. § 150B-36(d) by not remanding the matter back to the ALJ, but instead electing to adopt certain new findings of fact and strike other findings of fact. N.C. Gen. Stat. § 150B-36 (2011) (Repealed by 2011 N.C. Sess. Laws ch. 398, § 20).⁵ Under the former N.C. Gen. Stat. § 150B-36(d), where an ALJ grants summary judgment in a contested case, "[i]f the agency does not adopt the [ALJ's] decision, it shall set forth the basis for failing to adopt the decision and shall remand the case to the [ALJ] for hearing." *Id.*

Specifically, Petitioner argues that the Commission "revamped" the ALJ's findings of fact 11, 12, 13, 16 and 30 without remanding the matter for a contested hearing regarding those findings. However, we have carefully reviewed the changes made by the Commission and conclude

5. 2011 N.C. Sess. Laws ch. 398, § 63, as amended by 2012 N.C. Sess. Laws ch. 187, § 8.1, provides in relevant part: "Sections 15 through 55 of this act become effective January 1, 2012, and apply to contested cases commenced on or after that date. With regard to contested cases affected by Section 55.2 of this act, the provisions of Sections 15 through 27 of this act become effective when the United States Environmental Protection Agency approvals referenced in Section 55.2 have been issued or October 1, 2012, whichever occurs first. With regard to contested cases affected by Section 55.1 of this act, the provisions of Sections 15 through 27 and Sections 32 and 33 of this act become effective when the waiver referenced in Section 55.1 has been granted or February 1, 2013, whichever occurs first. Unless otherwise provided elsewhere in this act, the remainder of this act is effective when it becomes law."

BUSIK v. N.C. COASTAL RES. COMM'N

[230 N.C. App. 148 (2013)]

that the changes were, rather, of legal conclusions. For instance, the Commission's changes to findings of fact 11, 12, and 13 relate to whether to include the square footage of "appurtenances" within the square footage calculation under the Setback Rules. Also, in finding of fact 16, the Commission merely added a portion of the Setback Rules to this finding.⁶ See *N.C. Farm Bureau Mut. Ins. Co. v. Cully's Motorcross Park, Inc.*, __ N.C. __, __, 742 S.E.2d 781, 789 (2013) (stating that "plaintiff did not challenge the trial court's findings of fact *as findings of fact*; rather, plaintiff challenged what the trial court labeled 'findings of fact,' . . . [and] [i]n essence, plaintiff challenged the trial court's conclusions of law"); *In re Foreclosure by David A. Simpson, P.C.*, 211 N.C. App. 483, 487-88, 711 S.E.2d 165, 169 (2011) (stating that "[w]hen this Court determines that findings of fact and conclusions of law have been mislabeled by the trial court, we may reclassify them, where necessary, before applying our standard of review").

III. Conclusion

Based on the foregoing, we affirm the 20 April 2012 Order and Judgment of the trial court affirming the Commission's Final Agency Decision.

AFFIRMED.

Judge BRYANT and Judge STEPHENS concur.

6. It is unclear the nature of Petitioner's argument as it relates to the Commission's finding of fact 30. Petitioner included as an exhibit to his brief a copy of the Commission's decision with the changes to the ALJ's findings noted. However, Petitioner does not argue the nature of any of the changes; and, further, it is not apparent from the Commission's decision attached to Petitioner's brief that the Commission actually made any change to the ALJ's finding of fact 30.

CHAFFINS v. TAR HEEL CAPITAL CORP.

[230 N.C. App. 156 (2013)]

SONYA CHAFFINS, EMPLOYEE, PLAINTIFF-APPELLEE

v.

TAR HEEL CAPITAL CORPORATION, EMPLOYER, AND COMPANION PROPERTY
& CASUALTY CO., CARRIER, DEFENDANT-APPELLANTS

No. COA13-332

Filed 5 November 2013

Workers' Compensation—medical expenses—injury—no causal relationship

The Industrial Commission erred in a workers' compensation case by ordering defendants to compensate plaintiff for medical expenses related to the treatment of plaintiff's right shoulder and neck. No competent evidence supported the trial court's finding of a causal relationship between plaintiff's 7 October 2010 fall and her right shoulder and neck injury.

Appeal by defendants Tar Heel Capital Corporation and Companion Property & Casualty Co. from the opinion and award of the Industrial Commission filed 6 February 2013. Heard in the Court of Appeals 28 August 2013.

Williams & Mills, PLLC, by Reed G. Williams, for plaintiff-appellee.

Rudisill, White & Kaplan, PLLC, by Stephen Kushner, for defendant-appellants.

McCULLOUGH, Judge.

Defendants Tar Heel Capital Corporation, the employer, and Companion Property & Casualty Co., the insurance carrier, appeal from the opinion and award of the Industrial Commission (the "Commission") in favor of employee Sonya Chaffins ("plaintiff"). For the following reasons, we reverse.

I. Background

This workers' compensation action stems from an admittedly compensable back injury suffered by plaintiff on 1 August 2002. Since that time, plaintiff has undergone eleven different surgeries on her spine and has required continuing treatment. Plaintiff initially received indemnity and medical compensation as a consequence of her injury. However, on 24 April 2007, the parties entered into a Partial Agreement for Final

CHAFFINS v. TAR HEEL CAPITAL CORP.

[230 N.C. App. 156 (2013)]

Compromise Settlement and Release that resolved the indemnity portion of plaintiff's claim; the medical portion of plaintiff's claim remains open to this day. The Partial Agreement for Final Compromise Settlement and Release was approved by the Commission by order filed 7 June 2007.

As a result of plaintiff's back injury and subsequent surgeries, plaintiff's legs occasionally buckle, causing her to fall. Pertinent to this case, plaintiff fell on 7 October 2010 when her left leg gave out as she was getting into her car. Plaintiff testified that when she began to fall, she attempted to catch herself by grabbing the car door with her right hand. Plaintiff's attempt, however, was unsuccessful and she fell to the ground, twisting her right shoulder. Plaintiff indicated that she experienced severe pain in her right shoulder as a result of the fall.

After several months without treatment, plaintiff's nurse case manager, Ms. Lisa Hollifield, referred plaintiff to Dr. Jesse L. West, IV, for treatment of plaintiff's right shoulder. At that time, Dr. West was an orthopedic surgeon at Carolina Hand and Sports Medicine, P.A., whose practice focused on the upper extremities. Dr. West first examined plaintiff on 31 January 2011. Following the examination, Dr. West formed the initial impression that plaintiff suffered severe biceps tendonitis and right shoulder impingement. For treatment, Dr. West provided plaintiff steroid injections to the areas of plaintiff's discomfort and ordered six weeks of physical therapy for iontophoresis and rotator cuff strengthening.

On 21 March 2011, plaintiff returned to Dr. West for a follow-up appointment. Due to plaintiff's lack of improvement and continued right shoulder pain, Dr. West changed his impression to possible right-side cervical radiculopathy and ordered either an MRI or CT myelogram to evaluate plaintiff for cervical stenosis.

At that point, on 28 March 2011, Ms. Hollifield was notified that defendants would not authorize any further treatment to plaintiff's right shoulder, effectively denying the compensability of plaintiff's right shoulder injury.

Nevertheless, a CT myelogram was performed and plaintiff returned to Dr. West for a third appointment on 18 April 2011. Upon review of the CT myelogram, Dr. West noted that plaintiff suffered from multilevel degenerative disc disease with central canal stenosis and changed his impression to right-side cervical radiculopathy. Because plaintiff's right shoulder injury was related to her neck, Dr. West then referred plaintiff to Dr. Stephen M. David, an orthopedic surgeon whose practice focused on the spine, for a consultation. Plaintiff, however, never saw Dr. David concerning her neck and shoulder.

CHAFFINS v. TAR HEEL CAPITAL CORP.

[230 N.C. App. 156 (2013)]

Plaintiff initiated the present action on 22 June 2011 by filing a Form 33 request for a hearing. Following defendants' Form 33R response, the matter came on for hearing on 15 December 2011 in Asheville before Deputy Commissioner Melanie Wade Goodwin. On 26 July 2012, an opinion and award by Deputy Commissioner Goodwin was filed ruling in favor of plaintiff. Defendants appealed to the full commission.

The full commission heard the matter on 5 December 2012. Thereafter, an opinion and award for the full commission was filed on 6 February 2012 affirming the deputy commissioner's opinion and award with minor modifications. The full commission concluded plaintiff's fall on 7 October 2010 "and the consequent injury to her right shoulder and neck, were a direct and natural result of her admittedly compensable injury of 1 August 2002[]" and ordered defendants to pay medical expenses related to the treatment of plaintiff's right shoulder and neck. Defendants appealed to this Court.

II. Discussion

On appeal, defendants contend the Commission erred in ordering them to compensate plaintiff for medical expenses related to the treatment of plaintiff's right shoulder and neck. Specifically, defendants argue there is no competent evidence to support the Commission's conclusion that the injury to plaintiff's right shoulder and neck was "a direct and natural result of her admittedly compensable injury of 1 August 2002." For the sake of clarity, we emphasize that the issue on appeal is not whether plaintiff's fall on 7 October 2010 was a result of her admittedly compensable injury of 1 August 2002; but whether the injury to plaintiff's neck, which was determined to be the cause of plaintiff's right shoulder pain, was a result of plaintiff's 7 October 2010 fall and, therefore, related back to plaintiff's admittedly compensable injury.

This Court's review of an opinion and award of the Commission "is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law. This 'court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.'" *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citation omitted) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). "The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson*, 265 N.C. at 433-34, 144 S.E.2d at 274.

CHAFFINS v. TAR HEEL CAPITAL CORP.

[230 N.C. App. 156 (2013)]

In the instant case, the Commission issued numerous findings of fact that summarize and recite medical records and testimony.¹ Based on the evidence in these purported findings of fact, the Commission then issued its ultimate finding of fact and conclusion of law concerning causation. In what the Commission labeled conclusion of law number two, the Commission found, “[w]hen Plaintiff attempted to prevent her 7 October 2010 fall by grabbing her car door handle with her right hand, she injured her right shoulder and neck.” See *State ex rel. Utilities Comm. v. Eddleman*, 320 N.C. 344, 351, 358 S.E.2d 339, 346 (1987) (“Findings of fact are statements of what happened in space and time.”). The Commission then concluded “[t]his [fall], and the consequent injury to her right shoulder and neck, were a direct and natural result of her admittedly compensable injury of 1 August 2002.” See *Guox v. Satterly*, 164 N.C. App. 578, 582, 596 S.E.2d 452, 455 (2004) (“A determination which requires the exercise of judgment or the application of legal principles is more appropriately a conclusion of law.”).

Having pinpointed the Commission’s ultimate finding that plaintiff injured her right shoulder and neck in her 7 October 2010 fall, we now review the record for any competent evidence supporting the finding. Upon review, we find no such evidence.

“In a workers’ compensation claim, the employee ‘has the burden of proving that his claim is compensable.’ ” *Holley v. ACTS, Inc.*, 357 N.C. 228, 231, 581 S.E.2d 750, 752 (2003) (quoting *Henry v. A.C. Lawrence Leather Co.*, 231 N.C. 477, 479, 57 S.E.2d 760, 761 (1950)).

A subsequent injury is compensable if it is the direct and natural result of a compensable primary injury. As long as the primary injury is shown to have arisen out of and in the course of employment, then every natural consequence flowing from that injury likewise arises out of the employment. The subsequent injury is not compensable if it is the result of an independent, intervening cause.

Nale v. Ethan Allen, 199 N.C. App. 511, 515, 682 S.E.2d 231, 235 (2009) (citation omitted). “Still, ‘the employment-related accident need not be the sole causative force to render an injury compensable’ so long as competent evidence proves it to be a ‘causal factor.’ ” *Cawthorn v. Mission Hosp., Inc.*, 211 N.C. App. 42, 47, 712 S.E.2d 306, 310 (2011)

1. Although evidence in the record supports these purported findings of fact, we note that “findings of fact must be more than a mere summarization or recitation of the evidence” *Lane v. American Nat’l Can Co.*, 181 N.C. App. 527, 531, 640 S.E.2d 732, 735 (2007).

CHAFFINS v. TAR HEEL CAPITAL CORP.

[230 N.C. App. 156 (2013)]

(quoting *Holley*, 357 N.C. at 231–32, 581 S.E.2d at 752 (internal quotation marks and citations omitted)).

As explained by our Supreme Court,

[t]he quantum and quality of the evidence required to establish *prima facie* the causal relationship will of course vary with the complexity of the injury itself. There will be many instances in which the facts in evidence are such that any layman of average intelligence and experience would know what caused the injuries complained of. On the other hand, where the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury.

Click v. Pilot Freight Carriers, Inc., 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980) (internal quotation marks and citations omitted). “Although medical certainty is not required, an expert’s ‘speculation’ is insufficient to establish causation.” *Holley*, 357 N.C. at 234, 581 S.E.2d at 754. “The evidence must be such as to take the case out of the realm of conjecture and remote possibility, that is, there must be sufficient competent evidence tending to show a proximate causal relation.” *Id.*, 357 N.C. at 232, 581 S.E.2d at 753 (quoting *Gilmore v. Hoke Cty. Bd. of Educ.*, 222 N.C. 358, 365, 23 S.E.2d 292, 296 (1942)). “Stating an accident ‘could or might’ have caused an injury, or ‘possibly’ caused it is not generally enough alone to prove medical causation; however, supplementing that opinion with statements that something ‘more than likely’ caused an injury or that the witness is satisfied to a ‘reasonable degree of medical certainty’ has been considered sufficient.” *Carr v. Dep’t. of HHS (Caswell Ctr.)*, __ N.C. App. __, __, 720 S.E.2d 869, 873 (2012).

As noted above, upon review of the CT myelogram in this case, Dr. West noted that plaintiff suffered from multilevel degenerative disc disease with central canal stenosis and changed his impression to right-side cervical radiculopathy. Given the complex nature of plaintiff’s injury, testimony from plaintiff that the pain in her shoulder and neck did not occur until after her 7 October 2010 fall was insufficient to support the finding of a causal relationship. See *Young v. Hickory Business Furniture*, 353 N.C. 227, 232, 538 S.E.2d 912, 916 (2000) (temporal proximity is not competent evidence of causation when addressing a complicated medical condition). Instead, evidence of medical causation was necessary.

CHAFFINS v. TAR HEEL CAPITAL CORP.

[230 N.C. App. 156 (2013)]

As recited in the Commission's purported finding of fact number twelve, the only medical evidence supporting the finding that plaintiff injured her right shoulder and neck in the 7 October 2010 fall is a notation made in plaintiff's medical record by Dr. West during plaintiff's 18 April 2011 visit. That notation states, "[h]er new onset shoulder pain that occurred from her fall in October 2010 appears to be in fact related to her neck[.]" The Commission then found that "Dr. West testified that it was at least as likely as not that [p]laintiff's complaints of pain were consistent with the injury mechanism [p]laintiff described to him."

Although the notation in the medical record appears to support the Commission's finding, we hold the notation is not competent evidence of causation given that the notation was not Dr. West's opinion. As Dr. West explained the medical record at his deposition, he discounted the notation by testifying that "[t]hat was the history related [sic] to me at the initial visit." Furthermore, Dr. West's statement that "[i]t's at least as likely as not[]" that plaintiff's complaints of pain were consistent with the injury mechanism plaintiff described is insufficient to establish a causal relationship. Dr. West's statement merely amounts to speculation.

The speculative nature of Dr. West's opinion is further evident from his responses that "[i]t's possible" or "50/50" that plaintiff's right shoulder and neck injury was consistent with the injury mechanism plaintiff described. Dr. West testified that it was also possible that plaintiff's degenerative disc disease in and of itself, just occurring naturally over time, could have caused plaintiff's neck condition. Moreover, Dr. West could not state within a reasonable degree of medical certainty that plaintiff's degenerative disc disease in her cervical spine was exacerbated or made symptomatic by her 7 October 2010 fall.

III. Conclusion

For the reasons discussed above, we find no competent evidence to support the trial court's finding of a causal relationship between plaintiff's 7 October 2010 fall and her right shoulder and neck injury. As a result, we reverse the decretal portions of the Commission's opinion and award ordering defendants to compensate plaintiff for the treatment of her right shoulder and neck.

Reversed.

Judges HUNTER (Robert C.) and GEER concur.

ESTATE OF HURST v. JONES

[230 N.C. App. 162 (2013)]

ESTATE OF TIMOTHY ALAN HURST BY AND THROUGH CHRISTIAN P. CHERRY AS COLLECTOR,
JEFFREY WAYNE HENLEY AND BEVERLY HENLEY, PLAINTIFFS

v.

PATRICK B. JONES, JEFFREY V. GORDON AND SCOTT L. BIEBER, DEFENDANTS

No. COA12-758

Filed 5 November 2013

1. Estoppel—judicial—fraud—intent—good faith

Where plaintiffs in prior litigation asserted that business entities were one and the same, they were judicially estopped from asserting any inconsistent factual allegations in the present case and could not show that defendant Moorehead's transfer of money to defendant Jones was fraudulent under N.C.G.S. § 39-23.4(a)(2) or 39-23.5. The trial court's entry of summary judgment in favor of plaintiffs was reversed and the matter was remanded for entry of summary judgment in Jones' favor as to these issues. Where there were issues of material fact as to whether Moorehead transferred the money to Jones with fraudulent intent and as to whether Jones took it in good faith, the Court of Appeals reversed the trial court's entry of summary judgment in favor of plaintiffs as to Jones under N.C.G.S. § 39-23.4(a)(1) and remanded the case for a jury trial on these issues.

2. Corporations—piercing corporate veil—fraud—genuine issues of material fact

Where defendants Gordon and Bieber failed to cite to the Court of Appeals facts that supported a conclusion that the corporate veil should be pierced as to two corporations, there was no repayment of an antecedent debt to constitute reasonably equivalent value when Moorehead transferred the monies to Gordon and Bieber. There existed genuine issues of material fact under N.C.G.S. §§ 39-23.5, 39-23.4, and 39-23.8 as to plaintiffs' claims against Gordon and Bieber, and the Court of Appeals reversed the trial court's order granting summary judgment in their favor and remanded the case for further evidentiary proceedings.

Appeal by defendants from order filed 24 February 2012 by Judge W. David Lee in Cabarrus County Superior Court. Heard in the Court of Appeals 12 December 2012.

ESTATE OF HURST v. JONES

[230 N.C. App. 162 (2013)]

Law Offices of Dale S. Morrison, by Dale S. Morrison, for plaintiff-appellees Jeffrey Wayne Henley and Beverly Henley.

Mills Law PA, by William L. Mills, III for plaintiff-appellee Estate of Timothy Alan Hurst.

Sellers, Hinshaw, Ayers, Dortch & Lyons, P.A., by Brett E. Dressler, for defendant-appellant Patrick B. Jones.

Ferguson, Scarbrough, Hayes, Hawkins & Demay, P.A., by James R. DeMay, for defendant-appellants Jeffrey V. Gordon and Scott L. Bieber.

STEELMAN, Judge.

Where plaintiffs in prior litigation asserted that business entities were one and the same, they are judicially estopped from asserting any inconsistent factual allegations in this case and cannot show that Moorehead's transfer to defendant Jones was fraudulent under N.C. Gen. Stat. § 39-23.4(a)(2) or 39-23.5. We reverse the trial court's entry of summary judgment in favor of plaintiffs and remand for entry of summary judgment in Jones' favor as to these issues. Where there are issues of material fact as to whether Moorehead made the transfer of monies to Jones with fraudulent intent and as to whether Jones took in good faith, we reverse the trial court's entry of summary judgment in favor of plaintiffs as to Jones under N.C. Gen. Stat. § 39-23.4(a)(1) and remand for a jury trial on these issues.

Where defendants Gordon and Bieber failed to cite this Court to facts that support a conclusion that the corporate veil should be pierced as to two corporations, we hold that there was no repayment of an antecedent debt to constitute reasonably equivalent value when Moorehead transferred the monies to Gordon and Bieber. There exist genuine issues of material fact under N.C. Gen. Stat. § 39-23.5, 39-23.4, and 39-23.8 as to plaintiffs' claims against Gordon and Bieber, and we reverse the trial court's order granting summary judgment in their favor and remand for further evidentiary proceedings consistent with this opinion.

I. Factual and Procedural History

On 28 June 2006, Timothy Alan Hurst (Hurst) and Jeffrey Henley (Henley) entered into a Purchase and Sale Agreement with Cramer

ESTATE OF HURST v. JONES

[230 N.C. App. 162 (2013)]

Mountain Development, LLC (Cramer Mountain) under the terms of which Hurst and Henley agreed to sell to Cramer Mountain two tracts of land in Cabarrus County, containing approximately 73 acres and 3.5 acres, for \$4,700,000. On 2 March 2007, Moorehead I, LLC (Moorehead) was incorporated. On 12 March 2007, Cramer Mountain assigned its rights in the Purchase and Sale Agreement to Moorehead. The Purchase and Sale Agreement provided that at closing Hurst and Henley would be paid \$1,000,000. The balance of the purchase price, \$3.7 million, would be owner-financed for twelve months at an interest rate of prime rate plus one percent. This debt was to be secured by a mortgage on the property that was to be in “second position on the property behind buyer’s financing.” The purchaser had the option to extend the owner-financing for another year upon the payment of an additional \$2,000,000 under the same terms.

In February of 2007, Hurst and Henley were advised that the buyer wanted to make an additional advance of \$200,000. Hurst and Henley understood that this would not be the closing on the property, which would take place in June. The June closing would include an Internal Revenue Code Section 1031 exchange of property. Henley, his wife, and Hurst met with the manager of Cramer Mountain, Frank DeSimone (DeSimone), at Henley’s farm. DeSimone printed documents from his computer that were signed by the Henleys and Hurst.¹ The transaction in fact was not merely an additional advance towards the purchase of the property, but a closing. Hurst and the Henleys executed a deed for the two tracts of land on 13 March 2007 and received \$200,000. Moorehead executed a note in the amount of \$4,500,000 secured by a second deed of trust upon the two tracts. Moorehead borrowed \$3,400,000 from F&M Bank, which was secured by a first deed of trust on the two tracts conveyed by Hurst and Henley, and an additional tract of nine acres. Moorehead left the closing with \$2,078,546.41 after deducting closing expenses. This sum was deposited into the bank account of Moorehead.

On 14 March 2007, Moorehead wired \$650,000 to Pat Jones (Jones). On 14 March 2007, Moorehead transferred \$380,383.74 from its bank account to Jeff Gordon (Gordon) by debit memo. Also on 14 March 2007, Moorehead transferred \$380,383.74 from its account to Scott Bieber (Bieber) by debit memo.

Jones had previously loaned \$500,000 to Park West Development Company (Park West) on 8 June 2006 at an interest rate of 30% per

1. Hurst became ill at the farm and went home, where he signed documents. The Henleys signed the documents at the farm.

ESTATE OF HURST v. JONES

[230 N.C. App. 162 (2013)]

annum, which was due on 28 February 2007. The promissory note from Park West to Jones was signed by Bruce Blackmon (Blackmon) as President. On 10 November 2005, Gordon and Bieber had each loaned \$300,000 to Investments International Incorporated (Investments) at an interest rate of 20% per annum. A promissory note in the amount of \$600,000 was issued jointly to Gordon and Bieber, and was signed by Blackmon on behalf of Investments.

On 29 July 2008, Hurst² and Henley filed suit in Cabarrus County Superior Court against Blackmon, Moorehead, Park West, Cramer Mountain, and other corporations and individuals.³ Investments was not a party to this litigation. This complaint alleged claims for fraud and unfair and deceptive trade practices. Hurst and Henley alleged that they only received \$200,000 at closing rather than the \$1,000,000 provided for in the Purchase and Sale Agreement, that there was no 1031 exchange, and that the proceeds of the F&M Bank Loan were “diverted and not used as part of the payment towards the purchase price of the Property.” Plaintiffs additionally sought to pierce the corporate veil with respect to Blackmon, DeSimone, and their related entities. This case was tried at the 24 January 2011 session of Civil Superior Court for Cabarrus County before a jury. Judgment was entered against Blackmon and Moorehead in the amount of \$4,900,000 plus interest.⁴ The jury returned a verdict in favor of plaintiffs as follows:

Issue No. 11. Did defendant Bruce Blackmon control Moorehead I, LLC, Park West Development Company, Park West Investments, Inc., Park West Premier Properties, LLC and/or Park West-Stone, LLC with regard to the acts or omissions that damaged the plaintiffs?

A. Moorehead I, LLC

ANSWER: X Yes ___ No

2. Hurst died on 17 May 2007 and his estate is now the party in both the 2008 and instant case. We will refer to Hurst and his estate through this opinion as “Hurst.”

3. Plaintiffs filed suit against Moorehead I, LLC; Cramer Mountain Development Company, LLC; Park West Premier Properties, LLC; Park West Investments, Inc.; Park West-Stone, LLC; Park West Development Company; Cobblestone Builders, LLC; David Cox Premier Properties LLC; Frank DeSimone; Bruce Blackmon; Gregory A. Mascaro; Leslie Danielle Harrison; and F&M Bank.

4. This case was heard in the Court of Appeals on 27 March 2013. The judgment of the trial court was affirmed as to Blackmon. *Hurst v. Moorehead, LLC*, No. COA12-1285, ___ N.C. App. ___, ___, (Filed 6 August 2013). The appeal of the remaining defendants was dismissed. *Id.*

ESTATE OF HURST v. JONES

[230 N.C. App. 162 (2013)]

B. Park West Development Company

ANSWER: Yes No

C. Park West Investments, Inc.

ANSWER: Yes No

D. Park West Premier Properties, LLC

ANSWER: Yes No

E. Park West-Stone, LLC

ANSWER: Yes No

The judgment held:

Defendant Bruce B. Blackmon, Jr. is the alter-ego of Defendants Moorehead I, LLC, Park West Development Company, Park West Investments, Inc., Park West Premier Properties, LLC and Park West-Stone, 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.

On 31 March 2011⁵, Hurst and Henley filed the complaint in the instant action. The complaint asserted that the transfers by Moorehead to Jones, Bieber, and Gordon were fraudulent and in violation of the Uniform Fraudulent Transfer Act, Article 3A of Chapter 39 of the North Carolina General Statutes. Each of the defendants filed answers which pled a number of affirmative defenses, including estoppel. Following discovery, Gordon and Bieber filed a motion for summary judgment on 6 December 2011. Plaintiffs filed a motion for summary judgment on 22 December 2011. On 4 January 2012, Jones entered a motion for summary judgment. The trial court held that plaintiffs were entitled to judgment as a matter of law and entered judgment against Jones in the amount of \$650,000, against Gordon in the amount of \$380,383.74, and against Bieber in the amount of \$380,383.74. Each judgment was to bear interest at the legal rate from the date of the filing of the complaint.

Jones, Gordon, and Bieber appeal.

5. Plaintiffs commenced this action on 11 March 2011 through the issuance of an Application and Order Extending Time to File Complaint.

ESTATE OF HURST v. JONES

[230 N.C. App. 162 (2013)]

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) (citation omitted).

III. Jones’ Appeal

[1] In his first argument on appeal, Jones contends that plaintiffs are estopped from contending that Park West, Moorehead, and Blackmon are not one and the same entity. We agree.

A. Judicial Estoppel

“[J]udicial estoppel seeks primarily to protect the integrity of judicial proceedings” and has no requirement of “mutuality of the parties.” *Whitacre P’ship v. Biosignia, Inc.*, 358 N.C. 1, 16-17, 591 S.E.2d 870, 881 (2004). “Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position” *Id.* at 22, 591 S.E.2d at 884 (quoting *New Hampshire v. Maine*, 532 U.S. 742, 749, 149 L.Ed. 2d 968, 977). The North Carolina Supreme Court has enumerated three factors that typically influence the decision of whether to apply judicial estoppel in a particular case:

First, a party’s subsequent position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party’s earlier position, so that judicial acceptance of an inconsistent position in a later proceeding might pose a threat to judicial integrity by leading to inconsistent court determinations or the perception that either the first or the second court was misled. Third, courts consider whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Whitacre P’ship, 358 N.C. at 29, 591 S.E.2d at 888-89 (citations omitted). The “recognition of judicial estoppel is limited to the context of inconsistent factual assertions and that the doctrine should not be applied to prevent the assertion of inconsistent legal theories.” *Id.* at 32, 591 S.E.2d at 890.

ESTATE OF HURST v. JONES

[230 N.C. App. 162 (2013)]

After examining these three factors, we hold that the doctrine of judicial estoppel applies in this case. In their complaint in Cabarrus County case 08-CVS-2800, plaintiffs alleged that Blackmon had failed to observe the proper corporate formalities for Moorehead and Park West, and that “Blackmon [held] complete domination, not only of finances, but of policy and business practice, in [Moorehead and Park West] so that the entities had no separate mind, will, or existence of their own.” Plaintiffs succeeded in their assertion of this position, persuading the jury to so find and resulting in the entry of judgment in their favor. This Court subsequently affirmed that judgment. Plaintiffs now assert in the instant case that Moorehead repaid a debt that it did not owe and did not receive reasonably equivalent value in exchange for the transfer to Jones because Moorehead and Park West were separate corporate entities. This position is clearly inconsistent with their prior assertion. The acceptance of plaintiffs’ subsequent inconsistent position in the instant case would “pose[] a threat to judicial integrity by leading to inconsistent court determinations or the perception that either the first or the second court was misled.” *Id.* at 29, 591 at 888-89. Lastly, we consider whether plaintiffs’ inconsistent position would impose an unfair detriment to Jones. Jones was not a party to the prior litigation; however, he, like plaintiffs, was a creditor of the Blackmon, Moorehead, Park West corporate structure. We see no reason why plaintiffs should be able to assert one set of facts in their 2008 action against Blackmon and his related entities, and then assert an inconsistent factual position against Jones. To do so would threaten the judicial integrity of the courts of this state. We apply the principles of judicial estoppel, and hold that plaintiffs are estopped from asserting that Blackmon, Moorehead, and Park West were separate entities.

B. Reasonably Equivalent Value

Under N.C. Gen. Stat. § 39-23.4:

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor’s claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

- (1) With intent to hinder, delay, or defraud any creditor of the debtor; or
- (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

ESTATE OF HURST v. JONES

[230 N.C. App. 162 (2013)]

- a. Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
- b. Intended to incur, or believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

N.C. Gen. Stat. § 39-23.4 (2011). Similarly, as to present creditors, N.C. Gen. Stat. § 39-23.5 requires the debtor to have made the transfer “without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.” N.C. Gen. Stat. § 39-23.5 (2011). North Carolina General Statutes § 39-23.3(a) defines “value” as follows: “Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied” N.C. Gen. Stat. § 39-23.3 (2011). To evaluate whether reasonably equivalent value was exchanged, we examine the net effect of the transaction on the debtor's estate and whether there has been a net loss to the debtor's estate as a result of the transaction. *Cf. Miller v. First Bank*, 206 N.C. App. 166, 173-74, 696 S.E.2d 824, 828 (2010) (discussing the appropriate analysis to determine reasonably equivalent value in a multi-party transaction in the indirect benefit context).

We apply these principles to the uncontested facts of the instant case. Plaintiffs cannot assert that Moorehead, Park West, and Blackmon were separate entities. Jones loaned \$500,000 to Park West on 8 June 2006. On 14 March 2007, Moorehead wired \$650,000 to Jones in satisfaction of Park West's debt to Jones. This was a payment of an antecedent debt under N.C. Gen. Stat. § 39-23.3(a), and was therefore given for value. An essential element of a transfer in fraud of creditors claim under either N.C. Gen. Stat. § 39-23.4(a)(2) or N.C. Gen. Stat. § 39-23.5 is that the transfer was made without the debtor receiving “reasonably equivalent value.” We hold that the repayment of an antecedent debt owed by Park West was also a debt of the Moorehead, Park West, Blackmon corporate entity and that the payment to Jones was in exchange for a “reasonably equivalent value.” We therefore reverse the portion of the trial court's order granting summary judgment in favor of plaintiffs against Jones as to their claims under N.C. Gen. Stat. § 39-23.4(a)(2) and 39-23.5 and remand for entry of summary judgment in Jones' favor on this issue.

ESTATE OF HURST v. JONES

[230 N.C. App. 162 (2013)]

C. Fraudulent Intent and Good-Faith Transferee

Jones concedes in his brief that there remain genuine issues of material fact as to whether Moorehead made the transfer of monies to him with the intent to hinder, delay, or defraud any creditor; however, he also contends that summary judgment should have been entered in his favor because he was a good-faith transferee. We disagree.

N.C. Gen. Stat. § 39-23.4(b) provides a non-exhaustive list of factors to be considered in determining fraudulent intent, including whether: the transfer or obligation was concealed; the debtor has been sued or threatened with suit; the transfer was of substantially all the debtor's assets; the debtor concealed assets; the debtor was insolvent or became insolvent shortly after the transfer was made; and the transfer occurred shortly before or shortly after a substantial debt was incurred. N.C. Gen. Stat. § 39-23.4(b). “[I]ntent is an operation of the mind, it should be proven and found as a fact, and is rarely to be inferred as a matter of law.” *Danville Lumber & Mfg. Co. v. Gullivan Bldg. Co.*, 177 N.C. 104, 107, 97 S.E. 718, 720 (1919).

Despite the fact that the transfer to Jones may have been made with fraudulent intent, the transfer is not voidable if Jones can establish that he was a “good-faith transferee for value” and is entitled to protection under N.C. Gen. Stat. § 39-23.8(a). Under this statute, “[a] transfer or obligation is not voidable under G.S. 39-23.4(a)(1) against a person who took in good faith and for a reasonably equivalent value” N.C. Gen. Stat. § 39-23.8(a) (2011). The person who invokes this defense carries the burden of establishing good faith and the reasonable equivalence of the consideration exchanged. N.C. Gen. Stat. § 39-23.8, Official Cmt. 1.

Jones has established that he took for a reasonably equivalent value, however, he has not directed us to any conclusive facts in the record that demonstrate that he took in good faith. We therefore remand this issue to the trial court for a determination by a jury as to whether the Moorehead, Park West, Blackmon structure transferred the monies to Jones with the intent to defraud plaintiffs and if so, whether Jones can assert an affirmative defense under N.C. Gen. Stat. § 39-23.8(a).

IV. The Appeal of Gordon and Bieber

[2] In their appeal, Gordon and Bieber contend that the trial court erred in granting summary judgment in favor of plaintiffs. We agree in part, and remand.

ESTATE OF HURST v. JONES

[230 N.C. App. 162 (2013)]

A. Plaintiffs' Claims under N.C. Gen. Stat. § 39-23.5

In order to establish the transfers made from Moorehead to Gordon and Bieber were fraudulent under N.C. Gen. Stat. § 39-23.5, plaintiffs must show that (1) their claim arose before the transfers were made; (2) Moorehead made the transfers without receiving a reasonably equivalent value in exchange; and (3) Moorehead was insolvent at the time or became insolvent as a result of the transfer. N.C. Gen. Stat. § 39-23.5; *Miller*, 206 N.C. App. at 170-71, 696 S.E.2d at 827.

We will now analyze each of these elements in the context of plaintiffs' claims against Gordon and Bieber.

1. Timing of Transactions

Plaintiffs' claims arise out of the closing that took place on 13 March 2007. The transfers to Gordon and Bieber took place on 14 March 2007. Thus the claims of plaintiffs arose prior to the contested transfers. We further note that on appeal, Gordon and Bieber do not contest this element. The ruling of the trial court as to this element is affirmed.

2. Reasonably Equivalent Value

Gordon and Bieber contend that the payments to them by Moorehead on 14 March 2007 were for reasonably equivalent value. This is based upon their assertion that Moorehead and Investments are alter ego entities. Gordon and Bieber assert that "as Plaintiffs proved in the Blackmon Litigation, the Blackmon Entities are all alter-egos . . . value received by Investments International is also value to Moorehead." They further assert that "[w]hat is striking in the case at bar is that Plaintiffs have *already proven* that Blackmon is the alter-ego of the Blackmon Entities." The flaw in this argument is that Investments was not a party to the prior litigation, plaintiffs never asserted that Investments, Moorehead, and Blackmon were not separate entities, and there was no determination that Investments was controlled by Blackmon to the extent that they were not separate entities. Therefore, there can be no judicial estoppel as was present as to plaintiffs' claims against Jones.

On appeal, Gordon and Bieber do not cite this Court to facts in the record that would support a conclusion that Investments was an alter ego of Moorehead, nor do they argue that there were material issues of fact as to whether Investments was the alter ego of Moorehead or Blackmon. Rather, they rely solely upon the mistaken belief that the prior litigation established this fact.

ESTATE OF HURST v. JONES

[230 N.C. App. 162 (2013)]

Without an alter ego relationship between Investments and Moorehead, we must treat the two corporations as separate entities. As such, there can be no payment of an antecedent debt. However, this does not end our inquiry as to whether or not Moorehead received a reasonably equivalent value in exchange for the payment of monies to Gordon and Bieber.

Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person.

N.C. Gen. Stat. § 39-23.3(a). While it is uncontroverted that Moorehead directly transferred the sum of \$380,383.74 to each of Gordon and Bieber on 14 March 2007, Gordon and Bieber refer us to the testimony of Blackmon and his bookkeeper, Patricia Duckworth (Duckworth), that the books of Moorehead and Investments reflect an intercompany loan from Moorehead to Investments. The testimony of Blackmon and Duckworth as to the alleged intercompany loan created an issue of fact as to whether the transfer of money to them was in exchange for a reasonably equivalent value.

Plaintiffs argue that this "loan" cannot constitute value under N.C. Gen. Stat. § 39-23.3 because it is nothing more than an unperformed promise made otherwise than in the ordinary course of business to furnish support to the debtor. Under N.C. Gen. Stat. § 39-23.3(a), such an unperformed promise does not constitute value. The Official Comment to N.C. Gen. Stat. § 39-23.3 indicates that the current statute represents a departure from the provisions of the earlier Uniform Fraudulent Conveyances Act that was thought not to recognize an unperformed promise as fair consideration. Section 4 of the Official Comment goes on to discuss judicial exceptions to this principle:

Courts construing these provisions of the prior law nevertheless have held unperformed promises to constitute value in a variety of circumstances. See, e.g., *Harper v. Lloyd's Factors, Inc.*, 214 F.2d 662 (2d Cir. 1954) (transfer of money for promise of factor to discount transferor's purchase-money notes given to fur dealer); *Schlecht v. Schlecht*, 168 Minn. 168, 176-77, 209 N.W. 883, 886-87 (1926) (transfer for promise to make repairs and improvements on transferor's homestead); *Farmer's Exchange*

ESTATE OF HURST v. JONES

[230 N.C. App. 162 (2013)]

Bank v. Oneida Motor Truck Co., 202 Wis. 266, 232 N.W. 536 (1930) (transfer in consideration of assumption of certain of transferor's liabilities); see also Hummel v. Cernocky, 161 F.2d 685 (7th Cir. 1947) (transfer in consideration of cash, assumption of a mortgage, payment of certain debts, and agreement to pay other debts). Likewise a transfer in consideration of a negotiable note discountable at a commercial bank, or the purchase from an established, solvent institution of an insurance policy, annuity, or contract to provide care and accommodations clearly appears to be for value. On the other hand, a transfer for an unperformed promise by an individual to support a parent or other transferor has generally been held voidable as a fraud on creditors of the transferor. See, e.g., Springfield Ins. Co. v. Fry, 267 F.Supp. 693 (N.D.Okla. 1967); Sandler v. Parlapiano, 236 App.Div. 70, 258 N.Y.Supp. 88 (1st Dep't 1932); Warwick Municipal Employees Credit Union v. Higham, 106 R.E. 363, 259 A.2d 852 (1969); Hulsether v. Sanders, 54 S.D. 412, 223 N.W. 335 (1929); Cooper v. Cooper, 22 Tenn.App. 473, 477, 124 S.W.2d 264, 267 (1939); Note, Rights of Creditors in Property Conveyed in Consideration of Future Support, 45 Iowa L.Rev. 546, 550-62 (1960). This Act adopts the view taken in the cases cited in determining whether an unperformed promise is value.

N.C. Gen. Stat. § 39-23.3, Official Cmt. 4. The Official Comment indicates that an unperformed promise may be consideration except for an executory promise to support another person.

This interpretation of the statute is confirmed by the North Carolina Comment to N.C. Gen. Stat. § 39-23.3:

Prior North Carolina law has dealt with what constitutes "full value" or "good consideration," terms that were employed in former N.C. Gen. Stat. § 39-16 and -19. The inquiry has generally focused on the amount of consideration, however, rather than on its character. Two types of consideration that have been analyzed in prior law are prior indebtedness (so-called "antecedent debt") and unfulfilled ("executory") promises. As to antecedent debt, prior North Carolina law laid down the same rule as that set out in subsection (a): antecedent debt qualified as consideration. See *Fowle v. McLean*, 168 N.C. 537, 541, 84 S.E. 852, 854 (1915). See also *Howard*, 50 N.C. L. Rev. at 880-81.

ESTATE OF HURST v. JONES

[230 N.C. App. 162 (2013)]

Executory promises of support constituted consideration under prior North Carolina law, subject to a number of exceptions and limits. Services furnished to relatives were presumed to be gratuitous; the relationship of the parties could go far toward raising a presumption that a transfer involved fraudulent intent. *See Howard*, 50 N.C. L. Rev. at 881-82. Subsection (a) excludes from the definition of value unperformed promises to furnish support, subject only to an exception for a promise made in the ordinary course of the provisor's business. This blanket exclusion represents a change from prior North Carolina law. Subsection (a) does not expressly address unperformed promises other than to furnish support. *But see* Official Comment 4.

N.C. Gen. Stat. § 39-23.3, N.C. Cmt.

In the instant case, the “book entry loan” from Moorehead to Investments was not a promise “to furnish support to the debtor or another person,” and does not fall under the exclusion contained in N.C. Gen. Stat. § 39-23.3(a). There remains an issue of fact as to whether Moorehead made the transfers of monies to Gordon and Bieber and received a reasonably equivalent value in exchange. This element is remanded to the trial court for a determination as to whether the “book entry loan” from Moorehead to Investments constitutes adequate consideration and reasonably equivalent value.

3. Insolvency at Time of Transfer

As to this element, Gordon and Bieber contend that if the assets and liabilities of Moorehead, Park West, and Investments are aggregated, then the collective entities were not insolvent. Because it has not been established that Moorehead and Investments were alter ego entities, it would be improper to include the assets and liabilities of Investments in our analysis of the insolvency of Moorehead. However, as discussed in section III.A of this opinion, plaintiffs are unable to assert that Moorehead, Park West, and Blackmon were separate entities. There was evidence presented to the trial court at the hearing on the summary judgment motions that at the time of the transfers to Gordon and Bieber that Park West had net assets of \$865,024.69.

In addition, conflicting evidence was presented as to the value of the real estate owned by Moorehead at the time of the transfer. We hold that there exist genuine issues of material fact as to whether Moorehead was insolvent at the time of the transfers to Gordon and Bieber, and that

ESTATE OF HURST v. JONES

[230 N.C. App. 162 (2013)]

the trial court erred in granting summary judgment in favor of plaintiffs as to Gordon and Bieber. This element is remanded to the trial court for resolution before a jury.

B. Plaintiffs' Claims under N.C. Gen. Stat. § 39-23.4

Plaintiffs also asserted claims against Gordon and Bieber under N.C. Gen. Stat. § 39-23.4, which provides two different theories of recovery. Based upon our discussion of fraudulent intent in section III.C of this opinion and the evidence in the record, we hold that there exist genuine issues of material fact as to whether Moorehead's transfers to Gordon and Bieber were fraudulent under N.C. Gen. Stat. § 39-23.4(a)(1).

Because there exist genuine issues of material fact as to whether Moorehead was insolvent at the time of the transfers to Gordon and Bieber, there also exist genuine issues of material fact under N.C. Gen. Stat. § 39-23.4(a)(2) as to whether at the time of the transfers Moorehead was about to engage in a transaction in which its remaining assets were unreasonably small, or intended to incur debts beyond its ability to pay.

We reverse the order of the trial court granting summary judgment in favor of plaintiffs' claims under N.C. Gen. Stat. § 39-23.4 and remand for further evidentiary proceedings to determine: (1) whether Moorehead made the transfers with fraudulent intent as described in N.C. Gen. Stat. § 39-23.4(a)(1); and (2) whether Moorehead was engaged or about to engage in a business or transaction for which its remaining assets were unreasonably small or whether Moorehead intended to incur debts beyond its ability to pay as they became due as described in N.C. Gen. Stat. § 39-23.4(a)(2).

C. Affirmative Defenses under N.C. Gen. Stat. § 39-23.8(b)(2)

In their second argument, Gordon and Bieber contend that if we determine the transfer was fraudulent, then there exist genuine issues of material fact as to whether they were good faith subsequent transferees under N.C. Gen. Stat. § 39-23.8(b)(2). We agree.

N.C. Gen. Stat. § 39-23.8(a) and (b) provide that:

(a) A transfer or obligation is not voidable under G.S. 39-23.4(a)(1) against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

(b) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor

ESTATE OF HURST v. JONES

[230 N.C. App. 162 (2013)]

under G.S. 39-23.7(a)(1), the creditor may recover judgment for the value of the asset transferred, as adjusted under subsection (c) of this section, or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:

- (1) The first transferee of the asset or the person for whose benefit the transfer was made; or
- (2) Any subsequent transferee other than a good-faith transferee who took for value or from any subsequent transferee.

N.C. Gen. Stat. § 39-23.8(a) and (b) (2011). This statute provides a defense for transferees under certain specific circumstances. Under subsection (a), even though the transfer was made with the "intent to hinder, delay or defraud" a creditor of the debtor, the transfer is not voidable in two situations: (1) the transferee took in good faith and for reasonably equivalent value; or (2) the transferee was a subsequent transferee. *Id.* Under subsection (b), the amount of the transfer that can be set aside pursuant to N.C. Gen. Stat. § 39-23.7(a)(1) is limited to the adjusted value of the asset transferred or the amount of the creditor's claim, whichever is less. *Id.* Under subsection (b)(2), there are again two exceptions for: (1) a good faith transferee who took for value; or (2) any subsequent transferee. *Id.*

The North Carolina Comment to N.C. Gen. Stat. § 39-23.8 makes it clear that as was the case under prior North Carolina law, the transferee "has the burden of establishing good faith and the reasonable equivalence of the consideration exchanged." N.C. Gen. Stat. § 39-23.8, N.C. Cmt; *See also Aman v. Walker*, 165 N.C. 224, 81 S.E. 162 (1914). In the instant case, defendants Gordon and Bieber bear the burden of establishing an affirmative defense pursuant to N.C. Gen. Stat. § 39-23.8.

In order to avail themselves of the affirmative defenses under N.C. Gen. Stat. § 39-23.8, Gordon and Bieber must show either that: (1) they were an initial transferee from the debtor who took for value; or (2) that they were a "subsequent transferee." A subsequent transferee is not required to demonstrate that they took in good faith or for value. *See* N.C. Gen. Stat. § 39-23.8(a) and (b)(2). On appeal, Gordon and Bieber's argument appears to be a conflation of the two defenses available under N.C. Gen. Stat. § 39-23.8: that they were "good faith subsequent transferees."

It is uncontroverted that Moorehead directly transferred the sum of \$380,383.74 to each of Gordon and Bieber on 14 March 2007. This

ESTATE OF HURST v. JONES

[230 N.C. App. 162 (2013)]

sum was paid in satisfaction of the debt of Investments to Gordon and Bieber. Gordon and Bieber direct us to the testimony of Blackmon and Duckworth, that the books of Moorehead and Investments reflect an intercompany loan from Moorehead to Investments, and that the transfer of funds should be viewed as a two-step transaction: first a loan from Moorehead to Investments, followed by a payment by Investments of antecedent debts owed to Gordon and Bieber. They contend that they are thus “subsequent transferees” and entitled to the affirmative defense under N.C. Gen. Stat. § 39-23.8. It is clear that “subsequent transferees” are excepted from the requirement of showing good faith and value for the transfer. However, the rationale for this lesser showing is that the transferee did not deal directly with the debtor. The language of the statute indicates that there is a point in a chain of transfers, beyond which it would be inequitable to continue voiding the transfers. In the instant case, Gordon and Bieber were direct transferees of the monies from Moorehead. As such, they cannot be subsequent transferees.

However, this does not end our inquiry as to the applicability of an affirmative defense under N.C. Gen. Stat. § 39-23.8. As discussed in section IV.A.2 of this opinion, the testimony of Blackmon and Duckworth as to the alleged intercompany loan created an issue of fact as to whether this loan from Moorehead to Investments constitutes value and thus, whether Gordon and Bieber were transferees in good faith and for value. We hold that the trial court properly granted summary judgment as to Gordon and Bieber’s defense of being a subsequent transferee. However, the trial court erred in granting summary judgment as to whether they were good faith transferees for value.

D. Equity Arguments

Gordon and Bieber raise equity arguments on appeal under N.C. Gen. Stat. § 39-23.10 and 39-23.8(c). N.C. Gen. Stat. § 39-23.10 provides that the provisions of the UFTA are supplemented by the principles of equity, including estoppel. N.C. Gen. Stat. § 39-23.8(c) provides that when a judgment is entered “the judgment shall be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require.” Gordon and Bieber make an argument under N.C. Gen. Stat. § 39-23.10 based upon the assumption that the corporate veil was pierced as to Investments. As discussed in section IV.A.2 of this opinion, this argument is rejected. They also make a vague and confusing argument that because some of the earnest money and installment payments to plaintiffs were made by either a DeSimone or Blackmon controlled entity that plaintiffs cannot now complain that Gordon and Bieber were repaid by the wrong entity. We note that this argument does

ESTATE OF HURST v. JONES

[230 N.C. App. 162 (2013)]

not set forth how the principles of estoppel are applicable to this fact situation, nor does it specify which theory of estoppel is applicable to this case. It is not the role of this Court to construct arguments for the parties, or to flush out incomplete arguments. *See First Charter Bank v. Am. Children's Home*, 203 N.C. App. 574, 580, 692 S.E.2d 457, 463 (2010). This argument, as made by Gordon and Bieber, is without merit.

As to their argument under N.C. Gen. Stat. § 39-23.8(c), the Official Comment to this section makes it clear that it is applicable only when there is a question about the value of a tangible asset being conveyed. Examples cited include where the transferee made improvements to the property that enhances its value, or the property was subjected to liens that reduced its value. N.C. Gen. Stat. § 39-23.8, Official Cmt. 3. This is confirmed by the North Carolina Comment to subsection (c) which states that it “is significant if the value of an asset has changed while in the hands of a transferee.” N.C. Gen. Stat. § 39-23.8, N.C. Cmt. In the instant case, the asset transferred to Gordon and to Bieber was \$380,383.74 in cash. We hold that the transfer of cash is not subject to the equitable adjustments contemplated by N.C. Gen. Stat. § 39-23.8(c).

This argument is without merit.

V. Conclusion

We reverse the portion of the trial court's order granting summary judgment to plaintiffs against Jones and remand for further evidentiary proceedings to determine whether the transfer to Jones was made with the intent to hinder, delay, or defraud plaintiffs under N.C. Gen. Stat. § 39-23.4(a)(1) and whether Jones took in good faith. Because Moorehead's transfer to Jones was made in exchange for a reasonably equivalent value, we reverse the portion of the trial court's order granting summary judgment to plaintiffs against Jones as to their claims under N.C. Gen. Stat. § 39-23.4(a)(2) and 39-23.5 and remand for entry of summary judgment in Jones' favor on those issues.

We reverse the entry of summary judgment as to Gordon and Bieber and remand this matter to the trial court for further evidentiary proceedings to determine: (1) whether the alleged intercompany loan between Moorehead and Investments constitutes reasonably equivalent value; (2) whether Moorehead was insolvent at the time of the transfers to Gordon and Bieber; (3) whether Moorehead made the transfers to Gordon and Bieber with intent to hinder, delay, or defraud plaintiffs; (4) whether Moorehead was engaged in or about to engage in business or transactions for which its remaining assets were unreasonably small; (5) whether Moorehead intended to incur or believed it would incur debts

FARLOW v. BROOKBANK

[230 N.C. App. 179 (2013)]

beyond its ability to pay; and (6) if the transfer is fraudulent, whether Gordon and Bieber are good faith transferees who took for value.

All other portions of the trial court's order are affirmed.

REVERSED AND REMANDED IN PART, AFFIRMED IN PART.

Judges STEPHENS and McCULLOUGH concur.

JEWEL A. FARLOW, PLAINTIFF

v.

JAMES E. BROOKBANK, DEFENDANT

No. COA13-403

Filed 5 November 2013

Interest—right to collect—higher than legal rate—waiver

The trial court did not err in a breach of contract case arising out of the nonpayment of legal services by denying plaintiff attorney's request for the assessment of interest at a rate of one and one-half percent per month (or eighteen percent per annum) pursuant to N.C.G.S. § 24-11(a) rather than at the legal rate. A creditor's right to collect interest at a rate higher than the legal rate pursuant to N.C.G.S. § 24-11(a) should be asserted in a regular and consistent manner and may be waived by the creditor's subsequent failure to assert her rights in such a manner.

Appeal by plaintiff from judgment entered 17 October 2012 by Judge Polly D. Sizemore in Guilford County District Court. Heard in the Court of Appeals 26 September 2013.

Gordon Law Offices, by Harry G. Gordon, for Plaintiff.

Smith, James, Rowlett & Cohen, LLP, by Norman B. Smith, for Defendant.

ERVIN, Judge.

Plaintiff Jewel A. Farlow appeals from a judgment requiring Defendant James E. Brookbank to pay \$16,600.00 in compensatory damages, interest on the compensatory damage award calculated at the legal

FARLOW v. BROOKBANK

[230 N.C. App. 179 (2013)]

rate (eight per cent per annum), and \$105.00 in costs. In her brief, Plaintiff contends that the trial court erred by denying her request for the assessment of interest at a rate of one and one-half percent per month (or eighteen percent per annum) pursuant to N.C. Gen. Stat. § 24-11(a) rather than at the legal rate. After careful consideration of Plaintiff's challenge to the trial court's judgment in light of the record and the applicable law, we conclude that the trial court's judgment should be affirmed.

I. Factual BackgroundA. Substantive Facts

On or about 17 June 2003, Defendant hired Plaintiff to represent him in litigation in which he was engaged with his former spouse. Between December 2003 and February 2007, Plaintiff sent five invoices to Defendant relating to the legal services that she had provided to Defendant in connection with this litigation.

On 1 December 2003, Plaintiff sent an invoice to Defendant in the amount of \$230.00 relating to legal services rendered from 23 June 2003 through 6 October 2003. Defendant paid Plaintiff's first invoice on 4 November 2003. On 27 September 2004, Plaintiff sent Defendant an invoice in the amount of \$1,507.59, with the amount billed in this invoice relating to work that Plaintiff performed on Defendant's behalf from 1 March 2004 through 31 May 2004. Defendant paid the second invoice that he received from Plaintiff on 7 October 2004. On 4 October 2006, Plaintiff sent a third invoice in the amount of \$9,632.16 covering services that she rendered on Defendant's behalf from 1 July 2006 to 30 September 2006. According to the 4 October 2006 invoice, "[s]ervices rendered prior to [1 July 2006 would] be billed at a later date." None of the first three invoices that Plaintiff sent to Defendant either specified a date upon which the invoiced amount was due and owing or provided for payment of a particular interest rate. Defendant did not pay the amount set out in the third invoice prior to 4 December 2006.

On 4 December 2006, Plaintiff sent a fourth invoice to Defendant in the total amount of \$12,421.36, with the amount billed by means of this invoice stemming from work that Plaintiff had performed and expenses that Plaintiff had incurred on Defendant's behalf from 4 June 2006 until the specified billing date. The time and expense amounts reflected on the 4 December 2006 invoice were incurred either prior to 1 July 2006 or after 30 September 2006. The 4 December 2006 invoice was attached to a letter that stated, in pertinent part, "[p]lease note that this Statement is a bill and is payable upon your receipt thereof" and that "[i]nterest at the rate of 1 1/2 percent per month will be added to the balance due on

FARLOW v. BROOKBANK

[230 N.C. App. 179 (2013)]

amounts which remain unpaid thirty (30) days or more.” Similarly, language appearing at the bottom of the 4 December 2006 invoice indicated that “PAYMENT [was] DUE UPON RECEIPT” and that “ANY BALANCE THAT REMAINS UNPAID THIRTY (30) DAYS OR MORE WILL ACCRUE INTEREST AT THE RATE OF 1 1/2 PERCENT PER MONTH.”

On 19 February 2007, Plaintiff sent a final invoice to Defendant in the amount of \$1,305.51 relating to time spent and expenses incurred in connection with Plaintiff’s representation of Defendant from 6 December 2006 to 19 February 2007. As was the case with the first three invoices that Plaintiff sent to Defendant and unlike the 4 December 2006 invoice, the 19 February 2007 invoice did not mention a due date or contain any language relating to the payment of interest. Although Defendant made a \$1,000.00 payment on 19 December 2006, he did not pay anything else to Plaintiff after that date.

B. Procedural History

On 23 July 2009, Plaintiff filed a complaint in which she alleged that Defendant had breached a contract between the parties and sought to recover Defendant’s past due balance of \$22,359.03, plus interest “at the legal rate.” On 25 September 2009, Defendant filed an answer in which he admitted that Plaintiff had provided legal services to him, that he had made certain payments to Plaintiff, and that Plaintiff had made demand upon him for the payment of additional amounts, but denied that he was obligated to make any additional payments to Plaintiff.

Plaintiff’s claim against Defendant came on for trial before the trial court and a jury at the 13 February 2012 civil session of the Guilford County District Court. On 20 February 2012, the jury returned a verdict finding that the parties had entered into a contract, that Defendant had breached the contract between the parties, and that Plaintiff was entitled to recover the principal sum of \$16,600.00 from Defendant.

In accordance with a pretrial agreement between the parties, the trial court, sitting without a jury, proceeded to determine the extent, if any, to which Defendant should be required to pay interest on the amount of compensatory damages awarded by the jury. At a hearing held with respect to the interest rate issue before the trial court on 24 February 2012, Plaintiff requested the trial court to award interest at a rate of one and one-half percent per month pursuant to N.C. Gen. Stat. § 24-11 while Defendant requested the trial court to award interest at the legal rate.

On 17 October 2012, the trial court entered a judgment reciting the jury’s verdict with respect to the breach of contract and compensatory

FARLOW v. BROOKBANK

[230 N.C. App. 179 (2013)]

damages issues and addressing the interest rate issue which had been litigated following the return of the jury's verdict. After making findings of fact consistent with the factual statement set out earlier in this opinion, the trial court found as a fact that:

9. This court finds that plaintiff is not entitled to [an interest rate of one and one-half percent per month from December 4, 2006 until the date of the judgment] due to the manner in which the invoices were sent. Plaintiff's billing was irregular in that one invoice was sent December 1, 2003; a second invoice [was sent] eight months later on September 27, 2004. The third invoice was not sent until October of 2006 and did not contain time and expenses incurred for two years from June 1, 2004 to June 30, 2006. This does not demonstrate any course of dealing with Defendant.

10. Plaintiff's complaint in paragraph 11, paragraph 17 and the prayer for relief request interest from February 19, 2007 at the legal rate of interest as provided by law.

11. Defendant failed to pay the bill sent October 4, 2006 but this bill also expressly stated there was prior unbilled time and expenses which will be billed later. Defendant failed to pay the invoice mailed December 5, 2006. A reasonable time of payment would be thirty days and Defendant's breach of the oral contract occurred on January 4, 2007.

Based upon these findings of fact, the trial court concluded that Defendant should pay \$16,600.00 in compensatory damages, "interest on the jury verdict . . . at the legal rate of interest from January 4, 2007 until paid," and \$105.00 in court costs to Plaintiff. Plaintiff noted an appeal to this Court from the trial court's order.

II. Legal Analysis

In her brief, Plaintiff argues that the trial court erred by failing to award interest on the amount of compensatory damages awarded by the jury at a rate of one and one-half percent per month. In essence, Plaintiff argues that, given the language of the fourth invoice, she complied with the prerequisites for the assessment of interest pursuant to N.C. Gen. Stat. § 24-11(a) and that any failure on the part of this Court to enforce her right to assess interest at a rate authorized by N.C. Gen. Stat. § 24-11(a) would have the effect of encouraging debtors to refrain from paying amounts which they owe to their creditors. We do not find Plaintiff's arguments persuasive.

FARLOW v. BROOKBANK

[230 N.C. App. 179 (2013)]

A. Standard of Review

“The standard of review on appeal from a judgment entered after a non-jury trial is ‘whether there is competent evidence to support the trial court’s findings of fact and whether the findings support the conclusions of law and ensuing judgment.’ ” *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (quoting *Sessler v. Marsh*, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163, *disc. review denied*, 354 N.C. 365, 556 S.E.2d 577 (2001)), *disc. review denied*, 356 N.C. 434, 572 S.E.2d 428 (2002). In the event that a party “fails to argue that the trial court’s findings of fact are not supported by sufficient evidence, any such argument is deemed abandoned, and the trial court’s findings are binding on appeal.” *O’Connor v. Zelinske*, 193 N.C. App. 683, 687, 668 S.E.2d 615, 617 (2008) (citing *Estroff v. Chatterjee*, 190 N.C. App. 61, 71, 660 S.E.2d 73, 79 (2008)). “The trial court’s conclusions [of law], however, are completely reviewable.” *Baker v. Showalter*, 151 N.C. App. 546, 549, 566 S.E.2d 172, 174 (2002). As a result, given that Plaintiff has not challenged the trial court’s findings of fact as lacking in sufficient evidentiary support and that Plaintiff’s argument is focused on the correctness of the trial court’s conclusion of law to the effect that “interest on the jury verdict is at the legal rate of interest from January 4, 2007 until paid,” the issue before us as a result of Plaintiff’s challenge to the trial court’s judgment is a pure question of law which is subject to *de novo* review. *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004).

B. Appropriateness of Trial Court’s Interest Rate Decision

N.C. Gen. Stat. § 24-11(a) provides that:

[o]n the extension of credit under an open-end credit or similar plan . . . under which no service charge shall be imposed upon the consumer or debtor if the account is paid in full within 25 days from the billing date . . . there may be charged and collected interest, finance charges or other fees at a rate in the aggregate not to exceed one and one-half percent (1 1/2%) per month computed on the unpaid portion of the balance of the previous month less payments or credit within the billing cycle or the average daily balance outstanding during the current billing period.

According to well-established North Carolina law, there are two requirements that must be satisfied in order to support an award of interest pursuant to N.C. Gen. Stat. § 24-11(a). First, the creditor must give notice to the debtor of her intent to assess interest against an unpaid

FARLOW v. BROOKBANK

[230 N.C. App. 179 (2013)]

balance on an open account or some similar credit arrangement, with this notice requirement having been satisfied as long as the notice is given during the term of the debtor-creditor relationship and no interest is assessed retroactively against credit extended prior to the date upon which the notice was given. *Hyde Ins. Agency, Inc. v. Noland*, 30 N.C. App. 503, 506, 227 S.E.2d 169, 171 (1976) (stating that “the creditor could collect a finance charge on an open account under the provisions of [N.C. Gen. Stat. §] 24-11(a) provided the person to whom the credit is extended had been notified by the creditor when the credit was extended of all the details and circumstances pertaining to the imposition of finance charges”). Assuming that the notice requirement described above has been satisfied, N.C. Gen. Stat. § 24-11 also precludes the assessment of interest until after the 25th day following the date upon which the principal amount against which interest is to be assessed is billed. As a result, in order to lawfully assess interest against an unpaid balance pursuant to N.C. Gen. Stat. § 24-11(a), the creditor must notify the debtor of the interest payment requirement, refrain from assessing interest against principal amounts accrued prior to the date upon which notice of the interest payment requirement was provided, and give the debtor at least 25 days after the date upon which the principal amount in question had been billed to make an interest-free payment.

A careful review of the record establishes that the trial court correctly rejected Plaintiff’s request for the assessment of interest against Defendant at a rate authorized by N.C. Gen. Stat. § 24-11(a). Although Plaintiff did not attempt to assess an interest obligation upon Defendant until thirty days after the transmission of the 4 December 2006 invoice, the record contains no indication that Plaintiff notified Defendant at any time prior to the transmission of that invoice that she intended to assess interest on the principal amount reflected in that invoice. As a result, while Plaintiff “would be entitled to impose finance charges under [N.C. Gen. Stat. §] 24-11(a) on all credit extended on purchases made after” 4 December 2006, *Hyde Ins.*, 30 N.C. App. at 506, 227 S.E.2d at 171, the effect of the 4 December 2006 invoice was to impermissibly seek to charge interest on amounts relating to services provided and expenses incurred prior to Plaintiff’s initial notice, a result that our prior decisions construing N.C. Gen. Stat. § 24-11(a) simply do not permit. Therefore, the trial court correctly concluded that Plaintiff was barred from attempting to obtain interest at a rate of one and one-half per cent per month on the principal amount billed by means of the 4 December 2006 invoice.

Similarly, we conclude that Plaintiff is not entitled to collect interest at a rate of one and one-half per cent per month on the principal amount

FARLOW v. BROOKBANK

[230 N.C. App. 179 (2013)]

reflected in the 19 February 2007 invoice either. Although Plaintiff had the right to assess interest against the additional principal amount reflected in this invoice in the event that the notice requirements of N.C. Gen. Stat. § 24-11 had been complied with, and although Plaintiff had given notice that she intended to charge interest at a rate higher than the legal rate in the 4 December 2006 invoice, a notice such as that provided in the 4 December 2006 invoice will not be deemed valid in perpetuity. Instead, we conclude that a creditor's right to collect interest at a level higher than the legal rate pursuant to N.C. Gen. Stat. § 24-11(a) should be asserted in a regular and consistent manner and may be waived by the creditor's subsequent failure to assert her rights in such a manner.

According to well-established North Carolina law, “[a] waiver is implied when a person dispenses with a right ‘by conduct which naturally and justly leads the other party to believe that he has so dispensed with the right.’” *Medearis v. Trustees of Meyers Park Baptist Church*, 148 N.C. App. 1, 12, 558 S.E.2d 199, 206-07 (2001) (quoting *Guerry v. American Trust Co.*, 234 N.C. 644, 648, 68 S.E.2d 272, 275 (1951)), *disc. review denied*, 355 N.C. 493, 563 S.E.2d 190 (2002). As we have already noted, the 19 February 2007 invoice, unlike the 4 December 2006 invoice, made no reference to the assessment of interest on any balance that remained unpaid after thirty days (or any other period of time). Instead, the 4 December 2006 invoice was the only one of the five invoices that Plaintiff sent to Defendant that made any reference to the subject of interest.

In our previous cases upholding a creditor's right to assess interest against a debtor pursuant to N.C. Gen. Stat. § 24-11(a), we have emphasized the regularity with which the creditor asserted its right to impose interest charges pursuant to that statutory subsection and the detailed nature of the statements that the creditor made to the debtor relating to the interest issue. *See Hyde Ins.*, 30 N.C. App. at 506, 227 S.E.2d at 171 (upholding the assessment of interest charges pursuant to N.C. Gen. Stat. § 24-11(a) because “the statements received by defendant after [the date of initial notice] contained detailed information regarding the imposition of finance charges”); *Harrell Oil Co. v. Case*, 142 N.C. App. 485, 490, 543 S.E.2d 522, 526 (2001) (noting that “defendants had been receiving statements on a regular basis” and that “each [statement] contain[ed] a specific and detailed provision regarding the imposition of finance charges”). The single invoice in which Plaintiff attempted to assert a right to assess interest against Defendant stands in stark contrast to the level of regularity and detail that this Court has deemed important in determining that a creditor was entitled to assess interest charges against a debtor pursuant to N.C. Gen. Stat. § 24-11(a).

FARLOW v. BROOKBANK

[230 N.C. App. 179 (2013)]

In addition, nothing in the record suggests that Defendant was ever made aware that Plaintiff sought to assess interest against Defendant relating to the principal amount evidenced in the 19 February 2007 invoice. On the contrary, the 19 February 2007 invoice did not mention that any interest would be owed on the unpaid balance remaining from the 4 December 2006 invoice or suggest that interest was being assessed against any new charges reflected on the 19 February 2007 invoice. Thus, the 4 December 2006 invoice, rather than being part of a systematic effort to assess interest against the amount that Defendant owed to Plaintiff pursuant to N.C. Gen. Stat. § 24-11(a), amounted to an anomalous departure from an otherwise uniform series of invoices in which no reference to the subject of interest appeared. As a result, given that Plaintiff never explicitly asserted the right to assess interest against the amount embodied in the 19 February 2007 invoice and that Plaintiff had failed to consistently assert the right to collect such interest during her interactions with Defendant, we hold that the trial court correctly concluded that the record did “not demonstrate any course of dealing with Defendant” and that Plaintiff had, for that reason, waived the right to assess interest charges on the principal amount reflected in the 19 February 2007 invoice.¹ For all of these reasons, the trial court correctly refrained from awarding Plaintiff interest at the rate of one and one-half percent on the amounts which she was entitled to receive from Defendant.

III. Conclusion

Thus, for the reasons set forth above, we hold that none of Plaintiff’s challenges to the interest-related provisions of the trial court’s judgment have merit. As a result, the trial court’s judgment should be, and hereby is, affirmed.²

AFFIRMED.

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

1. As a result of our determination that Plaintiff was barred from assessing interest against Defendant due to her failure to comply with the provisions of N.C. Gen. Stat. § 24-11, we need not address the parties’ contentions with respect to Formal Ethics Opinion No. 3 and Plaintiff’s failure to request an award of interest pursuant to N.C. Gen. Stat. § 24-11(a) in her complaint.

2. Although Plaintiff advances a number of assertions in her brief concerning the unfairness of allowing a debtor to force a creditor to reduce an essentially uncontested claim to judgment and the efficacy of requiring the payment of interest at a rate higher than the established legal rate as a means of deterring such conduct, such policy-based considerations have no real bearing on the application of the provisions of N.C. Gen. Stat. § 24-11(a) as construed by the prior decisions of this Court to the facts contained in the present record.

FIRST FED. BANK v. ALDRIDGE

[230 N.C. App. 187 (2013)]

FIRST FEDERAL BANK, PLAINTIFF

v.

SCOTT D. ALDRIDGE, DEFENDANT

No. COA13-450

Filed 5 November 2013

1. Negotiable Instruments—promissory notes—collection by third party—right to enforce—not sufficiently alleged

The trial court properly granted defendant's motion to dismiss pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) in an action to enforce promissory notes executed by defendant with a third party bank. Plaintiff's complaint lacked allegations sufficiently particular to indicate plaintiff's right to enforce the instrument.

2. Civil Procedure—Rule 12(b)(6) dismissal—with prejudice—no abuse of discretion

The trial court did not abuse its discretion when it granted a Rule 12(b)(6) dismissal with prejudice rather than allowing leave to amend. The record was devoid of any motion by plaintiff to amend its complaint and nothing indicated that plaintiff moved that the dismissal be without prejudice. Plaintiff cannot now claim that the trial court abused its discretion by not offering, *sua sponte*, an opportunity to amend the complaint.

Appeal by plaintiff from order entered 5 November 2012 by Judge Marion R. Warren in Brunswick County District Court. Heard in the Court of Appeals 26 September 2013.

Smith Debnam Narron Drake Saintsing & Myers, LLP, by Connie Carrigan, and Clawson and Staubes, LLC, by J. Ronald Jones, Jr., for plaintiff-appellant.

The Chandler Law Firm, P.A., by John Calvin Chandler, for defendant-appellee.

HUNTER, JR., Robert N., Judge.

First Federal Bank ("Plaintiff") appeals from an order dismissing its complaint with prejudice pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Plaintiff contends that its complaint, which seeks enforcement of two promissory notes, contains sufficient

FIRST FED. BANK v. ALDRIDGE

[230 N.C. App. 187 (2013)]

allegations identifying its right to enforce the instruments. In the alternative, Plaintiff contends that dismissal with prejudice was inequitable and requests a remand with opportunity to amend the complaint. We disagree and affirm the trial court's order.

I. Factual & Procedural History

Plaintiff filed a complaint in this action on 26 September 2012 seeking enforcement of two promissory notes executed by Scott D. Aldridge ("Defendant"). Both of these promissory notes, which are attached and incorporated into the complaint by reference, identify Defendant as the borrower and "Cape Fear Bank" as the lender. Plaintiff is not identified in either instrument.

The first note, executed by Defendant on 13 February 2008, required Defendant to pay back a principal loan of \$293,727.44 by 20 February 2009 at a five percent interest rate. The second note, executed by Defendant on 17 March 2009, modified the original agreement by extending the due date on the loan by thirteen months. Plaintiff alleges that Defendant is in default under the terms of the agreement, leaving an unpaid balance of \$228,830.29, plus interest.

Attached to Plaintiff's complaint was the affidavit of Michael S. Brinson ("Mr. Brinson"), an Asset Recovery Coordinator for Plaintiff. In the affidavit, Mr. Brinson stated that he was "familiar with the books and records of the Plaintiff" and "familiar with the account of [Defendant]," and that Defendant's account was in arrears for the amount of \$228,830.29, plus interest. Neither the text of the complaint nor Mr. Brinson's affidavit indicate that Plaintiff Bank had acquired the debt from Cape Fear Bank or was otherwise entitled to it as a holder in due course.

On 23 October 2012, Defendant filed an answer and simultaneously moved to dismiss Plaintiff's complaint for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of our Rules of Civil Procedure. Following a hearing, the trial court dismissed Plaintiff's complaint with prejudice. The record does not contain any evidence that Plaintiff sought to amend the complaint during the hearing or afterward.

II. Jurisdiction

Plaintiff's appeal from the district court's final order granting Defendant's motion to dismiss lies of right to this Court pursuant to N.C. Gen. Stat. § 7A-27(c) (2011).

FIRST FED. BANK v. ALDRIDGE

[230 N.C. App. 187 (2013)]

III. Analysis

Plaintiff's appeal presents two questions for our review. First, whether the trial court erred in granting Defendant's motion to dismiss. Second, if the dismissal was proper, whether the trial court erred by dismissing Plaintiff's complaint with prejudice.

A. Defendant's 12(b)(6) Motion to Dismiss

[1] At issue with respect to Defendant's motion to dismiss is whether the allegations of Plaintiff's complaint demonstrate Plaintiff's right to enforce promissory notes executed by Defendant with a third party bank. Plaintiff contends that the allegations are sufficient under the notice pleading standard of N.C. R. Civ. P. 8 and that any ambiguity in the complaint should be resolved through discovery. 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). "On a Rule 12(b)(6) motion to dismiss, the question is whether, as a matter of law, the allegations of the complaint, treated as true, state a claim upon which relief can be granted." *Allred v. Capital Area Soccer League, Inc.*, 194 N.C. App. 280, 282, 669 S.E.2d 777, 778 (2008) (quoting *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002)). Accordingly, we must consider Plaintiff's complaint "to determine whether, when liberally construed, it states enough to give the substantive elements of a legally recognized claim." *Governors Club, Inc. v. Governors Club Ltd. P'Ship*, 152 N.C. App. 240, 246, 567 S.E.2d 781, 786 (2002) (internal citations omitted), *aff'd per curiam*, 357 N.C. 46, 577 S.E.2d 620 (2003).

Evidence that a plaintiff is the holder of a promissory note, or has otherwise acquired the rights of the holder, is an "essential element of a cause of action upon such note." *Liles v. Myers*, 38 N.C. App. 525, 528, 248 S.E.2d 385, 388 (1978); accord N.C. Gen. Stat. § 25-3-301 (2011). See also *Kane Plaza Assocs. v. Chadwick*, 126 N.C. App. 661, 664, 486 S.E.2d 465, 467 (1997) (stating that the party seeking enforcement of a promissory note "must be a real party in interest, *i.e.*, it must assert legal rights that will be determined by the litigation"). The "holder" of a negotiable instrument is defined as:

- a. The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession;

FIRST FED. BANK v. ALDRIDGE

[230 N.C. App. 187 (2013)]

- b. The person in possession of a negotiable tangible document of title if the goods are deliverable either to bearer or to the order of the person in possession; or
- c. The person in control of a negotiable electronic document of title.

N.C. Gen. Stat. § 25-1-201(21) (2011).

When the plaintiff is the payee of a promissory note that has been attached to the complaint, he is not required to allege in his complaint that he is the holder of the note because “[t]he payee or endorsee of a note is the *prima facie* owner and holder.” *Deloatch v. Vinson*, 108 N.C. 147, 148, 12 S.E. 895, 896 (1891).¹ However, when the plaintiff is not the payee, he “must aver the facts showing the execution of the note and the assignment or other transfer to himself.” *Id.* at 150, 12 S.E. at 896.

For example, in *Kane Plaza*, the trial court dismissed the plaintiff’s complaint in an action to enforce a promissory note on the ground that the complaint failed to allege that the plaintiff was the holder of the note. *Kane Plaza*, 126 N.C. App. at 663, 486 S.E.2d at 466. On appeal, this Court reversed because, although the note did not indicate the plaintiff was the payee, an additional agreement indicating that the payee was a disclosed agent of the plaintiff with respect to the note was attached and incorporated into the complaint. *Id.* at 665-66, 486 S.E.2d at 467-68.

Here, both promissory notes identify “Cape Fear Bank” as the payee, not Plaintiff. The instruments are payable to the order of Cape Fear Bank, not to the bearer of the instrument. Moreover, Plaintiff did not allege in the body of its complaint that it was the payee on the notes or that it acquired the right to enforce the notes. While Mr. Brinson’s affidavit indicates that Plaintiff was aware of the status of Defendant’s account, it likewise failed to establish Plaintiff’s standing to collect on the outstanding debt.

Plaintiff points to the liberal nature of notice pleading and argues that “[c]ommon knowledge exists that loans and extensions of credit are transferred between lenders utilizing various methods” and that “[a]ny ambiguity in the Complaint would have been readily explained in the discovery process.” Even so, neither of these factors negate Plaintiff’s obligation under N.C. R. Civ. P. 8 to draft a complaint that is sufficiently particular to show that Plaintiff is entitled to relief. *See Sutton v. Duke*,

1. Although *Deloatch* was decided under the former “code pleading” standard, we find it instructive here.

FIRST FED. BANK v. ALDRIDGE

[230 N.C. App. 187 (2013)]

277 N.C. 94, 105, 176 S.E.2d 161, 167 (1970) (stating that “no amount of liberalization should seduce the pleader into failing to state enough to give the substantive elements of his claim” (internal quotation marks and citation omitted)). To enforce a promissory note, a plaintiff must allege facts sufficiently particular to indicate the plaintiff’s right to enforce the instrument. Accordingly, because Plaintiff’s complaint is missing this essential element, we hold that dismissal pursuant to Rule 12(b)(6) was proper.

B. Order of Dismissal with Prejudice without Leave to Amend

[2] Given our decision to affirm the trial court’s dismissal of Plaintiff’s complaint pursuant to Rule 12(b)(6), we now reach Plaintiff’s second contention, namely, that the trial court erred by dismissing the complaint with prejudice. Specifically, Plaintiff argues that a dismissal with prejudice produces an “extreme” and “inequitable” result and that the trial court should have granted Plaintiff leave to amend its complaint.

The decision to dismiss an action with or without prejudice is in the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Trent v. River Place, LLC*, 179 N.C. App. 72, 77, 632 S.E.2d 529, 533 (2006). “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).

With respect to the amendment of pleadings, the North Carolina Rules of Civil Procedure provide that “[a] party may amend his pleading once as a matter of course at any time before a responsive pleading is served. . . . Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.” N.C. R. Civ. P. 15(a). However, when the plaintiff completely fails to make any effort to amend the pleading, take a voluntary dismissal, or move that the complaint be dismissed without prejudice, the trial court does not abuse its discretion in dismissing the complaint with prejudice. *Johnson v. Bollinger*, 86 N.C. App. 1, 9, 356 S.E.2d 378, 383 (1987).

In *Johnson*, the plaintiff filed a defective complaint seeking damages for intentional infliction of emotional distress. *Id.* at 2, 356 S.E.2d at 379-80. Without any attempt by the plaintiff to amend the complaint, the trial court dismissed the complaint with prejudice under Rule 12(b) (6). *Id.* at 2, 356 S.E.2d at 380. On appeal, the plaintiff made a similar argument to the one at issue here to the effect that the trial court should have, *sua sponte*, given the plaintiff leave to amend the complaint. *Id.* at

FIRST FED. BANK v. ALDRIDGE

[230 N.C. App. 187 (2013)]

7, 356 S.E.2d at 382. Addressing the trial court's failure to provide leave to amend, this Court said:

As plaintiff failed to take any action to amend his complaint either before or after its dismissal, he cannot now complain he lacked adequate opportunity to amend his complaint. After dismissal of plaintiff's complaint under Rule 12(b)(6), the trial court was no longer empowered to grant plaintiff leave to amend under Rule 15(a): To hold otherwise would enable the liberal amendment policy of Rule 15(a) to be employed in a way that is contrary to the philosophy favoring finality of judgments and the expeditious termination of litigation.

Id. at 7-8, 356 S.E.2d at 382 (quotation marks and citation omitted). Moreover, and with regard to the trial court's decision to dismiss the complaint with prejudice, this Court said:

Since the dismissal order operates as an adjudication on the merits unless the order specifically states to the contrary, the party whose claim is being dismissed has the burden to convince the court that the party deserves a second chance; thus, the party should move the trial court that the dismissal be without prejudice.

Id. at 9, 356 S.E.2d at 383. As the plaintiff in *Johnson* failed to make any such motion, this Court held that dismissing the complaint with prejudice was not an abuse of discretion. *Id.*

Here, the record is devoid of any motion by Plaintiff to amend its complaint. Furthermore, there is nothing in the record indicating that Plaintiff moved that the dismissal be without prejudice. Consistent with our decision in *Johnson*, Plaintiff cannot now claim that the trial court abused its discretion by not offering Plaintiff, *sua sponte*, an opportunity to amend the complaint. Accordingly, we hold that the trial court did not abuse its discretion when it dismissed Plaintiff's complaint with prejudice.

IV. Conclusion

For the foregoing reasons, we affirm the order of the trial court in its entirety.

Affirmed.

Judges ERVIN and DAVIS concur.

IN RE C.M.

[230 N.C. App. 193 (2013)]

IN THE MATTER OF C.M.

No. COA13-546

Filed 5 November 2013

Child Abuse, Dependency, and Neglect—neglect—erroneous award of guardianship to non-relatives—cessation of review

The trial court erred in a child neglect case by awarding guardianship to non-relatives and ceasing further review in the matter. On remand, the trial court should ensure that respondent father’s right to appear at hearings in the matter and his right to effective assistance of counsel are protected.

Appeal by respondent from order entered 6 March 2013 by Judge Herbert L. Richardson in District Court, Robeson County. Heard in the Court of Appeals 8 October 2013.

No brief filed, for petitioner-appellee Robeson County Department of Social Services.

Jeffrey L. Miller, for respondent-father-appellant.

Lindsey A. Houk, for guardian ad litem.

STROUD, Judge.

Respondent-father appeals order awarding guardianship to non-relatives and ceasing further review in the matter. For the following reasons, we reverse and remand.

I. Background

On 26 March 2010, Robeson County Department of Social Services (“DSS”) filed a juvenile petition alleging Claire¹ was a neglected juvenile. On 15 April 2010, DSS amended its juvenile petition and alleged Claire was abused and neglected. None of the allegations of abuse or neglect in the petitions mention Claire’s father, the respondent. On 15 April 2010, the district court entered an order placing Claire in the nonsecure custody of DSS. On 4 June 2010, the district court adjudicated Claire a neglected juvenile. This same date, the district court entered

1. A pseudonym will be used to protect the identity of the child at issue.

IN RE C.M.

[230 N.C. App. 193 (2013)]

a disposition order ordering Claire remain in the custody of DSS.² On 18 January 2013, the district court entered an order changing the plan for Claire “from reunification with the mother to guardianship with a court approved caretaker.” On 6 March 2013, the district court ordered “legal guardianship be awarded to non-relatives” and “further requirements of review as set forth in N.C.G.S. 7B-906, et. seq. will no longer [be] deemed necessary as to juvenile . . . and will no longer be a requirement as to this matter.” Respondent-father appeals the 6 March 2013 order.

II. Competent Evidence

Respondent-father contends that the trial court’s findings of fact are not supported by competent evidence. We agree. “Appellate review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and the findings support the conclusions of law.” *In re J.C.S.*, 164 N.C. App. 96, 106, 595 S.E.2d 155, 161 (2004).

The entire transcript for the 6 March 2013 order is eight pages, and much of the dialogue does not even concern the child at issue on appeal, but rather another child who has the same mother but a different father. The trial court found as fact:

3. That the child is currently placed in a licensed foster home.
4. That on October 31, 2012 the plan for this child was changed to guardianship with a court approved caretaker.
5. That [Claire] has been in her current placement for more than 1 year.
6. That the current plan for this child is to grant guardianship of [Claire] . . . to Hazel and Aaron Hunt, non-relatives and that there be no need for further review.
7. That a Guardian ad Litem Court Report, marked GAL Exhibit “A” was admitted into evidence.

2. At this point DSS filed multiple juvenile petitions and the trial court entered corresponding adjudication and disposition orders. Neither the subsequent petitions or orders change the outcome of this case and as respondent-father states in his brief, “[i]t is unclear from the record why a third and fourth juvenile petition or the second and third adjudication and disposition Orders were required or entered since DSS remained the court-ordered custodian of the juvenile at all times and the juvenile court’s continuing authority under the initial petition and orders had never been relinquished or terminated by the court.”

IN RE C.M.

[230 N.C. App. 193 (2013)]

8. That the return of this Child to the home of the parents would be contrary to the welfare of this Child.

Based on the transcript before us, no evidence was taken during the hearing at all; indeed, no testimony was taken, no exhibits were actually admitted,³ and no previous orders were judicially noticed or incorporated in Claire's case.

The only remaining findings of fact are:

1. That this matter came on for a Permanency Planning Review pursuant to G.S. 7B-907.

2. That the Child, [Claire] . . . , is currently in the legal care, custody and control of the Robeson County Department of Social Services, pursuant to a nonsecure custody Order entered on March 26, 2010.

These findings of fact are certainly not enough to support any conclusions of law regarding awarding guardianship or ceasing review pursuant to North Carolina General Statute § 7B-906. Accordingly, we reverse and remand. Furthermore, although we need not address respondent's remaining arguments on appeal since we reverse the 6 March 2013 order for the reasons as stated above and remand for further proceedings, we do note that respondent's arguments regarding his right to appear at hearings in the matter and his right to effective assistance of counsel are well-taken, and on remand the trial court should ensure that his rights are protected.

III. Conclusion

For the foregoing reasons, we reverse and remand.

REVERSED and REMANDED.

Judges McGEE and BRYANT concur.

3. The trial court asked if "we [have] some paper work" as to Claire's visitation with her mother and DSS's counsel responded that "Yes, they are, Your Honor. They will be approaching." We are unable to connect this cryptic statement to any particular exhibit in the record on appeal, and the record does not include an exhibits/evidence log prepared by the clerk which might indicate that any exhibits were actually offered or admitted.

IN RE E.G.M.

[230 N.C. App. 196 (2013)]

IN THE MATTER OF E.G.M.

No. COA13-584

Filed 5 November 2013

1. Native Americans—child neglect proceeding—Indian Child Welfare Act

The Indian Child Welfare Act (ICWA) was applicable to a child neglect proceeding where the district court transferred legal custody of the child to the Department of Social Services. The ICWA applies to all state court child custody proceedings involving Indian children. This proceeding qualified as a “foster care placement” and thus a “child custody proceeding” under the ICWA.

2. Jurisdiction—subject matter—Native American child—neglect—agreement with tribe—record insufficient

The question of the district court’s jurisdiction under the Indian Child Welfare Act (ICWA) in a child neglect proceeding could not be resolved on the record presented and the matter was remanded for a determination of subject matter jurisdiction. While the State may exercise subject matter jurisdiction pursuant to an agreement with the Eastern Band of the Cherokee Indian Tribe, and a Memorandum of Agreement between the Tribe and the State was tendered, the document was not authenticated and the trial record contained no reference to it.

3. Native Americans—placement of child in foster care—supporting testimony—prior hearing

The trial court’s placement of a child in foster care under the Indian Child Welfare Act must be supported by evidence, including expert testimony, introduced at the proceeding that results in the foster care placement.

4. Native Americans—neglected child—foster care—supporting testimony—not sufficient

The removal to foster care of an allegedly neglected child who was a member of the Eastern Band of the Cherokee Indian tribe was not supported by the expert testimony where the court relied upon the testimony of a case manager for Cherokee Family Support Services from a prior hearing. The pediatric psychologist who testified as an expert at the foster care hearing offered no opinion regarding the likelihood of serious physical or emotional damage to the

IN RE E.G.M.

[230 N.C. App. 196 (2013)]

child in respondent mother's custody and did not profess any expertise in matters of Cherokee tribal culture or childrearing practices.

5. Appeal and Error—interlocutory orders and appeals—child custody—changed from mother to DSS—immediately appealable

A permanency planning order that changed legal custody of a child from respondent mother to DSS was immediately appealable.

6. Native Americans—child neglect—foster case—cessation of reunification efforts—findings

The authority of North Carolina's district courts to cease family reunification efforts under N.C.G.S. § 7B-507(b)(1) does not conflict with "minimum Federal standards" for Indian child welfare cases established by the Indian Child Welfare Act. The Act merely requires a finding, both before ordering a foster care placement and before terminating parental rights, that "active efforts" to prevent the disruption of the Indian family "proved unsuccessful." The policy concerns that animate the ICWA do not oblige our social service agencies to undertake actions inconsistent with the welfare of Indian children.

7. Appeal and Error—findings—not made by trial court—evidence in the record

An order in a child neglect case, involving the Indian Child Welfare Act, that ceased reunification efforts was reversed and remanded for proper findings. While there may be evidence in the record to support a determination that further efforts would be futile, it was up to the trial court to make proper factual findings based on the record evidence.

Appeal by respondent-mother and respondent-father from order entered 18 February 2013 by Judge Donna Forga in Jackson County District Court. Heard in the Court of Appeals 8 October 2013.

Mary G. Holliday, agency attorney for petitioner-appellee Jackson County Department of Social Services.

Angela Lewis, counsel for petitioner-appellee The Eastern Band of Cherokee Indians.

Administrative Office of the Courts, by Associate Counsel Deana K. Fleming, for guardian ad litem.

IN RE E.G.M.

[230 N.C. App. 196 (2013)]

Assistant Appellate Defender Joyce L. Terres for respondent-appellant father.

Richard Croutharmel for respondent-appellant mother.

BRYANT, Judge.

Where the record does not contain sufficient findings of fact and conclusions of law to confirm subject matter jurisdiction under the Indian Child Welfare Act, we vacate the trial court order and remand for entry of findings as to subject matter jurisdiction.

I. Procedural History

In November 2011, Jackson County Department of Social Services (“DSS”) filed petitions alleging that three-year-old E.G.M. (“Ellen”) was a neglected juvenile and her four-year-old half-sister, “Nancy,” was neglected and abused.¹ The petitions arose from reports of abusive injuries inflicted on Nancy by respondent-father in Ellen’s presence. DSS served notice that Ellen was subject to the Indian Child Welfare Act of 1978 (“ICWA” or “Act”) as an eligible member of the Eastern Band of the Cherokee Indian Tribe (“the Tribe”). 25 U.S.C. §§ 1901-63 (2012). The Tribe intervened in the proceedings pursuant to 25 U.S.C. § 1911(c) (2012) (“In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child’s tribe shall have a right to intervene at any point in the proceeding.”).

On 16 March 2012, the district court adjudicated Ellen a neglected juvenile. It entered adjudications of abuse and neglect as to Nancy and ordered respondent-father to be placed on the responsible individuals list. *See* N.C. Gen. Stat. §§ 7B-101(18a), 7B-311(b)(2) (2011). In its subsequent “Order on Disposition” entered 10 May 2012, the court awarded legal custody of Ellen to respondents and continued her placement in kinship care with respondent-mother, who had moved out of the marital residence after the petitions were filed. In a 90-day review order entered 15 November 2012, the court found that respondent-mother had been “awarded custody of [Ellen] through a divorce action in the Cherokee Tribal Court.”² The district court ordered that legal custody would

1. Pseudonyms have been used to protect the identities of the juveniles.

2. Respondent-mother is the mother of Ellen. Nancy’s mother did not appeal and is not a respondent in this matter. Respondent-father is the father of both Ellen and Nancy.

IN RE E.G.M.

[230 N.C. App. 196 (2013)]

remain with respondent-mother on the condition that Ellen continue in her kinship placement with family friend J.F.

Following a hearing on 7 January 2013, the court entered the instant permanency planning and review order on 18 February 2013. The order granted legal custody of Ellen to DSS and ordered her continued placement in the home of J.F. The court established a permanent plan of reunification with respondent-mother but relieved DSS of further efforts toward reunification with respondent-father. Both respondents filed notice of appeal from the 18 February 2013 permanency planning order.³

II. Applicability of the ICWA

[1] Congress enacted the ICWA pursuant to its “plenary power over Indian affairs” under U.S. Const. art. I, § 8, cl. 3. See 25 U.S.C. §1901(1) (2012); *see also Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192, 104 L. Ed. 2d 209, 237 (1989) (“[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs[.]”). The purpose of the ICWA was “the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture[.]” 25 U.S.C. § 1902 (2012). Accordingly, where the Act provides a higher standard of protection to the Indian family than is otherwise provided by state law, the ICWA standard prevails. *See, e.g., In re Welfare of Child of R.S.*, 805 N.W.2d 44, 49 (Minn. 2011) (citing U.S. Const. art. VI, § 2); *T.F. v. Dep’t of Health & Soc. Servs.*, 26 P.3d 1089, 1098 (Alaska 2001); *Quinn v. Walters*, 881 P.2d 795, 809-10 (Or. 1994). Where applicable state law “provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under [the ICWA],” the state law prevails. 25 U.S.C. § 1921 (2012).

The ICWA applies to all “state-court child custody proceedings involving Indian children[.]” *Adoptive Couple v. Baby Girl*, 570 U.S. ___, ___, 186 L. Ed. 2d 729, 733 (2013) (Thomas, J., concurring). The Act defines “child custody proceeding” to include any “foster care placement[.]” 25 U.S.C. § 1903(1)(i) (2012). For purposes of the ICWA, “foster care placement” refers to “any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated[.]” *Id.* Inasmuch as the

3. This order addresses only Ellen and the respondent-parents in this action.

IN RE E.G.M.

[230 N.C. App. 196 (2013)]

district court transferred legal custody of Ellen to DSS, leaving respondent-mother unable to demand her return from kinship care, the proceeding qualifies as a “foster care placement” and thus, a “child custody proceeding” under the ICWA.

Because Ellen is an Indian child, the parties agree that the ICWA applies.

III. Subject Matter Jurisdiction under the ICWA

[2] Respondents each challenge the district court’s exercise of subject matter jurisdiction as contrary to the provisions of the ICWA. “The issue of subject matter jurisdiction may be considered by the court at any time, and may be raised for the first time on appeal.” *In re T.B.*, 177 N.C. App. 790, 791, 629 S.E.2d 895, 896-97 (2006). Whether the district court had subject matter jurisdiction is a question of law subject to *de novo* review. *Powers v. Wagner*, 213 N.C. App. 353, 357, 716 S.E.2d 354, 357 (2011). Although the court found that the ICWA “does apply to this matter” and asserted subject matter jurisdiction pursuant to N.C. Gen. Stat. § 7B-200 (2011), it made no findings or conclusions regarding its exercise of jurisdiction under the ICWA.

The ICWA allocates jurisdiction between tribal and state courts as follows:

(a) . . . An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. . . .

(b) . . . In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child’s tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child’s tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) . . . In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the

IN RE E.G.M.

[230 N.C. App. 196 (2013)]

Indian child's tribe shall have a right to intervene at any point in the proceeding.

25 U.S.C. § 1911 (2012); *cf. also Jackson Cnty. v. Swayney*, 319 N.C. 52, 63, 352 S.E.2d 413, 419 (1987) (“[O]ur State courts lack subject matter jurisdiction to determine paternity in [a] case where the child, mother and defendant are members of the Eastern Band of Cherokee Indians residing on the reservation.”).

For purposes of the ICWA, Ellen's domicile was that of her parents. *See Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48, 104 L. Ed. 2d 29, 46 (1989). At the time DSS filed the juvenile petition on 8 November 2011, respondents were domiciled in Cherokee, North Carolina, within the Tribe's Qualla Boundary land trust.⁴ Therefore, this case is governed by 25 U.S.C. § 1911, which grants exclusive jurisdiction to the tribal court, “except where such jurisdiction is otherwise vested in the State by existing Federal law.” 25 U.S.C. § 1911(a).

Existing federal law provides three means by which a state court may exercise jurisdiction under subsection 25 U.S.C. § 1911(a). First, Public Law 280 provides six states — not including North Carolina — with jurisdiction over cases arising on “Indian country within the State.” 28 U.S.C. § 1360(a) (2011). Second, a state court may exercise emergency jurisdiction under the ICWA over an Indian child who is temporarily located off of the reservation “in order to prevent imminent physical damage or harm to the child.” 25 U.S.C. § 1922 (2012). Here, however, the district court did not purport to exercise emergency jurisdiction over Ellen, nor did it relinquish jurisdiction as contemplated by 25 U.S.C. § 1922. The record reflects that Ellen was safely in kinship care by agreement of respondents at the time DSS filed the juvenile petition. Finally, the ICWA authorizes *ad hoc* agreements between individual states and Indian tribes:

(a) . . . States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis

4. Pursuant to N.C. Gen. Stat. § 8C-1, Rule 201(c) (2011), we take judicial notice that the Town of Cherokee lies within the Qualla Boundary. *See State v. W.N.C. Pallet & Forest Products Co.*, 283 N.C. 705, 712, 198 S.E.2d 433, 437 (1973) (recognizing “courts will take judicial notice of . . . political subdivisions of the State”); *Wildcatt v. Smith*, 69 N.C. App. 1, 4, 316 S.E.2d 870, 873 (1984) (describing origin of the Qualla Boundary lands in western North Carolina).

IN RE E.G.M.

[230 N.C. App. 196 (2013)]

and agreements which provide for concurrent jurisdiction between States and Indian tribes.

(b) . . . Such agreements may be revoked by either party upon one hundred and eighty days' written notice to the other party. . . .

25 U.S.C. 1919 (2012).

Respondents observe that the district court made no findings as to any agreement between the Tribe and the State affecting the tribal court's exclusive jurisdiction under 25 U.S.C. § 1919(a). Therefore, they contend, the court's orders in this cause are void.

Appellees guardian ad litem, DSS, and The Eastern Band of Cherokee Indians ask this Court to take judicial notice of a memorandum of agreement ("MOA") submitted by the guardian ad litem ("GAL") as a supplement to the record on appeal. *See* N.C.R. App. P. 9(b)(5) (2013). Styled "Agreement Between the Eastern Band of Cherokee Indians and the North Carolina Department of Health and Human Services, Division of Social Services; the Cherokee County Department of Social Services; the Graham County Department of Social Services; the Jackson County Department of Social Services; and the Swain County Department of Social Services[,]" the MOA purports "to establish, for the mutual benefit of the Parties, procedures which will provide for the enforcement of the [North Carolina's] Child Protective Services laws . . . consistent with the provision[s] of the Indian Child Welfare Act[.]" In pertinent part, the MOA provides that "[t]he TRIBE agrees to defer to the jurisdiction of the State of North Carolina for the specific purpose of complying with Chapter 7B of the North Carolina General Statutes" as authorized by 25 U.S.C. § 1919, and allows DSS to "file a Juvenile Petition in the District Court where the child resides pursuant to the provision of Chapter 7B" if DSS deems an Indian child "to be abused or at risk of being abused, neglected or dependent." The MOA was signed by the Tribe's principal chief on 8 December 2006, and by the directors of DSS and the state Division of Social Services on 16 March and 2 May 2007. In addition to providing for termination by the Tribe or State upon 180 days written notice, *see* 25 U.S.C. § 1919(b), the MOA allows for written modifications, if signed by all parties, and requires a joint review by the parties "no less than once every three (3) years."

Under North Carolina Rules of Evidence, Rule 201, a court may take judicial notice of adjudicative facts that are "not subject to reasonable dispute in that [they are] either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready

IN RE E.G.M.

[230 N.C. App. 196 (2013)]

determination by resort to sources whose accuracy cannot reasonably be questioned.” N.C.G.S. § 8C-1, Rule 201(b) (2011). “Judicial notice may be taken at any stage of the proceeding.” *Id.* § 8C-1, Rule 201(f) (2011). Moreover, where a party makes a request and provides the court with the necessary information, judicial notice is mandatory. *Id.* § 8C-1, Rule 201(d) (2011).

Based on the materials before this Court, we are unable to take judicial notice of the MOA. As an evidentiary matter, the document tendered by the GAL is not certified or otherwise authenticated in accordance with our Rules of Evidence. N.C. Gen. Stat. §§ 8C-1, Art. 9 (2011). The GAL provides no source for the MOA; and the record provides no means for this Court to determine its formal validity. *Cf. Pallet*, 283 N.C. at 712, 198 S.E.2d at 437 (“Judicial notice is not taken of municipal ordinances, and annoying difficulties of proof may be encountered unless the ordinance is printed or published under proper authority.”) (citation and quotations omitted); *cf. also Glenn-Robinson v. Acker*, 140 N.C. App. 606, 633—34, 538 S.E.2d 601, 620 (2000) (declining judicial notice of police department regulations). Nor are we persuaded that an MOA executed under 25 U.S.C. § 1919(a) falls within the ambit of “adjudicative facts” as contemplated by N.C.G.S. § 8C-1, Rule 201 (2011).⁵ We are unable to determine, for example, whether such an agreement has been subject to an intervening modification by the parties or a revocation by the Tribe or the State as contemplated by 25 U.S.C. § 1919(b). We therefore conclude that the existence of the agreement between the Tribe and the State under the ICWA is in the nature of a “legislative fact” not subject to judicial notice. *See Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 38, 568 S.E.2d 893, 903 (2002) (“Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process Legal conclusions are not the proper subject of judicial notice.” (citations and quotation omitted)).

Both DSS and the Tribe insist that the MOA’s existence is “generally known within the territorial jurisdiction of the trial court[.]” N.C.G.S. § 8C-1, Rule 201(b) (2011), as evidenced by the fact that “four of the seven county departments of social services in the 30th Judicial District

5. Adjudicative facts “are the facts that normally go to the jury in a jury case” and involve “the immediate parties — who did what, where, when, how, and with what motive or intent[.]” N.C.G.S. § 8C-1, Rule 201, commentary (quotation omitted). “Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body.” *Id.*

IN RE E.G.M.

[230 N.C. App. 196 (2013)]

of North Carolina are signatories” thereto. The GAL suggests that the district court took judicial notice of the MOA implicitly. As nothing in the trial court record makes reference to the MOA, however, we have no means by which to determine the state of general knowledge within Jackson County or the basis for the court’s exercise of subject matter jurisdiction.

Because the question of the district court’s jurisdiction under the ICWA cannot be resolved based on the evidence of record, we must remand the cause “for a determination of subject matter jurisdiction.” *In re M.G.*, 187 N.C. App. 536, 538, 543, 653 S.E.2d 581, 585 (2007), *rev’d in non-pertinent part*, 363 N.C. 570, 681 S.E.2d 290 (2009); *see also In re A.R.*, ___ N.C. App. ___, ___, 742 S.E.2d 629, 634 (2013) (remanding for findings on the applicability of the ICWA).

Notwithstanding our ruling, we proceed to address respondents’ remaining arguments on appeal “in the interests of expediting review. In the event that the trial court concludes on remand that it lacks subject matter jurisdiction . . . , then it will be required to dismiss the petition[.]” *In re M.G.*, 187 N.C. App. at 548 n.5, 653 S.E.2d at 588 n.5.

IV. Requirements for Foster Care Placement under the ICWA

[3] Respondent-mother next claims the trial court violated the ICWA by placing Ellen in DSS custody without clear and convincing evidence, including qualified expert testimony, that the child would likely suffer serious emotional or physical damage if she remained in the custody of respondent-mother. *See* 25 U.S.C. § 1912(e) (2012). While conceding that the district court made the necessary finding under 25 U.S.C. § 1912(e), she contends that the finding was not based on expert testimony adduced at the 7 January 2013 permanency planning hearing or otherwise supported by clear and convincing evidence at the hearing.

The relevant statute provides as follows:

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Id. § 1912(e). As previously noted, the district court’s transfer of legal custody from respondent-mother to DSS while leaving Ellen in kinship

IN RE E.G.M.

[230 N.C. App. 196 (2013)]

care constituted a foster care placement subject to the requirements of 25 U.S.C. § 1912(e).⁶ See *id.* § 1903(1)(i).

The record reflects that Jenny Bean, case manager for Cherokee Family Support Services, testified at Ellen’s initial dispositional hearing on 4 April 2012 as an expert in “Indian Culture as it Applies to Indian Child Rearing[.]” In its May 2012 dispositional order, the district court made the following finding of fact by clear and convincing evidence: “In [Bean’s] expert opinion, which the Court finds as fact, continued custody or a return to the custody of [respondent-father] and/or [respondent-mother] would likely cause serious physical or emotional damage to [Ellen].” Although Bean did not testify at any subsequent hearing, both the court’s 15 November 2012 review order and its 18 February 2013 permanency planning order include the following finding:

That Jenny Bean, case manager for Cherokee Family Support Services, *previously testified* and was received by the Court as an expert witness In her expert opinion, which the Court finds as fact, continued custody or a return of the custody of [respondent-father] and/or [respondent-mother] would likely cause serious physical or emotion damage to [Ellen].

(emphasis added). The finding is identical to the initial finding at disposition, except for the court’s reference to Bean’s “previous” testimony.

A. Timing of Qualified Expert Testimony under 25 U.S.C. § 1912(e)

[3] In urging this Court to uphold the permanency planning order, appellees note that 25 U.S.C. § 1912(e) does not require that the expert testify contemporaneously to the court’s decision to order a foster care placement, merely that such testimony be presented. Respondent-mother disagrees. We have found no case law from other jurisdictions interpreting this specific aspect of 25 U.S.C. § 1912(e), and the issue is one of first impression for our appellate courts.

6. We recognize that the court’s 90-day review order of 15 November 2012 conditioned respondent-mother’s legal custody upon Ellen’s kinship placement with J.F. This condition did not eliminate respondent-mother’s legal right to demand the child’s return, albeit with likely consequences. We further note that respondent-mother had no ability to appeal the 15 November 2012 review order, inasmuch as it did not “chang[e] legal custody” of Ellen. N.C. Gen. Stat. § 7B-1001(a)(4) (2011). We thus conclude that the court’s formal transfer of legal custody from respondent-mother to DSS on 18 February 2013 amounted to Ellen’s “foster care placement” under 25 U.S.C. § 1903(1)(i).

IN RE E.G.M.

[230 N.C. App. 196 (2013)]

The practical flaw in appellees' position is revealed by their characterization of respondent-mother's appeal as an impermissible collateral attack on the 10 May 2012 disposition order which contained the district court's first iteration of the contested finding. Indeed, appellees assert that "the doctrine of collateral estoppel prevents respondent[-]mother from attacking this finding of fact[,]" having failed to appeal the original disposition order. We find this argument unpersuasive. Respondent-mother had no occasion to appeal from the initial disposition order in this cause, inasmuch as it awarded her both legal custody and physical care of her daughter. Indeed, as she observes, appellees' argument highlights the inherent conflict between the court's disposition and its finding — purportedly based on expert testimony and clear and convincing evidence — that continuing Ellen in respondent-mother's custody "would likely cause serious physical or emotional damage" to the child. *Cf. In re I.K.*, __ N.C. App. __, __, 742 S.E.2d 588, 593 (2013) (noting the inconsistency between the finding of a "reasonable probability" that the respondent-father would discipline his daughter with a bullwhip and the court's award of unsupervised visitation to the father). The fact that the court waited until February of 2013 to remove Ellen from respondent-mother's custody, despite reiterating its finding of a likelihood of serious damage to the child in its November 2012 review order, "seems irrational" and calls into question the solemnity of the court's fact-finding. *Id.*

Notwithstanding Congress's avowed goal of preserving Indian families, we do not believe the ICWA contemplates a court leaving an Indian child in a parent's custody after finding a likelihood of serious physical or emotional damage to the child under 25 U.S.C. § 1912(e). Such an outcome would be contrary to the overriding concern on the child's best interests that lies at the heart of both the ICWA and our state's Juvenile Code. *See Adoptive Couple*, __ U.S. at __, 186 L. Ed. 2d at 740 ("[T]he purpose of [the ICWA] is to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families[.]") (emphasis added) (citation and quotations omitted); *In re M.I.W.*, 365 N.C. 374, 381, 722 S.E.2d 469, 474 (2012) (recognizing "the fundamental principle underlying North Carolina's approach to controversies involving child neglect and custody[—]that the best interest of the child is the polar star" (alteration in original; citation and quotations omitted)). In other words, a determination under 25 U.S.C. § 1912(e) that "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child" should result in the child's removal from custody at the time such determination is made, not nine months and multiple hearings thereafter. While we need

IN RE E.G.M.

[230 N.C. App. 196 (2013)]

not consider whether a 25 U.S.C. § 1912(e) determination *requires* the court to order a foster care placement, we are persuaded that Congress intended the determination to be made contemporaneously to any such placement. Our conclusion is fully consistent with the ICWA's purpose as well as the principle that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit[.]" *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 85 L. Ed. 2d 753, 759 (1985). We therefore hold that a determination under 25 U.S.C. § 1912(e) must be supported by evidence, including expert testimony, introduced at the proceeding that results in the foster care placement.

B. "Qualified Expert Witnesses" under the ICWA

[4] Although the ICWA does not define "qualified expert witnesses," non-binding guidelines promulgated by the Bureau of Indian Affairs emphasize "that Congress attribute[d] many unwarranted removals of Indian children to cultural bias on the part of the courts and social workers making the decisions." Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,593, (Nov. 26, 1979). Therefore, the guidelines offer the following list of "[p]ersons . . . most likely to meet the requirements for a qualified expert witness for purposes of Indian child custody proceedings:"

- (i) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and child-rearing practices.
- (ii) A lay expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe.
- (iii) A professional person having substantial education and experience in the area of his or her specialty.

Id. (stating the ICWA "makes clear that knowledge of tribal culture and childrearing practices will frequently be very valuable to the court").

We note that pediatric psychologist Dr. Lydia Aydlett testified as an expert at the 7 January 2013 permanency planning hearing but offered no opinion regarding the likelihood of serious physical or emotional damage to Ellen in respondent-mother's custody. Nor did the court purport to rely upon her opinion in making its determination under 25 U.S.C. § 1912(e), instead citing the previous testimony of Ms. Bean.

IN RE E.G.M.

[230 N.C. App. 196 (2013)]

We further note that Dr. Aydlett did not profess any expertise in matters of Cherokee tribal culture or childrearing practices. While we need not define the specific requirements for a qualified expert witness under the ICWA, we do not believe Dr. Aydlett's hearing testimony or the few findings based thereon were sufficient to comply with 25 U.S.C. § 1912(e).

C. Conclusion

In order to sustain a foster care placement under the ICWA, the "determination . . . that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child" must be "supported by clear and convincing evidence, including testimony of qualified expert witnesses," adduced *at the proceeding* that results in the "placement . . . be[ing] ordered[.]" 25 U.S.C. § 1912(e). Because the qualified expert cited by the district court did not testify at the permanency planning hearing, its order awarding legal custody to DSS must be vacated and the cause remanded for further proceedings consistent with the ICWA.

V. Ceasing Reunification Efforts as to Respondent-Father

[5] Respondent-father challenges the district court's ceasing of reunification efforts pursuant to N.C. Gen. Stat. § 7B-507(b)(1) (2011). Generally, "[a] trial court may cease reunification efforts upon making a finding that further efforts 'would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time[.]'" *In re C.M.*, 183 N.C. App. 207, 214, 644 S.E.2d 588, 594 (2007) (quoting N.C.G.S. § 7B-507(b)(1)). The order includes a conclusion of law that DSS "shall be relieved of the requirement that it make reasonable efforts to reunify [Ellen] with the Respondent Father as those efforts would be futile or inconsistent with [her] need for a safe, permanent home within a reasonable period of time." However, respondent-father claims that the ICWA overrides N.C.G.S. § 7B-507(b)(1). In the alternative, he contends the court's decision to cease reunification efforts under subpart (b)(1) was unsupported by its findings or the evidence.

Citing *In re D.K.H.*, 184 N.C. App. 289, 645 S.E.2d 888 (2007), appellees respond that respondent-father has no right of immediate appeal from the order ceasing reunification efforts under N.C.G.S. § 7B-1001(a) (5). *Id.* at 291, 645 S.E.2d at 890. Unlike the order at issue in *In re D.K.H.*, the 18 February 2013 permanency planning order also "change[d] legal custody of" Ellen from respondent-mother to DSS. N.C.G.S. § 7B-1001(a) (4). The order is thus immediately appealable pursuant to N.C.G.S. § 7B-1001(a)(4) and properly before this Court for review.

IN RE E.G.M.

[230 N.C. App. 196 (2013)]

A. Ceasing Reunification Efforts under the ICWA

[6] Raising an issue of first impression in this Court, respondent-father argues the ICWA prohibits the ceasing of “active efforts”⁷ to reunify an Indian family at any time prior to a termination of parental rights. 25 U.S.C. § 1912(d) (2012). He notes the ICWA makes no provision for ceasing such efforts toward the Indian family and cites the following statutory language as evincing its contrary intention:

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

Id. By requiring a finding of unsuccessful efforts both prior to placing a child in foster care and prior to termination of parental rights, respondent-father claims, the ICWA “does not allow the agency to give up on reuniting an Indian family until it has reached the final stage of the court proceedings” – resulting in either a termination of parental rights or the return of the child to the parents. Moreover, because the ICWA establishes “minimum Federal standards” for the protection of Indian families, *id.* § 1902, it prevails over any conflicting state law providing lesser protections.

By requiring “reasonable efforts” toward reunification, the North Carolina Juvenile Code incorporates the standard established by the Adoption and Safe Families Act (“ASFA”) as a condition of federal funding under Title IV-E. 42 U.S.C. § 671(a)(15)(A) (2011); N.C. Gen. Stat. § 7B-100(5) (2011); *see also* 45 C.F.R. § 1356.21(b) (2012) (“The title IV-E agency must make reasonable efforts . . . to effect the safe reunification of the child and family[.]”); N.C. Gen. Stat. § 7B-101(18) (2011) (defining “reasonable efforts”). The ASFA specifies that “the child’s health and safety shall be the paramount concern” when applying the term “reasonable efforts” in a given case. 42 U.S.C. § 671(a)(15)(A). The ASFA further enumerates four circumstances in which reasonable efforts are not required: (1) when “the parent has subjected the child to aggravated

7. Most states addressing the issue have held that the ICWA’s “active efforts requirement ‘sets a higher standard for social services departments than the reasonable efforts required by state statutes.’” *People ex rel. P.S.E.*, 2012 SD 49, ¶ 18, 816 N.W.2d 110, 115 (quotation omitted). However, respondent father disavows any objection to the quality of DSS’s previous reunification efforts. We note the court did find that DSS had engaged in “active efforts to rehabilitate the Indian Family.”

IN RE E.G.M.

[230 N.C. App. 196 (2013)]

circumstances” such as torture; (2) when the parent has been convicted of murder or voluntary manslaughter of a parent or sibling of the child, or of a felonious assault that resulted in serious bodily injury to any of the parent’s children; (3) when the parent’s rights as to a sibling of the child have been involuntarily terminated; and (4) when such efforts are “determined to be inconsistent with the permanency plan for the child[.]” 42 U.S.C. § 671(a)(15)(C)-(D); 45 C.F.R. § 1356.21(b)(3). These circumstances are reflected in our courts’ authority to cease reunification efforts under N.C.G.S. § 7B-507(b)(1)-(4).

Whether the ICWA forbids the ceasing of reunification efforts in circumstances where it is otherwise allowed by the ASFA is a matter of dispute among the states. *Compare J.S. v. State*, 50 P.3d 388, 392 (Alaska 2002) (relying on the ASFA as support for its ruling that active efforts were not required under the ICWA in cases of sexual abuse by a parent), *with In re J.S.B.*, 2005 SD 3, ¶ 21, 691 N.W.2d 611, 619 (“[W]e do not think Congress intended that ASFA’s ‘aggravated circumstances’ should undo the State’s burden of providing ‘active efforts’ under [the] ICWA.”). A consensus has emerged, however, that “[a]lthough the state must make ‘active efforts’ under the ICWA, it need not ‘persist with futile efforts.’” *In re K.D.*, 155 P.3d 634, 637 (Colo. App. 2007) (quoting *In re J.S.B.*, 2005 SD 3, ¶ 29, 691 N.W.2d at 621); *accord State ex rel. C.D.*, 2008 UT App 477, ¶ 30, 200 P.3d 194, 205 (“[T]he State must demonstrate that active efforts have been made with respect to the specific parent or Indian custodian . . . or provide evidence that such efforts would be futile.”); *Letitia v. Superior Court of Orange Cnty.*, 97 Cal. Rptr. 2d 303, 308-09 (Cal. Ct. App. 2000) (“The law does not require the performance of idle acts.”); *In re S.D.*, 599 N.W.2d 772, 775 n.3 (Mich. Ct. App. 1999) (“[U]nder the circumstances of this case, . . . remedial efforts would have been largely futile.”).

We join our sister states in concluding that the court may order the cessation of reunification efforts in ICWA cases if it finds that “[s]uch efforts clearly would be futile.” N.C.G.S. § 7B-507(b)(1). Moreover, we do not believe the ICWA requires reunification efforts to persist if they are “clearly . . . inconsistent with the juvenile’s health, safety, and need for a safe, permanent home within a reasonable period of time.” *Id.* As previously noted, the ICWA shares the primary aim of the ASFA and our Juvenile Code to protect and serve the best interests of children. *See Adoptive Couple*, __ U.S. at __, 186 L. Ed. 2d at 740. As shown by the ASFA’s imposition of strict deadlines to attain permanency for children in foster care, 42 U.S.C. § 675(5)(C), (E) (2011), both timeliness and permanency are essential to a child’s well-being. *See In re T.H.T.*, 362 N.C. 446, 450,

IN RE E.G.M.

[230 N.C. App. 196 (2013)]

665 S.E.2d 54, 57 (2008) (“The importance of timely resolution of cases involving the welfare of children cannot be overstated.”); *In re Fletcher*, 148 N.C. App. 228, 238, 558 S.E.2d 498, 504 (2002) (recognizing “the need for permanency for young children”) (citation and quotation omitted).

We are not convinced by respondent-father’s structural argument that the language of 25 U.S.C. § 1912(d) prohibits the ceasing of reunification efforts prior to the proceeding to terminate parental rights. This subsection merely requires a finding, both before ordering a foster care placement and before terminating parental rights, that “active efforts” to prevent the disruption of the Indian family “proved unsuccessful.” If a court ceases such efforts at the time of the foster care placement, and the case then proceeds to termination, the court may simply cite the pre-foster-care efforts in making the necessary finding under 25 U.S.C. § 1912(d).

We hold that the authority of North Carolina’s district courts to cease reunification efforts under N.C.G.S. § 7B-507(b)(1) does not conflict with “minimum Federal standards” for Indian child welfare cases established by the ICWA. 25 U.S.C. § 1902 (2012). The policy concerns that animate the ICWA do not oblige our social service agencies to undertake actions inconsistent with the welfare of Indian children. We recognize that the ICWA’s application to a case will require “active efforts” toward reunification, rather than the “reasonable efforts” generally required by our Juvenile Code. It may also inform a court’s assessment of what constitutes “a reasonable period of time” for purposes of N.C.G.S. § 7B-507(b)(1), if warranted by tribal culture or childrearing practices. As neither of these issues are raised by respondent-father’s appeal, we need not address them.

B. Sufficiency of Findings

[7] Respondent-father also claims that “the court made no specific findings regarding why continued reasonable efforts (or active efforts) were futile.” We agree.

Despite its statutory designation as a finding or “ultimate finding[,]” *see In re I.R.C.*, __ N.C. App. __, __, 714 S.E.2d 495, 499 (2011), the determination that grounds exist to cease reunification efforts under N.C.G.S. § 7B-507(b)(1) is in the nature of a conclusion of law that must be supported by adequate findings of fact. *See In re I.K.*, __ N.C. App. __, __, 742 S.E.2d 588, 595 (2013) (“[T]he findings fail to support a conclusion that reunification efforts ‘clearly would be futile or would be inconsistent with the juvenile’s health, safety, and need for a safe, permanent

IN RE E.G.M.

[230 N.C. App. 196 (2013)]

home within a reasonable period of time.’ ”) (citing *In re T.R.M.*, 208 N.C. App. 160, 162, 702 S.E.2d 108, 109—10 (2010)).

Here, the court found that respondent-father was “currently in federal custody and unable to attend this hearing.” After listing the conditions of his case plan, the court made the following additional findings about respondent-father:

16. . . . The Respondent Father has no visitation at this time.

. . .

24. That on at least one occasion the Respondent Mother has spoken to the Respondent Father, despite the requirement that he have no contact with potential witnesses in his federal case. [He] reported to the Department’s social worker that he had never gone to the Respondent Mother’s apartment, but that the Respondent Mother was doing his wash for him and that he would see her from time to time away from her apartment.

25. That the Respondent Father’s criminal attorney had filed a motion to allow the Respondent Father to have contact with the Respondent Mother because the Respondent Father did not think that [she] would be a witness. This was done because the [respondents] still have bills together. The Respondent Father has admitted to the social worker that he has spoken to the Respondent Mother by telephone

Plainly, these limited facts do not show that further efforts to reunify Ellen with her father “would be futile or inconsistent with [her] need for a safe, permanent home within a reasonable period of time.” The specific factual findings in the order mostly address the actions and situation of respondent-mother. In addition, the order did not find any facts by reference to or incorporation by reference of any of the reports submitted to the trial court or prior orders, although the order does note that various exhibits and reports were “admitted into evidence.” From these reports and prior orders, it appears that the trial court previously found in the disposition order that respondent-father “kicked [Nancy] down the stairs” and caused a serious and life-threatening injury to her small intestine, for which she had surgery and “was on a ventilator for approximately one week and in the Pediatric Intensive Care Unit (PICU) for 17 days.” Respondent-father is under federal indictment for various

IN RE E.G.M.

[230 N.C. App. 196 (2013)]

felony charges as a result of his abuse of Nancy. There is also evidence that Ellen saw respondent-father kick her half-sister down the stairs and that she was traumatized by this event. Therefore, while there may be evidence in the record to support a determination that further efforts would be futile, it is up to the trial court to make proper factual findings based on the record evidence.

Accordingly, we reverse the order ceasing reunification efforts “and remand for entry of an order containing proper findings and conclusions.” *In re I.K.*, __ N.C. App. at __, 742 S.E.2d at 596. The court may receive additional evidence on this issue, within its sound discretion. *Id.*

VI. Conclusion

The district court’s permanency planning order is hereby vacated. We remand to the court for further proceedings to include entry of findings of fact and conclusions of law on the following issues: (1) whether the court has subject matter jurisdiction under the ICWA; and if so (2) whether clear and convincing evidence *at the hearing*, including testimony of qualified expert witnesses, shows that respondent-mother’s continued custody is likely to result in serious emotional or physical damage to Ellen; and (3) whether reunification efforts should cease as to respondent-father.

Vacated and remanded.

Judges McGEE and STROUD concur.

IN RE J.L.H.

[230 N.C. App. 214 (2013)]

IN THE MATTER OF J.L.H.

No. COA13-385

Filed 5 November 2013

Juveniles—release from commitment—notice

The trial court erred by denying the juvenile's motion for release from commitment where the Division of Juvenile Justice failed to comply with the notice requirements set out in N.C.G.S. § 7B-2515(a) at the time that it extended the duration of the juvenile's commitment period.

Appeal by juvenile from order entered 19 November 2012 by Judge John Covolo in Nash County District Court. Heard in the Court of Appeals 12 September 2013.

Attorney General Roy Cooper, by Assistant Attorney General Stephanie A. Brennan, for the State.

Geeta N. Kapur, for juvenile-appellant.

ERVIN, Judge.

Juvenile J.L.H.¹ appeals from an order denying his motion to be released from commitment entered on 19 November 2012. On appeal, James argues that the trial court erred by denying his motion for release on the grounds that the Division of Juvenile Justice failed to comply with the notice requirements set out in N.C. Gen. Stat. § 7B-2515(a) at the time that it extended the duration of his commitment period.² After

1. J.L.H. will be referred to throughout the remainder of this opinion as James, a pseudonym used for ease of reading and to protect the juvenile's privacy.

2. Although James has advanced a number of challenges to prior adjudication and disposition orders in his brief, none of these issues are properly before us at the time given James' failure to note appeals from those orders in a timely manner. According to N.C. Gen. Stat. § 7B-2602, "[n]otice of appeal shall be given in open court at the time of the hearing or in writing within 10 days after entry of the order." Pursuant to well-established North Carolina law, a "failure to give timely notice of appeal . . . is jurisdictional, and an untimely attempt to appeal must be dismissed." *In re A.L.*, 166 N.C. App. 276, 277, 601 S.E.2d 538 (2004) (quoting *In re Lynette H.*, 323 N.C. 598, 602, 374 S.E.2d 272, 274 (1988)). As a result, given that the only issue which is properly before us at this time is James' appeal from the 19 November 2012 order denying his motion for release, we will refrain from discussing other details surrounding the history of James' involvement in the juvenile justice system and the facts and circumstances surrounding the entry of the earlier orders which have been challenged in James' brief.

IN RE J.L.H.

[230 N.C. App. 214 (2013)]

careful consideration of James' challenges to the trial court's order in light of the record and the applicable law, we conclude that the Division of Juvenile Justice failed to comply with the applicable notice requirement at the time that it extended his commitment period, so that the trial court's order denying his motion for release should be reversed and this case remanded to the Nash County District Court for further proceedings not inconsistent with this opinion.

I. Factual Background**A. Substantive Facts**

On 9 March 2012, four petitions alleging that James should be adjudicated a delinquent juvenile on the basis of allegations that he had committed the offenses of possession of a Schedule VI controlled substance with the intent to sell or deliver; resisting, delaying, or obstructing an officer; possession of a firearm by a minor; and carrying a concealed weapon were filed. On 15 May 2012, the trial court adjudicated James as a delinquent juvenile after finding beyond a reasonable doubt that he had committed the offenses of possession of a handgun by a minor and carrying a concealed weapon and determining that the possession of a Schedule VI controlled substance with the intent to sell or deliver and resisting, delaying, and obstructing an officer charges should be dismissed. At the dispositional stage of the proceeding, the trial court ordered that James be committed to the custody of the Department of Juvenile Justice for placement in a youth development center for a maximum period of six months. As a result, in the absence of a valid extension, James' six-month commitment period was scheduled to expire on 15 November 2012.

On 15 October 2012, Sonynia Stancil, who served as James' court counselor; Randy Krank, a social worker at the Youth Development Center; and other members of James' treatment team held a meeting with James during which they decided to seek an extension of James' commitment period on the grounds that James was displaying escalating behavioral problems and needed further treatment. More specifically, given that James had acted in a belligerent manner towards members of the facility's staff and other students, his treatment team believed that he needed additional counseling for the purpose of addressing his inability to interact with his peers and with members of the institution staff in a positive manner.

In spite of the fact that James' father was subject to an order requiring him to attend all service plan meetings, he was unable to attend the 15 October 2012 meeting as the result of transportation and work-related

IN RE J.L.H.

[230 N.C. App. 214 (2013)]

difficulties. Although James' father had requested the Division of Juvenile Justice to provide him with transportation assistance, he did not receive any assistance in addressing these problems. As a result, James' father received permission from Mr. Krank to participate in the service plan meeting by telephone. James' father did not know before the meeting that a request for the extension of James' commitment period would be proposed.

At the service planning meeting, James' father was orally informed of the treatment team's recommendation that James' commitment period be extended, the reasons which underlay this recommendation, and the nature of the treatment that the team recommended that James receive during this additional commitment period. After learning of this recommendation, James' father objected to the proposed extension of James' commitment period on the grounds that the treatment team's recommendation effectively punished James because his father had not been able to attend the meeting. At some point during the meeting, the telephone connection between James' father and the treatment team was disconnected for reasons relating to James' father's employment obligations.

James was provided with a copy of the notes on the proposed extension plan during the treatment team meeting. Had James' father been physically present at the meeting, he would have received a copy of these notes as well. On 17 October 2012, Mr. Krank submitted a formal request for a three month extension of James' commitment period for approval. On 23 October 2012, the extension review committee and Katherine Dudley, who served as the Director of Youth Development Centers for the Division of Juvenile Justice, approved an extension of James' commitment period of no more than six months. Written notice of the extension was mailed to James' parents after the request for an extension of James' commitment period had received official approval. According to Mr. Krank, written notice could not have been mailed to a juvenile's parents prior to official approval of the recommendation request because the ultimate extension plan might, as it did in this instance, change during the approval process. James' attorney did not receive a copy of the extension plan until the morning of the 19 November 2012 hearing.

B. Procedural History

On 24 October 2012, the Division of Juvenile Justice filed a motion for review requesting approval of the extension of James' commitment period. On 5 November 2012, James filed a motion seeking to be released from his commitment on the grounds that the Division had failed to provide written notice of the proposed extension of the commitment period

IN RE J.L.H.

[230 N.C. App. 214 (2013)]

to James and his parents at least 30 days before the last day of his existing commitment period as required by N.C. Gen. Stat. § 7B-2515 and that James had served the maximum term of his initial commitment period.

On 7 November 2012, a hearing was held for the purpose of addressing the issues raised by James' motion for release from commitment. At the conclusion of the hearing, the trial court entered a written order denying James' motion on the grounds that the notice given to James' father over the telephone during the 15 October 2012 meeting constituted sufficient compliance with the notice provisions of N.C. Gen. Stat. § 7B-2515(a). According to the trial court, "[w]hile not in writing, notice to the Juvenile's parent of the Division's intent to extend the Juvenile's term of commitment was properly given by telephone communication on October 15, 2012 in compliance with the terms of N.C. [Gen. Stat.] § 7B-2515." James noted an appeal to this Court from the trial court's order. After being released from the custody of the Division of Juvenile Justice in March 2013, James was placed on one year of post-release supervision.

II. Substantive Legal Analysis

In his brief, James argues that the trial court erroneously denied his motion for release on the grounds that the Division of Juvenile Justice violated the notice provisions set out in N.C. Gen. Stat. § 7B-2515(a) in the course of obtaining the extension of his commitment period. More specifically, James argues that his period of commitment was unlawfully extended because the Division failed to provide him and his parents with written notice of the Division's extension plan at least 30 days prior to the end of his maximum commitment period. We believe that James' argument has merit.

A. Mootness

As an initial matter, we are required to address the State's contention that, given that James "is no longer committed," his challenge to the denial of his motion for release from commitment has been rendered moot. In essence, the State argues that, since James is no longer being held in the custody of the Division of Juvenile Justice, this Court is unable to provide him with any meaningful relief in the event that we were to uphold the validity of his challenge to the trial court's decision to deny his motion for release. We do not find the State's argument persuasive.

As a general proposition, a pending appeal from a particular judgment or order which has been fully effectuated is moot because a subsequent appellate decision "cannot have any practical effect on the

IN RE J.L.H.

[230 N.C. App. 214 (2013)]

existing controversy.” *In re A.K.*, 360 N.C. 449, 452, 628 S.E.2d 753, 755 (2006) (quoting *Roberts v. Madison Cty. Realtors Ass’n, Inc.*, 344 N.C. 394, 398–99, 474 S.E.2d 783, 787 (1996)). On the other hand, however, “[w]hen the terms of the judgment below have been fully carried out, if collateral legal consequences of an adverse nature can reasonably be expected to result therefrom, then the issue is not moot and the appeal has continued legal significance.” *State v. Black*, 197 N.C. App. 373, 375–76, 677 S.E.2d 199, 201 (2009) (citing *In re Hatley*, 291 N.C. 693, 694, 231 S.E.2d 633, 634 (1977)). As a result, “[b]efore determining whether an appeal is moot when the defendant has completed his sentence, it is necessary to determine whether collateral legal consequences of an adverse nature may result.” *Black*, 197 N.C. App. at 375, 377 S.E.2d at 201.

In seeking to persuade us of the validity of its mootness argument, the State contends that James would not suffer any adverse collateral consequences in the event that the trial court’s order was allowed to stand given that James has already been released and that “any decision in this appeal would not impact the extension of incarceration.” In addition, the State argues that, even “if this Court were to determine that the extension had been improper, that would not change the Division’s determination that [James] should be subject to one year of supervised release” or affect the amount of supervised release that James has left to serve. As a result, the State argues that James would not receive any benefit whatsoever from a decision upholding the validity of his challenge to the denial of his release motion.

Although the State is correct in asserting that a decision to overturn the denial of James’ release motion would not result in his release from commitment or affect the length of the post-release supervision period to which he is subject (against which no challenge has been advanced in James’ brief), we are unable to accept its contention that James cannot obtain meaningful relief in the event that we were to decide this case in his favor. The clear impact of the challenged order was to extend the period during which James was committed to the custody of the Division of Juvenile Justice. In the event that the trial court erroneously refused to release James from his commitment to the Division of Juvenile Justice, his release from commitment and the commencement of the one-year period of post-release supervision was delayed for a number of months. As a result, had the trial court granted, instead of denied, James’ motion for release, on the grounds that James’ period of commitment had been unlawfully extended, he would be much nearer to the end of this one-year period of post-release supervision than is currently the case. In view of the fact that a person subject to post-release supervision must comply with certain significant restrictions and the

IN RE J.L.H.

[230 N.C. App. 214 (2013)]

fact that any failure on James' part to comply with the conditions of post-release supervision can result in his commitment to the custody of the Division of Juvenile Justice, N.C. Gen. Stat. § 7B-2516 (stating that the juvenile "shall be returned to the Division for placement in a Youth Development Center" in the event that his or her post-release supervision is revoked); *In re D.M.*, 192 N.C. App. 729, 732, 666 S.E.2d 501, 503 (2008) (stating that, "[u]nder the plain language of the statute, the trial court must only determine 'by the greater weight of the evidence that the juvenile has violated the terms of post-release supervision' in order to revoke the juvenile's post-release supervision") (quoting N.C. Gen. Stat. § 7B-2516(b)), the length of a particular juvenile's period of commitment has potential effects which extend well beyond the date upon which he or she is released from the custody of the Division of Juvenile Justice. As a result, a decision by this Court to the effect that James' period of commitment had been improperly extended would, in actuality, have a practical impact on James' life, a determination which precludes us from dismissing his appeal from the denial of his release motion on mootness grounds.

In seeking to persuade us to reach a different result, the State cites *In re W.H.*, 166 N.C. App. 643, 603 S.E.2d 356 (2004), for the proposition that a challenge to the length of a juvenile's incarceration was moot because he had already been released. In *W.H.*, the juvenile argued that the trial court had erred by refusing to order his release from custody pending appeal. *Id.* at 648, 603 S.E.2d at 360. In response, however, we held that the juvenile's challenge to the trial court's order was moot "in light of the fact that the juvenile has already served his Level 3 disposition and was discharged." *Id.* *W.H.* is readily distinguishable from the present case given the complete absence of any reference to the potential impact of a decision in the juvenile's favor on the length of any post-release supervision to which the juvenile might have been subject or to any other potential adverse collateral consequence which might result from a refusal to overturn the challenged trial court order. In other words, although the record does not suggest that a ruling on the challenged issue in *W.H.* would have had any impact on the juvenile's life, a similar statement cannot be made in this instance. As a result, we conclude that James' appeal has not been rendered moot by his release from his commitment and that we should, for that reason, reach the merits of his challenge to the denial of his motion for release.

B. Extension of Period of Commitment

The essential issue implicated by James' challenge to the denial of his motion for release was whether the Division had extended his period

IN RE J.L.H.

[230 N.C. App. 214 (2013)]

of commitment in a lawful manner. The prerequisites for a valid extension of a juvenile's period of commitment are spelled out in N.C. Gen. Stat. § 7B-2515(a), which provides, in pertinent part, that:

if the Division determines that the juvenile's commitment should be continued beyond the maximum commitment period as set forth in G.S. 7B-2513(a), the Division shall notify the juvenile and the juvenile's parent, guardian, or custodian in writing at least 30 days in advance of the juvenile's eighteenth birthday or the end of the maximum commitment period, of the additional specific commitment period proposed by the Division, the basis for extending the commitment period, and the plan for future care or treatment.

Thus, the essential issue raised by James' challenge to the trial court's order is the extent, if any, to which the Division adequately complied with the provisions of N.C. Gen. Stat. § 7B-2515(a) during the process of obtaining an extension of James' period of commitment.³

As a result of the fact that James was subject to a maximum commitment period of six months in accordance with N.C. Gen. Stat. § 7B-2513(a) and the 15 May 2012 order, James would, in the ordinary course of events, have been released on 15 November 2012. Although the record reflects that the members of the treatment team decided to recommend that James' period of commitment be extended at the 15 October 2012 meeting, that recommendation was not approved by the relevant officials within the Division until 23 October 2012. In addition, even though the notes generated in connection with the 15 October 2012 treatment team meeting were provided to James on that date, no written notice of the final extension decision and the nature of the associated extension plan was provided to either James or his father until the date upon which the Division officially approved the treatment team's recommendation. As a result, as the Division recognized at the time of the proceedings before the trial court, the undisputed information contained in the present record establishes that, even if the extension decision was

3. As we will discuss in more detail below, we believe that the proper resolution of the ultimate issue raised by James' challenge to the denial of his motion for release is the manner in which the notice provisions of N.C. Gen. Stat. § 7B-2515(a) should be construed. According to well-established North Carolina law, "[i]ssues of statutory construction are questions of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

IN RE J.L.H.

[230 N.C. App. 214 (2013)]

made at the time of the treatment team meeting rather than on the date upon which the team's recommendation received official approval,⁴ the notice provided in connection with its request for an extension of James' period of commitment was "under the statutorily mandated time frame." Thus, we conclude that the Division failed to comply with the provisions of N.C. Gen. Stat. § 7B-2515(a) at the time that it attempted to extend James' period of commitment.

In attempting to persuade us to reach a different conclusion, the State argues, consistently with the logic adopted by the trial court, that the copies of the meeting notes provided to James during the 15 October 2012 meeting and the oral notice provided to James' father during that meeting constituted sufficient compliance with the notice requirements set out in N.C. Gen. Stat. § 7B-2515(a) to support a decision to uphold the denial of James' release motion. Assuming, without in any way deciding, that the provision of the notes developed at the 15 October 2012 meeting constituted the provision of adequate notice to James, we must still determine whether the provision of oral notice of the Division's extension decision to James' father constitutes sufficient compliance with the relevant statutory provision to support a decision to uphold the extension of James' commitment period, a decision which requires us to construe the relevant language set out in N.C. Gen. Stat. § 7B-2515(a).

"The primary goal of statutory construction is to effectuate the purpose of the legislature in enacting the statute." *State v. Hooper*, 358 N.C. 122, 125, 591 S.E.2d 514, 516 (2004) (citing *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 574, 573 S.E.2d 118, 121 (2002)). The first step which must be taken in the statutory construction process is examining the language utilized by the General Assembly in drafting the relevant statutory provision. *Correll v. Division of Soc. Servs.*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992). "It is well settled that[,] '[w]here the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning.'" *In re Estate of Lunsford*, 359 N.C. 382, 391, 610 S.E.2d 366, 372 (2005) (quoting *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990)).

4. In view of our determination that the Division failed to provide adequate notice of the extension of James' commitment period to James and his father, we need not make a definitive determination concerning the extent to which the extension decision was made on 15 October 2012 or 23 October 2012. However, we have difficulty discerning how a treatment team recommendation which is subject to internal Division review and material alteration before becoming effective can be treated as a definitive decision that a juvenile's period of commitment should be extended and that a specific extension plan should be approved.

IN RE J.L.H.

[230 N.C. App. 214 (2013)]

As we have already noted, N.C. Gen. Stat. § 7B-2515(a) clearly and unambiguously states that notice of the extension of a juvenile's period of commitment shall be provided to both the juvenile and his parents "in writing at least 30 days in advance" of the juvenile's scheduled release date. N.C. Gen. Stat. § 7B-2515(a). In view of the fact that the relevant statutory language clearly and unambiguously requires that the notice of the proposed extension provided to the juvenile and his or her parents be in writing, we "must construe the statute using its plain meaning." *Estate of Lunsford*, 359 N.C. at 391, 610 S.E.2d at 372. The State attempts to avoid the difficulties arising from the literal meaning of the relevant statutory language by suggesting, in reliance on decisions such as *State v. Inman*, 174 N.C. App. 567, 621 S.E.2d 306 (2005) (stating that "the importance of the provision involved may be taken into consideration" in "determining the mandatory or directory nature of a statute"), *disc. review denied*, 360 N.C. 652, 638 S.E.2d 907 (2006), that the notice provisions contained in N.C. Gen. Stat. § 7B-2515(a) should be deemed directory rather than mandatory on the theory that strict compliance with those notice provisions was not of any particular importance to the prosecution of a subsequent challenge to the Division's extension decision. However, since, "[a]t a minimum, due process requires adequate notice of the charges and a fair opportunity to meet them," *In re Lamm*, 116 N.C. App. 382, 386, 448 S.E.2d 125, 128 (1994), *aff'd*, 341 N.C. 196, 458 S.E.2d 921 (1995), *cert. denied*, 516 U.S. 1047, 116 S. Ct. 708, 133 L. Ed. 2d 663 (1996), and since the notice provisions of N.C. Gen. Stat. § 7B-2515(a) represent an attempt to address the same considerations that underlie fundamental due process protections, we are unwilling to construe the notice provisions of N.C. Gen. Stat. § 7B-2515(a) as directory rather than mandatory.

In addition, the State argues that we should overlook the difficulties created by the absence of timely written notice to James' parents by pointing out that James' father would have received the required written notice on 15 October 2012 had he attended the treatment team meeting in person rather than telephonically. However, we are unable to read any exception to the statutory requirement that notice of the extension of a juvenile's commitment period be given to the juvenile's parents in writing into the relevant statutory language. Moreover, we note that the Division had advance notice that James' father would be unable to attend the treatment team meeting without assistance from the Division, which was not forthcoming. Finally, given that the Division had not discussed the option of extending James' period of commitment prior to the treatment team meeting, James' father could not have been aware that the subject of extending James' period of commitment would

IN RE J.L.H.

[230 N.C. App. 214 (2013)]

be under consideration at the treatment team meeting. As a result, for all of these reasons, we conclude that the fact that James' father received oral notice of the treatment team's recommendation that James' period of commitment should be extended does not provide any justification for a decision to overlook the Division's failure to provide written notice of the extension decision to James' father in a timely manner and that the trial court erred by reaching a contrary conclusion.

Lastly, the State argues that, even if the notice provided to James' father was technically deficient, we should decline James' invitation to overturn the denial of his release motion on the basis of the logic enunciated in our recent decision in *Fisher v. Town of Nags Head*, __ N.C. App. __, 725 S.E.2d 99, *appeal dismissed and disc. review denied*, __ N.C. __, 731 S.E.2d 166 (2012). In *Fisher*, the plaintiffs contended that a notice of condemnation that they had received from the defendant failed to comply with the requirements of N.C. Gen. Stat. § 40A-40. *Id.* at __, 725 S.E.2d at 104-05. After acknowledging that the notice which had been provided in *Fisher* suffered from technical deficiencies, we declined to award any relief to the plaintiffs given our inability to "find that the plaintiffs were prejudiced by the notice." *Id.* at __, 731 S.E.2d at 104. We do not believe that *Fisher* controls in this instance given that the statutory provisions at issue there, unlike the notice provisions contained in N.C. Gen. Stat. § 7B-2515(a), specifically provide that "[a]n owner is entitled to no relief because of any defect or inaccuracy in the notice unless the owner was actually prejudiced by the defect or inaccuracy." N.C. Gen. Stat. § 40A-40. As a result, given that nothing in N.C. Gen. Stat. § 7B-2515(a) authorizes us to overlook the existence of deficient notice in this case based on any failure on James' part to making a showing of actual prejudice, we lack explicit statutory authority to absolve the State from the Division's failure to comply with the relevant notice requirements based on the logic adopted in *Fisher*.

In addition, to the extent that traditional harmless error analysis should be undertaken in this instance, we are unable to conclude that the Division's error should be excused on harmless grounds. As we have already noted, the provision of adequate notice has a direct impact upon the ability of James and his parents to contest the Division's effort to extend the length of his commitment period as authorized by N.C. Gen. Stat. § 7B-2515(c) (stating that "[t]he juvenile and the juvenile's parent, guardian, or custodian may request a review by the court of the Division's decision to extend the juvenile's commitment beyond the juvenile's . . . maximum commitment period, in which case the court shall conduct a review hearing" and "may modify the Division's decision

IN RE J.L.H.

[230 N.C. App. 214 (2013)]

and the juvenile's maximum commitment period"). In fact, the record reflects that James' trial counsel did not receive a copy of the Division's extension plan until the morning of the hearing on James' release motion, a development which has obvious implications for James' ability to adequately contest the Division's extension decision. As a result, given that the trial court committed prejudicial error by denying James' release motion and that we are unable to conclude that the trial court's error was harmless, we hold that the trial court's order should be reversed and that this case should be remanded to the Nash County District Court for further proceedings not inconsistent with this opinion.⁵

III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court erred by denying James' motion for release from commitment. As a result, the trial court's order should be, and hereby is, reversed, and this case should be, and hereby is, remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

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

5. As a result of the fact that "[p]ost-release supervision shall be terminated by an order of the court," N.C. Gen. Stat. § 7B-2514(g), the court below must, on remand, order an adjustment in the amount of time to which James is subject to post-release supervision by crediting the amount of time from his initial 15 November 2012 release date and the March 2013 date upon which he was actually released against his one-year term of post-release supervision.

IN RE M.M.

[230 N.C. App. 225 (2013)]

IN THE MATTER OF M.M.

No. COA13-600

Filed 5 November 2013

1. Child Abuse, Neglect, and Dependency—permanency planning order—transfer of jurisdiction—insufficient findings of fact—failure to stay proceeding

The trial court erred in a permanency planning order by transferring jurisdiction of the case to Michigan where the trial court's findings of fact failed to demonstrate that the trial court properly considered the relevant factors under N.C.G.S. § 50A-207(b). Moreover, the trial court failed to stay the present juvenile case upon condition that a child custody proceeding be promptly commenced in Michigan, as required by N.C.G.S. § 50A-207(c). The order was reversed and the matter was remanded to the trial court.

2. Child Abuse, Neglect, and Dependency—permanency planning order—child not returned home—inadequate findings of fact

The trial court erred in a permanency planning order by failing to make adequate findings of fact under N.C.G.S. § 7B-907(b) to support its conclusion that the child could not be returned home. The order was reversed and remanded for entry of an order with sufficient findings to support the trial court's judgment.

3. Child Abuse, Neglect, and Dependency—permanency planning order—waiver of future hearings—inadequate findings of fact

The trial court erred in a permanency planning order by failing to make sufficient findings of fact under N.C.G.S. § 7B-906(b) to support its decision to waive further review hearings. The order was reversed and the matter was remanded to the trial court for further proceedings.

4. Child Abuse, Neglect, and Dependency—permanency planning order—no detailed visitation plan

The trial court erred in a permanency planning order by failing to set forth a detailed visitation plan for respondent mother and, instead, inappropriately leaving visits within the discretion of the child's guardians. The order was reversed and the matter was remanded to the trial court.

IN RE M.M.

[230 N.C. App. 225 (2013)]

Appeal by respondent-mother from order entered 11 February 2013 by Judge John W. Dickson in District Court, Cumberland County. Heard in the Court of Appeals 8 October 2013.

John Campbell for Cumberland County Department of Social Services, for petitioner-appellee.

Beth A. Hall for guardian ad litem.

Mary McCullers Reece for respondent-appellant.

STROUD, Judge.

Respondent-mother appeals from a permanency planning order entered 11 February 2013 and amended by order entered 24 April 2013. We reverse and remand for further proceedings.

I. Background

This is the second appeal by respondent-mother arising out of this juvenile petition, filed on 8 August 2007. The trial court adjudicated Margo dependent by order filed 17 January 2008.¹ Thereafter the court conducted several periodic review hearings. On 7 June 2011, this Court filed an opinion reversing a permanency planning order entered 21 September 2010 because the trial court failed to hear any testimony at the permanency planning hearing. *In re M.M.*, 212 N.C. App. 420, 713 S.E.2d 790, 2011 WL 2206655 (2010) (unpublished). On remand, the trial court heard testimony and entered a “corrected” permanency planning order on 11 July 2012. Respondent-mother appealed but subsequently withdrew her appeal from that order on 10 September 2012.

On 5 December 2012, the court conducted a permanency planning hearing. The trial court entered an order on 11 February 2013 which, *inter alia*, (1) changed the permanent plan to guardianship; (2) awarded legal custody and guardianship to Margo’s paternal grandparents; (3) allowed Margo’s father to have unsupervised visitation with the child; (4) allowed respondent-mother to have supervised visitation for one day per month not to exceed four hours in duration; (5) allowed respondent-mother to have supervised telephone contact with the child; (6) forbade the maternal grandfather and the fiancé of respondent-mother from having contact with the child unless recommended by the child’s

1. To protect the identity of the juvenile and for ease of reading we will refer to her by pseudonym.

IN RE M.M.

[230 N.C. App. 225 (2013)]

therapist; and (7) transferred jurisdiction to Michigan, where the paternal grandparents reside. Respondent-mother filed timely notice of appeal.

II. Standard of Review

This Court's review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and whether the findings support the conclusions of law. If the trial court's findings of fact are supported by any competent evidence, they are conclusive on appeal. The trial court's conclusions of law are reviewable de novo on appeal.

In re T.R.M., 208 N.C. App. 160, 162, 702 S.E.2d 108, 110 (2010) (citation and quotation marks omitted).

III. Transfer of Jurisdiction

[1] Respondent-mother contends the trial court erred by transferring "venue" to Michigan. The record reflects that in its original order filed on 11 February 2013, the court incorrectly used the terminology of "venue" in reference to transferring the case to Michigan. The court filed a corrected order on 24 April 2013 in which it struck through the words "transferring venue" and replaced them with the words "relinquishing jurisdiction." The court also deleted some, but not all, other uses of the word "venue."

A court has the authority on its own motion to correct a clerical mistake in its judgment or order pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(a) (2011) as long as the correction does not substantively change the order or judgment. *Spencer v. Spencer*, 156 N.C. App. 1, 10-11, 575 S.E.2d 780, 786 (2003). It is clear from the transcript and the context of the order specifically identifying Michigan that the trial court intended to transfer jurisdiction to another state rather than transfer venue to another county in North Carolina. The changes do not have any substantive effect.

Respondent-mother contends that even if the court's order is construed as declining jurisdiction based upon a determination of inconvenient forum pursuant to N.C. Gen. Stat. § 50A-207, the court's findings of fact and conclusions of law are inadequate. We agree.

A court having jurisdiction to make a child custody determination "may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances, and that a court of another state is a more appropriate forum." N.C. Gen. Stat.

IN RE M.M.

[230 N.C. App. 225 (2013)]

§ 50A-207(a) (2011). A child custody determination includes one made in abuse, dependency or neglect proceedings involving the child. *In re Van Kooten*, 126 N.C. App. 764, 768, 487 S.E.2d 160, 162-63 (1997), *app. dismissed*, 347 N.C. 576, 502 S.E.2d 618 (1998); N.C. Gen. Stat. § 50A-102(4) (2011). Before making a determination that this state is an inconvenient forum, the court must consider whether it is appropriate for a court of another state to exercise jurisdiction. N.C. Gen. Stat. § 50A-207(b).

In deciding whether it is appropriate for the court of another state to exercise jurisdiction, the trial court

shall consider all relevant factors, including:

- (1) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
- (2) The length of time the child has resided outside this State;
- (3) The distance between the court in this State and the court in the state that would assume jurisdiction;
- (4) The relative financial circumstances of the parties;
- (5) Any agreement of the parties as to which state should assume jurisdiction;
- (6) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;
- (7) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and
- (8) The familiarity of the court of each state with the facts and issues in the pending litigation.

N.C. Gen. Stat. § 50A-207(b).

The decision to relinquish jurisdiction to another state on the basis of more convenient forum is reviewed for an abuse of discretion. *Kelly v. Kelly*, 77 N.C. App. 632, 635, 335 S.E.2d 780, 783 (1985). Nevertheless, where it determines that the current forum is inconvenient, the trial court must make sufficient findings of fact to demonstrate that it properly

IN RE M.M.

[230 N.C. App. 225 (2013)]

considered the relevant factors listed in N.C. Gen. Stat. § 50A-207(b). *Velasquez v. Ralls*, 192 N.C. App. 505, 509, 665 S.E.2d 825, 827 (2008) (noting that findings about “[t]he factors listed in N.C.G.S. § 50A-207(b) are necessary when the current forum is inconvenient.”).

Here, the trial court found that Margo had lived in Michigan with her paternal grandparents since 22 July 2010 and that a majority of the parties live in the State of Michigan. Although the court had previously found that respondent-mother and respondent-father had engaged in domestic violence toward one another, the trial court made no finding regarding the likelihood of such violence recurring or whether Michigan is better situated to protect the juvenile. The trial court also made no findings about the nature and location of the evidence, the relative familiarity of the courts of Michigan and North Carolina with this case (which has never before been considered by a Michigan court in any way), or the relative financial circumstances of the parties. Thus, the findings here fail to demonstrate that the trial court properly considered the relevant factors under N.C. Gen. Stat. § 50A-207(b). Therefore, we reverse its order transferring jurisdiction to Michigan.

If a trial court considering a child custody matter determines that the current jurisdiction is an inconvenient forum and that another jurisdiction would be a more appropriate forum, it “*shall stay the proceedings upon condition that a child custody proceeding be promptly commenced in another designated state . . .*” N.C. Gen. Stat. § 50A-207(c) (emphasis added). “It is well established that the word ‘shall’ is generally imperative or mandatory.” *Boylan v. Verizon Wireless*, ___ N.C. App. ___, ___, 736 S.E.2d 773, 781 (2012) (citation and quotation marks omitted). The trial court here simply purported to transfer jurisdiction, effectively dismissing the case in North Carolina. It did not stay the present case and condition the stay on the commencement of a child custody proceeding in Michigan. The record before us does not indicate that there is or ever has been a custody proceeding of any sort regarding Margo in Michigan.

Failure to condition an order transferring jurisdiction on the filing of a child custody proceeding in the new jurisdiction leaves the child and the proceedings in legal limbo, something that the Uniform Child-Custody Jurisdiction Act is intended to prevent. *See* N.C. Gen. Stat. § 50A-207, Official Comment (noting that a court declining jurisdiction on inconvenient forum grounds “may not simply dismiss the action. To do so would leave the case in limbo.”). It also ignores the mandatory procedure contained in N.C. Gen. Stat. § 50A-207(c).

IN RE M.M.

[230 N.C. App. 225 (2013)]

If on remand the trial court should again determine that it should decline jurisdiction and it makes sufficient findings to support its determination that North Carolina is an inconvenient forum and that Michigan is an appropriate forum, it must stay the present juvenile case “upon condition that a child custody proceeding be promptly commenced in” Michigan. N.C. Gen. Stat. § 50A-207(c).²

IV. Findings under N.C. Gen. Stat. § 7B-907(b)

[2] Respondent-mother next contends the trial court erred in concluding that return of the juvenile to the custody of her parents would be contrary to the child’s best interest and that a permanent plan of guardianship was in the child’s best interests. She argues certain findings of fact are actually conclusions of law while other findings are actually recitations of evidence, and that when those findings are omitted, the remaining findings are not sufficient to support a conclusion that it is in the child’s best interest for the child’s paternal grandparents to have custody and guardianship of the child. We agree that the current findings are inadequate under N.C. Gen. Stat. § 7B-907(b).

The general purpose of a permanency planning hearing is to develop a plan to achieve a safe, permanent home for a juvenile within a reasonable period of time. N.C. Gen. Stat. § 7B-907(a) (2011).

At the conclusion of the hearing, if the juvenile is not returned home, the court shall consider the following criteria and make written findings regarding those that are relevant:

(1) Whether it is possible for the juvenile to be returned home immediately or within the next six months, and if not, why it is not in the juvenile’s best interests to return home;

(2) Where the juvenile’s return home is unlikely within six months, whether legal guardianship or custody with a relative or some other suitable person should be established, and if so, the rights and responsibilities which should remain with the parents;

2. We also note that it appears the trial court may have intended to end all DSS involvement in the case and create a Chapter 50 custody action as it ceased DSS review hearings and made no mention of involving Michigan DSS. The trial court does indeed have the authority to terminate the court’s jurisdiction in the juvenile proceeding and create a Chapter 50 custody action, provided it makes the necessary findings and conclusions. *See generally* N.C. Gen. Stat. § 7B-911 (2011). These findings would be in addition to those required to transfer jurisdiction on the basis of inconvenient forum.

IN RE M.M.

[230 N.C. App. 225 (2013)]

- (3) Where the juvenile's return home is unlikely within six months, whether adoption should be pursued and if so, any barriers to the juvenile's adoption;
- (4) Where the juvenile's return home is unlikely within six months, whether the juvenile should remain in the current placement or be placed in another permanent living arrangement and why;
- (5) Whether the county department of social services has since the initial permanency plan hearing made reasonable efforts to implement the permanent plan for the juvenile;
- (6) Any other criteria the court deems necessary.

N.C. Gen. Stat. § 7B 907(b) (2011).

The court must make findings of fact as to all of the relevant criteria. *In re J.S.*, 165 N.C. App. 509, 512, 598 S.E.2d 658, 660-61 (2004). These findings must be of "ultimate facts essential to support the conclusions of law" and must be sufficiently specific to enable the appellate court to determine whether the findings and the conclusions of law are correct. *In re M.R.D.C.*, 166 N.C. App. 693, 696, 603 S.E.2d 890, 892 (2004) (citation and quotation marks omitted), *disc. review denied*, 359 N.C. 321, 611 S.E.2d 413 (2005). A mislabeled finding of fact which is in reality a conclusion of law will be reviewed as such. *Id.* at 697, 603 S.E.2d at 893.

Respondent-mother is correct that many of the trial court's "findings" merely recite assertions made by parties and witnesses or even arguments by the parties' attorneys. The trial court's crucial findings under N.C. Gen. Stat. § 7B-907(b) were as follows:

34. That it is not possible for the juvenile to return home immediately or within the next six (6) months inasmuch as the conditions which led to the removal of the juvenile from the home have not been alleviated and the juvenile is in need of more adequate care and supervision than can be provided by the Respondents at this time.

....

38. Return of the juvenile to the custody of the Respondents would be contrary to the welfare and best interest of the juvenile inasmuch as the conditions which led to the removal of the juvenile from the home have not been alleviated and the juvenile is in need of more

IN RE M.M.

[230 N.C. App. 225 (2013)]

adequate care and supervision than can be provided by the Respondents at this time.

It is not clear from the order which “condition” the trial court was referring to as the one that led to the removal of Margo from the home. The primary substantive factual finding in the order under review is this:

2. That the court readopts findings made in previous Orders entered in this matter.

This finding is followed by about three pages listing the “concerns,” contentions, and requests of the respondent-mother, respondent-father, paternal grandparents, DSS, and GAL, most of which are simply recitations of evidence or argument and not actual findings of fact. Thus, in order to discern the “condition” which led to the child’s removal and which cannot be corrected within the next six months—a condition which the trial court claims to have previously found as fact in “previous orders”—we have been required to inspect carefully all 1014 pages of this record on appeal. These findings are contained in numerous orders entered over a period of six years and the order before us does not refer specifically to any particular issue or order. The trial court’s findings in some of these prior orders are problematic in a similar way to the findings in the order presently on appeal. Most of the findings relate assertions, feelings, or fears of various parties and witnesses; few resolve material, disputed factual issues.

Our review was complicated further by the fact that several orders are flatly contradictory. For example, there is a series of orders from May 2010 until May 2012,³ all of which continued the removal of the child from the parents and granted custody to the paternal grandparents. Then, based upon the 7 May 2012 hearing, the court did a 180 degree turn and entered an order which readopted the findings in the prior orders but granted joint legal and physical custody to respondents mother and father and, in another switch from prior orders, permitted respondent-mother’s fiancé Tony to have contact with the child.⁴ Thus

3. The order from the 7 May 2012 hearing was actually entered on 1 August 2012.

4. The conflicting orders contributed to discord and confusion at respondent-mother’s 7 August 2011 visit in Michigan, at which her fiancé was present. The paternal grandmother objected to his presence, producing to the Michigan law enforcement officer a copy of the 21 September 2010 order (which was reversed on 7 June 2011) in support of her claim that he was not permitted in the presence of the child; respondent-mother relied upon a 4 May 2011 order which did not prevent Tony from being present. The 4 May 2011 order was effective at that time, while the 21 September 2010 order was not, although the Michigan officer had no way of knowing this.

IN RE M.M.

[230 N.C. App. 225 (2013)]

we have orders which include negative findings which led the court to restrict the visitation of both respondent-mother and respondent-father and to prohibit contact with Tony, and we have orders which do the opposite, but the findings in all of these prior orders were “readopted” in the order under appeal.⁵

But in an effort to resolve this case, which has been pending for over 6 years, as promptly as possible, we have searched through the prior orders and the juvenile petition underlying this entire action seeking the “condition” that the trial court found could not be corrected. There are at least four possibilities: (1) respondent-parents’ use of drugs, which was one of the allegations in the juvenile petition and the *only* reason that the juvenile was adjudicated dependent; (2) respondent-parents’ domestic violence toward each other in the home when the child was present; (3) respondent-parents’ “abnormal lifestyle,” which the trial court found was “not conductive [sic] to child rearing”; and (4) the juvenile’s accusations of abuse against respondent-mother’s fiancé and father.

The order before us does limit the possibilities to some extent. First, the trial court specifically found that respondent-mother’s drug use was no longer a concern. Indeed, the juvenile was returned to custody of her parents in April 2008 because they had addressed the trial court’s concerns about their drug use—the one condition found by the trial court in its dependency adjudication and the reason for the juvenile’s initial removal from the home.⁶ The trial court has not found that drug use continues to interfere with respondent-parents’ ability to care for their child. Thus, this condition is not one which respondent-mother has failed to alleviate and could not be the basis for finding that the child could not be returned to the home from which she was removed.

Second, although the trial court found that the respondent-parents had been violent with one another in front of the juvenile, it never found that domestic violence is likely to recur, especially in light of the fact that respondent-parents are no longer living together and no longer maintain an ongoing romantic relationship. In fact, the evidence does not indicate any on-going domestic violence in either respondent-mother’s or respondent-father’s relationships or homes.

5. We have assumed that the trial court did not include the order of 21 September 2010, which was reversed previously by this Court, and we have not considered the findings of that order as ones that may have been considered as “readopted.”

6. Domestic violence had also been alleged in the juvenile petition, but the juvenile was not adjudicated dependent on that basis.

IN RE M.M.

[230 N.C. App. 225 (2013)]

In between the trial court's decision to return the juvenile to her parents' custody in 2008 and the trial court's next involvement in this matter, in 2010, the respondent-parents had engaged in domestic violence toward one another while co-habiting. After one of these episodes in late 2009, respondent-father moved to Michigan with Margo and stayed with his parents without the consent of respondent-mother, who had joint legal and physical custody. At that time, respondent-father had respondent-mother involuntarily committed; she was quickly released with no diagnosis or recommendation for treatment.

In April 2010, respondent-mother filed a motion for review asking that respondent-father be ordered to return the juvenile to North Carolina and moved that the trial court amend its prior order in light of the changed circumstance of the then-recent domestic violence. The trial court never addressed respondent-father's removal of the child from North Carolina, except to recognize that it happened, and the court directed psychological evaluations of both parents and child; many review hearings ensued.

The trial court has never found that respondent parents continued to act in a violent manner toward one another after respondent-father moved to Michigan or that such violence is likely to recur. Indeed, in the 1 August 2012 order,⁷ the trial court returned joint custody to respondent-parents, finding such an arrangement to be in the juvenile's best interest and giving respondent-father primary physical custody. The trial court granted custody to the paternal grandparents in the order currently on appeal, entered 11 February 2013. Although there may be several good reasons for the trial court's decision to put Margo's custody back with her grandparents between May 2012 and February 2013, there are no findings of acts of domestic violence during this time. It would seem that the trial court's decision to return joint custody to respondent-parents in May 2012 indicates that by that point domestic violence was not an ongoing issue that respondent-parents have failed to alleviate. Thus, the trial court cannot have been referring to the parties' inability to correct conditions of domestic violence in its February 2013 order.

Third, by order entered 11 July 2012, the trial court found

[t]hat the Respondent Parents lead an abnormal lifestyle,
one of sexual deviancy and substance abuse. This lifestyle

7. This date, which is the date the order was filed, is somewhat misleading—the hearing occurred on 7 May 2012, and by 1 August 2012 several more hearings had been held and orders entered which had placed the child back in custody of the paternal grandparents.

IN RE M.M.

[230 N.C. App. 225 (2013)]

is not conducive [sic] to child rearing, and the Court is concerned that the Juvenile will be further impacted by the Respondents' lifestyle and the people who surround the parents and engage in a similar lifestyle; the Respondent Mother is bisexual and the Respondent Father has cross dressed in the past.

As noted above, the "substance abuse" portion of this finding is no longer relevant, since the trial court found that respondent-mother no longer engages in this activity. This leaves only the finding of "sexual deviancy," and as to the appellant before us, that she is bisexual.⁸ The trial court made no findings as to any particular sexual activity which respondent-mother has engaged in which has affected the juvenile in any way. Further, it is not self-evident that respondent-mother's sexual orientation has an adverse effect on the welfare of the child. *See Pulliam v. Smith*, 348 N.C. 616, 627, 501 S.E.2d 898, 904 (1998) ("Nor does this Court hold that the mere homosexual status of a parent is sufficient, taken alone, to support denying such parent custody of his or her child or children."); *Shipman v. Shipman*, 357 N.C. 471, 478, 586 S.E.2d 250, 256 (2003) (noting that it is not self-evident that a change in a parent's sexual orientation was a substantial change affecting the welfare of the child). Thus, even assuming the trial court's findings that respondent-mother is bisexual and that people who surround her "engage in a similar lifestyle" are supported by the evidence, the mere characterization of this lifestyle as "abnormal" and "not conducive [sic] to child rearing" falls far short of the findings required to link these circumstances to the child's welfare.⁹

There were no findings that these "lifestyle" choices were having any negative impact on Margo or how they related to the parents' abilities to care for her. Thus, even if these facts are still true of the parents today, these conditions were not those that led to the juvenile's removal or which DSS or the trial court ever sought to modify and failure to remedy them cannot be a basis to take custody away from the juvenile's biological parents.

Finally, and most seriously, the trial court found that the juvenile had accused her maternal grandfather and respondent-mother's fiancé

8. Since respondent-father did not appeal, we will not address the portion of this finding as to his having "cross dressed in the past."

9. We also note that the trial court apparently has less concern—in the most recent order, at least—regarding respondent-father's having "cross dressed" in the past, as Margo is now living with his parents and he has full and unsupervised access to Margo.

IN RE M.M.

[230 N.C. App. 225 (2013)]

of sexual abuse in October 2011. It never found, however, that this abuse actually occurred—a fact vehemently denied by respondent-mother, her father, and her fiancé. The juvenile had initially also accused her paternal grandfather—the one with whom she now lives in Michigan—of sexual abuse, but later retracted the accusation. Police in Michigan investigated the allegations against the paternal grandfather, but stopped investigating once the juvenile retracted her accusation. The record in this case is voluminous, but we can find no indication that the juvenile's accusations against her maternal grandfather or respondent-mother's fiancé were ever formally investigated in North Carolina by law enforcement or even DSS, although it does appear that Michigan DSS transmitted this report to North Carolina.

We are unable to discern from the record before us why the allegations of sexual abuse against the paternal grandfather, which led at least to a formal investigation, are of less concern to the trial court than the allegations against the maternal grandfather and fiancé, which have never even been investigated, much less substantiated. Despite the fact that the child's therapist in Michigan repeatedly stressed the importance of all of the caregivers believing the child's claims of abuse, even she noted that "this court case may be more about custody than about the appropriateness and safest environment for" the child.

The trial court found it quite significant that respondent-mother continues to disbelieve her daughter's assertions that she was sexually abused by her maternal grandfather or Tony. We find it significant that the trial court, while faulting respondent-mother for her disbelief, also has never found that any sexual abuse occurred. In other words, the trial court expects respondent-mother to accept the allegations of sexual abuse as true and to act accordingly even though the trial court has not accepted the allegations as true.¹⁰ Indeed, well after the juvenile accused respondent-mother's fiancé of physical abuse, the trial court's orders were inconsistent in that some permitted him to be in the child's presence and others prohibited this. It is inconsistent for the trial court to deprive respondent-mother of custody of her daughter simply for failing to believe an accusation that the trial court has never found to be true.

10. The actual finding is that "Respondent Mother continues not to believe the juvenile's statements about being sexually abused by her maternal grandfather and the Respondent Mother's fiancé. She has indicated that she has no intention of breaking off her relationship with her fiancé against whom the juvenile has made accusations of sexual abuse." In fact, according to respondent-father's motion for review filed in November 2011, the child claimed that Tony spanked her and hit her in the mouth. Although this may be abuse, it is not sexual abuse.

IN RE M.M.

[230 N.C. App. 225 (2013)]

Despite the lack of a finding that someone actually sexually or physically abused Margo, there was evidence which would indicate that Margo has intense fear of respondent-mother's fiancé and her maternal grandfather. In July 2012, Margo's therapist was concerned that Margo's "caregivers"—apparently referring to respondent-mother—do not believe Margo's accusations of abuse. She noted that Margo continued to express "intense fear" of respondent-mother's fiancé, and that even if she was not abused, she was very fearful and it is "even more harmful" not to be believed by caregivers.¹¹ While the child's fears, whether grounded in fact or not, are certainly a valid consideration, the order leaves several huge questions unanswered: Was Margo sexually and/or physically abused? If so, by whom? If she was not, why is she still so fearful?

The evidence of respondent-mother's reactions to the accusations of sexual and/or physical abuse, which included interrogating her daughter about it on video and posting the video to Facebook, could support a finding that respondent-mother has acted in an inappropriate manner and that her actions have traumatized Margo, regardless of the veracity of the accusations. Respondent-mother's actions have no doubt worsened an already bad situation. Nevertheless, the trial court did not resolve the material disputes of fact as to what the respondent-mother had done or failed to do, find that respondent-mother's actions were having a negative impact on the juvenile, or that additional counseling on how to properly deal with the issue would not alter respondent-mother's behavior.

Two other related issues are (1) respondent-mother's misrepresentations regarding where she was living and with whom; and (2) respondent-mother's violations of various orders by the trial court which directed her to cease posting information regarding Margo and this case on various social media websites, primarily regarding the abuse allegations. Both the trial court and the child's therapist clearly had concerns about respondent-mother's refusal or inability to follow the rules set forth by the trial court, but the order under review does not include any specific findings on this issue, and we are unable to discern from the multitude of prior orders if this was an additional reason for the trial court's order.

Although this last issue of the accusation of sexual or physical abuse *appears* to be the one with which the trial court was most concerned,

11. We are also unable to discern if the trial court's restrictions on the maternal grandfather were related to concerns regarding abuse or if they were based upon his inappropriate outbursts in various court hearings, which led on one occasion to his incarceration for 15 days and to an order barring him from attending future hearings.

IN RE M.M.

[230 N.C. App. 225 (2013)]

it is unclear from the trial court's findings how it believed respondent-mother failed to correct a "condition" that had led to the juvenile's removal, since the only condition that actually did lead to removal—substance abuse—was resolved several years ago. Therefore, from the findings, it is not clear to us why it is not possible to return the juvenile to the home immediately or in the next six months.

The trial court is required to resolve the material, disputed factual issues by its findings of fact. *See In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002). These findings must be based upon clear, cogent, and convincing evidence. *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000). Findings that a party or attorney asserted some fact or felt a particular way about an issue without a finding by the court resolving the conflicting assertions is not sufficient. *See In re C.L.C.*, 171 N.C. App. 438, 446, 615 S.E.2d 704, 708 (2005), *disc. rev. allowed*, 360 N.C. 289, 628 S.E.2d 251, *aff'd in part and disc. rev. dismissed in part*, 360 N.C. 475, 628 S.E.2d 760 (2006). Additionally, the trial court cannot simply incorporate reports by DSS or the GAL to substitute for actual findings of fact. *In re M.R.D.C.*, 166 N.C. App. at 698, 603 S.E.2d at 893. The trial court's "findings [of ultimate fact] must be sufficiently specific to enable an appellate court to review the decision and test the correctness of the judgment." *Id.* (citation and quotation marks omitted).

Although it can be appropriate to incorporate findings from prior orders, assuming that the standards of proof were the same as in the current order, where the trial court incorporates the orders wholesale without identifying at least the general import of the prior findings it is adopting, proper appellate review is impossible. *See Crocker v. Crocker*, 190 N.C. App. 165, 170, 660 S.E.2d 212, 215 (2008) (noting that "[t]he general incorporation of all findings from other court documents is not sufficiently specific to demonstrate whether the trial judge properly considered the statutory factors for awarding alimony.").

The ultimate findings here are insufficient for us to test the correctness of the judgment because we cannot discern what "condition" the trial court believed that respondent-mother has failed to alleviate which makes return of the juvenile to the home impossible within the next 6 months. Therefore, we must reverse the permanency planning order and remand for entry of an order with sufficient findings to support the trial court's judgment.

V. Future Review Hearings

[3] Respondent-mother next contests the trial court's decision to waive further review hearings. She contends the court erred by failing to make

IN RE M.M.

[230 N.C. App. 225 (2013)]

the findings of fact required by N.C. Gen. Stat. § 7B-906(b) in order to waive further periodic review hearings. This statute permits a court to waive further review hearings if the court finds by clear, cogent and convincing evidence that:

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

N.C. Gen. Stat. § 7B-906(b) (2011). This Court has held that the trial court must make written findings of fact satisfying each of the above criteria in its order. *In re L.B.*, 184 N.C. App. 442, 447, 646 S.E.2d 411, 414 (2007). An order which fails to address all of the criteria will be reversed and remanded for entry of an order containing findings of fact in compliance with N.C. Gen. Stat. § 7B-906(b). *Id.* at 449, 646 S.E.2d at 415.

Respondent-mother submits, and petitioner and guardian ad litem appropriately concede, that the court's order does not address the third and fourth criteria listed above. Perhaps the trial court found that no further review hearing were needed because it purported to transfer the case to Michigan, as addressed above. It also appears, as noted above, that the trial court may have meant to terminate DSS's involvement in this case and transfer to a Chapter 50 action, as we acknowledge that the usefulness of DSS's continued involvement in this case is not entirely apparent. In any event, the trial court may consider these matters on remand. Accordingly, we reverse this portion of the order.

VI. Visitation Plan

[4] Respondent-mother lastly contends the order fails to set out a detailed visitation plan. This Court has held that a visitation plan ordered by the trial court "must provide for a minimum outline of visitation, such

IN RE M.M.

[230 N.C. App. 225 (2013)]

as the time, place and conditions under which visitation may be exercised.” *In re E.C.*, 174 N.C. App. 517, 523, 621 S.E.2d 647, 652 (2005) (citation omitted). The court may not leave the terms of visitation in the discretion of the custodian. *In re C.P.*, 181 N.C. App. 698, 705, 641 S.E.2d 13, 18 (2007).

The order at bar provides that respondent-mother “shall be allowed supervised visitation one (1) day a month and not to exceed four (4) hours in duration. Said visitation shall occur at Safe Place in the [sic] Saginaw, Michigan.” The order also provides that any costs associated with the visitation at “Safe Place” is to be split between the child’s parents. Petitioner and the guardian ad litem concede that the order is deficient and inappropriately leaves visits within the discretion of the guardians, and that on remand, the trial court should be required to set forth the required specifics in its order.

Leaving the visitation provisions in the discretion of the guardians is even more problematic than usual in this case, since Margo now resides in Michigan and respondent-mother must travel to Michigan to exercise the four hours of time she was granted. Any confusion or disagreement regarding the visitation scheduling may result in respondent-mother’s inability to make adequate travel arrangements and the visitation simply will not happen. Indeed, past history in this case would indicate that visitation is likely not to go smoothly in the absence of specific provisions. We accordingly reverse this portion of the order as well.

VII. Conclusion

The trial court failed to make necessary findings to support its decision to transfer jurisdiction to Michigan, end review hearings, and not to return custody to the respondent-parents. Further, the trial court failed to set out an adequate visitation schedule. Therefore, we must reverse the entirety of the 11 February 2013 order and the amended order entered 24 April 2013 and remand for further proceedings.

REVERSED and REMANDED.

Judges McGEE and BRYANT concur.

IN RE McNEIL

[230 N.C. App. 241 (2013)]

IN THE MATTER OF THE WILL OF ELZIE ROGERS McNEIL, DECEASED

No. COA13-451

Filed 5 November 2013

**Wills—caveat—undue influence—testamentary capacity—duress
—insufficient evidence**

The trial court did not err in a will case by granting summary judgment in favor of the propounders of a will. There were no genuine issues of fact concerning undue influence or testamentary capacity and propounders were thus entitled to summary judgment as a matter of law. The Court of Appeals did not address caveators' argument that there were genuine issues of material fact concerning duress because the allegations underlying the challenges to undue influence and duress were identical.

Appeal by Caveators from Order entered on or about 13 December 2012 by Judge Donald W. Stephens in Superior Court, Wake County. Heard in the Court of Appeals 23 September 2013.

George Ligon, Jr. and Katrina L. Smith, for caveators-appellants.

Law Office of David Watters, PLLC, by David T. Watters, for propounder-appellants.

STROUD, Judge.

Etongia Richardson, Elbert McNeil, Elvin McNeil, and Tiara McNeil (“caveators”) appeal from an order entered 13 December 2012 granting summary judgment in favor of Sonja Ely, Ida Ely, and James Adams (“propounders”), the propounders of a 2010 will executed by Elzie Rogers McNeil (“Mrs. McNeil”). For the following reasons, we affirm.

I. Background

Elzie Rogers McNeil was a longtime resident of Wake County and business owner before she passed away on 16 December 2010. Mrs. McNeil was survived by a number of relatives, including brothers Elbert McNeil, Elvin McNeil, and James Adams, sister Ida Ely, daughter Etongia Richardson, niece Sonja Ely, and granddaughter Tiara McNeil.

In December 2008, Mrs. McNeil executed a “Last Will and Testament” (“2008 will”) prepared by attorney Joseph Kosko. Then, in November 2010,

IN RE McNEIL

[230 N.C. App. 241 (2013)]

Mrs. McNeil was hospitalized. It is not clear from the record what led to this hospitalization, but Mrs. McNeil had been diagnosed with breast cancer, coronary artery disease, and diabetes, among other illnesses.

While Mrs. McNeil was hospitalized, Sonja Ely contacted attorney Brenda Martin to prepare a new will for Mrs. McNeil. According to Ms. Martin, she informed Sonja that she would only prepare a will at the request of the testator. Ms. Martin later spoke directly to Mrs. McNeil by phone. In that conversation, Mrs. McNeil reminded Ms. Martin that they had met previously when Ms. Martin had prepared a will for one of Mrs. McNeil's friends. Mrs. McNeil expressed her desire to change her will and an urgent need to remove a grandson from the will in light of her failing health.

Mrs. McNeil told Ms. Martin that she would mark up the changes she wanted on the current will and send them over. While still hospitalized, Mrs. McNeil told Sonja what changes she wanted and Sonja marked those changes on the will, then delivered the document to Ms. Martin. Ms. Martin made the indicated changes and sent Mrs. McNeil the draft will. Mrs. McNeil made an additional change, which she discussed directly with Ms. Martin.

On 30 November 2010, Ms. Martin, her assistant, and one of Mrs. McNeil's neighbors went to Mrs. McNeil's home so that she could execute the will. Ms. Martin and Mrs. McNeil spoke for approximately fifteen minutes before she administered an oath to Mrs. McNeil in the presence of the two witnesses and asked her questions about any narcotic medications she was taking and whether she knew why they were there. Mrs. McNeil signed the will, which included a "self-proving clause," under oath and in the presence of two uninterested witnesses. Mrs. McNeil passed away about two weeks later.

On 28 December 2010, Sonja Ely applied for and received letters testamentary to administer Mrs. McNeil's estate. The Clerk of Court for Wake County admitted the 2010 writing to probate as the "Last Will and Testament" ("2010 will") of Mrs. McNeil. On 29 December 2010, Etongia Richardson also applied for and received letters of administration, asserting that her mother died intestate. The Clerk of Court then revoked the letters of administration issued to Etongia as erroneously duplicative.

On 28 February 2011, Etongia, Elbert, and Elvin filed a caveat to the 2010 will, alleging that Mrs. McNeil lacked the capacity to make the will, that the will was procured by undue influence and duress, and that a fiduciary relationship existed between one of the propounders and Mrs. McNeil. The trial court later aligned Tiara McNeil with the other

IN RE McNEIL

[230 N.C. App. 241 (2013)]

caveators. Propounders of the 2010 will were Sonja Ely, Ida Ely, and James Adams. After months of discovery, propounders filed a motion for summary judgment on 6 September 2012, which was granted by order entered 13 December 2012. Caveators filed notice of appeal on 14 January 2013.

II. Summary Judgment

Caveators argue on appeal that the trial court erred in granting summary judgment in favor of propounders on all issues because there were genuine issues of material fact, or alternatively, that the trial court erred in not granting summary judgment to caveators on these issues.

A. Propriety of Summary Judgment on *Devisavit Vel Non*

Caveators argue that the trial court erred and exceeded its authority by “determin[ing] the issue of *devisavit vel non* because it purported to rule on all issues in this caveat case.” The Latin phrase *devisavit vel non* simply “refers to a determination of whether a will is valid.” *Seagraves v. Seagraves*, 206 N.C. App. 333, 337 n.4, 698 S.E.2d 155, 160 n.4 (2010). Caveators contend that their challenge to the will’s validity on the basis of testamentary incapacity, undue influence, and duress should have been decided by a jury and imply that summary judgment is always inappropriate on that issue.¹ This argument is meritless.

Our Supreme Court has stated that summary judgment on such issues is appropriate, as in other contexts, if “there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law.” *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation and quotation marks omitted). “If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the non-movant to present specific facts which establish the presence of a genuine factual dispute for trial.” *Id.* Thus, the only question is whether the trial court correctly determined that propounders were entitled to summary judgment on the issues of undue influence, testamentary capacity, and duress under the facts presented here.

B. 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

1. Caveators do not otherwise challenge the validity of the 2010 will.

IN RE McNEIL

[230 N.C. App. 241 (2013)]

as a matter of law. When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party. If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmovant to present specific facts which establish the presence of a genuine factual dispute for trial. Nevertheless, if there is any question as to the weight of evidence summary judgment should be denied.

Id. (citations and quotation marks omitted). “Where the moving party offers facts and the opposing party only offers mere allegations, there is no *genuine* issue as to a material fact.” *Moore v. Fieldcrest Mills, Inc.*, 36 N.C. App. 350, 353, 244 S.E.2d 208, 210 (1978), *aff’d*, 296 N.C. 467, 251 S.E.2d 419 (1979).

C. Undue Influence

Caveators first contend that the trial court erred in determining that there was no genuine issue of material fact as to undue influence and duress imposed by propounders, especially Sonja Ely, on Mrs. McNeil. For the following reasons, we hold that caveators have failed to forecast sufficient evidence to create a genuine issue of material fact regarding undue influence.

Our Supreme Court has defined “undue influence” as

something operating upon the mind of the person whose act is called in judgment, of sufficient controlling effect to destroy free agency and to render the instrument, brought in question, not properly an expression of the wishes of the maker, but rather the expression of the will of another. It is the substitution of the mind of the person exercising the influence for the mind of the testator, causing him to make a will which he otherwise would not have made.

In short, undue influence, which justifies the setting aside of a will, is a fraudulent influence, or such an overpowering influence as amounts to a legal wrong. It is close akin to coercion produced by importunity, or by a silent, irresistible power, exercised by the strong over the weak, which could not be resisted, so that the end reached is tantamount to the effect produced by the use of fear or force.

Thus, while undue influence requires more than *mere* influence or persuasion because a person can be influenced to

IN RE McNEIL

[230 N.C. App. 241 (2013)]

perform an act that is nevertheless his voluntary action, it does not require moral turpitude or a bad or improper motive. Indeed, undue influence may even be exerted by a person with the best of motives. Nevertheless, influence is not necessarily “undue,” even if gained through persuasion or kindness and resulting in an unequal or unjust disposition in favor of those who have contributed to the testator’s comfort and ministered to his wants, so long as such disposition is voluntarily made.

In re Will of Jones, 362 N.C. at 574, 669 S.E.2d at 577 (citations, quotation marks, ellipses, and brackets omitted).

“There are four general elements of undue influence: (1) a person who is subject to influence; (2) an opportunity to exert influence; (3) a disposition to exert influence; and (4) a result indicating undue influence.” *In re Sechrest*, 140 N.C. App. 464, 469, 537 S.E.2d 511, 515 (2000) (citation and quotation marks omitted), *disc. rev. denied*, 353 N.C. 375, 547 S.E.2d 16 (2001).

As our Supreme Court has noted,

It is impossible to set forth all the various combinations of facts and circumstances that are sufficient to make out a case of undue influence because the possibilities are as limitless as the imagination of the adroit and the cunning. The very nature of undue influence makes it impossible for the law to lay down tests to determine its existence with mathematical certainty.

Matter of Andrews’ Will, 299 N.C. 52, 54-55, 261 S.E.2d 198, 200 (1980).

Nevertheless, the courts of this state consider a number of factors relevant to the issue of undue influence:

1. Old age and physical and mental weakness;
2. That the person signing the paper is in the home of the beneficiary and subject to his constant association and supervision;
3. That others have little or no opportunity to see him;
4. That the will is different from and revokes a prior will;
5. That it is made in favor of one with whom there are no ties of blood;

IN RE McNEIL

[230 N.C. App. 241 (2013)]

6. That it disinherits the natural objects of his bounty;
7. That the beneficiary has procured its execution.

Id. at 55, 261 S.E.2d at 200 (citation and quotation marks omitted).

A caveator need not demonstrate every factor named in *Andrews* to prove undue influence, as undue influence is generally proved by a number of facts, each one of which standing alone may be of little weight, but taken collectively may satisfy a rational mind of its existence.

Accordingly, any evidence showing an opportunity and disposition to exert undue influence, the degree of susceptibility of the testator to undue influence, and a result which indicates that undue influence has been exerted is generally relevant and important. If a reasonable mind could infer from such evidence that the purported last will and testament is not the product of the testator's free and unconstrained act, but is rather the result of overpowering influence sufficient to overcome the testator's free will and agency, then the case must be submitted to the jury for its decision.

In re Will of Jones, 362 N.C. at 576, 669 S.E.2d at 578 (citations, quotation marks, and brackets omitted).

Caveators argue in a summary fashion that “there is ample evidence to raise an issue of material fact on the issue of a confidential and/or fiduciary relationship between Mrs. McNeil and Propounders.” They fail to specify which of the propounders was in a fiduciary relationship with Mrs. McNeil, what the nature of that relationship was, or point to any evidence in the record to support that assertion. Therefore, we consider that argument abandoned, N.C.R. App. P. 28(b)(6), and will only consider whether there is a genuine issue of material fact on undue influence under the *Andrews* factors.

As to the first *Andrews* factor, “old age and physical and mental weakness,” the evidence forecast by the parties shows that Mrs. McNeil was 72 years old when she executed the 2010 will and that she had been physically weakened by cancer and other illnesses. Attorney Brenda Martin, Ms. Martin's assistant, and Nancy Kelly—one of Mrs. McNeil's friends and neighbors—were present when Mrs. McNeil executed the 2010 will. Ms. Martin spoke with Mrs. McNeil for fifteen minutes about her family and her assets and whether she was taking any narcotic medication—she indicated that she was not and caveators have not produced contrary

IN RE McNEIL

[230 N.C. App. 241 (2013)]

evidence. Ms. Martin asked if Mrs. McNeil knew who she was and why she was there. Mrs. McNeil stated her name and said that Ms. Martin was there regarding the signing of her will. Mrs. McNeil also identified the current President of the United States and the time of day. Ms. Martin then went through the draft will paragraph by paragraph with Mrs. McNeil.

All three of the witnesses present that day averred that Mrs. McNeil was alert and lucid. Ms. Martin described Mrs. McNeil's demeanor on 30 November 2010 as "a general giving orders to her troops." Approximately a week later, Mrs. McNeil went to the Renaissance Funeral Home to discuss burial arrangements with the owner, Joseph Smolenski, Jr. Mr. Smolenski averred that although Mrs. McNeil was in a wheel chair, she asked appropriate questions, gave appropriate answers, and even negotiated a discount for her casket.

Although caveators have averred that Mrs. McNeil at times could not remember their names or the names of her doctors, the averments are extremely general and vague. Caveators have failed to identify any specific instances of such mental infirmity. Instead, the caveators' averments and responses to interrogatories largely repeat one another without providing additional detail. "Where the moving party offers facts and the opposing party only offers mere allegations, there is no genuine issue as to a material fact." *Moore*, 36 N.C. App. at 353, 244 S.E.2d at 210.

The second *Andrews* factor, whether testator was in the home of the beneficiary and subject to her supervision, weighs in favor of neither party. There was evidence that propounders lived with Mrs. McNeil at her McKay Place residence, though it is not clear whether *all* of the propounders lived with her, or only some. There was no evidence that Mrs. McNeil was subject to the constant association and supervision of any of the propounders. Indeed, there is no evidence whatsoever about the living arrangement other than the fact that—perhaps some, perhaps all—of the propounders lived with Mrs. McNeil.

Caveators presented no evidence on the third *Andrews* factor. There is no indication in the record that others had little opportunity to see and interact with Mrs. McNeil. Indeed, the affidavits submitted by Mrs. Kelly and Mr. Smolenski suggest otherwise.

The fourth *Andrews* factor, whether the new will is different from and revokes a previous will, weighs heavily in favor of propounders. The 2010 will is substantially similar to the 2008 will.² The only substantive

2. There also appears to have been a 2007 will, but a copy of that document does not appear in the record.

IN RE McNEIL

[230 N.C. App. 241 (2013)]

differences between the two wills are: (1) under the 2010 will, grandson Anthony McNeil, who is not a party to this action, inherits nothing; (2) as a result of Anthony's disinheritance, caveator Tiara McNeil now solely holds the remainder interest in the McKay Place residence, at the expiration of a life estate bequeathed to propounders Ida Ely and James Adams;³ (3) there is no mention in the 2010 will of "Mother and Daughter Salon"—a business owned by Mrs. McNeil and caveator Etongia Richardson;⁴ (4) Eleanor Sykes—one of Mrs. McNeil's nieces—receives all of Mrs. McNeil's jewelry; and (5) caveator Etongia Richardson, caveator Tiara McNeil, and April Colfield—a granddaughter who is not a party—each receive a one-third interest in the residuary estate.

None of the propounders benefit more under the 2010 will than they did under the 2008 will and it appears that caveators have not lost any interests to which they would have been entitled under the prior will. Indeed, some of the caveators have gained under the new will.

As to the fifth and sixth *Andrews* factors, Mrs. McNeil is related by blood to all beneficiaries of her 2010 will. Additionally, the only person disinherited under the 2010 will is grandson Anthony McNeil. As noted above, Mrs. McNeil specifically told her attorney that she wanted to change her will in order to remove a grandson. It is not clear from the record what, if anything, precipitated this change, but it is clear that Mrs. McNeil intended to remove him.

Finally, as to the seventh *Andrews* factor, Sonja Ely, one of the beneficiaries under the 2010 will, did assist Mrs. McNeil in procuring the will. Sonja Ely called the attorney's office to arrange a discussion between the attorney and Mrs. McNeil, helped deliver documents between Mrs. McNeil and the attorney, and was present when Mrs. McNeil executed the will. Neither of the other propounders assisted with the procurement of the will in any way. But, as noted above, Sonja Ely did not benefit any more under the 2010 will than she did under the 2008 will. There is no indication that she had any role in procuring that prior will.

3. This life estate was present in both wills.

4. Previously, half of Mrs. McNeil's interest in the business was devised to Etongia Richardson and one quarter of her interest was devised each to Tiara and Anthony McNeil. The significance of that omission is not apparent since Etongia Richardson was already a partner in that business and has a one-third share in the residuary estate under the 2010 will. It is not clear from the record what kind of business entity it is or how Mrs. McNeil's death would affect ownership interests. Caveators do not explain how this change prejudices their interest.

IN RE McNEIL

[230 N.C. App. 241 (2013)]

Considering these factors together, we conclude that caveators have failed to forecast sufficient evidence of undue influence. The 2010 will largely copied the 2008 will and propounders do not benefit in any way from the changes. All of the beneficiaries are blood relatives and the 2010 will does not disinherit any of the natural objects of Mrs. McNeil's bounty other than her grandson. There is no evidence that Mrs. McNeil was under constant control and supervision by propounders. In sum, there is no evidence on the third and fourth elements of undue influence: a disposition to exert influence and a result indicating undue influence.

The evidence forecast here is not sufficient to satisfy a rational mind that Sonja Ely or the other propounders substituted their will for that of Mrs. McNeil, causing her to make a will which she otherwise would not have made. We hold that there is no genuine issue of fact material to that determination and that propounders are entitled to judgment as a matter of law on the issue of undue influence.⁵

D. Testamentary Capacity

Caveators next contend that there is a genuine issue of material fact regarding whether Mrs. McNeil had the capacity to make her 2010 will. We disagree.

An individual possesses testamentary capacity—the capacity to make a will—if the following is true: She (1) comprehends the natural objects of her bounty, (2) understands the kind, nature and extent of her property, (3) knows the manner in which she desires her act to take effect, and (4) realizes the effect her act will have upon her estate.

The presumption is that every individual has the requisite capacity to make a will, and those challenging the will

5. Although caveators challenge the validity of the will under both undue influence and duress, caveators' allegations underlying both are the same. Because we hold that the forecast of evidence is insufficient even to create a genuine issue of material fact as to undue influence and because the allegations underlying both challenges are identical, we need not address caveators' arguments on duress. *See generally, In re Loftin's Estate*, 285 N.C. 717, 722-23, 208 S.E.2d 670, 675 (1974) ("Duress is the result of coercion and may be described as the extreme of undue influence and may exist even when the victim is aware of all facts material to his decision."); *Link v. Link*, 278 N.C. 181, 191, 179 S.E.2d 697, 703 (1971) (Duress, fraud, and undue influence "are related wrongs and, to some degree, overlap. They are, however, not synonymous. Proof of facts sufficient to show one does not necessarily constitute proof of either of the other two. . . . Duress is the result of coercion. It may exist even though the victim is fully aware of all facts material to his or her decision. Undue influence may exist where there is no misrepresentation or concealment of a fact and the pressure applied to procure the victim's ostensible consent to the transaction falls short of duress." (citations omitted)).

IN RE McNEIL

[230 N.C. App. 241 (2013)]

bear the burden of proving, by the greater weight of the evidence, that such capacity was wanting.

However, to establish testamentary incapacity, a caveator need only show that one of the essential elements of testamentary capacity is lacking. It is not sufficient for a caveator to present only general testimony concerning testator's deteriorating physical health and mental confusion in the months preceding the execution of the will, upon which a caveator based her opinion as to the testator's mental capacity. *A caveator needs to present specific evidence relating to testator's understanding of his property, to whom he wished to give it, and the effect of his act in making a will at the time the will was made.*

Seagraves, 206 N.C. App. at 349, 698 S.E.2d at 167 (citations, quotation marks, and brackets omitted) (emphasis added).

Almost all of caveators' evidence on testamentary capacity are general allegations of confusion and deteriorating health. None of their affidavits or responses to interrogatories identifies any specific instance in which Mrs. McNeil was unable to recall the name of a family member or understand what was going on around her. They have produced no medical records or affidavits from treating professionals that show mental infirmity. Indeed, caveators' responses to propounders' interrogatories specifically state that they are unable to recall any specifics. As we held in *Seagraves*, such general statements of deteriorating mental or physical health are insufficient to support a claim of testamentary incapacity. *See id.* The specific evidence in the record, described in our discussion of the first *Andrews* factor, shows that Mrs. McNeil generally understood what assets she had, who the people around her were, and that the 2010 will accurately reflected her intended distribution of assets.

The only specific, relevant evidence forecast by caveators that shows Mrs. McNeil misunderstood the effect of her will was the provision regarding disposition of "ownership" of Mrs. McNeil's apparently non-profit corporation. Both the 2008 will and the 2010 will devise the business to Sonja Ely. The 2010 will states: "I hereby devise and bequeath all of my entire interest in and all my shares of stock in my business known as McNeil's Home Service, Inc. to my niece, Sonjia [sic] Ely." Caveators correctly point out that if McNeil's Home Service, Inc. is a non-profit corporation—as it appears to be—then there are no shares to bequeath. *See* N.C. Gen. Stat. § 55A-6-21 (2011) (prohibiting a non-profit

IN RE McNEIL

[230 N.C. App. 241 (2013)]

corporation from issuing stock). But we fail to see how a possible misunderstanding of corporate law demonstrates testamentary incapacity.⁶

The 2010 will's provisions regarding McNeil's Home Service are materially similar to those in the 2008 will—both provisions purport to transfer whatever interest exists to Sonja Ely. The 2008 will did have a provision “request[ing] that . . . Sonja receive assistance operating McNeil's Home Service, Inc. from . . . Andrew McNeil and from . . . Tiara McNeil.” This provision was omitted from the 2010 will, but as propounders note, such precatory language in a provision clearly bequeathing Sonja ownership would likely not have been binding in any event. *See Rouse v. Kennedy*, 260 N.C. 152, 156, 132 S.E.2d 308, 312 (1963) (holding that precatory language, such as “wish” or “desire,” in a will is not a testamentary disposition of property).

Caveators have “presented only general testimony concerning testator's deteriorating physical health and mental confusion in the months preceding the execution of the will.” *Seagraves*, 206 N.C. App. at 349, 698 S.E.2d at 167 (citation and quotation marks omitted). They have failed “to present specific evidence relating to testator's understanding of [her] property, to whom [she] wished to give it, and the effect of [her] act in making a will at the time the will was made.” *Id.* Therefore, we hold that there is no genuine issue of material fact as to Mrs. McNeil's competence at the time she executed her 2010 will and that propounders are entitled to judgment as a matter of law on testamentary capacity.

III. Conclusion

The trial court correctly concluded that there are no genuine issues of material fact as to undue influence or testamentary capacity and that propounders are entitled to judgment as a matter of law. Therefore, we affirm the trial court's order granting propounders' motion for summary judgment.

AFFIRMED.

Chief Judge MARTIN and Judge GEER concur.

6. “[H]ave not many wills been established where the testator had ample capacity to understand but who was laboring under some mistake of law or fact so that he did not know what he was doing?” *Lawrence v. Steel*, 66 N.C. 584, 588 (1872); *see also, Mims v. Mims*, 305 N.C. 41, 60, 286 S.E.2d 779, 792 (1982) (“Mere ignorance of law, unless there be some fraud or circumvention, is not a ground for relief in equity whereby to set aside conveyances or avoid the legal effect of acts which have been done.” (citation, quotation marks, and brackets omitted)). Moreover, this misunderstanding appears not to be limited to Mrs. McNeil. One of caveators' interrogatories asked propounders to “[s]tate the name, address, and phone number of all stockholders of McNeil's Home Service, Inc. during the last five years.” Propounder Sonja Ely responded that Mrs. McNeil “was the sole shareholder.”

IN RE TOWN OF SMITHFIELD

[230 N.C. App. 252 (2013)]

IN THE MATTER OF APPLICATION BY TOWN OF SMITHFIELD FOR APPROVAL OF AGREEMENT BETWEEN ELECTRIC SUPPLIERS WITH CAROLINA POWER & LIGHT COMPANY D/B/A PROGRESS ENERGY CAROLINAS, INC.

No. COA13-435

Filed 5 November 2013

Utilities—agreement—allocation of rights—not authorized by statute

The Utilities Commission did not err by denying approval of an agreement between the Town of Smithfield and Carolina Power & Light Company, d/b/a Progress Energy Carolinas, Inc. (“Progress”) that allocated rights to serve certain areas within the town. N.C.G.S. § 160A-331.2(a) only authorizes those agreements wherein the parties exchange rights to serve premises that each would not have the right to serve but for the agreement. Because both parties had rights to serve the premises they purported to exchange, the agreement was not authorized by statute.

Appeal by Town of Smithfield from Order entered on or about 27 December 2012 by the North Carolina Utilities Commission. Heard in the Court of Appeals 9 September 2013.

Poyner Spruill LLP by Michael S. Colo, for applicant-appellant Town of Smithfield.

Hewett & Wood, P.A. by Marcus C. Burrell, for intervenor-appellee Theron Lee McLamb; and Narron, O’Hale & Whittington, P.A. by Jason W. Wenzel, for intervenor-appellee Partners Equity Group.

STROUD, Judge.

The Town of Smithfield (“Smithfield”), a municipality and electric provider, appeals an order entered by the Utilities Commission on or about 27 December 2012 denying approval to an agreement between it and Carolina Power & Light Company, d/b/a Progress Energy Carolinas, Inc. (“Progress”) that allocated rights to serve certain areas within the Town of Smithfield. For the following reasons, we affirm.

I. Background

Smithfield and Progress are primary and secondary electric providers, respectively, within the corporate limits of the Town of Smithfield.

IN RE TOWN OF SMITHFIELD

[230 N.C. App. 252 (2013)]

In 2010, Smithfield's staff reviewed the location of its electric facilities and decided that Progress did not have the right to serve some of the customers that it was then serving. Progress disagreed.

To resolve the dispute, Progress and Smithfield entered into an "Agreement Between Electric Suppliers" ("Agreement") on 10 January 2012. In the Agreement, Smithfield was allocated the exclusive right to serve all premises in the Smithfield Crossing area, the Smithfield Business Park, and Lot 7 on North Equity Drive. Smithfield also acquired the exclusive right to serve all premises not currently requiring electric service which might tap into the Fieldcrest Feeder, an area designated area "D" on the map accompanying the agreement. Progress was allocated the right to serve all premises in the North Equity Drive and South Equity Drive areas other than Lot 7.

Smithfield and Progress filed an application for approval of their agreement with the Utilities Commission on 31 January 2012. Theron McLamb and Partners Equity Group ("Partners Equity") then filed separate complaints seeking to intervene. The Commission granted complainants' request to intervene.

Complainants are property owners in the area covered by the agreement. Partners Equity Group ("Partners Equity") owns Lot 7 on North Equity Drive, though it was under contract to sell the property at the time of the hearing. Lot 7 was vacant at the time of the hearing and had no premises requiring electric service other than a Smithfield sewer lift station. Theron McLamb purchased land in the Venture Drive area of Smithfield in 1998, 2005, and 2006. Like the Partners Equity property, there are no premises on Mr. McLamb's property requiring electric service, though Mr. McLamb intends to eventually create a commercial development on the property.

The Commission held a hearing on 18 July 2012 and denied the application by order on 27 December 2012 wherein it made a number of findings of fact and detailed conclusions of law explaining its reasoning. Smithfield filed written notice of appeal on 25 January 2013. Progress does not appeal.

II. Standard of Review

The procedure for appeals from final orders or decisions of the Utilities Commission is established by N.C. Gen. Stat. 62-94, *et seq.* The Court may reverse the Commission's decision if the appellants' rights have been prejudiced because the decision was affected by an error of law.

IN RE TOWN OF SMITHFIELD

[230 N.C. App. 252 (2013)]

N.C. Gen. Stat. § 62–94(b)(4). Questions of law are reviewed *de novo*. N.C. Gen. Stat. § 62–94(b) (“the court shall decide all relevant questions of law [and] interpret constitutional and statutory provisions”).

State ex rel. Utilities Com’n v. Environmental Defense Fund, ___ N.C. App. ___, ___, 716 S.E.2d 370, 372 (2011).

III. Analysis

Smithfield argues that the Utilities Commission erred in its interpretation of N.C. Gen. Stat. § 160A-331.2(a). Specifically, it contends that the Commission engrafted additional requirements not found in the statute onto agreements entered into pursuant to that statute. This case is one of first impression under N.C. Gen. Stat. § 160A-331.2. For the following reasons, we affirm.

A. Statutory Construction

When construing a statute, the court looks first to its plain meaning, reading words that are not defined by the statute according to their plain meaning as long as it is reasonable to do so. The court must give effect to the plain meaning as long as the statute is clear and unambiguous.

Environmental Defense Fund, ___ N.C. App. at ___, 716 S.E.2d at 372 (citations omitted).

The present dispute focuses on the meaning of N.C. Gen. Stat. § 160A-331.2(a). That statute provides:

The General Assembly finds and determines that, in order to avoid the unnecessary duplication of electric facilities and to facilitate the settlement of disputes between cities that are primary suppliers and other electric suppliers, it is desirable for the State to authorize electric suppliers to enter into agreements pursuant to which the parties to the agreements allocate to each other the right to provide electric service to premises each would not have the right to serve under this Article but for the agreement, provided that no agreement between a city that is a primary supplier and another electric supplier shall be enforceable by or against an electric supplier that is subject to the territorial assignment jurisdiction of the North Carolina Utilities Commission until the agreement has been approved by the Commission. The Commission shall approve an

IN RE TOWN OF SMITHFIELD

[230 N.C. App. 252 (2013)]

agreement entered into pursuant to this section unless it finds that such agreement is not in the public interest. Such agreements may allocate the right to serve premises by reference to specific premises, geographical boundaries, or amounts of unspecified load to be served, but no agreement shall affect in any way the rights of other electric suppliers who are not parties to the relevant agreement. The provisions of this section apply to agreements relating to electric service inside and outside the corporate limits of a city.

N.C. Gen. Stat. § 160A-331.2(a).

“The general rule in statutory construction is that a statute must be construed as written.” *Norman v. Nash Johnson & Sons’ Farms, Inc.*, 140 N.C. App. 390, 410, 537 S.E.2d 248, 262 (2000) (citation, quotation marks, and brackets omitted), *disc. rev. on additional issues denied*, 353 N.C. 378, 547 S.E.2d 14, *app. withdrawn*, 354 N.C. 219, 553 S.E.2d 684 (2001). “Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.” *In re Miller*, 357 N.C. 316, 324, 584 S.E.2d 772, 780 (2003) (citation, quotation marks, brackets, and emphasis omitted).

No party argues that the statute is ambiguous; they simply disagree on what it “plainly” means. Smithfield contends that we should interpret the statute to permit agreements between electric suppliers regardless of the actual rights of each to serve the properties concerned because the purpose of this statute is to “facilitate the settlement of disputes between cities that are primary suppliers and other electric suppliers.”

We hold that the Commission correctly interpreted N.C. Gen. Stat. § 160A-331.2(a) to plainly mean what it says: agreements authorized under this statute are those in “which the parties to the agreements allocate to each other the right to provide electric service to premises *each would not have the right to serve under this Article but for the agreement.*” N.C. Gen. Stat. § 160A-331.2(a) (emphasis added).

Smithfield argues that despite this “but for” language, the actual rights of the parties to the agreement are immaterial. It reasons that the Commission’s interpretation would render the statute useless because the disputes between primary and secondary electric providers usually focus on who has which rights to serve. Therefore, Smithfield says, the

IN RE TOWN OF SMITHFIELD

[230 N.C. App. 252 (2013)]

statute “authorizes electric suppliers to negotiate the allocation of territorial service rights between themselves to the extent they see fit.”

“We cannot accept this contention without giving to the statutory phraseology a distorted meaning at complete variance with the language used. This we are not permitted to do.” *State v. Welch*, 232 N.C. 77, 82, 59 S.E.2d 199, 203 (1950). Even assuming that the types of disputes raised by Smithfield are those that the Legislature actually intended to resolve by agreement under this statute, “we are powerless to construe away the limitation just because we feel that the legislative purpose behind the requirement can be more fully achieved in its absence.” *Appeal of North Carolina Sav. and Loan League*, 302 N.C. 458, 468, 276 S.E.2d 404, 411 (1981).¹

If the statute truly “authorize[d] electric suppliers to negotiate the allocation of territorial service rights between themselves to the extent they see fit,” the Legislature could have left out the phrase “each would not have the right to serve under this Article but for the agreement” and the statute would have the same meaning. They also could have left out the “right to serve” language and simply declared that parties to such agreements can acquire rights that each would not have otherwise (e.g., making a non-exclusive right exclusive). Instead, the Legislature restricted the agreements permitted under § 160A-331.2(a) to those wherein “the parties to the agreement[] allocate to each other the right to provide electric service to premises each would not [otherwise] have the right to serve under this Article.” N.C. Gen. Stat. § 160A-331.2(a).

Under Smithfield’s interpretation, the “but for” and “right to serve” language is entirely superfluous. Such an interpretation would contravene the principle that “a statute should not be interpreted in a manner which would render any of its words superfluous.” *State v. Ramos*, 193 N.C. App. 629, 637, 668 S.E.2d 357, 363 (2008) (citation and quotation marks omitted), *aff’d*, 363 N.C. 352, 678 S.E.2d 224 (2009). Instead, “[w]e

1. We are skeptical of Smithfield’s assertion that such disputes are the only, or even primary, disputes the Legislature intended to resolve through agreements under this statute. The territorial assignment provisions of “[t]he Electric Act [were] intended to resolve the disputes of electric suppliers with limited litigation. The language of the Electric Act was carefully chosen to provide certainty with respect to service rights and to promote orderly competition among electric suppliers.” *City of New Bern v. Carteret-Craven Elec. Membership Corp.*, 356 N.C. 123, 127, 567 S.E.2d 131, 133 (2002) (citations omitted); see also *Duke Power Co. v. City of Morganton*, 90 N.C. App. 755, 758, 370 S.E.2d 54, 56 (observing that the Electric Act “carefully defined and established the rights of competing power suppliers according to lines that were in place on a set date—matters that can usually be ascertained without either difficulty or dispute; and it gave no effect whatever to subsequent events of any kind . . .”), *disc. rev. denied*, 323 N.C. 364, 373 S.E.2d 544 (1988).

IN RE TOWN OF SMITHFIELD

[230 N.C. App. 252 (2013)]

construe each word of a statute to have meaning, where reasonable and consistent with the entire statute, because it is always presumed that the legislature acted with care and deliberation.” *Id.* (citation and quotation marks omitted).

We conclude that N.C. Gen. Stat. § 160A-331.2(a) only authorizes those agreements wherein the parties “allocate to each other the right to provide electric service to premises each would not have the right to serve under this Article but for the agreement.” N.C. Gen. Stat. § 160A-331.2(a). Therefore, to determine whether the Commission erred in concluding that the agreement submitted by Smithfield was not permitted under the statute, we must consider whether the rights to serve acquired by the parties to the Agreement are rights that each party would not have but for the agreement.

We do agree with Smithfield that nothing in § 160A-331.2(a) restricts the agreements to exchanges of exclusive rights to serve. But we do not think that the Commission meant to restrict its interpretation in that way—it was simply noting that in *this* case, both parties have concurrent, non-exclusive rights to serve the future premises at issue and therefore neither party was acquiring rights to serve it did not already have. It is conceivable that a party could acquire a non-exclusive right through an agreement under this statute to serve premises that it would otherwise have no right to serve under Chapter 160A, whether inside or outside corporate limits.

B. Application

We must now decide whether the Commission correctly concluded that the agreement submitted for approval by Smithfield is not authorized by N.C. Gen. Stat. § 160A-331.2(a) because the parties to the Agreement are not acquiring rights to serve premises each would not have but for the agreement. To resolve this question, we must look to what rights each party to the Agreement already possessed apart from the agreement.

Under N.C. Gen. Stat. § 160A-332(a)(5) (2011),

Any premises initially requiring electric service after the determination date which are located wholly or partially within 300 feet of the primary supplier’s lines and are located wholly or partially within 300 feet of the secondary supplier’s lines, as such suppliers’ lines existed on the determination date, may be served by either the secondary supplier or the primary supplier, whichever the consumer

IN RE TOWN OF SMITHFIELD

[230 N.C. App. 252 (2013)]

chooses, and no other supplier shall thereafter furnish service to such premises, except with the written consent of the supplier then serving the premises.

The Commission found that on the determination date, 30 June 1994, “Lot 7 was wholly within 300 feet of a Progress line and was partially within 300 feet of a Smithfield line.” The Commission further found that on the determination date, “the McLamb Properties were partially within 300 feet of a Progress line and partially within 300 feet of a Smithfield line.” The Commission noted that no premises requiring electric service have been built on either property. Nevertheless, based on the dimensions of the property, which limit the possible locations of future structures, and the location of the lines, it concluded that, pursuant to N.C. Gen. Stat. § 160A-332(a)(5), “both Progress and Smithfield have an equal right to serve any premises hereafter built on Lot 7 or on the portions of the McLamb properties, that are partially within 300 feet of both” suppliers’ lines “until the electricity consumer of any such future premises designates an electric supplier.”

The Agreement purported to give Smithfield the exclusive right to serve all premises in the Smithfield Crossing area, the Smithfield Business Park, and Lot 7 on North Equity Drive. Progress was allocated the right to serve all premises in the North Equity Drive and South Equity Drive areas other than Lot 7. Both complainants’ properties were assigned to Smithfield.

Smithfield does not challenge any of the Commission’s findings on this issue or even its conclusion that, absent the agreement, both Smithfield and Progress would likely have the right to serve any premises on the contested properties.

Based on these uncontested findings, we hold that the Commission correctly concluded that the Agreement does not meet the requirements of N.C. Gen. Stat. § 160A-331.2(a). Specifically, the parties to the Agreement are not exchanging “the right to provide electric service to premises each would not have the right to serve under this Article but for the agreement” because each party already had the right to serve those premises. N.C. Gen. Stat. § 160A-331.2(a). Since the agreement does not meet the requirements of the statute, we need not reach the parties’ arguments about whether the Agreement is in the public interest or whether the Commission applied the correct burden of proof in making that determination.

IN RE TWIN CNTY. MOTORSPORTS, INC.

[230 N.C. App. 259 (2013)]

IV. Conclusion

The Commission correctly interpreted N.C. Gen. Stat. § 160A-331.2(a) to only authorize those agreements wherein the parties exchange rights to serve premises that each would not have the right to serve but for the agreement. Because both parties had rights to serve the premises they purported to exchange, the Agreement was not authorized by the statute. Therefore, we affirm the Commission's order denying approval of the agreement.

AFFIRMED.

Chief Judge MARTIN and GEER concur.

IN RE TWIN COUNTY MOTORSPORTS, INC.

No. COA13-21

Filed 5 November 2013

Corporations—Department of Motor Vehicles hearing—representation by counsel

The trial court did not err by reversing the final decision of the Department of Motor Vehicles (DMV), which assessed a civil penalty of \$1,500 against Twin County Motorsports, Inc. (Twin County) and suspended its safety inspection license for a period of 1,080 days, and remanding the matter to the DMV hearing officer for a new hearing with Twin County represented by proper counsel. Twin County was not represented by counsel at the DMV hearing and corporations cannot appear pro se in DMV hearings.

Appeal by respondent from order entered 17 October 2012 by Judge Frank Brown in Nash County Superior Court. Heard in the Court of Appeals 15 August 2013.

Ralph E. Stevenson, III, for petitioner.

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

DAVIS, Judge.

IN RE TWIN CNTY. MOTORSPORTS, INC.

[230 N.C. App. 259 (2013)]

The Commissioner of the North Carolina Division of Motor Vehicles (the “DMV”) appeals from the trial court’s order (1) reversing the final agency decision assessing a civil penalty of \$1,500 against Twin County Motorsports, Inc. (“Twin County”) and suspending its safety inspection license for a period of 1,080 days; and (2) remanding for a new hearing before the DMV. The primary issue raised on appeal is whether corporations are required under North Carolina law to be represented by legal counsel in hearings before the DMV. Because we hold that corporations cannot appear *pro se* in DMV hearings, we affirm the trial court’s order.

Factual Background

On 5 October 2010, Inspector L. Neil Ambrose (“Inspector Ambrose”) of the Bureau of License and Theft of the DMV went to the place of business of Twin County to investigate a report that the business was conducting state inspections without a licensed mechanic in violation of N.C. Gen. Stat. § 20-183.7B(a)(3).¹ Inspector Ambrose spoke to Lance Cherry (“Cherry”), the owner of Twin County, and Brandon Crawley (“Crawley”), the service manager of the station, and learned that Twin County’s employees were improperly using the access code of a former employee — who was a licensed safety inspection mechanic — to conduct motor vehicle safety inspections.

Inspector Ambrose charged Crawley with four counts of performing a safety inspection without a license (a Class 3 misdemeanor) and cited Twin County with six violations of N.C. Gen. Stat. § 20-183.7B(a)(3). On 5 May 2011, Cherry was served with Notices of Charges. The violations alleged in the Notices of Charges were classified as “Type I” violations, which carry a civil penalty of \$250 and a six month suspension of the business’ license for the first or second violation within three years and a penalty of \$1,000 and a two-year license suspension for any subsequent violations.

Cherry requested an administrative hearing before the DMV, and a hearing was held on 19 May 2011. Twin County was not represented by counsel at this proceeding. Instead, Cherry appeared on Twin County’s behalf, and DMV Hearing Officer Linda Brown allowed him to represent Twin County *pro se*. On 24 May 2011, Hearing Officer Brown entered an Official Hearing Decision and Order (1) finding that Twin County committed the six Type I violations; (2) ordering the suspension of Twin

1. We note that our General Assembly recently amended N.C. Gen. Stat. § 20-183.7B. However, these amendments do not “become effective [until] October 1, 2013, and apply to violations occurring on or after that date.” 2013 N.C. Sess. Law ch. 302, § 2-3, 13. Therefore, the amendments do not apply to this case.

IN RE TWIN CNTY. MOTORSPORTS, INC.

[230 N.C. App. 259 (2013)]

County's safety equipment inspection station license for a period of 1,080 days; and (3) imposing a civil penalty assessment of \$1,500.

Twin County requested a review by the Commissioner of the hearing officer's decision. The Commissioner subsequently upheld the hearing officer's decision. Twin County sought judicial review of the final agency decision in Nash County Superior Court pursuant to N.C. Gen. Stat. § 20-183.8G(g) and Article 4 of Chapter 150B.

On 17 October 2012, the Honorable Frank Brown entered an order reversing the final agency decision and remanding the matter to the hearing officer for "a new hearing on the Charge Order of October 5, 2010 with [Twin County] represented by proper counsel." The Commissioner appealed to this Court.

Analysis

On appeal, the Commissioner argues that the trial court erred in reversing the final agency decision of the DMV on the grounds that (1) corporations are entitled to appear *pro se* in DMV hearings; and (2) there was substantial, competent evidence in the record supporting the final agency decision. Because we hold that corporations must be represented by legal counsel in hearings before the DMV and cannot appear *pro se*, we affirm the trial court's order.

In North Carolina, the general rule is that "a corporation must be represented by a duly admitted and licensed attorney-at-law and cannot proceed *pro se* . . ." *Lexis-Nexis, Div. of Reed Elsevier, Inc. v. Travishan Corp.*, 155 N.C. App. 205, 209, 573 S.E.2d 547, 549 (2002).

In *Lexis-Nexis*, Florence Smith, a non-attorney and the chief executive officer and sole shareholder of the defendant corporation, filed an answer and counterclaim on behalf of the corporation. *Id.* at 206, 573 S.E.2d at 548. The plaintiff moved to strike Smith's answer and counterclaim, arguing that Smith's *pro se* representation of the defendant constituted the unauthorized practice of law. *Id.* The trial court allowed Smith to represent the defendant but dismissed her counterclaim against the plaintiff. *Id.*

Smith appealed the dismissal of her counterclaim, and the plaintiff cross-appealed the trial court's order permitting Smith's representation of the defendant. *Id.* We held that "a corporation must be represented by a duly admitted and licensed attorney-at-law and cannot proceed *pro se* unless doing so in accordance with the exceptions set forth in this opinion." *Id.* at 209, 573 S.E.2d at 549. In so holding, we reasoned that

IN RE TWIN CNTY. MOTORSPORTS, INC.

[230 N.C. App. 259 (2013)]

[r]egarding legal representation, North Carolina law provides that “it shall be unlawful for any person or association of persons, except active members of the Bar of the State of North Carolina admitted and licensed to practice as attorneys-at-law, to appear as attorney or counselor at law in any action or proceeding before any judicial body ... except in his own behalf as a party thereto.” N.C. Gen. Stat. § 84-4 (2001). Moreover, “[a] corporation cannot lawfully practice law. It is a personal right of the individual.” *Seawell, Attorney General v. Motor Club*, 209 N.C. 624, 631, 184 S.E. 540, 544 (1936).

Id. at 207, 573 S.E.2d at 548-49. We then examined the law of other jurisdictions and set out the following three exceptions to the rule requiring corporations to be represented by counsel: (1) an employee of a corporation may prepare legal documents; (2) a corporation may appear *pro se* in small claims court; and (3) a corporation may enter an appearance through a corporate officer to avoid default. *Id.* at 208, 573 S.E.2d at 549.

In *Allied Envtl. Servs., PLLC v. N.C. Dep’t of Envtl. & Natural Res.*, 187 N.C. App. 227, 229, 653 S.E.2d 11, 13 (2007), *disc. review denied*, 362 N.C. 354, 661 S.E.2d 238 (2008), a case upon which the DMV heavily relies in the present appeal, we held that our decision in *Lexis-Nexis* was not applicable to most contested case proceedings before the Office of Administrative Hearings (“OAH”). *Allied* arose from a decision by the North Carolina Department of Environment and Natural Resources (“DENR”) to revoke the eligibility of Deans Oil Company, Inc. to receive reimbursement from the North Carolina Commercial Leaking Underground Storage Tank Clean Up Fund.² *Id.* at 228, 653 S.E.2d at 12. Upon receiving notification that it would no longer receive reimbursements for clean-up costs and that it was required to repay prior disbursements from the fund, Brian Gray, the president of Allied Environmental Services, attempted to appeal DENR’s decision by signing and submitting a petition for a contested case in the OAH. *Id.* at 229, 653 S.E.2d at 12.

DENR moved to dismiss the contested case petition, arguing that “Gray could not act as agent for Deans Oil Company in signing the petition because Deans Oil Company is a corporation and corporations can only be represented by an attorney.” *Id.* The administrative law judge granted the motion to dismiss, and the superior court affirmed its decision. On appeal, this Court reversed, holding that a petition for

2. Deans Oil Company employed Allied Environmental Services, PLLC to clean up petroleum contamination and compensated Allied using the reimbursement funds.

IN RE TWIN CNTY. MOTORSPORTS, INC.

[230 N.C. App. 259 (2013)]

a contested case in most proceedings before the OAH may be signed by a corporation's non-attorney representative. *Id.* at 230, 653 S.E.2d at 13.

Allied does not, however, stand for the broad proposition that a corporation is entitled to appear *pro se* in any administrative proceeding. Instead, we made clear in *Allied* that our holding was addressing only “appeals arising before the OAH.” *Id.* at 229, 653 S.E.2d at 13. Our General Assembly has expressly exempted the Department of Transportation — the agency within which the DMV exists — from the provisions of the Administrative Procedure Act authorizing contested cases to be brought in the OAH against certain state agencies. N.C. Gen. Stat. § 150B-1(e)(8) (2011); *Dep’t of Transp. v. Blue*, 147 N.C. App. 596, 605, 556 S.E.2d 609, 618 (2001), *disc. review denied*, 356 N.C. 434, 572 S.E.2d 428 (2002).

Therefore, because hearings before the DMV are not within the class of administrative hearings encompassed by our decision in *Allied*, we are not bound by our result in that case. However, it is appropriate for us to examine the reasoning employed in *Allied* to determine whether it supports a similar result here. We conclude that it does not.

In *Allied*, we focused on the language used by our General Assembly in N.C. Gen. Stat. § 150B-23 — the statute governing the commencement and hearing procedures regarding contested cases in the OAH. We noted that the version of Section 150B-23 in effect at that time stated that a “petition [commencing a contested case before the OAH] shall be signed by a party or a *representative* of the party” *Allied*, 187 N.C. App. at 229; 653 S.E.2d at 12 (emphasis added). We explained that

it is clear to us that the term “representative” as used in N.C. Gen. Stat. § 150B-23 is not coterminous with the term “attorney.” Black’s Law Dictionary defines “representative” as “[o]ne who stands for or acts on behalf of another” Black’s Law Dictionary 1304 (7th ed. 1999). The legislature, in drafting N.C. Gen. Stat. § 150B-23, could have chosen the word “attorney,” but instead chose “representative,” a word whose plain meaning is broader than “attorney.”

Id. at 230, 653 S.E.2d at 13.

Conversely, hearings before the DMV are authorized pursuant to N.C. Gen. Stat. § 20-183.8G. Unlike N.C. Gen. Stat. § 150B-23, N.C. Gen. Stat. § 20-183.8G lacks any language suggesting a legislative intent to allow corporations to be represented by a representative other than an attorney.

IN RE TWIN CNTY. MOTORSPORTS, INC.

[230 N.C. App. 259 (2013)]

Allied also relied on provisions of the North Carolina Administrative Code making clear that parties could be represented by non-attorneys in proceedings before the OAH. Indeed, we noted that 26 N.C.A.C. 3.0120(e) expressly stated that “[a] party need not be represented by an attorney.” *Id.* Likewise, we observed that 26 N.C.A.C. 3.0114(b) explicitly referenced an “attorney at law or *other representative of a party . . .*” *Id.* (emphasis in original). None of these code provisions, however, apply to DMV hearings.

Thus, because our decision in *Allied* was specifically premised on our interpretation of statutory and administrative code provisions that are inapplicable to DMV hearings, we believe that the reasoning underlying our ultimate conclusion in *Allied* is not relevant here. We therefore hold that in hearings before the DMV, corporations must be represented by legal counsel pursuant to the general rule articulated in *Lexis-Nexis*.

Accordingly, we conclude that the trial court was correct in determining that corporations must be represented by licensed attorneys-at-law in DMV hearings. As such, we affirm the trial court’s order remanding for a new hearing in which Twin County shall be represented by legal counsel. Because we are affirming the trial court’s order remanding for a new hearing, we decline to address the DMV’s argument that there was substantial competent evidence supporting the final agency decision.

Conclusion

For the reasons stated above, we affirm the trial court’s order reversing the final agency decision and remanding for a new hearing.

AFFIRMED.

Judges CALABRIA and STROUD concur.

IRVING v. CHARLOTTE MECKLENBURG BD. OF EDUC.

[230 N.C. App. 265 (2013)]

TYKI SAKWAN IRVING, PLAINTIFF-APPELLANT

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, DEFENDANT-APPELLEE

No. COA12-1496

Filed 5 November 2013

Tort Claims Act—jurisdiction—school activity bus accident

The Industrial Commission erred by ruling that it lacked jurisdiction over a Tort Claims Act case arising from an accident involving a school activity bus, and by granting defendant's motion for summary judgment. N.C.G.S. § 143-300.1 granted sole jurisdiction to the Commission to hear plaintiff's claim. To the extent that policies of defendant or the State Board conflicted with the General Statutes and appellate opinions of North Carolina interpreting these statutes, the Court of Appeals was bound by the statutory enactments and prior case law.

Appeal by Plaintiff from order entered 8 August 2012 by the North Carolina Industrial Commission. Heard in the Court of Appeals 13 August 2013.

Osborne Law Firm, P.C., by Curtis C. Osborne, for Plaintiff-Appellant.

Attorney General Roy Cooper, by Assistant Attorney General Christina S. Hayes, for Defendant-Appellee.

McGEE, Judge.

Randal Long ("Long"), the football coach for Providence High School ("the school"), was driving an activity bus ("the bus") owned by the Charlotte-Mecklenburg Board of Education ("Defendant"), on 5 October 2007, when the bus collided with the rear of a vehicle driven by Tyki Sakwan Irving ("Plaintiff"). At the time of the collision, Long was transporting the school's football team to a game with another high school. Plaintiff was injured and alleges her injuries were the result of Long's negligence.

Plaintiff filed a form NCIC-T-1, Claim for Damages Under Tort Claims Act, initiating this tort claims action with the North Carolina Industrial Commission ("the Commission") on 29 September 2010. Following

IRVING v. CHARLOTTE MECKLENBURG BD. OF EDUC.

[230 N.C. App. 265 (2013)]

multiple filings not relevant to this appeal, the Commission decided Defendant's motion for summary judgment by order entered 8 August 2012. In that order, the Commission stated:

The parties' disagreement primarily centers on whether the driver of the activity bus owned by [D]efendant in this case "was at the time of the alleged negligent act or omission operating a public school bus or school transportation service vehicle *in accordance with* [N.C. Gen. Stat. §] 115C-242 in the course of his employment[.]" N.C. Gen. Stat. § 143-300.1 (2007) (emphasis added).

The Commission ruled that Long was not operating a public school bus or school transportation service vehicle in accordance with N.C.G.S. § 115C-242, because that statute did not

include or encompass transporting students in an activity bus owned by a county board of education to an extra-curricular activity of the sort involved in Plaintiff's claim, namely the transportation of a high school football team to and from a football game at another high school on a Friday evening.

For this reason, the Commission granted Defendant's motion for summary judgment, based upon its ruling that the accident did not fall within the requirements of N.C.G.S. § 143-300.1 and therefore the Commission lacked subject matter jurisdiction. Plaintiff appeals.

I.

Plaintiff argues on appeal that the Commission erred in ruling that it lacked jurisdiction over the claim and in granting Defendant's motion for summary judgment. We agree.

"Summary judgment is proper when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. Review of summary judgment on appeal is *de novo*. The evidence must be evaluated in the light most favorable to the non-moving party." *Collier v. Bryant*, __ N.C. App. __, __, 719 S.E.2d 70, 75 (2011) (citation omitted). The Commission "shall have jurisdiction to hear and determine tort claims against any county board of education or any city board of education, which claims arise . . . as a result of any alleged negligent act or omission of the driver . . . of a public school bus or school transportation service vehicle when" certain criteria are met. N.C. Gen. Stat. § 143-300.1(a) (2011). If a negligent act by such a driver falls within the scope of the Tort Claims Act, the Commission has sole jurisdiction over

IRVING v. CHARLOTTE MECKLENBURG BD. OF EDUC.

[230 N.C. App. 265 (2013)]

the matter. *Stein v. Asheville City Bd. of Educ.*, 168 N.C. App. 243, 250-251, 608 S.E.2d 80, 85-86 (2005), *reversed in part not affecting this citation*, 360 N.C. 321, 626 S.E.2d 263 (2006).

II.

Resolution of this matter depends on whether, as required by N.C.G.S. § 143-300.1(a), (A) the activity bus operated by Long can be considered a “public school bus” or a “school transportation service vehicle” and, if so, (B) whether Long was operating the activity bus in accord with N.C. Gen. Stat. § 115C-242 (2011). In light of sometimes inconsistent statutes and case law related to this question, we conduct an extended analysis.

A. “Public School Bus” or “School Transportation Service Vehicle”

The North Carolina State Board of Education (the State Board) formerly owned and operated school buses. *Turner v. Board of Education*, 250 N.C. 456, 463, 109 S.E.2d 211, 217 (1959). At that time, the State Board could be sued for torts involving school bus drivers serving local schools. *Id.* at 463, 109 S.E.2d at 216-17. Later, in the 1950’s, the State Board transferred ownership of these buses to the local boards of education and, at that time, the General Assembly declared that the State Board would not be liable for negligent acts associated with the operation of these buses. *Id.* at 463-64, 109 S.E.2d at 217.

The provision was made by reason of the fact that the State Board of Education had previously operated the buses, and upon the transfer of ownership and operation the State was disclaiming responsibility for negligent operations after the transfer. As a corollary to the Act withdrawing liability of the State Board of Education for negligent acts of school bus drivers, the General Assembly placed the financial responsibility for such act squarely on the county and city boards of education. G.S. 143-300.1. The section, effective July 1, 1955, amended the State Tort Claims Act by prescribing that claims against county and city boards for such injuries shall be heard by the North Carolina Industrial Commission under rules of liability and procedure as provided with respect to tort claims against the State Board of Education.

Id. at 464, 109 S.E.2d at 217. N.C.G.S. § 143-300.1 provided not only for tort claims act coverage for the negligence of drivers of “public school buses,” but also for the negligence of drivers of public “school

IRVING v. CHARLOTTE MECKLENBURG BD. OF EDUC.

[230 N.C. App. 265 (2013)]

transportation service vehicles.” N.C.G.S. § 143-300.1(a). “School transportation service vehicles” are referred to as (1) “school transportation service vehicles” in N.C. Gen. Stat. § 115C-42 (2011), N.C. Gen. Stat. § 115C-255 (2011), and N.C.G.S. § 143-300.1, and as (2) “service vehicles” in N.C. Gen. Stat. § 115C-240 (2011) and N.C. Gen. Stat. § 115C-249 (2011).

By authority granted it by the General Assembly: “The State Board of Education shall promulgate rules and regulations for the operation of a public school transportation system.” N.C.G.S. § 115C-240(a) (2011). Pursuant to the State Board Policy Manual: “Local Education Agencies (LEAs) [(local boards of education)] shall adopt and keep on file in the office of the superintendent rules, regulations and policies to assure the safe, orderly and efficient operation of school buses, including: (1) the use of school buses under G.S. 115C-242(5)[.]” 16 N.C. Admin. Code 6B.0103 (2011). N.C.G.S. § 115C-242(5) states in relevant part: “Local boards of education, under rules adopted by the State Board of Education, may permit the use and operation of school buses for the transportation of pupils and instructional personnel as the board deems necessary to serve the instructional programs of the schools.” N.C. Gen. Stat. § 115C-242(5) (2011). Defendant’s policy states:

**EEAFA Extra Curricular Activity Buses Field Trips —
Special Events Transportation**

Special transportation by school buses or school activity vehicles will be provided for appropriate educational experiences in compliance with state law.

Activity buses and vans will be provided for activities and functions sponsored by the school system. These vehicles shall be maintained by the Transportation Department as provided for in the state law. Insurance for school activity vehicles will be provided for under the Board of Education policy.

Legal Reference: G.S. 115C-242, G.S. 115C-248.

Charlotte-Mecklenburg Sch. Bd. of Educ., *Policy Code: EEAFA*, Charlotte-Mecklenburg School Board Policies, (http://policy.microscribepub.com/cgibin/om_isapi.dll?clientID=307134909&depth=2&info base=charmeck.nfo&record={5A2}&softpage=PL_frame) (last revised May 27, 1986).

Defendant’s “Regulation Code: EEAFA-R Bus Transportation for Special Occasions and Activity Buses/Vans” states in relevant part:

IRVING v. CHARLOTTE MECKLENBURG BD. OF EDUC.

[230 N.C. App. 265 (2013)]

Bus Transportation for Special Occasions

2. Special transportation shall provide for the transportation of students, teachers, and approved supervisory personnel only to activities, performances, and events directly related to the school curriculum of the Charlotte Mecklenburg Schools.
3. Regular school buses shall not be used for transportation to destinations outside of Mecklenburg County, except for wheelchair lift equipped buses which may travel into an adjacent county but not out of state.
4. Drivers used for special transportation must have a valid commercial driver's license with a school bus or passenger endorsement.
-
6. It is the transportation specialist's responsibility to obtain approved, qualified drivers for field trips.

.....

Activity Buses/Vans

1. All activity bus/van drivers must hold a North Carolina Class A or Class B operator's license or a school bus license.
2. Activity buses/vans may be used to transport pupils to and from athletic events and for other school sponsored activities.
3. The maximum permissible speed for an activity bus is 45 miles per hour. All other traffic laws governing the operation of public school buses apply to activity buses. The maximum permissible speed for an activity van is 55 miles per hour.

.....

Legal Reference: G.S. 115C-242(5).

Charlotte-Mecklenburg Sch. Bd. of Educ., *Regulation Code: EEAFAR*, Charlotte-Mecklenburg School Board Policies, (http://policy.microscribepub.com/cgibin/om_isapi.dll?clientID=307135360&depth=2&info)

IRVING v. CHARLOTTE MECKLENBURG BD. OF EDUC.

[230 N.C. App. 265 (2013)]

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N.C.G.S. § 115C-242(5), the “Legal Reference” given in support of the above policy, states in relevant part:

Local boards of education, under rules adopted by the State Board of Education, may permit the use and operation of school buses for the transportation of pupils and instructional personnel as the board deems necessary to serve the instructional programs of the schools. . . . On any such trip, a city or county-owned school bus shall not be taken out of the State.

If State funds are inadequate to pay for the transportation approved by the local board of education, local funds may be used for these purposes. Local boards of education shall determine that funds are available to such boards for the transportation of children to and from the school to which they are assigned for the entire school year before authorizing the use and operation of school buses for other services deemed necessary to serve the instructional program of the schools.

N.C.G.S. § 115C-242(5).

Defendant’s “Policy Code: LJOA Field Trips” states:

Field trips of significant educational value will be encouraged. All trips are to be an extension of the classroom and an integral part of the educational program. . . .

In accordance with State law, the Board of Education authorizes and supports school bus and/or school activity bus transportation services for schools. The use and operation of the buses for the transportation of students and instructional personnel is authorized for activities the State, the Board of Education, or the principal of the school has deemed necessary to serve the instructional programs of the schools. These special activities include:

. . . .

- Approved athletic events

. . . .

IRVING v. CHARLOTTE MECKLENBURG BD. OF EDUC.

[230 N.C. App. 265 (2013)]

Regular school buses may be used to support educational field trips only during normal school hours to locations within the boundaries of Mecklenburg County and in support of after-school extracurricular activities at the middle schools and high schools. . . .

Activity buses and vans will be provided for activities and functions sponsored by the school system. These buses will transport students to and from athletic events, other school sponsored extracurricular activities and field trips where a school bus is not authorized or available.

. . . . All other traffic laws governing the operation of a school bus are applicable.

Charlotte-Mecklenburg Sch. Bd. of Educ., *Policy Code: IJOA*, Charlotte-Mecklenburg School Board Policies, (http://policy.microscribepub.com/cgibin/om_isapi.dll?clientID=307135360&depth=2&info base=charmec.nfo&record={10E7}&softpage=PL_frame) (last revised January 27, 1998).

Plaintiff and Defendant agree that Long was driving a school activity bus at the time of the collision. N.C.G.S. § 143-300.1(a) states in relevant part:

The North Carolina Industrial Commission shall have jurisdiction to hear and determine tort claims against any county board of education or any city board of education, which claims arise . . . as a result of any alleged negligent act or omission of the driver . . . of a public school bus or school transportation service vehicle when:

(1) The driver is an employee of the county or city administrative unit of which that board is the governing body, and the driver is paid or authorized to be paid by that administrative unit,

. . . .

and which driver was at the time of the alleged negligent act or omission operating a public school bus or school transportation service vehicle in accordance with G.S. 115C-242 in the course of his employment by or training for that administrative unit or board[.]

N.C.G.S. § 143-300.1(a).

IRVING v. CHARLOTTE MECKLENBURG BD. OF EDUC.

[230 N.C. App. 265 (2013)]

This Court stated in *Smith v. McDowell Co. Bd. of Education*, 68 N.C. App. 541, 316 S.E.2d 108 (1984) (holding that a driver education vehicle is not a “school transportation service vehicle” pursuant to N.C.G.S. § 143-300.1) that:

[N.C.G.S. § 143-300.1] clearly vests jurisdiction over claims against county boards of education for accidents involving school buses or school transportation service vehicles in the North Carolina Industrial Commission when the following factors are present:

- (1) If there is an accident, and if the accident involved the operation of a public school bus or school transportation service vehicle, and
- (2) If the accident resulted from the negligence of the driver of a public school bus or school transportation service vehicle, and
- (3) If the salary of such driver is paid from the state public school funds, and
- (4) If the driver is an employee of the county or city administrative unit, and
- (5) If the driver was at the time of the alleged negligent act operating a school bus or a school transportation service vehicle in the course of his employment.

Id. at 544, 316 S.E.2d at 110-11. The General Assembly, in 1998 and after *Smith* was filed, added the requirement that a school bus or school transportation service vehicle must have been operated in accordance with N.C.G.S. § 115C-242 in order for the Tort Claims Act to apply. The “definitions” sections of neither Article 31 of Chapter 143, *Tort Claims Against State Departments and Agencies*, nor Chapter 115C, *Elementary and Secondary Education*, includes definitions of “school bus,” “school activity bus,” or “school transportation service vehicle.”

We must decide whether a school activity bus is considered a “school bus” or a “school transportation service vehicle” pursuant to N.C.G.S. § 143-300.1. The only definition of “school bus” in Chapter 115C is found in N.C. Gen. Stat. § 115C-249.1 (2011): “Purchase of tires for school buses; repair or refurbishment of tires for school buses[,]” which states:

- (a) Definitions. – The following terms apply in this section:

.....

IRVING v. CHARLOTTE MECKLENBURG BD. OF EDUC.

[230 N.C. App. 265 (2013)]

(2) School bus. – A vehicle as defined in G.S. 20-4.01(27)d3. and G.S. 20-4.01(27)d4. that is owned, rented, or leased by a local board of education.

N.C.G.S. § 115C-249.1(a)(2).

N.C. Gen. Stat. §§ 20-4.01(27)d3. and d4. state as follows:

d3. School activity bus. – A vehicle, generally painted a different color from a school bus, whose primary purpose is to transport school students and others to or from a place for participation in an event other than regular classroom work. The term includes a public, private, or parochial vehicle that meets this description.

d4. School bus. – A vehicle whose primary purpose is to transport school students over an established route to and from school for the regularly scheduled school day, that is equipped with alternately flashing red lights on the front and rear and a mechanical stop signal, that is painted primarily yellow below the roofline, and that bears the plainly visible words “School Bus” on the front and rear. The term includes a public, private, or parochial vehicle that meets this description.

N.C. Gen. Stat. § 20-4.01(27)d3. and d4. (2011). Therefore, for the purposes of N.C.G.S. § 115C-249.1: “Purchase of tires for school buses; repair or refurbishment of tires for school buses[,]” the term “school bus” includes “school activity buses.” However, pursuant to N.C.G.S. § 20-4.01, the definitions in Chapter 20, *Motor Vehicles*, only apply to Chapter 20. N.C.G.S. § 20-4.01 (“the following definitions apply throughout this chapter”). Of course, if definitions from Chapter 20 are specifically adopted in a section of another chapter, as was done in N.C.G.S. § 115C-249.1(a)(2), they control for that section as well.

Chapter 115C does include an implied definition of “activity bus.”

The several local boards of education in the State are hereby authorized and empowered to take title to *school buses purchased with local or community funds for the purpose of transporting pupils to and from athletic events and for other local school activity purposes, and commonly referred to as activity buses.*

Each local board of education that operates activity buses shall adopt a policy relative to the proper use of the

IRVING v. CHARLOTTE MECKLENBURG BD. OF EDUC.

[230 N.C. App. 265 (2013)]

vehicles. The policy shall permit the use of these buses for travel to athletic events during the regular season and play-offs and for travel to other school-sponsored activities.

The provisions of G.S. 115C-42 shall be fully applicable to the ownership and operation of such activity school buses. Activity buses may also be used as provided in G.S. 115C-243.

N.C. Gen. Stat. § 115C-247 (2011) (emphasis added). N.C. Gen. Stat. § 115C-243 involves “the use of school buses to provide transportation for the elderly.” N.C. Gen. Stat. § 115C-243(a) (2011). Therefore, N.C.G.S. § 115C-243 is another section that includes “activity buses” within the term “school buses,” as N.C.G.S. § 115C-243 only references “school buses” and does not mention “activity buses.” *Id.* (“[a]ny local board of education may enter into agreements . . . to provide for the use of *school buses* to provide transportation for the elderly”) (emphasis added).

The General Statutes do not clarify whether an activity bus is considered a “school bus,” a “school transportation service vehicle,” or a completely separate class. Some portions of the statutes appear to treat activity buses as a subset of “school buses,” which is sensible considering their comparative sizes and functions. According to the State Board’s policy, “Each local board of education is authorized to own and operate a school bus fleet under Statute 115C-239. These fleets include school buses for basic to-and-from-school transportation and the service vehicles required for maintenance of those buses and delivery of fuel to those buses.” N.C. Dept. Pub. Instruction, *NC BUS FLEET: North Carolina School Transportation Fleet Manual*, N.C. Dept. Pub. Instruction School Support Division, Transportation Services, p. 8, (<http://www.ncbussafety.org/Manuals/NCBUSFLEETManualExcerptVehicles03March2011.pdf>) (March 3, 2011), *adopted by* N.C. State Bd. Of Educ., *TCS-H-005, Policy regarding Preventive Maintenance and Vehicle Replacement Manual*, N.C. State Bd. Of Educ. Policy Manual, (<http://sbepolicy.dpi.state.nc.us/>) (last revised August 4, 2011). The State Board includes the following as service vehicles: pickup trucks, cargo vans, fuel trucks, wreckers, tire trucks, lube trucks and “other vehicles used for the maintenance of the state’s school bus fleet.” *Id.* at 10-11.

Like activity buses, regular school buses can be purchased with local funds, N.C.G.S. § 115C-249(a) and (b), and regular school buses may be used in certain circumstances for field trips and other special activities pursuant to N.C.G.S. § 115C-242(5). Activity buses are not operated with funds from the State Public School Fund. N.C.G.S. §§ 115C-240(f)

IRVING v. CHARLOTTE MECKLENBURG BD. OF EDUC.

[230 N.C. App. 265 (2013)]

and 248(d). When regular school buses are operated for extracurricular purposes, they may be funded by local funds. *See* N.C. Gen. Stat. § 115C-47(24) (2011); N.C.G.S. § 115C-255.

Therefore, for the purpose of serving instructional programs of a school, it is possible that a regular school bus is purchased and operated using only local funds. Were someone to be injured by the operation of such a bus due to the negligence of its driver, sole jurisdiction over any ensuing action would lie with the Commission pursuant to the Tort Claims Act, as set forth in N.C.G.S. § 143-300.1. According to Defendant's own policy, instructional programs include athletic events. Charlotte-Mecklenburg Sch. Bd. of Educ., *Policy Code: IJOA*, Charlotte-Mecklenburg School Board Policies, (http://policy.microscribepub.com/cgi-bin/om_isapi.dll?clientID=307135360&depth=2&infobase=charm_eck.nfo&record={10E7}&softpage=PL_frame) (last revised January 27, 1998). There is little to distinguish such a hypothetical scenario, where a regular school bus is used for extracurricular instructional activities, from the facts of the present case, other than the designation of the bus as a "school bus" rather than an "activity bus."

The plain language of N.C.G.S. § 143-300.1, incorporating N.C.G.S. § 115C-242, does not clearly include or exclude "school activity buses" from coverage under the Tort Claims Act. If activity buses are intended to be included by our General Assembly in N.C.G.S. § 143-300.1, they might more logically fit as a subsection of "public school buses" and not "school transportation service vehicles." However, this Court has previously held otherwise. In *Smith*, this Court held:

We conclude that the phrase [school transportation service vehicle] includes vehicles which perform the service of transporting children to and from school and related school activities: including those vehicles which perform functionally like the traditional yellow "school bus," such as *school activity buses* or vans. In addition, the phrase may include service vehicles used in the maintenance of the aforesaid vehicles; vehicles such as a pickup or gas truck owned by the local boards of education for the purpose of servicing the school buses themselves. The intent of the legislature in amending the statute to include service vehicles as well as school buses must have been primarily and simply to include those motor vehicles which are the functional equivalents of a school bus, but are not technically buses, such as vans, and also such service vehicles as are used in their maintenance.

IRVING v. CHARLOTTE MECKLENBURG BD. OF EDUC.

[230 N.C. App. 265 (2013)]

Smith, 68 N.C. App. at 545-46, 316 S.E.2d at 111 (emphasis added). *Smith* represents the only opinion of our appellate courts interpreting the terms “school bus” and “school transportation service vehicle” as used in N.C.G.S. § 143-300.1. *Smith* emphasized a distinction between vehicles that “serve a transportation need of the board of education[,]” and those that do not, with the former being covered by N.C.G.S. § 143-300.1. *Smith*, 68 N.C. App. at 546, 316 S.E.2d at 111. Though our General Assembly has amended N.C.G.S. § 143-300.1 since *Smith* was filed, and has had the opportunity to clarify or redefine the term “school transportation service vehicle,” it has not done so. Therefore, we are bound by this definition. *In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989). Thus, the activity bus driven by Long was a “school transportation service vehicle” for the purposes of N.C.G.S. § 143-300.1. *Smith*, 68 N.C. App. at 545, 316 S.E.2d at 111 (“[w]e conclude that the phrase [school transportation service vehicle] includes . . . those vehicles which perform functionally like the traditional yellow ‘school bus,’ such as school activity buses”). Until the General Assembly provides appropriate definitions, or other guidance, or our Supreme Court addresses the issue decided in *Smith*, we are constrained to reach this result.

B. Activity Bus Operated in Accord with N.C.G.S. § 115C-242

The uncontested facts show that Long, a teacher and the head football coach at Providence High School, was driving “a Charlotte-Mecklenburg Board of Education-owned white and blue activity bus[,]” while transporting student football players from Providence High School to another high school to participate in a football game. When we apply the uncontested facts, and the alleged negligence of Long, to the requirements of N.C.G.S. § 143-300.1, the only remaining issue to determine in deciding whether the Commission had exclusive jurisdiction over this action is whether Long was, at the time of the accident, operating the “school transportation service vehicle in accordance with G.S. 115C-242[.]” N.C.G.S. § 143-300.1(a). As noted above, the language “in accordance with G.S. 115C-242” was added in 1998. N.C. Gen. Stat. § 115C-242 states in relevant part:

Public *school buses* may be used for the following purposes only, and it shall be the duty of the superintendent of the school of each local school administrative unit to supervise the use of all school buses operated by such local school administrative unit so as to assure and require compliance with this section:

- (1) A school bus may be used for the transportation of pupils enrolled in and employees in the operation

IRVING v. CHARLOTTE MECKLENBURG BD. OF EDUC.

[230 N.C. App. 265 (2013)]

of the school to which such bus is assigned by the superintendent of the local school administrative unit. Except as otherwise herein provided, such transportation shall be limited to transportation to and from such school for the regularly organized school day, *and from and to the points designated by the principal of the school to which such bus is assigned, for the receiving and discharging of passengers.*

. . . .

(5) Local boards of education, under rules adopted by the State Board of Education, may permit the use and operation of school buses for the transportation of pupils and instructional personnel as the board deems necessary to serve the *instructional programs* of the schools.

N.C. Gen. Stat. § 115C-242 (2011) (emphasis added).

Defendant's own policies, enacted pursuant to the policies of the State Board, authorized by N.C.G.S. § 115C-240, place the operation of the activity bus by Long within the restrictions of N.C.G.S. § 115C-242. "The use and operation of the buses [including activity buses] for the transportation of students and instructional personnel is authorized for activities . . . the principal of the school has deemed necessary to serve the instructional programs of the schools. These special activities include: Approved athletic events." Charlotte-Mecklenburg Sch. Bd. of Educ., *Policy Code: IJOA*, Charlotte-Mecklenburg School Board Policies (http://policy.microscribepub.com/cgibin/om_isapi.dll?clientID=307135360&depth=2&infobase=charmecck.nfo&record={10E7}&softpage=PL_frame) (last revised January 27, 1998).

Defendant's policy thus allows activity buses to be directed by the principal, a requirement of N.C.G.S. § 115C-242(1), and classifies athletic events as instructional programs, a requirement of N.C.G.S. § 115C-242(5). Furthermore, the General Assembly, in a statute prohibiting certain interference with free enterprise, clearly indicates that school activity buses are to be operated pursuant to the provisions of N.C.G.S. § 115C-242. N.C. Gen. Stat. § 66-58 states that no unit of State government is to provide transportation services that compete with private enterprise. N.C. Gen. Stat. § 66-58(a) (2011). N.C.G.S. § 66-58(c) then states that certain public transportation activities are exempt from this prohibition, including: "The use of a public school bus *or public school activity bus for a purpose allowed under G.S. 115C-242[.]*" N.C.G.S.

IRVING v. CHARLOTTE MECKLENBURG BD. OF EDUC.

[230 N.C. App. 265 (2013)]

§ 66-58(c)(9a) (emphasis added). As far as we can determine, this is the only statute clearly suggesting that activity buses perform duties covered under N.C.G.S. § 115C-242, the plain language of which only references “public school buses.”

We note that the language of N.C.G.S. § 115C-242 references only “public school buses.” “School transportation service vehicles” are nowhere mentioned in the statute – nor are “school activity buses.” Further, not all “school transportation service vehicles,” as defined by *Smith*, are contemplated by N.C.G.S. § 115C-242. Most obviously, N.C.G.S. § 115C-242 is limited to vehicles that transport passengers or “for emergency management purposes in any state of disaster or local state of emergency declared under Chapter 166A of the General Statutes.” N.C.G.S. § 115C-242. The *Smith* definition of “school transportation service vehicles” includes service vehicles used solely for the maintenance of school buses. *Smith*, 68 N.C. App. at 546, 316 S.E.2d at 111.

Considering the totality of the statutory and policy evidence, it is clear that “school transportation service vehicles” include vehicles purchased to service the public school bus fleet. These vehicles are not used for the transportation of passengers and, therefore, do not fit within the requirements of N.C.G.S. § 115C-242. It is not possible for these school transportation service vehicles to be operated “in accordance with G.S. 115C-242.” The 1998 inclusion of the language “in accordance with G.S. 115C-242” to N.C.G.S. § 143-300.1 created an inconsistency, in that full effect cannot be given to the plain language of both sections. N.C.G.S. § 115C-242 is irreconcilable with N.C.G.S. § 143-300.1 if the term “public school bus” in N.C.G.S. § 115C-242 is read narrowly.

For the purpose of resolving the statutory difficulty in the issue before us, we hold that, by incorporating “in accordance with G.S. 115C-242” in N.C.G.S. § 143-300.1, the term “public school buses” in N.C.G.S. § 115C-242 refers to “school transportation service vehicles” as well.

The activity bus, being a school transportation service vehicle under *Smith*, 68 N.C. App. at 545, 316 S.E.2d at 111 (“[w]e conclude that the phrase [school transportation service vehicle] includes . . . those vehicles which perform functionally like the traditional yellow ‘school bus,’ such as school activity buses”), driven by Long, a paid employee of Defendant, which was being operated in the course of Long’s employment with Defendant, was involved in an accident allegedly caused by Long’s negligence. The activity bus was operating at the direction of the

IRVING v. CHARLOTTE MECKLENBURG BD. OF EDUC.

[230 N.C. App. 265 (2013)]

principal of the school by which Long was employed, and the activity bus was being operated to serve the “instructional programs of the school.” N.C.G.S. § 115C-242(1) and (5). Therefore, N.C.G.S. § 143-300.1 granted sole jurisdiction to the Commission to hear Plaintiff’s claim. We reverse and remand for further proceedings in accordance with this opinion.

We note we are aware that Defendant’s policies state: “Activity buses and vans are not covered by the State Tort Claims Act. All activity buses and vans will be covered with liability insurance under the Board of Education policy.” Charlotte-Mecklenburg Sch. Bd. of Educ., *Regulation Code: EEAF-A-R*, Charlotte-Mecklenburg School Board Policies (http://policy.microscribepub.com/cgibin/om_isapi.dll?clientID=307135360&depth=2&infobase=charmeck.nfo&record={5AB}&softpage=PL_frame) (last revised June 9, 1986). According to Defendant’s policies, activity buses are not covered by the Tort Claims Act, but local school boards are required to purchase liability insurance to cover activity buses. In this matter, Defendant is only authorized to act within the authority granted it by the State Board, and the State Board is only authorized to act within the authority granted by the General Assembly. N.C.G.S. §§ 115C-239 and 240. With respect to this issue, to the extent that policies of the Defendant or the State Board conflict with the General Statutes and appellate opinions of North Carolina interpreting these statutes, we are bound by the statutory enactments of the General Assembly and by prior case law of our Courts.

Reversed and remanded.

Judges STEELMAN and ERVIN concur.

JOHNSON v. JOHNSON

[230 N.C. App. 280 (2013)]

DALILA L. JOHNSON, PLAINTIFF
v.
STEVEN B. JOHNSON, DEFENDANT

No. COA12-977

Filed 5 November 2013

1. Divorce—equitable distribution—pension—value—evidence

The trial court did not abuse its discretion in an equitable distribution action by not assigning a value to defendant's military pension or distributing the pension where plaintiff failed to produce credible evidence of the value of defendant's pension at the time of separation.

2. Divorce—equitable distribution—valuation of marital residence

The trial court did not err in an equitable distribution action in its valuation of a marital residence. Although plaintiff contended that she was entitled to credit for payments made on the indebtedness on the marital residence after separation, once the residence was distributed to plaintiff in the interim distribution order, any payments she made were for her residence and to her benefit rather than for the marital estate.

3. Divorce—equitable distribution—note—marital property—evidence

The trial court did not err in an equitable distribution action by determining that a promissory note from plaintiff's brother was marital property valued at \$45,000. The parties' pretrial stipulations and the testimony of the parties as to the amount of the debt were sufficient to support the trial court's findings, which supported its conclusions and its ultimate award.

Appeal by plaintiff from judgment entered 10 April 2012 by Judge Eula E. Reid in Currituck County District Court. Heard in the Court of Appeals 9 January 2013.

Gailor, Wallis & Hunt, P.L.L.C., by Jaime H. Davis and Carrie J. Buell, for plaintiff-appellant.

Frank P. Hiner, IV, for defendant-appellee.

JOHNSON v. JOHNSON

[230 N.C. App. 280 (2013)]

STEELMAN, Judge.

Where plaintiff failed to produce credible evidence of the value of defendant's pension at the time of separation, the trial court did not err in declining to value and distribute that pension as marital property. Where plaintiff received the marital home in an interim distribution order, any further payments on the home accrued to her benefit, and she was not entitled to a credit for these payments. Where plaintiff stipulated to the existence of a marital asset in the pre-trial order, and offered testimony as to the value of that asset at trial, plaintiff cannot on appeal complain of the lack of evidence to support the value of that asset.

I. Factual and Procedural Background

Dalila L. Johnson (plaintiff) and Steven B. Johnson (defendant) were married on 21 November 1991. They separated on 25 August 2009. There were two children of the marriage. On 4 September 2009, plaintiff filed a complaint, seeking custody of the children, child support, equitable distribution of marital property, alimony, post-separation support and attorney's fees. On 22 October 2009, defendant filed an answer and a counterclaim for equitable distribution.

On 20 May 2010, the trial court entered an order awarding physical custody of one of the children to each of the parties, directing that defendant pay child support to plaintiff, along with post-separation support and attorney's fees. Defendant was also ordered to make mortgage payments on the "Crumpler residence," with these payments to be considered in the equitable distribution proceedings.

The equitable distribution hearing was conducted on 11 August 2011, and 7-8 November 2011. On 10 April 2012, the trial court entered its equitable distribution judgment. The judgment held that there was \$143,653.98 in marital and divisible property. After concluding that an unequal distribution of the marital property would be equitable, it awarded sixty-seven percent (67%) of the marital property to plaintiff (\$96,290.65) and thirty-three percent (33%) of the marital property to defendant (\$47,363.33). The findings of the trial court relevant to this appeal were: (1) defendant's military pension was not distributed because "there was insufficient credible evidence for the Court to value that item[;]" (2) plaintiff's school retirement was not distributed because there was no evidence presented as to its value; (3) the marital residence was found to have increased in value in the amount of \$12,000 from the date of separation until the date of the interim distribution to plaintiff; and (4) there was a debt owed to the parties by plaintiff's brother in the

JOHNSON v. JOHNSON

[230 N.C. App. 280 (2013)]

amount of \$45,000, which was found to be a marital asset, and was distributed to plaintiff.

Plaintiff appeals.

II. Standard of Review

Equitable distribution is vested in the discretion of the trial court and will not be disturbed absent a clear abuse of that discretion. Only a finding that the judgment was unsupported by reason and could not have been a result of competent inquiry, or a finding that the trial judge failed to comply with the statute, will establish an abuse of discretion.

Wiencek-Adams v. Adams, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992) (citations omitted).

We have stated that “[t]he standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court’s findings of fact and whether the findings support the conclusions of law and ensuing judgment. The trial court’s findings of fact are binding on appeal as long as competent evidence supports them, despite the existence of evidence to the contrary.”

Peltzer v. Peltzer, ___ N.C. App. ___, ___, 732 S.E.2d 357, 359, *disc. review denied*, 366 N.C. 417, 735 S.E.2d 186 (2012) (quoting *Pegg v. Jones*, 187 N.C. App. 355, 358, 653 S.E.2d 229, 231 (2007)).

III. Defendant’s Military Pension

[1] In her first argument, plaintiff contends that the trial court erred in failing to distribute defendant’s military retirement. We disagree.

On 11 August 2011, the trial court entered an Amended Pre-Trial Equitable Distribution Order, with the consent of the parties and their respective counsel.¹ Defendant’s military pension was shown on Schedule D to this order and was in a “list of marital property and debts upon which there is disagreement as to distribution and disagreement as to value.” Neither plaintiff nor defendant showed a value for defendant’s military pension on Schedule D.

1. The original Pre-Trial Equitable Distribution Order was filed on 3 May 2011. It was amended following the filing of plaintiff’s motion to amend the Pre-Trial Order. This motion asserted that the original order inadvertently omitted the defendant’s retirement and plaintiff’s retirement. It further acknowledged that there was “no agreement or stipulation entered into regarding the parties’ retirement plans.”

JOHNSON v. JOHNSON

[230 N.C. App. 280 (2013)]

Plaintiff inserted the notation “213/264=41%” as her contention. Defendant made no contention concerning the pension. Schedule D also listed plaintiff’s school retirement. Plaintiff valued her retirement at \$0, while defendant noted that its value was “[t]o be determined[.]”

In her listing of factors in favor of an unequal distribution of marital property, plaintiff asserted “[t]he expectation of pension, retirement, or deferred compensation rights that are not marital property: Husband’s ability to acquire substantially higher retirement amount.” Defendant’s listing of factors for an unequal distribution included “[t]he expectation of pension, retirement, or other deferred compensation rights that are not marital property.”

The only evidence at trial pertaining to defendant’s retirement was very limited testimony elicited from defendant. Upon cross-examination, defendant testified that he had been in the military for 24 years, that he was undecided on whether he would remain in the military, and that his retirement increased by a percentage for each year of service up to the thirtieth year. Defendant would be forced to retire from the military after thirty years of service. Upon further examination by his own counsel, defendant testified that he did not know when he would retire from the military, and that it could “be between anywhere from July of 2012 to August of 2017, at my forced retirement date. I do not know when in between.” Upon re-cross examination, the following exchange took place:

Q. Well, have you looked at what your retirement will be if you should retire in – did you say 2012?

A. Yes, I did.

Q. Did you look to see what your retirement would be each month if you retired in 2012?

A. I’ve looked at it, yes.

Q. And have you compared that to what your retirement will be if you wait until 2017?

A. I have.

Q. What’s the difference?

A. Roughly \$1,600, give or take a couple of bucks.

Q. That’s quite a difference. How much would your retirement be each month if you retire next year, 2012?

JOHNSON v. JOHNSON

[230 N.C. App. 280 (2013)]

A. I don't know a specific amount, but if you go back over my last three years of pay, average out each month's pay-day as they do, I believe it will be somewhere around – I want to say \$3,500 a month, give or take.

Defendant testified that this value might even be as high as \$3,600. Defendant went on to testify that if he remained in the military, that he would receive a promotion in 2013. If he remained in the military for a total of 30 years, his gross retirement would be “\$5,500, \$5,600” per month. There was further testimony concerning additional compensation that defendant would receive in the event of his “deployment” overseas.

After the conclusion of the hearings on 8 November 2011, plaintiff filed a nine-page memorandum in support of the valuation of defendant's military pension. The memorandum requested that the trial court take judicial notice of documents and internet sites that were not offered as evidence at trial. Plaintiff's counsel then asserted that the marital portion of defendant's military pension had a value of \$1,127,196 as of the date of separation, and requested that her client be awarded “40% of the monthly pension payable at the time Defendant begins receiving such payments.”

In its Equitable Distribution Judgment, the trial court made the following finding of fact as to defendant's military pension:

c. Husband's Military Retirement: No competent evidence was offered as to the value of this item. Plaintiff's evidence tended to show the Defendant was in the military for 264 months and the parties were married 213 of those months and, therefore, Plaintiff was entitled to 41% of Defendant's military retirement. The Plaintiff argued the Court should rely on Defendant's estimation of his monthly retirement income, should he retire in 2012, as proof of overall net value. There was no evidence offered as to the Defendant's basis for his estimation or how the Defendant calculated his estimation. Even in light of the appellate case of Bishop v. Bishop, the Court does not have sufficient competent evidence to attempt to value the Defendant's retirement. The Court must determine a value supported by evidence in the record. After the conclusion of the hearing, Plaintiff's Attorney forwarded a written statement to the undersigned Judge asking the Court to take Judicial Notice of items that were not offered during

JOHNSON v. JOHNSON

[230 N.C. App. 280 (2013)]

the hearing as well as asking the Court to research and select items via the Internet to assist the Court in calculating the value of a military pension without any evidence offered to assist the Court in determining which tables are appropriate to value this pension. Therefore, the Court finds, due to the lack of competent evidence, it is unable to value this item and it cannot be considered as part of equitable distribution. However, the Court will consider this item as a distributional factor.

“The 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.” *Atkins v. Atkins*, 102 N.C. App. 199, 206, 401 S.E.2d 784, 787 (1991). Additionally, “the party claiming property to be marital has the burden of presenting evidence on the value of such property[.]” *Id.* at 211, 401 S.E.2d at 790.

A military pension eligible under the federal Uniformed Services Former Spouses’ Protection Act is marital property. N.C. Gen. Stat. § 50-20(b)(1) (2011); *see also* 10 U.S.C. § 1408 (2012). Any pension plan, such as defendant’s military retirement, which is not a defined contribution plan is considered to be a defined benefit plan. *Bishop v. Bishop*, 113 N.C. App. 725, 730, 440 S.E.2d 591, 595 (1994) (citations omitted). In *Bishop*, we outlined the analysis to be undertaken by the trial court in valuing a defined benefit plan:

First, the trial court must calculate the amount of monthly pension payment the employee, assuming he retired on the date of separation, will be entitled to receive at the later of the earliest retirement age or the date of separation. This calculation must be made as of the date of separation and “shall not include contributions, years of service or compensation which may accrue after the date of separation.” N.C.G.S. § 50-20(b)(3). The calculation will however, include “gains and losses on the prorated portion of the benefit vested at the date of separation.” *Id.* Second, the trial court must determine the employee-spouse’s life expectancy as of the date of separation and use this figure to ascertain the probable number of months the employee-spouse will receive benefits under the plan. Third, the trial court, using an acceptable discount rate, must determine the then-present value of the pension as of the later of the date of separation or the earliest retirement date. Fourth,

JOHNSON v. JOHNSON

[230 N.C. App. 280 (2013)]

the trial court must discount the then-present value to the value as of the date of separation. In other words, determine the value as of the date of separation of the sum to be paid at the later of the date of separation or the earliest retirement date. This calculation requires mortality and interest discounting. The mortality and interest tables of the Pension Benefit Guaranty Corporation, a corporation within the United States Department of Labor, are well suited for this purpose. Finally, the trial court must reduce the present value to account for contingencies such as involuntary or voluntary employee-spouse termination and insolvency of the pension plan. This calculation cannot be made with reference to any table or chart and rests within the sound discretion of the trial court.

Id. at 731, 440 S.E.2d at 595-96 (citations omitted). Further, our Supreme Court has held that

if the marital estate contains adequate property other than the pension and retirement benefits, an in kind or monetary distribution of these assets may be made which takes into account the anticipated pension and retirement benefits. This is impermissible only when the value of the pension or retirement benefits is so disproportionate in relation to other marital property that an immediate distribution would be inappropriate.

Seifert v. Seifert, 319 N.C. 367, 370, 354 S.E.2d 506, 509 (1987) (citations omitted). If the retirement account is distributed to one spouse, it is equitable to distribute other marital assets to the other spouse to offset the value of the pension, unless such a large distribution of immediate assets would be inequitable.

In her memorandum to the trial court, plaintiff set forth an elaborate calculation, based on defendant's testimony that his monthly pension would be \$3,500. Plaintiff proposed that the trial court should total these payments over time, based on defendant's life expectancy of another 34.7 years; that the trial court should use a discount rate derived from an internet website; that the trial court should apply the coverture fraction proposed by plaintiff; and that the trial court, when taking all of these values and converting to present-day dollars, should find the present-day value of defendant's pension to be \$1,127,196.00, with plaintiff entitled to a 40% distribution of the monthly payments.

JOHNSON v. JOHNSON

[230 N.C. App. 280 (2013)]

The trial court found that “[t]here was no evidence offered as to the Defendant’s basis for his estimation or how the Defendant calculated his estimation.” The court found that neither this memorandum, submitted after the close of proceedings, nor defendant’s unsubstantiated estimations, constituted competent evidence of valuation.

As to the parties’ contentions pertaining to an unequal distribution of marital property, the trial court found that an unequal distribution in favor of plaintiff would be equitable. Specifically, the trial court stated that it was relying upon the fact that “because there was insufficient credible evidence for the Court to value that item, Defendant’s military pension was not distributed[]” in making an unequal distribution.

It was plaintiff who sought to have defendant’s pension classified as marital property, who had the burden of showing that it was marital property, and of presenting evidence to support a valuation.

Bishop expressly requires that the beginning point of the computation is “the amount of monthly pension payment the employee, assuming he retired on the date of separation will be entitled to receive at the later of the earliest retirement age or the date of separation.” *Bishop*, 113 N.C. App. at 731, 440 S.E.2d at 595. In this case, the date of separation was 25 August 2009. The only evidence of the “amount of monthly pension” to which defendant might be entitled was defendant’s testimony that his retirement would be about \$3,500 per month if he retired sometime in 2012. Without the amount of the monthly pension as of the date of separation, the *Bishop* computation cannot be completed. The trial court correctly found and then concluded that it did “not have sufficient competent evidence to attempt to value Defendant’s retirement.”

In equitable distribution cases, the burden rests upon the party seeking distribution of marital property to place before the trial court competent evidence upon which the trial court can determine the value of the marital asset. *Atkins*, 102 N.C. App. at 211, 401 S.E.2d at 790. In this case, plaintiff failed to do this.

This flaw cannot be corrected with a post-trial memorandum that relies upon internet websites and other materials not before the trial court as competent, admitted evidence. Clever arguments cannot atone for a fatal deficiency in the evidence presented to the trial court.

Further, our resolution of this issue is controlled by our decision in the case of *Albritton v. Albritton*, 109 N.C. App. 36, 426 S.E.2d 80 (1993). In *Albritton*, the plaintiff appealed the equitable distribution judgment wherein the trial court did not value defendant’s pension and did not

JOHNSON v. JOHNSON

[230 N.C. App. 280 (2013)]

distribute the pension as marital property. The trial court found that “[t]here was insufficient evidence to enable the Court to establish the present value of this pension at the time of the parties’ separation.” *Id.* at 40, 426 S.E.2d at 83. On appeal, plaintiff conceded that there were deficiencies in her evidence as to defendant’s pension, but contended that “the trial court should have taken judicial notice of any ‘number of respected actuarial source books.’ ” *Id.* This Court rejected this argument and held:

It is also noted by this Court that plaintiff, as the party claiming an interest in the pension plan, had the burden of proof as to the value of the pension plan on the date of the parties’ separation. *See Atkins v. Atkins*, 102 N.C. App. 199, 401 S.E.2d 784 (1991).

Id.

This Court noted that plaintiff had multiple opportunities in discovery and at trial to elicit the necessary information from defendant’s former employer, but “failed to pursue [these] opportunit[ies].” *Id.* at 41, 426 S.E.2d at 83.

We then held:

We see no reason to remand this case on the basis that the trial court failed to make a specific finding as to the present discount value of the defendant’s pension plan when it was plaintiff who failed to provide the trial court with the necessary information. “[R]emanding the matter for the taking of new evidence, [as to the value of the pension plan] in essence granting the party a second opportunity to present evidence, ‘would only protract the litigation and clog the trial courts with issues which should have been disposed of at the initial hearing.’ ” *Miller*, 97 N.C. App. at 80, 387 S.E.2d at 184 (citation omitted). Under the circumstances, we feel that the trial court did the best it could with the information available. Therefore, the trial court’s failure to put a specific value on defendant’s pension plan was not error.

Id. at 41, 426 S.E.2d at 83-84.

We note that in *Albritton*, there was more evidence from which the trial court could have valued defendant’s pension than in the instant case. There was evidence as to the exact amount of Mr. Albritton’s monthly pension, both gross and net, as of the date of the parties’ separation. In

JOHNSON v. JOHNSON

[230 N.C. App. 280 (2013)]

the instant case, the only estimate of defendant's monthly pension was that it would be "\$3,500 a month, give or take[.]" as of 2012. We do not know whether this was a gross or net amount. The relevant time for determination of the value of a pension is the date of separation, here 25 August 2009. According to *Bishop*, the court must determine the value which the recipient,

assuming he retired on the date of separation, will be entitled to receive at the later of the earliest retirement age or the date of separation. This calculation must be made as of the date of separation and "shall not include contributions, years of service or compensation which may accrue after the date of separation." N.C.G.S. § 50-20(b)(3).

113 N.C. App. at 731, 440 S.E.2d at 595. In the instant case, there was no testimony as to the value of defendant's pension as of the date of separation. The testimony as to the amount of the monthly pension was not even as of the time that it was given (7 November 2011), but as of some unspecified date in 2012.

The only evidence as to the "earliest retirement age" presented was defendant's testimony that he had to retire "anywhere from July of 2012 to August of 2017[.]" Defendant later confirmed that "the earliest I can retire is 2012." This is not, however, a specific date for valuation purposes, nor is it any more credible than defendant's \$3,500 valuation. Defendant's assertion that he would receive "\$3,500 a month, give or take[.]" if he retired "anywhere between July of 2012 to August of 2017," is not a competent statement of valuation or of an earliest retirement age.

We hold that the trial court's findings on defendant's pension are supported by evidence in the record, and that these findings support its conclusions of law. We further hold that the trial court did not abuse its discretion in not assigning a value to defendant's pension or distributing the pension.

This argument is without merit.

IV. Marital Residence

[2] In her second argument, plaintiff contends that the trial court erred in its valuation of the marital residence. We disagree.

"Upon application of a party, the court shall 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 in accordance with the provisions of this section." N.C. Gen.

JOHNSON v. JOHNSON

[230 N.C. App. 280 (2013)]

Stat. § 50-20(a). “There shall be an equal division by using net value of marital property and net value of divisible property unless the court determines that an equal division is not equitable.” N.C. Gen. Stat. § 50-20(c). Divisible property includes

[a]ll appreciation and diminution in value of marital property and divisible property of the parties occurring after the date of separation and prior to the date of distribution, except that appreciation or diminution in value which is the result of postseparation actions or activities of a spouse shall not be treated as divisible property.

N.C. Gen. Stat. § 50-20(b)(4)(a).

On 2 September 2010, with the consent of the parties, the trial court entered an interim distribution order. This order provided that the marital residence was distributed to plaintiff; that plaintiff would refinance the indebtedness on the marital residence, removing defendant’s name from the debt; and that the value of the marital residence would be determined at the equitable distribution hearing. The parties stipulated that, as of the date of separation, the residence had a negative value of \$14,369.50. This value was based on the fair market value of the residence, \$250,000, less the balances of the first and second mortgages. The residence was distributed to plaintiff at a value of negative \$14,369.50. The trial court also found that, from the date of separation until the date of distribution of the marital residence to plaintiff in September of 2010, the marital residence increased in value by \$12,000.00 to \$262,000. This increase in value was found to be divisible property, and was distributed to plaintiff.

Plaintiff contends that the trial court erred in its valuation. Plaintiff asserts that she was entitled to credit for the payments made on the indebtedness on the marital residence after separation.

Plaintiff cites to our recent decision in *Bodie v. Bodie*, ___ N.C. App. ___, 727 S.E.2d 11 (2012). In *Bodie*, the husband, pursuant to an interim distribution order, “paid \$216,000.00 towards the mortgage, insurance, upkeep and taxes for the marital residences” after the parties separated. The trial court found this debt to be marital, but made no findings as to whether the payments were marital, separate, or divisible. *Id.* at ___, 727 S.E.2d at 15. We noted that “[i]t is not enough that evidence can be found within the record which could support such classification; the court must actually classify all of the property and make a finding as to the value of all marital [and divisible] property.” *Id.* at ___, 727 S.E.2d at 15 (quoting *Robinson v. Robinson* 210 N.C. App. 319, 324, 707

JOHNSON v. JOHNSON

[230 N.C. App. 280 (2013)]

S.E.2d 785, 790 (2011)). We further observed that “[a] spouse is entitled to some consideration, in an equitable distribution proceeding, for any post-separation payments made by that spouse (from non-marital or separate funds) for the benefit of the marital estate. Likewise, a spouse is entitled to some consideration for any post-separation use of marital property by the other spouse.” *Id.* at ___, 727 S.E.2d at 15 (quoting *Walter v. Walter*, 149 N.C. App. 723, 731, 561 S.E.2d 571, 576–77 (2002)). We concluded that, because the trial court did not make any findings of fact as to whether these payments were marital, separate, or divisible property, it was necessary to remand the case for additional findings and an amended equitable distribution judgment. *Id.* at ___, 727 S.E.2d at 17.

The facts of the instant case differ from those in *Bodie*. In the instant case, the trial court assigned a value to the increase in value of the marital residence, which was distributed to plaintiff as divisible property. This was not a case where plaintiff made payments on the marital home or marital debt, or where plaintiff made payments to benefit defendant. Rather, the trial court noted that “[b]ecause Wife received the marital residence any benefits accrued to Wife when she received it.” Once the residence was distributed to plaintiff in the interim distribution order, any payments she made on the home were to her benefit, and therefore she need not be credited with them. Those payments were not made for the marital estate, but rather for her own personal residence. We hold that the trial court’s findings of fact are supported by evidence in the record, which in turn support the trial court’s conclusions of law. We further hold that the trial court did not abuse its discretion in assigning a value to the marital residence and declining to assign a value to plaintiff’s post-interim distribution payments.

This argument is without merit.

V. Marital Loan

[3] In her third argument, plaintiff contends that the trial court erred in determining that a promissory note from plaintiff’s brother was marital property valued at \$45,000. We disagree.

In the Amended Pre-Trial Equitable Distribution Order, the parties agreed that the note from plaintiff’s brother was marital property. Defendant valued the note at \$45,000.00, plaintiff at \$40,000.00. At trial, plaintiff repeatedly asserted that the amount loaned to her brother was \$45,000, not the \$40,000 value in the pre-trial order.

Plaintiff’s argument on appeal is that there was no “documentation or written instrument demonstrating the value of the loan[,]” and

JOHNSON v. JOHNSON

[230 N.C. App. 280 (2013)]

no evidence as to “whether future repayment would be made, and the amount and manner of any future repayment.” We hold that the parties’ pre-trial stipulations and the testimony of the parties as to the amount of the debt were sufficient to support the trial court’s findings of fact. These findings in turn support the trial court’s conclusions of law and its ultimate distributive award.

Clearly, it would have been preferable for the parties to have presented evidence of the date or dates that the debt was incurred, whether it was to be repaid with interest, and any repayment terms. However, both parties were afforded a full opportunity to present their positions in the pre-trial order and at the equitable distribution hearing. Plaintiff cannot on appeal complain of a lack of evidence when she stipulated to the debt and failed to avail herself of the opportunity to present the evidence which she now says was lacking before the trial court.

This argument is without merit.

VI. Unequal Distribution

In her fourth argument, plaintiff contends that the trial court abused its discretion in its distribution of marital property. We disagree.

This argument is entirely predicated upon plaintiff’s argument that the trial court failed to value and distribute defendant’s military pension. Based upon our prior holding on this issue, this argument is without merit.

AFFIRMED.

Judges STEPHENS and McCULLOUGH concur.

KRUEGER v. N.C. CRIMINAL JUSTICE EDUC. & TRAINING STANDARDS COMM'N

[230 N.C. App. 293 (2013)]

JAY EDUARD KRUEGER, PETITIONER

v.

NORTH CAROLINA CRIMINAL JUSTICE EDUCATION AND
TRAINING STANDARDS COMMISSION, RESPONDENT

No. COA13-288

Filed 5 November 2013

1. Administrative Law—petitioner’s proposed additional findings—no requirement that agency adopt

There was no basis in law for a contention that an agency should have adopted petitioner’s proposed additional findings in an action involving a police officer’s suspended law enforcement certification.

2. Administrative Law—findings for sanctions not imposed—not required

In an action arising from the suspension of a police officer’s law enforcement certification, respondent was required to make adequate findings to support its decision, but petitioner cited no case, statute, or regulation requiring an agency to make findings about sanctions it elected not to impose.

3. Constitutional Law—due process—equal protection—law enforcement certification—findings

In an action involving a police officer’s suspended law enforcement certification, respondent’s findings were sufficient to address petitioner’s due process and equal protection arguments. Respondent made findings about other officers who were suspended or received a lesser sanction and found that those officers who had committed similar offenses were treated similarly.

4. Constitutional Law—agency authority to decide punishment—not unfettered

The fact that respondent, which issued law enforcement certifications, had the authority to exercise some discretion in deciding whether to punish petitioner with a suspension or something less severe did not render the regulations unconstitutional. The regulations at issue did not give respondent unfettered discretion.

5. Constitutional Law—substantive due process—suspension of agency certification

A law enforcement officer whose certification was suspended by respondent was not deprived of substantive due process where

KRUEGER v. N.C. CRIMINAL JUSTICE EDUC. & TRAINING STANDARDS COMM'N

[230 N.C. App. 293 (2013)]

respondent did not offer him a consent agreement. Respondent's actions were not arbitrary because preserving the credibility of law enforcement certifications is a valid state objective and suspending the certification for officers who undermine that credibility is rationally related to that objective.

6. Constitutional Law—equal protection—suspension of law enforcement certification

A police officer was not deprived of his equal protection rights when respondent suspended his law enforcement certification. Respondent's interest in preserving the credibility of law enforcement officer certifications is substantial and there was a rational relation between respondent's decision to distinguish between petitioner and other officers who had received lesser sanctions.

Appeal by Petitioner from Order entered on or about 18 July 2012 by Judge Shannon Joseph in Superior Court, Wake County. Heard in the Court of Appeals 29 August 2013.

Edelstein & Payne by M. Travis Payne, for petitioner-appellant.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Catherine F. Jordan, for respondent-appellee.

STROUD, Judge.

Jay Krueger ("petitioner"), an officer with the Raleigh Police Department, appeals from a Superior Court order entered 18 July 2012, affirming the final agency decision issued by the North Carolina Criminal Justice Education and Training Standards Commission ("respondent") which suspended petitioner's law enforcement certification for 180 days. For the following reasons, we affirm the trial court's order and hold that respondent did not violate petitioner's constitutional rights.

I. Factual Background

The present appeal is the second to come before this Court in this matter. Our previous opinion laid out the factual background:

In May 2005, petitioner, a certified law enforcement officer employed since 2000 by the Raleigh Police Department ("the Department"), was interviewed by the Department after allegations surfaced that he had submitted falsified or inaccurate radar training records. Petitioner admitted

KRUEGER v. N.C. CRIMINAL JUSTICE EDUC. & TRAINING STANDARDS COMM'N

[230 N.C. App. 293 (2013)]

that he had signed forms [Form SMI 15] for two other law enforcement officers showing that those officers had completed radar training with petitioner when they had not in fact done so.

As a result, petitioner was suspended without pay for 20 days and barred from applying for special assignments or promotions within the Department. The Commission then initiated action to revoke petitioner's law enforcement certification. 12 N.C. Admin. Code 09A.0204(b)(8) (2008) provides that the Commission may suspend, revoke, or deny an officer's or applicant's certification if the Commission finds that the officer or applicant "knowingly and willfully, by any means of false pretense, deception, defraudation, misrepresentation or cheating whatsoever, aided another person in obtaining or attempting to obtain credit, training or certification from the Commission[.]"

When the suspension is for such a reason, "the period of sanction shall be not less than five years; however, the Commission may either reduce or suspend the period of sanction ... or substitute a period of probation in lieu of suspension of certification following an administrative hearing ..." 12 N.C. Admin. Code 09A.0205 (b)(5) (2008). To that end, the Commission has adopted a policy authorizing its Probable Cause Committee, "[i]n those cases that it deems to be appropriate," to enter into a consent agreement with an officer to reduce the sanction imposed before a Final Agency Decision is reached.

Krueger v. North Carolina Criminal Justice Educ. & Training Standards Com'n, 198 N.C. App. 569, 571, 680 S.E.2d 216, 218 (2009). We held that the case was not appropriate for disposition on summary judgment because there were genuine issues of material fact relevant to whether respondent's decision was arbitrary and capricious and whether it violated petitioner's constitutional rights. *Id.*

On remand, the parties conducted additional discovery and presented evidence regarding approximately thirty other officers whose cases had been considered by respondent's Probable Cause Committee. Petitioner again claimed that respondent had treated him differently from other officers who had violated respondent's standards and that this differential treatment violated his constitutional rights. The Administrative Law Judge (ALJ) made findings of fact with regard to

KRUEGER v. N.C. CRIMINAL JUSTICE EDUC. & TRAINING STANDARDS COMM'N

[230 N.C. App. 293 (2013)]

petitioner's case and that of the other officers whose cases had been presented. The ALJ found that petitioner was subject to suspension under the relevant regulations and that he was not treated dissimilarly from officers similarly situated. The ALJ therefore concluded that petitioner's constitutional rights had not been violated. The final agency decision issued on or about 11 November 2010 adopted the ALJ's findings and conclusions, essentially verbatim.

Petitioner again petitioned the Superior Court to review the final agency decision. By order entered 18 July 2012, the Superior Court concluded that respondent had not acted arbitrarily or capriciously and that petitioner's constitutional rights had not been violated. Petitioner was served with the order on 21 November 2012 and filed written notice of appeal on 19 December 2012.

II. Analysis

Petitioner argues that respondent's decision to suspend his law enforcement certification for 180 days violates his right to due process and equal protection because it decided not to offer him a "consent agreement" with lesser sanctions. We disagree.

A. Standard of Review

[I]n reviewing a superior court order examining an agency decision, an appellate court must determine whether the agency decision (1) violated constitutional provisions; (2) was in excess of the statutory authority or jurisdiction of the agency; (3) was made upon unlawful procedure; (4) was affected by other error of law; (5) was unsupported by substantial admissible evidence in view of the entire record; or (6) was arbitrary, capricious, or an abuse of discretion. In performing this task, the appellate court need only consider those grounds for reversal or modification raised by the petitioner before the superior court and . . . argued on appeal to this Court.

Shackleford-Moten v. Lenoir County Dept. of Social Services, 155 N.C. App. 568, 572, 573 S.E.2d 767, 770 (2002) (citations omitted), *disc. rev. denied*, 357 N.C. 252, 582 S.E.2d 609 (2003).

Petitioner's arguments on appeal are limited to issues of due process and equal protection.¹ Thus, the only error petitioner asserts is

1. [1] Petitioner does state that the agency should have adopted his proposed additional findings. But this argument has no basis in law and petitioner cites none that supports

KRUEGER v. N.C. CRIMINAL JUSTICE EDUC. & TRAINING STANDARDS COMM'N

[230 N.C. App. 293 (2013)]

one of law, which we review *de novo*. *Hardee v. North Carolina Bd. of Chiropractic Examiners*, 164 N.C. App. 628, 633, 596 S.E.2d 324, 328, *cert. denied and disc. rev. denied*, 359 N.C. 67, 604 S.E.2d 312 (2004).

B. Required Findings and Discretion

[2] Petitioner first argues that Respondent violated his due process rights—though he does not specify which type of due process—by declining to offer him a consent agreement without making findings about why it declined to do so.

Petitioner mischaracterizes what findings are required. Respondent was required to make adequate findings of fact to support its decision to suspend petitioner's law enforcement certification. *See Cameron v. North Carolina State Bd. of Dental Examiners*, 95 N.C. App. 332, 339, 382 S.E.2d 864, 869 (1989) (holding that the State Board of Dental Examiners did not act arbitrarily or capriciously when it suspended a dentist's license after finding that he had been negligent and incompetent in the practice of dentistry). It is undisputed that respondent's decision to suspend petitioner's certification was supported by extensive findings. Petitioner cites no case, statute, or regulation requiring an agency to make findings about sanctions it elected not to impose. The cases petitioner does cite simply do not support his argument to the contrary.

Respondent found that petitioner had knowingly and willfully falsified Form SMI-15 three times, that such conduct was in violation of 12 N.C. Admin. Code 9A.0204(b)(8) (2010), and that petitioner's certification was therefore subject to no less than a five year suspension. Respondent then reduced petitioner's sanction to a 180-day suspension, as authorized by 12 N.C. Admin. Code 9A.0205(b)(5) (2010) (permitting the reduction of an otherwise five-year suspension where the suspension is for "obtaining, attempting to obtain, aiding another person to obtain, or aiding another person to attempt to obtain credit, training or certification by any means of false pretense, deception, defraudation, misrepresentation or cheating").²

it. *See North Carolina Com'r of Banks v. Weiss*, 174 N.C. App. 78, 91, 620 S.E.2d 540, 548 (2005) (rejecting an argument that the Banking Commission had to make certain findings because "additional findings could have been made from [the] evidence[.]"). Reviewing courts are "bound by the findings of the agency if they are supported by competent, material, and substantial evidence in view of the entire record as submitted." *Bashford v. North Carolina Licensing Bd. for General Contractors*, 107 N.C. App. 462, 465, 420 S.E.2d 466, 468 (1992) (citation, quotation marks, and brackets omitted).

2. In his brief, petitioner consistently refers to the length of his suspension as a suspension "for five years". These statements are misleading; respondent reduced petitioner's suspension to 180 days.

KRUEGER v. N.C. CRIMINAL JUSTICE EDUC. & TRAINING STANDARDS COMM'N

[230 N.C. App. 293 (2013)]

[3] Moreover, respondent *did* make findings about a number of other officers who were suspended or received a lesser sanction and found that those officers who had committed similar offenses were treated similarly. These findings are sufficient to address petitioner's due process and equal protection arguments, which we address below.

Respondent's findings as to petitioner's violations are sufficient to support its decision to suspend his certification. This decision is consistent with respondent's statutory authority and comports with the regulations it has promulgated. *See* N.C. Gen. Stat. § 17C-6(a)(12) (2009) (authorizing respondent to "suspend, revoke, or deny, pursuant to the standards that it has established."); 12 N.C. Admin. Code 9A.0203 (2010); 12 N.C. Admin. Code 9A.0204(b)(8); 12 N.C. Admin. Code 9A.0205(b) (5). Thus, his argument that respondent's findings fail to demonstrate a course of reasoning or are otherwise inadequate is overruled.

[4] Petitioner further argues that the lack of regulations or rules as to when an officer who violates respondent's standards is eligible for a consent agreement vests respondent with unfettered discretion and is therefore unconstitutional. Petitioner does not explain how such discretion is unconstitutional or whether he grounds this challenge on the state or federal constitution.

Petitioner cites no case invalidating a regulation promulgated pursuant to statutory authority on the basis that it vests the agency with discretion in determining the level of sanction for violation of its rules. The cases petitioner cites simply stand for the unremarkable proposition that "[a]n ordinance which vests unlimited or unregulated discretion in a municipal officer is void." *Lewis v. City of Kinston*, 127 N.C. App. 150, 154, 488 S.E.2d 274, 277 (1997) (quoting *Maines v. City of Greensboro*, 300 N.C. 126, 131, 265 S.E.2d 155, 158 (1980)). This case concerns neither an ordinance nor a municipal officer.

Additionally, the regulations at issue do not vest respondent with *unfettered* discretion. The regulations specify which violations must result in revocation and which may result in suspension. *See* 12 N.C. Admin. Code 9A.0204. The regulations require suspensions for five years or more, but permit reduction or suspension of the sanction for certain violations, including petitioner's. 12 N.C. Admin. Code 9A.0205(b). The fact that respondent has the authority to exercise some discretion in deciding whether to punish petitioner with a suspension or something less severe does not render the regulations unconstitutional.³ Therefore,

3. *See CVS Pharmacy, Inc. v. North Carolina Bd. of Pharmacy*, 162 N.C. App. 495, 502, 591 S.E.2d 567, 571 (2004) ("The Board has the discretion to select a lesser punishment in

KRUEGER v. N.C. CRIMINAL JUSTICE EDUC. & TRAINING STANDARDS COMM'N

[230 N.C. App. 293 (2013)]

all of petitioner's arguments with regard to the findings and amount of discretion exercised by respondent are meritless.

C. Substantive Due Process

[5] Petitioner next argues that respondent violated his right to substantive due process by not offering him a consent agreement and reduced sanctions. We disagree.

"Substantive due process protection prevents the government from engaging in conduct that shocks the conscience, or 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). "The touchstone of due process is protection of the individual against arbitrary action of government." *Jones v. City of Durham*, 183 N.C. App. 57, 61, 643 S.E.2d 631, 634 (2007) (citation, quotation marks, and brackets omitted). A government action is not arbitrary if it had "a rational relation to a valid state objective." *City-Wide Asphalt Paving, Inc. v. Alamance County*, 132 N.C. App. 533, 539, 513 S.E.2d 335, 339 (citation and quotation marks omitted), *app. dismissed and disc. rev. denied*, 350 N.C. 826, 537 S.E.2d 815 (1999).

Petitioner admitted to falsifying respondent's Form SMI 15 regarding his training of two officers for their radar certification and respondent found that he did so. Respondent has the authority pursuant to 12 N.C. Admin. Code 9A.0203 to suspend the certification of someone who violates Commission rules. 12 N.C. Admin. Code 9A.0204(b) further specifies that respondent may suspend the certification of someone who "has knowingly and willfully, by any means of false pretense, deception, defraudation, misrepresentation or cheating whatsoever, aided another

accord with reason when the permittee has so clearly violated the statute."); *In re Appeal from Civil Penalty*, 324 N.C. 373, 379, 379 S.E.2d 30, 34 (1989) (declaring that "discretionary judicial authority may be granted to an agency when reasonably necessary to accomplish the agency's purposes."); *State v. Stansbury*, 230 N.C. 589, 591, 55 S.E.2d 185, 187 (1949) ("It is the accepted rule with us that within the limits of the sentence permitted by the law, the character and extent of the punishment is committed to the sound discretion of the trial court, and may be reviewed by this Court only in case of manifest and gross abuse." (citation and quotation marks omitted)); *Burton v. City of Reidsville*, 243 N.C. 405, 407, 90 S.E.2d 700, 703 (1956) (stating that courts reviewing administrative decisions "only decide[] whether the action of the public official was contrary to law or so patently in bad faith as to evidence arbitrary abuse of his right of choice."); *State ex rel. Com'r of Ins. v. North Carolina Rate Bureau*, 300 N.C. 381, 402, 269 S.E.2d 547, 563 (1980) ("The Legislature can obviously not anticipate every problem which will arise before an administrative agency in the administration of an act. The legislative process would be completely frustrated if that body were required to appraise beforehand the myriad situations to which it wished a particular policy to be applied and to formulate specific rules for each situation.").

KRUEGER v. N.C. CRIMINAL JUSTICE EDUC. & TRAINING STANDARDS COMM'N

[230 N.C. App. 293 (2013)]

person in obtaining or attempting to obtain credit, training or certification from the Commission.” 12 N.C. Admin. Code 9A.0204(b)(8). Finally, respondent may reduce or suspend the sanction of someone subject to suspension under 12 N.C. Admin. Code 9A.0204(b)(8). 12 N.C. Admin. Code 9A.0205(b)(5).

A 180-day suspension of a law enforcement certification cannot be said to “shock the conscience” when the certified officer knowingly and willfully falsifies training records. Additionally, on these facts, we have no difficulty concluding that there was a rational basis for respondent to suspend petitioner’s certification. Law enforcement officers are entrusted with a great deal of responsibility by the State and effective law enforcement requires a number of specialized skills, including accurate use of radar devices. An officer’s qualifications and training are vital to his credibility. When an officer misrepresents his training and qualifications, there can be significant consequences for the State. *See, e.g., State v. Peterson*, ___ N.C. App. ___, ___, 744 S.E.2d 153, 160 (2013) (affirming an order for a new trial where one of the State’s key law enforcement witnesses lied about his experience and qualifications).

We conclude that respondent’s actions were not arbitrary because preserving the credibility of law enforcement certifications is a valid state objective and suspending the certification of officers who undermine that credibility is rationally related to that objective. *Cf. Matter of DeLancy*, 67 N.C. App. 647, 654, 313 S.E.2d 880, 885 (holding that “the Board’s authority to regulate the licensing of dental hygienists is within the police power of the State, and that the Board’s action in the present case [suspending a hygentist for 12 months after it found the hygienist had violated its rules] was rationally related to the legislative goal of protection of the public health and welfare.”), *app. dismissed and disc. rev. denied*, 311 N.C. 756, 321 S.E.2d 130 (1984). Therefore, we hold that respondent did not violate petitioner’s right to substantive due process either under the Fourteenth Amendment or the North Carolina Constitution. *See City-Wide Asphalt Paving, Inc.*, 132 N.C. App. at 539, 513 S.E.2d at 339.

D. Equal Protection

[6] Petitioner next claims respondent’s actions violated his right to equal protection. Petitioner also argues that we must subject respondent’s decision not to grant him a lesser sanction to strict scrutiny because it infringes on his “fundamental right” to earn a living. We disagree that respondent’s decision merits strict scrutiny and hold that respondent did not violate petitioner’s right to equal protection.

KRUEGER v. N.C. CRIMINAL JUSTICE EDUC. & TRAINING STANDARDS COMM'N

[230 N.C. App. 293 (2013)]

The Equal Protection Clause of Article I, Section 19 of the North Carolina Constitution and the Equal Protection Clause of Section 1 of the Fourteenth Amendment to the United States Constitution forbid North Carolina from denying any person the equal protection of the laws, and require that all persons similarly situated be treated alike.

The Equal Protection Clauses function to restrain our state from engaging in activities that either create classifications of persons or interfere with a legally recognized right. Upon the challenge of a [governmental action] as violating equal protection, our courts must first determine which of several tiers of scrutiny should be utilized and then whether the [action] meets the relevant standard of review. Where the upper tier of equal protection analysis requiring strict scrutiny of a governmental classification applies only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class, we apply the lower tier or rational basis test if the [action] neither classifies persons based on suspect characteristics nor impinges on the exercise of a fundamental right.

Liebes v. Guilford County Dept. of Public Health, ___ N.C. App. ___, ___, 713 S.E.2d 546, 549 (citations and quotation marks omitted), *disc. rev. denied*, 365 N.C. 361, 718 S.E.2d 396 (2011).

Under any level of scrutiny, petitioner's equal protection challenge must fail if the officers who received lesser punishments were not similarly situated to him. *Yan-Min Wang v. UNC-CH School of Medicine*, ___ N.C. App. ___, ___, 716 S.E.2d 646, 658 (2011) ("Petitioner was required to show as an integral part of her equal protection claim that similarly situated individuals were subjected to disparate treatment." (citation omitted)); *see Jones v. Keller*, 364 N.C. 249, 260, 698 S.E.2d 49, 57 (2010) ("[E]qual protection of the laws is not denied by a statute prescribing the punishment to be inflicted on a person convicted of crime unless it prescribes different punishment *for the same acts committed under the same circumstances by persons in like situation.*" (citation and quotation marks omitted) (emphasis added)), *cert. denied*, ___ U.S. ___, 179 L.Ed. 2d 935 (2011). "[P]ersons who are in all relevant respects alike are similarly situated." *Clayton v. Branson*, 170 N.C. App. 438, 457, 613 S.E.2d 259, 272 (citation and quotation marks omitted), *disc. rev. denied*, 360 N.C. 174, 625 S.E.2d 785 (2005).

KRUEGER v. N.C. CRIMINAL JUSTICE EDUC. & TRAINING STANDARDS COMM'N

[230 N.C. App. 293 (2013)]

To the extent respondent did treat petitioner differently than similarly situated officers, respondent's actions must meet the appropriate level of scrutiny. Petitioner claims that he is in the class of officers who were not given consent agreements and implies that there was no reason to treat them differently from the officers who did receive consent agreements and the lesser sanctions that accompany such agreements. He argues that there were other officers who committed worse offenses but received consent agreements and that therefore respondent violated his right to equal protection by not offering him a similar agreement. Petitioner does not claim that respondent has discriminated on the basis of race, religion, or any other protected class.

Nevertheless, petitioner contends that we should subject respondent's decision to strict scrutiny because our courts have sometimes described the right to earn a living as "fundamental" under the state constitution. *See, e.g., Roller v. Allen*, 245 N.C. 516, 518-19, 96 S.E.2d 851, 854 (1957) ("The right to work and earn a livelihood is a property right that cannot be taken away except under the police power of the State in the paramount public interest for reasons of health, safety, moral, or public welfare. The right to conduct a lawful business or to earn a livelihood is regarded as fundamental." (citation and quotation marks omitted)).

Yet, even in those cases, our courts have not applied strict scrutiny. Rather, when the fundamental right to work and earn a livelihood under Article I, §§ 1, 19, and 35 of the North Carolina Constitution have been implicated, our courts have considered whether the challenged governmental action is "rationally related to a substantial government purpose." *Treants Enters. v. Onslow Cty.*, 320 N.C. 776, 778-79, 360 S.E.2d 783, 785 (1987) ("This is the requirement article I, section 1 [of the North Carolina Constitution] imposes on government regulation of trades and business in the public interest."); *see also Roller*, 245 N.C. at 525, 96 S.E.2d at 859 ("[W]here . . . no substantial public interest is shown to be involved or adversely affected, regulation is not justified."). "The test used to interpret the validity of state regulation of business under Article I, Section 1 is the same as that used . . . for an equal protection" challenge of such regulation under our Constitution. *Sanders v. State Personnel Com'n*, 197 N.C. App. 314, 326, 677 S.E.2d 182, 190 (2009).

We first note that "[t]he regulations at issue here do not . . . [regulate] an ordinary and simple occupation . . . intended to be free from governmental regulation," but police officers entrusted with the authority to enforce the laws of our state. *Id.* at 326-27, 677 S.E.2d at 191 (citation and quotation marks omitted). We find respondent's interest in preserving the credibility of law enforcement officer certifications "substantial."

KRUEGER v. N.C. CRIMINAL JUSTICE EDUC. & TRAINING STANDARDS COMM'N

[230 N.C. App. 293 (2013)]

Therefore, to the extent that respondent treated petitioner differently from similarly situated officers, its differential treatment must be rationally related to that substantial public interest.

Thus, we must consider (1) whether petitioner was similarly situated with those officers who were given lesser sanctions, and if so, (2) whether there is some rational relationship between the distinctions drawn by respondent and the government's substantial interest in preserving the credibility of law enforcement training and certification.

In deciding how to sanction an officer who violated the rules and regulations promulgated by respondent, respondent looks not to the bare fact of some violation, but considers the specific violation that occurred and the context of that violation. *See* 12 N.C. Admin. Code 9A.0204; 12 N.C. Admin. Code 9A.0205; *Clayton*, 170 N.C. App. at 458, 613 S.E.2d at 273 (observing that no "party would ever make decisions about the proper response to a claim based only on bare-bones information" and looking to the city's factors in making the determination). Thus, the particular violation found by the Probable Cause Committee is a relevant aspect for purposes of our equal protection analysis.

Petitioner falsified respondent's Form SMI 15, which records the amount of time an officer spends training with a radar device. All but two of the officers who received lesser sanctions had committed different violations. Most of those officers who were given written warnings or reprimands had failed to disclose a prior criminal conviction or had committed a misdemeanor.⁴ Therefore, petitioner is not alike in all relevant respects to them.

There are twelve officers in the record who had falsified respondent's Form SMI 15, as petitioner did. Of those twelve, all but two received suspensions comparable to or more severe than petitioner's.

4. Petitioner states in a conclusory fashion that several of those officers had committed more serious offenses than he had. Although it is clear that these officers committed *different* offenses than petitioner, it is not evident to us that they were necessarily "worse." We see no basis for this Court to substitute our judgment for that of respondent on that issue. *See generally Com. of Pa. ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55, 82 L.Ed. 43, 46 (1937) ("Save as limited by constitutional provisions safeguarding individual rights. . . [t]he comparative gravity of criminal offenses and whether their consequences are more or less injurious are matters for [the State's] determination." (citations omitted)). Respondent's use of discretion in deciding which offenses were worse is not an equal protection violation. *See State v. Jenkins*, 292 N.C. 179, 191, 232 S.E.2d 648, 655 (1977) ("The use of this discretionary [sentencing] power by the trial judge is not a denial of equal protection of the laws." (citations omitted)); *see also Howard v. Fleming*, 191 U.S. 126, 135-36, 48 L.Ed. 121, 124 (1903) (rejecting the claim that leniency to one of three conspirators was an equal protection violation).

KRUEGER v. N.C. CRIMINAL JUSTICE EDUC. & TRAINING STANDARDS COMM'N

[230 N.C. App. 293 (2013)]

Two officers who had falsified Form SMI 15 received official written reprimands. In both cases, the officers had been misinformed by a superior officer about what was required of them. Petitioner had no such mitigating excuse. It is reasonable for respondent to treat more senior or supervisory officers who violate its training regulations differently than more novice officers who had been misinformed about what was expected of them.

Petitioner was not alike in “all relevant respects” to the officers who received reprimands or warnings instead of a suspension for other violations. Additionally, there was a rational relation between respondent’s decision to distinguish between petitioner and other officers who had falsified Form SMI 15, but received lesser sanctions, and the government’s substantial interest in preserving the credibility of law enforcement certifications. Accordingly, we hold that respondent did not violate petitioner’s right to equal protection by suspending his law enforcement certification for 180 days. *See Clayton*, 170 N.C. App. at 457, 613 S.E.2d at 272; *Yan-Min Wang*, ___ N.C. App. at ___, 716 S.E.2d at 658.

III. Conclusion

For the foregoing reasons, we hold that respondent’s decision to suspend petitioner’s law enforcement certification for 180 days did not violate petitioner’s constitutional rights. We therefore affirm the trial court’s order in all respects.

AFFIRMED.

Judges CALABRIA and HUNTER, JR., Robert N. concur.

LIPINSKI v. TOWN OF SUMMERFIELD

[230 N.C. App. 305 (2013)]

IN RE RICHARD LIPINSKI, PETITIONER

v.

TOWN OF SUMMERFIELD, RESPONDENT

No. COA13-468

Filed 5 November 2013

1. Constitutional Law—due process—zoning violation—notice of hearing

Petitioner's due process right was not violated by a board of adjustment decision concerning a fence where petitioner had a property interest in his fence and was given notice and an opportunity to be heard. Petitioner was sent and received written notice of his ordinance violation, met with the town's code administrator and the town attorney before the hearing to clarify the scope of the hearing, was present for the hearing and was allowed to ask the code administrator questions, and was allowed to testify.

2. Zoning—fences—attachment of tarps—structural composition

A zoning board of adjustment erred in its interpretation of a fence ordinance where petitioner attached tarps to a chain link fence. The board's interpretation of the ordinance superimposed a limitation that was not found in the ordinance: that attaching things to a fence changes its structural composition. The tarps that petitioner attached were a nonstructural feature and petitioner's fence, with tarps attached to it, was constructed of a permitted material, chain-link, and complied with the ordinance.

Appeal by petitioner from order entered 11 December 2012 by Judge Edgar B. Gregory in Guilford County Superior Court. Heard in the Court of Appeals 23 September 2013.

Richard I. Shope, Attorney at Law, P.A., by Richard I. Shope and Adrienne F. Edmonds, for petitioner-appellant.

Frazier, Hill & Fury, RLLP, by William L. Hill and James D. Secor III, for respondent-appellee.

MARTIN, Chief Judge.

Petitioner, Richard Lipinski, sought judicial review of the Town of Summerfield's Board of Adjustment ("Board") decision affirming a Notice

LIPINSKI v. TOWN OF SUMMERFIELD

[230 N.C. App. 305 (2013)]

of Violation issued by respondent Town's Code Enforcement Officer. The superior court issued its writ of certiorari to review the decision. After a hearing, the superior court issued its order, finding extensive facts, and concluding that the Board's decision complied with substantive and procedural due process requirements, was supported by substantial evidence in the whole record, was within the Board's statutory authority, was a proper interpretation of the Town's Development Ordinance, and was neither arbitrary and capricious nor affected by error of law. Accordingly, the superior court dismissed petitioner's appeal.

The factual background appearing from the record is as follows: The Town's Development Ordinance contains the following provisions applicable to the issues before us:

Section 6-5.1 Applicability

This Section regulates all fences unless otherwise provided in this Ordinance. Fences are permitted in required setbacks according to Section 4-6.3 (Encroachments into Required Setbacks), provided the requirements of this Section are met.

Section 6-5.2 Permitted Fence Types

The following fence types are permitted in all zoning districts:

- A. Masonry or stone walls;
- B. Ornamental iron;
- C. Chain-link or woven wire; and
- D. Wood or similar material.

Section 6-5.3 Prohibited Fence Types

The following fence types are prohibited:

- A. Fences constructed primarily of barbed or razor wire, except for the purpose of enclosing livestock in agricultural zoning districts;
- B. Fences carrying electrical current, except for the purpose of enclosing livestock in agricultural zoning districts;
- C. *Fences constructed in whole or in part of readily flammable material such as paper, cloth or canvas;*

LIPINSKI v. TOWN OF SUMMERFIELD

[230 N.C. App. 305 (2013)]

- D. Fences topped with barbed wire or metal spikes in residential zoning districts, except those serving a public institution requiring a security fence for public safety purposes; and
- E. Fences constructed of concertina wire.

Town of Summerfield, N.C., Dev. Ordinance 6-5.1 to -5.3 (2010) (emphasis added).

In March 2011, petitioner erected a fence approximately five to six feet high and approximately 300 feet in length along his property line. The fence was constructed of woven wire affixed to vertical steel posts. Approximately six months later, petitioner attached red and blue plastic tarps to the fence. Over time, some of the tarps were blown off the fence by the wind; portions of others were ripped and torn. After a meeting between the Town's Interim Town Planner, Carrie Spencer, its Code Administrator, John Ganus, and petitioner, Mr. Ganus issued a Notice of Violation to petitioner on 7 February 2012. The notice of violation provided, in pertinent part:

This Warning Citation is issued for construction of a fence using materials of a prohibited type at the above described location. This is a violation of the Town of Summerfield Development Ordinance, Sections 6-5.1 and 6-5.3(C). The violations were observed or existed on December 20, 2011. You are hereby ordered to cease the above described violation by removal of the prohibited materials. A list of permitted fence types [is] provided in Section 6-5.2.

In response, petitioner submitted samples of the tarps to demonstrate that the material was not readily flammable so as to be prohibited by Section 6-5.3(C). Obtaining no relief, he gave written notice of appeal to the Town's Board of Adjustment. Prior to the Board's hearing of the matter, the Town withdrew that portion of the Notice of Violation based upon Section 6-5.3(C). After the hearing, the Board concluded that petitioner's act of "attaching" the tarps to the fence amounted to "construction of a fence using materials of a prohibited type," and affirmed the Notice of Violation.

The issues before the Court are whether the superior court erred (i) in concluding that the Board's proceedings did not violate petitioner's procedural due process rights, and (ii) in affirming the Board's decision upholding the Notice of Violation.

LIPINSKI v. TOWN OF SUMMERFIELD

[230 N.C. App. 305 (2013)]

The standard of review depends on the issues presented on appeal. *Mann Media, Inc. v. Randolph Cnty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002). When the issue is “(1) whether the agency’s decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the whole record test.” *Id.* (internal quotation marks omitted). “However, [i]f a petitioner contends the [b]oard’s decision was based on an error of law, *de novo* review is proper.” *Id.* (internal quotation marks omitted).

When a court is asked to review a board’s interpretation of an ordinance a court conducts a *de novo* review but also considers “the interpretation of the decision-making board, but is not bound by that interpretation, and may freely substitute its judgment as appropriate.” N.C. Gen. Stat. § 160A-393(k)(2) (2011).

[1] First, we address petitioner’s due process argument that he was not given adequate notice or a meaningful opportunity to be heard. We find this argument unconvincing.

The evaluation of a procedural due process claim requires a two part analysis. First, we must decide whether the State has interfered with a liberty or property interest. *In re W.B.M.*, 202 N.C. App. 606, 615, 690 S.E.2d 41, 48 (2010) (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 571, 33 L. Ed. 2d 548, 557 (1972)). Then, we must determine if the State used a constitutionally sufficient procedure to interfere with the liberty or property interest. *Id.* (citing *Hewitt v. Helms*, 459 U.S. 460, 472, 74 L. Ed. 2d 675, 688 (1983)).

Property interests “are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.” *Bd. of Regents*, 408 U.S. at 577, 33 L. Ed. 2d at 561. The Town of Summerfield’s Development Ordinance provides: “Fences are permitted in required setbacks according to Section 4-6.3 . . . provided the requirements of this Section are met.” Dev. Ordinance 6-5.1. This ordinance creates an entitlement because it secures the right of a person to have a fence. Therefore, petitioner has a property interest in his fence.

Next, we consider whether the procedure used by the Town of Summerfield was sufficient to protect petitioner’s interest. “The fundamental premise of procedural due process protection is notice and the opportunity to be heard.” *Peace v. Emp’t Sec. Comm’n of N.C.*, 349 N.C. 315, 322, 507 S.E.2d 272, 278 (1998) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 84 L. Ed. 2d 494, 503 (1985)). “Moreover,

LIPINSKI v. TOWN OF SUMMERFIELD

[230 N.C. App. 305 (2013)]

the opportunity to be heard must be ‘at a meaningful time and in a meaningful manner.’” *Id.* (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 14 L. Ed. 2d 62, 66 (1965)).

In this case, petitioner was sent and received written notice of his ordinance violation. Before the hearing, petitioner met with Mr. Ganus and the town attorney, Mr. Hill, to clarify the scope of the hearing. At that meeting, they agreed to focus the hearing on whether the tarps were part of the fence. Petitioner understood the scope of the hearing. At the hearing, he stated: “my understanding is that this is to be limited to what is a fence, what can a fence be constructed of, is, is the tarps part of the fence.” Therefore, petitioner had adequate notice of the purpose and scope of the hearing.

Petitioner was also given a meaningful opportunity to be heard. He was present for the hearing, understood the scope of the hearing, was allowed to ask Mr. Ganus questions, and was allowed to testify. Furthermore, petitioner, in an effort to show that the tarps were not part of the fence, testified that he attached tarps to the fence but that over time pieces of the tarps had blown away and he had not replaced them. Therefore, based on the evidence present in the record, petitioner’s procedural due process right was not violated because he was given notice and an opportunity to be heard.

[2] Next, we address petitioner’s contention that the Board erred in its interpretation of the ordinance. We find this argument meritorious.

To determine the meaning of the Town of Summerfield’s Development Ordinance, we start by considering the plain language of the ordinance. *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 574, 573 S.E.2d 118, 121 (2002). “ ‘Where the language of a[n ordinance] is clear and unambiguous, there is no room for judicial construction[,] and the courts must give [the ordinance] its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.’ ” *Id.* at 575, 573 S.E.2d at 121 (quoting *State v. Camp*, 286 N.C. 148, 152, 209 S.E.2d 754, 756 (1974)).

To determine the plain language meaning of the ordinance, we examine sections 6-5.1 through 6-5.7. The two sections relevant to our determination are sections 6-5.2 and 6-5.3.

After considering the language of these two sections, it is clear that section 6-5.3 provides a list of materials that may not be used in the construction of a fence based on the uniting theme of safety concerns. While section 6-5.2 clearly articulates the materials that may be used to

LIPINSKI v. TOWN OF SUMMERFIELD

[230 N.C. App. 305 (2013)]

construct a fence, neither section 6-5.2 nor 6-5.3 generally states that a person may not attach things to a fence constructed in accordance with section 6-5.2 and 6-5.3.

We acknowledge the Board's determination that the fence was constructed of unpermitted material because the tarps became part of the fence when they were attached. However, we find that interpretation of the ordinance superimposes a limitation that is not found in the ordinance: that attaching things to a fence changes its structural composition. Petitioner's chain-link fence stood for approximately six months before he attached the tarps to it. The act of attaching tarps to the fence did not change the structure of the fence because if the fence was truly constructed of tarps it likely would not be a fence at all but rather a screen made of tarps. The tarps that petitioner attached are a nonstructural feature. Therefore, we hold that petitioner's fence, with tarps attached to it, is constructed of a permitted material, chain-link, and complies with section 6-5.2.

As a result of our determination that the Board erred in interpreting the ordinance, we do not need to consider petitioner's arguments that the Board's decision was arbitrary and capricious, and was not supported by substantial evidence. The decision of the superior court affirming the decision of respondent Board of Adjustment is reversed.

Reversed.

Judges GEER and STROUD concur.

MATHIS v. DOWLING

[230 N.C. App. 311 (2013)]

DENISE MATHIS, PLAINTIFF

v.

PATSY DOWLING, INDIVIDUALLY AND IN HER REPRESENTATIVE CAPACITY AS EXECUTIVE
DIRECTOR OF MOUNTAIN PROJECTS, INC. ET AL., DEFENDANT

No. COA13-380

Filed 5 November 2013

1. Malicious Prosecution—institution of criminal proceedings—summary judgment

The trial court did not err in a malicious prosecution action that arose from a criminal investigation into missing funds by granting summary judgment for defendants on the issue of institution of criminal proceedings. While defendant Young made a written statement, there was no evidence that either she or the United Way defendants instituted or participated in the criminal proceeding.

2. Malicious Prosecution—probable cause—summary judgment

The trial court did not err in finding no genuine issue of material fact as to the element of probable cause in a malicious prosecution action that arose from an investigation into missing funds. There were reasonable grounds for suspicion in unpaid invoices and alleged 401(k) violations.

3. Malicious Prosecution—malice—summary judgment

In a malicious prosecution action arising from missing funds, the trial court correctly found that there was no genuine issue of material fact as to whether defendants pursued the criminal matter due to ill-will, spite, or a desire for revenge, and summary judgment was correctly granted for defendants.

Appeal by plaintiff from order entered 16 November 2012 by Judge Alan Z. Thornburg in Haywood County Superior Court. Heard in the Court of Appeals 11 September 2013.

McLean Law Firm, P.A., by Russell L. McLean, III, for plaintiff-appellant.

CONSTANGY, BROOKS & SMITH, LLP, by Jonathan W. Yarbrough, for appellee Victoria Young.

PATRICK HARPER & DIXON, LLP, by David W. Hood and Susan W. Matthews, for appellees United Way of Haywood County, Inc., Celesa Willett, and Michael Clinton.

MATHIS v. DOWLING

[230 N.C. App. 311 (2013)]

ELMORE, Judge.

The seminal issue before this Court is whether the trial court erred in granting the United Way of Haywood County, Inc., Celesa Willett, Michael Clinton (collectively the United Way defendants), and Victoria Young's motions for summary judgment. The other named defendants have since settled their involvement in this matter. After careful consideration, we affirm.

I. Background

In September 2004, western North Carolina was struck by two hurricanes that caused severe flooding in local counties. Several non-profit and governmental organizations provided flood relief, including the Haywood County Council on Aging, Inc. (the Council). At that time, plaintiff Denise Mathis (Mathis) acted as the CEO and Executive Director for the Council, and Victoria Young (Young) served as the Program Coordinator. Mathis volunteered the Council to host flood relief efforts for other non-profits in Haywood County.

Additionally, a "Governor's Disaster Relief Fund" was implemented, whereby those counties needing assistance were directed to form "Unmet Needs Committees" (UNC) for the purpose of allocating relief funds. The Haywood County UNC acted as a clearinghouse for the disbursement of monies from the Governor's relief fund, among others, including the United Way of Haywood County (the United Way). Celesa Willett (Willett), Executive Director for the United Way, and Michael Clinton (Clinton), Disaster Relief Coordinator, both volunteered on the UNC. Young is the only individual defendant in this action who did not volunteer on the UNC.

On 27 October 2004, the Council applied for a \$91,000 flood relief grant from the United Way for building materials and household furnishings; it was granted \$65,000. A condition of the grant required that the funds be held in a separate account and be distributed solely for flood-relief efforts. Accordingly, Mathis established a flood relief account, on which she was a signatory, to hold the grant and funds contributed by other charitable organizations. The funds were not to be used to pay the Council's overhead expenses. The UNC was charged with authorizing the release of funds from the account.

In early 2006, the UNC learned that certain flood relief invoices had not been paid. Concern over a possible misuse of funds prompted the UNC to request that the Council turn over the remaining funds and bank statements from the flood relief account. In a meeting with

MATHIS v. DOWLING

[230 N.C. App. 311 (2013)]

UNC members on 10 February 2006, Mathis was unwilling to answer questions or provide documentation related to the flood relief account. That same day, the Board of Directors for the Council voted to terminate her employment.

Constance Daly (Daly), the Chairman of the Council on Aging's Board of Directors, informed Willett that funds were indeed missing and voluntarily provided the UNC with bank statements for the account. Willett determined that Mathis had authorized the transfer of more than \$100,000 from the flood relief account to the Council's general account to cover operating expenses without UNC approval. While Mathis admits to making the transfers, she contends that the transfers were not subject to UNC approval as they were not part of the one-time \$65,000 grant. The United Way defendants argue that their approval was necessary, regardless of whether the funds originated from the United Way grant. Ultimately, the UNC requested that the United Way's Board of Directors turn the investigation of missing funds over to proper legal authorities. Willett, in her capacity as Executive Director for the United Way, provided prosecuting authorities with the bank statements and other documentation evidencing the alleged embezzlement. Detective Tyler Trantham of the Waynesville Police Department began an investigation.

Around that time, Young resigned from her position as Program Coordinator with the Council after learning that Mathis was not depositing the employees' 401(k) contributions into their accounts. Detective Trantham contacted Young as part of his investigation, and, on 22 February 2006, Young made a written statement addressing, *inter alia*, the alleged 401(k) contribution issue.

Eventually Mathis was indicted on fourteen counts of embezzlement of the funds from the flood relief account. However, prior to trial the Haywood County District Attorney's Office dismissed the charges. On 5 November 2010, Mathis filed suit for malicious prosecution against the United Way of Haywood County, Inc., Willett and Clinton, both individually and in their representative capacities for the United Way, and Young, (collectively defendants). On 16 November 2012, the trial court granted defendants' motions for summary judgment. Mathis timely appealed on 7 December 2012.

II. Malicious Prosecution

On appeal, Mathis argues that the trial court erred in granting defendants' motions for summary judgment on her claim for malicious prosecution. We disagree.

MATHIS v. DOWLING

[230 N.C. App. 311 (2013)]

“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)) (citations and quotation omitted). “When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party.” *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citation omitted). “If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmovant to present specific facts which establish the presence of a genuine factual dispute for trial. Nevertheless, [i]f there is any question as to the weight of evidence summary judgment should be denied.” *Jones*, 362 N.C. at 573-74, 669 S.E.2d at 576 (citations and quotations omitted) (alteration in original).

To recover for malicious prosecution, the plaintiff bears the burden of proving that the defendant: “(1) instituted, procured or participated in the criminal proceeding against plaintiff; (2) without probable cause; (3) with malice; and (4) the prior proceeding terminated in favor of plaintiff.” *Williams v. Kuppenheimer Mfg. Co., Inc.*, 105 N.C. App. 198, 200, 412 S.E.2d 897, 899 (1992) Here, it is undisputed that the criminal prosecution ended in Mathis’ favor – the criminal charges against her were dropped. Accordingly, we need only address the first three elements discussed above.

A. Institution of Criminal Proceedings

[1] Under the first element, Mathis contends that defendants instituted, procured or participated in the prior criminal proceeding because they “did not provide honest assistance, they in fact provided false and misleading information” to law enforcement. She relies on *Kuppenheimer Mfg. Co., supra*, where this Court concluded that a jury could find that the defendant instituted the criminal proceeding when he (1) brought all the documents used in the prosecution to the police, (2) these documents included suspicious alterations, and (3) law enforcement officers conducted only a minimal independent investigation. However, *Kuppenheimer* is distinguishable from the case *sub judice*, particularly because law enforcement conducted a thorough independent investigation.

Our courts have consistently held that the “act of giving honest assistance and information to prosecuting authorities does not render one liable for malicious prosecution.” *Id.* at 201, 412 S.E.2d at 900; *see*

MATHIS v. DOWLING

[230 N.C. App. 311 (2013)]

also *Shillington v. K-Mart Corp.*, 102 N.C. App. 187, 196, 402 S.E.2d 155, 160 (1991) (holding no “initiation” where defendants gave information to police but defendants did not press charges or direct police to arrest the plaintiff).

As the Executive Director for the United Way, Willett had a fiduciary obligation to investigate a possible misuse of funds. As such she met with prosecuting authorities, but only (1) at the request of the UNC, (2) after Daly told her that funds were missing from the account, and (3) after personally discerning that Mathis made unauthorized transfers. Thereafter, Detective Trantham conducted an independent and thorough investigation. He testified to independently reviewing the bank records before concluding on his own volition that “there [were] reasonable grounds to believe that a violation of criminal law had happened.” When asked whether there was “any individual out there pushing you to investigate Mrs. Mathis?,” he responded, “No, no. I don’t believe there was anybody pushing for this to go forward or pushing me in that direction.”

In his Investigation Report, Detective Trantham indicated that he initially became aware of the 401(k) issue after Denise Teague said that her contributions for March through July of 2005 had not been deposited into her 401(k) account. Detective Trantham obtained consent forms to access financial information from sixteen employees who participated in the 401(k) program. He also met with Edward Jones’ employee Jack Bishop, who managed the 401(k) plan held by the Council. Bishop alleged that Mathis was aware of the problem, and, when confronted, she said that the 401(k) contributions had not been made “because there was a cash flow problem at the [Council].” While Young made a written statement, there is no evidence that either she or the United Way defendants instituted or participated in the criminal proceeding. They rendered honest assistance to law enforcement to help aid in the separate and thorough investigation.

B. Probable Cause

[2] Probable cause exists where there is a reasonable ground for suspicion, supported by facts and circumstances, sufficient to induce a reasonable man to commence a prosecution. *Kuppenheimer*, 105 N.C. App. at 202, 412 S.E.2d at 900. “It is not essential that the person bringing the action knows the facts necessary to insure a conviction, but that there are known to him sufficient grounds to suspect that the person he charges was guilty of the offense.” *Gupton v. Son-Lan Dev. Co.*, 205 N.C. App. 133, 138, 695 S.E.2d 763, 768 (2010) (citation omitted).

MATHIS v. DOWLING

[230 N.C. App. 311 (2013)]

The record shows that members of the UNC became concerned as to the status of the flood relief account when certain vendors reported that invoices had not been paid. On 10 February 2006, Mathis refused the UNC access to the flood relief account's bank statements, and she was accordingly terminated that same day. On 13 February 2006, Daly wrote to Willett: "I acknowledge that money is owed, and will do my best to determine exactly how this money was spent, on what, and how much we owe you. There is not money in the account to return to you at the present time." After examining bank statements *provided by the Council*, Willett found that Mathis authorized the transfer of approximately \$100,000 of flood relief funds without UNC approval. Given the facts and circumstances, the United Way defendants had reasonable grounds for suspicion. Furthermore, in light of the facts and circumstances evidencing the alleged 401(k) violation, we conclude that Young also had reasonable grounds for suspicion. The trial court did not err in finding no genuine issue of material fact as to the element of probable cause for defendants.

C. Malice

[3] It is well settled that malice may be inferred from want of probable cause when a plaintiff is seeking compensatory damages. *Kuppenheimer*, 105 N.C. App. at 203, 412 S.E.2d at 901. As discussed above, defendants had sufficient probable cause so as to disallow an inference of malice. However, Mathis seeks to recover punitive damages from defendants. As such, she must "offer evidence tending to prove that the wrongful action of instituting the prosecution was done for actual malice in the sense of personal ill-will, or under circumstances of insult, rudeness or oppression, or in a manner which showed the reckless and wanton disregard of the plaintiff's right." *Jones v. Gwynne*, 312 N.C. 393, 405, 323 S.E.2d 9, 16 (1984) (quotations and citations omitted).

As to the United Way defendants, Mathis contends that Willett harbored ill-will towards her because she was offended by Mathis' overuse of the words "stinkin' thinkin'." Mathis also contends that both Willett and Clinton acted with "reckless disregard" in providing false and misleading statements to authorities. As to Young, Mathis contends that "it is clear from her nine page typed statement that [Young] possessed ill-will, spite, and a grudge" against her because "Young states on numerous occasions how embarrassed, angry, lied to, uncomfortable with, and mad at [Mathis] she was over a period of six months."

We find Mathis' argument as to the issue of malice unpersuasive, at best. First, Mathis does not argue that the United Way, Inc. acted with

ROCKFORD-COHEN GRP., LLC v. N.C. DEP'T OF INS.

[230 N.C. App. 317 (2013)]

malice. Second, Mathis has not referenced the misleading statements allegedly made by Willett and/or Clinton, and there is no evidence in the record to support her contention. Third, Young became involved in the investigation at Detective Trantham's request; she did not pursue the criminal investigation. While Young may not care for Mathis, her written statement is insufficient evidence of malice. The trial court was correct in finding that there is no genuine issue of material fact as to whether defendants pursued the criminal matter due to ill-will, spite, or a desire for revenge.

III. Conclusion

Mathis failed to prove three of the four essential elements of malicious prosecution: initiation of the prior proceeding, probable cause, and malice. Accordingly, the trial court did not err in granting defendants' motions for summary judgment.

Affirmed.

Judges CALABRIA and STEPHENS concur.

ROCKFORD-COHEN GROUP, LLC AND LYNETTE THOMPSON, PLAINTIFFS-APPELLEES
v.
NORTH CAROLINA DEPARTMENT OF INSURANCE, COMMISSIONER OF
INSURANCE WAYNE GOODWIN, NORTH CAROLINA BAIL AGENTS ASSOCIATION,
A NORTH CAROLINA NONPROFIT CORPORATION, DEFENDANTS-APPELLANTS

No. COA13-124

Filed 5 November 2013

1. Appeal and Error—interlocutory orders and appeals—preliminary injunction—substantial right

Plaintiffs' motion to dismiss defendant North Carolina Bail Agents Association's appeal from the trial court's order granting plaintiffs a preliminary injunction was denied. Although the appeal was interlocutory, the preliminary injunction required defendant to "give up" the right to do business as the exclusive provider of creditable bail bondsmen training and to receive remuneration for providing such education and thus affected a substantial right.

ROCKFORD-COHEN GRP., LLC v. N.C. DEP'T OF INS.

[230 N.C. App. 317 (2013)]

2. Constitutional Law—North Carolina—prohibition against monopolies—preliminary injunction

The trial court did not err by granting plaintiffs' motion for preliminary injunction declaring that 2012 N.C. Sess. Law, ch. 183, "An Act to Provide for the Pre-Licensing and Continuing Education of Bail Bondsmen and Runners[,]" violated Article I, Section 34 of the North Carolina Constitution. By assigning creditable bail bondsmen training solely to one group (defendant), where previously anyone could apply to the Commissioner of Insurance to provide such training, the law violated the prohibition against impermissible monopolies.

Appeal by Defendant North Carolina Bail Agents Association from order entered 1 October 2012 by Judge Donald W. Stephens in Superior Court, Wake County. Heard in the Court of Appeals 13 August 2013.

Hartzell & Whiteman, L.L.P., by J. Jerome Hartzell, for Plaintiffs-Appellees.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., by Phillip J. Strach; and Steven A. McCloskey, for Defendant-Appellant North Carolina Bail Agents Association.

McGEE, Judge.

Rockford-Cohen Group, LLC and Lynette Thompson ("Plaintiffs") filed a motion for preliminary injunction against the North Carolina Department of Insurance, Commissioner of Insurance Wayne Goodwin, and North Carolina Bail Agents Association. Plaintiffs sought a declaration that the 2012 N.C. Sess. Law, ch. 183, "An Act to Provide for the Pre-Licensing and Continuing Education of Bail Bondsmen and Runners[,]" (hereinafter "Act") violated Article I, Section 34 of the North Carolina Constitution on perpetuities and monopolies. The trial court entered an order on 1 October 2012, granting Plaintiffs' motion for preliminary injunction. Defendant North Carolina Bail Agents Association (hereinafter "Defendant") filed notice of appeal. Defendants North Carolina Department of Insurance and Commissioner Wayne Goodwin did not appeal the order.

I. Motion to Dismiss the Appeal

[1] Plaintiffs moved to dismiss Defendant's appeal as interlocutory. It is well-established that a preliminary injunction is an interlocutory order. *Revelle v. Chamblee*, 168 N.C. App. 227, 229, 606 S.E.2d 712, 713-14 (2005).

ROCKFORD-COHEN GRP., LLC v. N.C. DEP'T OF INS.

[230 N.C. App. 317 (2013)]

There is no immediate right of appeal from an interlocutory order unless the order affects a substantial right. N.C. Gen. Stat. §§ 1-277, 7A-27(d)(1) (2011).

To determine whether immediate appeal is warranted, this Court uses a two-part test, “with the first inquiry being whether a substantial right is affected by the challenged order and the second being whether this substantial right might be lost, prejudiced, or inadequately preserved in the absence of an immediate appeal.” *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 78, 711 S.E.2d 185, 189 (2011).

The substantial right test “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.” *Action Cmty. Television Broadcasting Network, Inc. v. Livesay*, 151 N.C. App. 125, 129, 564 S.E.2d 566, 569 (2002).

Defendant contends that a substantial right was affected because the injunction “seeks to prevent [Defendant] from performing the duty that has been assigned to it by statute.” However, as Plaintiffs note, the injunction does not command Defendant to perform or refrain from performing any action. Rather, the only action the injunction requires is that the North Carolina Department of Insurance “shall not in any way discriminate against any approved provider.”

In its brief, Defendant compares itself to the North Carolina State Bar for its responsibility to protect the public. When an agent of the State that is charged with enforcing statutes chooses to appeal rulings limiting the enforcement of those statutes, the right to enforce the statute is substantial, and the rulings are immediately appealable. See *Johnston v. State*, ___ N.C. App. ___, 735 S.E.2d 859, 864 (2012), *disc. review allowed*, ___ N.C. ___, 738 S.E.2d 360 (2013); *Gilbert v. N.C. State Bar*, 363 N.C. 70, 76-77, 678 S.E.2d 602, 606 (2009).

Defendant, however, is not a state agency or an agent of the State that is charged with enforcing the statutes regarding bail bondsmen. Rather, the Commissioner of Insurance has the “full power and authority to administer the provisions” of Article 71, “Bail Bondsmen and Runners.” N.C. Gen. Stat. § 58-71-5 (2011). The Act affected provisions of Article 71 of the General Statutes. As previously noted, the Commissioner of Insurance chose not to appeal the order. This argument is therefore unavailing.

Defendant further contends that the right to do business and collect remuneration as the exclusive provider of creditable bail bondsmen training constitutes a substantial right. We agree.

ROCKFORD-COHEN GRP., LLC v. N.C. DEP'T OF INS.

[230 N.C. App. 317 (2013)]

In *American Motors Sales Corp. v. Peters*, 58 N.C. App. 684, 294 S.E.2d 764 (1982), *rev'd in part on other grounds*, 311 N.C. 311, 317 S.E.2d 351 (1984), this Court held that the denial of a stay of the Commissioner of Motor Vehicles' order revoking a franchise that American Motors had given "421 Motor Sales" was interlocutory. This Court held that the order denying a stay "required [the appellants] to give up a right pending a hearing." *American Motors*, 58 N.C. App. at 686, 294 S.E.2d at 766. Although this Court does not state so explicitly, the context of the opinion in *American Motors* indicates the right at issue was the right to do business pursuant to the franchise granted by American Motors. This Court held that the right was substantial, and the appeal was heard.

In the present case, the trial court's grant of Plaintiffs' motion for a preliminary injunction required Defendant to "give up" the right to do business as the exclusive provider of creditable bail bondsmen training and to receive remuneration for providing such education. Pursuant to *American Motors*, we review the merits of Defendant's appeal.

II. Merits of the Appeal

[2] The issue Defendant asks this Court to review is "whether the General Assembly's policy decision to assign creditable bail bondsmen training to [Defendant] . . . constitutes an impermissible monopoly in violation of the North Carolina Constitution." The precise question of whether the decision to assign creditable bail bondsmen training to one particular group, where previously anyone could apply to the Commissioner of Insurance to provide such training, appears to be one of first impression.

The Courts of this State recognize "a presumption in favor of the constitutionality of a statute." *Gardner v. Reidsville*, 269 N.C. 581, 594, 153 S.E.2d 139, 150 (1967). "It is well settled in this State that the Courts have the power, and it is their duty in proper cases, to declare an act of the General Assembly unconstitutional — but it must be plainly and clearly the case." *Id.* "If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people." *Id.*

The Act at issue in this case states:

- (a) In order to be eligible to take the examination required to be licensed as a runner or bail bondsman under G.S. 58-71-70, each person shall complete at least 12 hours of education as provided by the North Carolina Bail

ROCKFORD-COHEN GRP., LLC v. N.C. DEP'T OF INS.

[230 N.C. App. 317 (2013)]

Agents Association in subjects pertinent to the duties and responsibilities of a runner or bail bondsman, including all laws and regulations related to being a runner or bail bondsman.

(b) Each year every licensee shall complete at least three hours of continuing education as provided by the North Carolina Bail Agents Association in subjects related to the duties and responsibilities of a runner or bail bondsman before renewal of the license.

2012 N.C. Sess. Laws, ch. 183 § 1. The underlined portion is the newly enacted language.

The North Carolina Constitution states: “Perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed.” N.C. Const. Art I, § 34. Although the constitutionality of a statute assigning creditable bail bondsmen training exclusively to one group, where previously anyone could apply, has not been addressed by our appellate courts, there are several instructive cases involving Article I, Section 34 of our Constitution.

In *American Motors Sales Corp.*, 311 N.C. 311, 317 S.E.2d 351 (1984), our Supreme Court reviewed the constitutionality of legislation affecting vehicle sales. Our Supreme Court described a monopoly as resulting “from ownership or control of so large a portion of the market for a certain commodity that competition is stifled, freedom of commerce is restricted, and control of prices ensues.” *Id.* at 315, 317 S.E.2d at 355. However, the Act in the present case does not affect a private market, like vehicle sales.

Rather, the Act affects the market for creditable bail bondsman training that the General Assembly created when it allowed groups and individuals to apply to the Commissioner of Insurance to provide such training. See “An Act to Adopt Risk-Based Capital Requirements for Life and Health Insurance Companies, To Make Corrections and Technical Amendments in the Insurance Laws, And To Amend the Scholarship Provisions of the Firemen’s Relief Fund in the Insurance Code”, 1994 N.C. Sess. Laws, ch. 678 § 32. Thus, we must look beyond *American Motors* for guidance.

“Monopoly, as originally defined, consisted in a grant by the sovereign of an exclusive privilege to do something which had theretofore been a matter of common right.” *State v. Harris*, 216 N.C. 746, 761 6 S.E.2d 854, 864 (1940).

ROCKFORD-COHEN GRP., LLC v. N.C. DEP'T OF INS.

[230 N.C. App. 317 (2013)]

The exclusion of others from such common right is still considered a prominent feature of monopoly, and the consequent loss to those excluded of opportunity to earn a livelihood for themselves and their dependents . . . has been considered the prime reason for the public policy then adopted into the Constitution.

Id.

Our Supreme Court discussed the “common right” analysis in *Thrift v. Elizabeth City*, 122 N.C. 31, 30 S.E. 349 (1898). At issue was a contract between Elizabeth City and an individual “to construct and maintain waterworks” for a term of thirty years. *Id.* at 32-33, 30 S.E. at 350. The Court did not wish “to be understood as conceding the power of the Legislature itself to grant such exclusive privileges.” *Id.* at 37, 30 S.E. at 351. However, the Court acknowledged there were “decisions to the contrary in other jurisdictions, but in all of them, where the power is admitted, it is strictly construed.” *Id.* The Court observed that “the error has apparently arisen from adopting the substance of *Lord Coke’s* definition of a monopoly, as ‘an exclusive right granted to a few of something, which was before of common right.’” *Id.*

Our theory of government, proceeding directly from the people, and resting upon their will, is essentially different, at least in principle, from that of England; and common law maxims and definitions, framed while the judges were still under the spell of the Feudal System, must be construed by us in the light of changed conditions.

Id. “Under our system of government, all rights and privileges are primarily of common right, unless their restraint becomes necessary for the public good[.]” *Id.*

Defendant contends that the “opportunity to provide State-mandated training to bail bondsmen is not a common right” because the General Assembly created creditable bail bondsmen training. However, Defendant misconstrues the common right at issue. The General Assembly created the right to apply to provide creditable bail bondsmen training in the previous version of this statute, 1994 N.C. Sess. Laws, ch. 678 § 32. Then, the General Assembly amended the statute to exclude all others from being considered by the Commissioner of Insurance to provide creditable bail bondsmen training. 2012 N.C. Sess. Laws, ch. 183 § 1.

Thus, the common right that has been lost is the right to be considered by the Commissioner of Insurance for approval to provide creditable

ROCKFORD-COHEN GRP., LLC v. N.C. DEP'T OF INS.

[230 N.C. App. 317 (2013)]

bail bondsmen training. By excluding all others, the General Assembly deprived all others of the opportunity “to earn a livelihood for themselves and their dependents[.]” *Harris*, 216 N.C. at 761, 6 S.E.2d at 864.

Another instructive case is *Madison Cablevision v. City of Morganton*, 325 N.C. 634, 386 S.E.2d 200 (1989). Madison Cablevision argued that the City’s refusal to grant cable franchises to private applicants was unconstitutional. *Id.* at 653, 386 S.E.2d at 211. Our Supreme Court disagreed. The City did not foreclose “for any period the possibility that franchises might be granted to other applicants.” *Id.* at 654, 386 S.E.2d at 211. “The City expressly left open the possibility that other cable companies could apply for and obtain a franchise in the future and committed itself to review the over-build situation five years after it issued its decision to operate a municipal system.” *Id.*

By contrast, in the present case, the General Assembly granted an exclusive right to Defendant to provide creditable bail bondsmen training, thereby foreclosing the possibility that others could provide this training. Furthermore, unlike *Madison Cablevision*, the General Assembly did not expressly leave open the possibility that others might be approved in the future to provide creditable bail bondsman training.

Defendant contends that, “if the General Assembly has the greater authority to license bondsmen and create for them a training requirement, then it has the lesser power to determine who will conduct that training[.]” citing *Watkins v. Iseley*, 209 N.C. 256, 183 S.E. 365 (1936). Our Supreme Court in *Watkins* analyzed the constitutionality of “ordinances requiring operators of taxicabs or other motor vehicles for hire in the city of Raleigh to secure liability insurance[.]” *Id.* at 257, 183 S.E. at 365. The challenge was that the ordinances discriminated “against those engaged in operating motor vehicles for hire in favor of persons operating such vehicles for their private ends[.]” *Id.*

Watkins does not cite, rely upon, or analyze the prohibition on monopolies and perpetuities. The ordinances in *Watkins* were not alleged to violate the prohibition on monopolies and perpetuities. *Watkins* neither supports nor undermines a conclusion of the Act’s constitutionality under N.C. Const. Art I, § 34.

In considering the constitutionality of the Act, this Court is mindful of the “common right” analysis that our Supreme Court discussed in *Thrift*. When the General Assembly previously allowed all to apply to the Commissioner of Insurance, the right to be considered to provide creditable bail bondsmen training was in the manner of a common right. Subsequently, the General Assembly granted an exclusive right to

STATE v. BRYAN

[230 N.C. App. 324 (2013)]

Defendant to conduct creditable bail bondsmen training. In so doing, the General Assembly granted to Defendant an exclusive right which was previously a common right.

In accordance with the power and duty of the courts described in *Gardner*, this Court concludes that the Act making Defendant the exclusive provider of creditable bail bondsmen training violates Article I, Section 34 of the North Carolina Constitution. The trial court's order is affirmed. Because of our holding as to this issue, we do not reach Defendant's remaining arguments.

Affirmed.

Judges STEELMAN and ERVIN concur.

STATE OF NORTH CAROLINA

v.

STEVEN GLENN BRYAN, DEFENDANT

No. COA13-520

Filed 5 November 2013

Appeal and Error—appellate jurisdiction—appeal from district court dismissal

An appeal by the State was not authorized by statute, and the Court of Appeals had no jurisdiction over the appeal, where defendant made a pretrial motion to dismiss a driving while impaired charge in district court; after a remand for further findings, the superior court affirmed the district court's preliminary order and remanded it to the district court for dismissal; and the State again appealed to the superior court. Since this appeal to superior court was from a final order of the district court, N.C.G.S. § 15A-1432 was the controlling statute and the State could then appeal only by following the procedures stated in N.C.G.S. § 15A-1432(e) and including a certificate that the appeal was not for purposes of delay. While the State sought to file a belated certificate by petitioning for a writ of *certiorari*, the Court of Appeals saw no reason to nullify the requirements of N.C.G.S. § 15A-1432(e) by allowing the petition.

Appeal by the State from the order entered 24 September 2012 by Judge John O. Craig in Forsyth County Superior Court. Heard in the Court of Appeals 9 October 2013.

STATE v. BRYAN

[230 N.C. App. 324 (2013)]

Attorney General Roy Cooper, by Assistant Attorney General Joseph L. Hyde, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Kathleen M. Joyce, for defendant-appellee.

BRYANT, Judge.

Where the State fails to file a certificate as required by N.C. Gen. Stat. § 15A-1432(e) (2011) for appeal from a final judgment of the district court, this Court lacks jurisdiction over the appeal and must dismiss.

On 26 June 2010, defendant was stopped and arrested for misdemeanor driving with license revoked and driving while impaired (“DWI”). The vehicle he was driving was impounded. Over the course of the next fourteen months, defendant’s case was set for trial, then continued, on eight occasions. Defendant filed two demands for a speedy trial on 6 July 2010 and 11 August 2011.

On 31 August 2011, the district court issued a written preliminary indication of intention to dismiss the DWI charges for a speedy trial violation. The State appealed to superior court on 2 September 2011, pursuant to N.C. Gen. Stat. § 20-38.7(a) and N.C. Gen. Stat. § 15A-1432(a)(1). On 12 October 2011, the superior court remanded the matter to district court for additional findings. Thereafter, defendant filed two requests for a hearing date on 17 October 2011 and 30 January 2012 and made two demands for a speedy trial on 3 November 2011 and 5 December 2011.

On 15 February 2012, the district court entered additional findings of fact and conclusions of law, determining that a speedy trial violation had occurred and indicating its intent to dismiss the DWI charge pending against defendant. On 16 February 2012, the State appealed to superior court, pursuant to N.C.G.S. § 20-38.7(a) and N.C.G.S. § 15A-1432(a)(1). On 20 February 2012 defendant made a request for a hearing date and a demand for a speedy trial. A second demand for a speedy trial was made on 26 March 2012. The superior court heard the State’s appeal on 2-3 April 2012. On 13 June 2012, the superior court entered a written order affirming the district court’s preliminary indication and remanded the case to district court for a final dismissal of the charges.¹

On 20 July 2012, the district court entered a final order dismissing the charges against defendant. The State appealed the dismissal

1. The superior court’s written order was made pursuant to N.C.G.S. § 20-38.7(a) and N.C.G.S. § 15A-1432(e).

STATE v. BRYAN

[230 N.C. App. 324 (2013)]

to superior court, pursuant to N.C.G.S. § 15A-1432(a)(1). After a hearing on 6 September 2012, the superior court issued a written order on 24 September 2012 upholding the district court's dismissal of the charges based on a speedy trial violation. On 24 September 2012, the State filed a notice of appeal to this Court, pursuant to N.C. Gen. Stat. § 15A-1445(a)(1).

Defendant filed a motion to dismiss the State's appeal contemporaneously with his brief to this Court on 8 July 2013. On 16 July 2013, the State filed a response to defendant's motion to dismiss and a petition for writ of certiorari.

Defendant's motion to dismiss challenges the jurisdiction of this Court to hear the State's appeal based on the State's failure to fulfill the statutory requirements for a proper appeal. In addressing defendant's motion to dismiss, the State argues that its appeal from the final judgment of the district court was properly filed pursuant to N.C.G.S. § 15A-1445(a)(1) rather than N.C.G.S. § 15A-1432(e). We disagree.

Our Court holds that "the State cannot appeal proceedings from a judgment in favor of the defendant in a criminal case in the absence of a statute clearly conferring that right." *State v. Dobson*, 51 N.C. App. 445, 446, 276 S.E.2d 480, 481 (1981). Where a statute must be interpreted, "[t]he intent of the Legislature controls the interpretation of a statute." *State v. Davis*, 364 N.C. 297, 302, 698 S.E.2d 65, 68 (2010) (citation omitted).

North Carolina General Statutes, section 15A-1432, "Appeals by State from district court judge," sets forth the procedures the State must follow when it wishes to appeal from a district court to a superior court. Section 15A-1432(e) states that

[i]f the superior court finds that the order of the district court was correct, it must enter an order affirming the judgment of the district court. *The State may appeal the order of the superior court to the appellate division upon certificate by the district attorney to the judge who affirmed the judgment that the appeal is not taken for the purpose of delay.*

N.C.G.S. § 15A-1432(e) (2011) (emphasis added). General Statutes, section 15A-1445(a)(1), "Appeal by the State," provides that "the State may appeal from the superior court to the appellate division . . . [w]hen there has been a decision or judgment dismissing criminal charges as to one or more counts." N.C.G.S. § 15A-1445(a)(1) (2011).

STATE v. BRYAN

[230 N.C. App. 324 (2013)]

The State contends that N.C.G.S. § 15A-1445(a)(1), rather than N.C.G.S. § 15A-1432(e), controls its appeal because the State is appealing from a judgment of the superior court affirming the district court's dismissal. We note that N.C.G.S. § 15A-1432(e), "Appeals by State from district court judge," is placed within Article 90, "Appeals from Magistrates and District Court Judges." In comparison, N.C.G.S. § 15A-1445(a)(1), "Appeal by the State," is found within Article 91, "Appeal to Appellate Division." Such a categorical division of these two statutes helps to enforce their separate roles regarding appeals by the State from a final decision of a district court judge as opposed to a superior court judge. *See Printing Servs. of Greensboro v. Am. Capital Grp.*, 180 N.C. App. 70, 76, 637 S.E.2d 230, 233 (2006) (holding that a statute's intent may be gleaned from its title and legislative history, and that "[p]arts of the same statute dealing with the same subject matter must be considered and interpreted as a whole.") (citation omitted). Moreover, the legislative history of N.C.G.S. § 15A-1432(e) indicates that this statute was enacted to cover all appeals taken from final judgments issued by a district court. *See State v. Palmer*, 197 N.C. App. 201, 203, 676 S.E.2d 559, 561 (2009) ("[A]fter the superior court considers an appeal by the State . . . the superior court must then enter an order remanding the matter to the district court with instructions to finally grant or deny the defendant's pretrial motion . . . because the plain language of N.C.G.S. § 20-38.6(f) [and N.C.G.S. § 15A-1432] indicate[] that the General Assembly intended [that] the *district* court should enter the final judgment on [such] a . . . pretrial motion.") (citation and internal quotations omitted). As such, N.C.G.S. § 15A-1432(e) was intended to address appeals taken from a final order of a district court by the State. *See State v. Fowler*, 197 N.C. App. 1, 7, 676 S.E.2d 523, 532 (2009) ("N.C.G.S. § 15A-1432(a)(1) gives the State a statutory *right of appeal to superior court from a district court's order dismissing* criminal charges against a defendant, and N.C.G.S. § 15A-1432(e) gives the State a statutory *right of appeal* to this Court from a *superior court's* order affirming a *district court's dismissal*.) (emphasis added).

In contrast, the legislative history of N.C.G.S. § 15A-1445(a)(1) indicates that this statute is applicable to final orders issued by a superior court acting in its original jurisdiction. *See* N.C.G.S. § 15A-1445; *see also* N.C. Gen. Stat. §§ 7A-240 ("original general jurisdiction of all justiciable matters of a civil nature . . . is vested in the . . . superior court division), 7A-271 ("[g]eneral jurisdiction for the trial of criminal actions is vested in the superior court"). This statutory application is supported by our case law, as the State receives an automatic appeal as of right only from decisions by a superior court acting in its normal capacity. *See State*

STATE v. BRYAN

[230 N.C. App. 324 (2013)]

v. Greenwood, 12 N.C. App. 584, 586, 184 S.E.2d 386, 387-88 (1971), *rev'd on other grounds*, 280 N.C. 651, 187 S.E.2d 8 (1972) (holding that where the State appeals from a final judgment of a superior court, “if the State’s right to appeal arises in the district court, the appeal is to the superior court; if it arises in the superior court, the appeal is to the appellate division.”); *see also State v. Osterhoudt*, ___ N.C. App. ___, ___, 731 S.E.2d 454, 458 (2012) (“Pursuant to N.C. Gen. Stat. § 15A-1445 . . . the State has a right of appeal to this Court if the superior court grants a defendant’s motion to suppress.”).

Here, defendant made before the district court a pretrial motion to dismiss the DWI charge for violation of his right to a speedy trial. The district court issued an order indicating its preliminary approval of defendant’s motion. The State appealed this order to the superior court; the superior court remanded to the district court for additional findings of fact. Once the superior court received those further findings of fact, it affirmed the district court’s preliminary order and remanded the case back to the district court with orders to affirm the dismissal of defendant’s case. Upon the district court issuing its final judgment, pursuant to the superior court’s orders, the State again appealed to the superior court. As this appeal to superior court was from a final order of the district court, N.C.G.S. § 15A-1432 is the controlling statute. As the superior court affirmed the order of the district court, the State could then appeal only by following the procedures stated in N.C.G.S. § 15A-1432(e):

[i]f the superior court finds that the order of the district court was correct, it must enter an order affirming the judgment of the district court. *The State may appeal the order of the superior court to the appellate division upon certificate by the district attorney to the judge who affirmed the judgment that the appeal is not taken for the purpose of delay.*

The State also argues that N.C.G.S. § 15A-1432(e) is not applicable to its appeal because N.C.G.S. § 15A-1432(e)’s certificate requirement indicates that this statutory provision only applies to interlocutory orders. We disagree.

“An order is interlocutory if it does not determine the issues in an action, but instead merely directs some further proceeding preliminary to the final decree.” *State v. Nichols*, 140 N.C. App. 597, 598, 537 S.E.2d 825, 826 (2000) (citation omitted). “As a general rule an appeal will not lie until there is a final determination of the whole case.” *State v. Newman*, 186 N.C. App. 382, 384, 651 S.E.2d 584, 586 (2007) (citation omitted).

STATE v. BRYAN

[230 N.C. App. 324 (2013)]

As already discussed, in the instant case the final order dismissing all charges against defendant was issued by the district court on 20 July 2012. Although the State appealed this final order to superior court, the superior court was limited, pursuant to N.C.G.S. § 15A-1432(e), to entering an order affirming the judgment of the district court. N.C.G.S. § 15A-1432(e). As such, the State's right of appeal was clearly from a final order by the district court. The State's contention that N.C.G.S. § 15A-1432(e)'s certificate requirement makes this statute applicable only to interlocutory orders is meritless. We further note that the language of N.C.G.S. § 15A-1432(e) confirms that the State's certificate requirement concerns final, rather than interlocutory orders, as

[i]f the superior court finds that the order of the district court was correct, it must enter an order affirming the judgment of the district court. *The State may appeal the order of the superior court to the appellate division upon certificate by the district attorney to the judge who affirmed the judgment that the appeal is not taken for the purpose of delay.*

Id. As such, the plain language of N.C.G.S. § 15A-1432(e) leaves no doubt as to its requirement that the State must provide a certificate when appealing from a final order of a district court. "Where the language of a statute is clear and unambiguous, there is no room for judicial construction[,] and the courts must give [the statute] its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 575, 573 S.E.2d 118, 121 (2002) (citations and internal quotations omitted). Accordingly, the State's argument that the requirement of a certificate applies only to interlocutory orders is overruled.

Therefore, the statutory requirements for appeal in the instant case are found in N.C.G.S. § 15A-1432(e). As the burden to demonstrate the right to appeal by following the statutory mandate is on the State, where the State fails to fulfill the statutory requirements, no appeal can be taken, and our Court is without jurisdiction over the appeal. *State v. McDonald*, 55 N.C. App. 393, 394, 285 S.E.2d 282, 283 (1982). Accordingly, "the appeal by the State is not authorized by statute, and this court has no jurisdiction over the appeal." *Id.*

The State further contends that even if a certificate was required, it has cured that defect by filing a belated certificate with its brief on appeal. We are not convinced, as we have held that where the State

STATE v. HIGH

[230 N.C. App. 330 (2013)]

sought to cure a failure to timely file a certificate by petitioning to file the certificate at a later date, the appeal must be dismissed because “[t]o give the State the right to file the certificate after the case has already been docketed in the appellate court would be to reduce the requirement of the certificate to a nullity.” *State v. Blandin*, 60 N.C. App. 271, 272, 298 S.E.2d 759, 759-60 (1983).

Here, the State seeks to file a belated certificate by petitioning for a writ of certiorari. As we see no reason to nullify the requirements of N.C.G.S. § 15A-1432(e) by allowing the petition for writ of certiorari, we therefore deny the State’s petition for writ of certiorari and dismiss the appeal.

Dismissed.

Judges HUNTER, Robert C., and STEELMAN concur.

STATE OF NORTH CAROLINA
v.
ETHAN MILES HIGH, DEFENDANT

No. COA12-1549

Filed 5 November 2013

**Probation and Parole—lack of jurisdiction—judgment arrested—
order vacated**

The trial court lacked jurisdiction to extend defendant’s period of probation. Judgment was arrested and the order modifying probation and imposing sentence was vacated.

Appeal by defendant from judgments entered 6 August 2012 by Judge Benjamin G. Alford in New Hanover County Superior Court. Heard in the Court of Appeals 14 August 2013.

Attorney General Roy Cooper, by Assistant Attorney General Jason R. Rosser, for the State.

Assistant Public Defender Brendan O’Donnell, for defendant-appellant.

BRYANT, Judge.

STATE v. HIGH

[230 N.C. App. 330 (2013)]

Where the trial court lacked jurisdiction to extend defendant's period of probation, we arrest judgment and vacate the order modifying probation and imposing sentence.

On 21 July 2008, defendant pled guilty to six counts of breaking or entering a motor vehicle and, in a consolidated judgment, was sentenced to two consecutive terms of six to eight months each. Both sentences were then suspended, resulting in a split sentence of thirty days imprisonment followed by 24 months of supervised probation. Defendant's probation expiration date was 20 July 2010.

On 1 March 2010, defendant's probation officer prepared two probation violation reports. The first report alleged defendant violated curfew twelve times within three months, tested positive for cocaine after taking a court-ordered drug test, had been found guilty of possession of marijuana and underage drinking on 18 July 2009, and was in arrears for court costs and restitution. The second report repeated all the allegations of the first report and in addition, alleged that defendant failed to complete community service and was in arrears on payment of probation supervision fees. Both reports were signed and dated 1 March 2010 by the probation officer and Deputy Clerk of Superior Court; however, neither report bore a time stamp with the date of filing.¹ On 20 September 2010, the trial court, based on the 1 March 2010 reports, found that defendant had violated his probation. Defendant's probation period was modified and extended by an additional 24 months.

On 22 June 2011, defendant's probation officer filed two new probation violation reports in the office of the Clerk of Superior Court. Each report alleged defendant failed to report for scheduled office appointments, was in arrears, and had absconded supervision.

On 3 August 2011, the trial court modified defendant's probation according to the 22 June 2011 probation violation reports. Defendant was ordered to pay \$130 and \$20 per month, per judgment, respectively. Defendant was also ordered to serve thirty days in jail, which could be served on the weekends at the probation officer's discretion.

On 9 March 2012, defendant's probation officer again filed in the office of the Clerk of Superior Court two probation violation reports. Each report alleged defendant was in arrears, had absconded supervision, and had four charges pending against him.

1. Both reports bear defendant's signature, dated 18 March 2010, acknowledging receipt and understanding of the violation reports and the directive to appear in court. The hearing date on the forms is 29 March 2010.

STATE v. HIGH

[230 N.C. App. 330 (2013)]

Defendant's probation violation hearing was held on 6 August 2012 in New Hanover County Superior Court. As defendant was incarcerated at the time of the hearing, he appeared via video for his first appearance. When the trial court asked whether defendant wanted an attorney, defendant responded that he "believed I have a lawyer for the case." The trial court found that public defender Walter Smith had been appointed to represent defendant on separate charges, and ordered Smith to be re-appointed for the pending violations. Defendant then stated that if he "didn't have one [a lawyer], I would just waive my right." The trial court then accepted defendant's sworn written waiver of counsel.

After waiving counsel defendant admitted to violating his probation by absconding to Florida after being evicted from his home. The trial court revoked defendant's probation due to his admissions and activated his sentences. Defendant then questioned the trial court as to what the activating of his sentences meant. The trial court responded "[t]hat means your probation's been revoked and your active sentence has been invoked in the Department of Correction[]" Defendant then asked the trial court if his sentences could "ran [sic] consecutive," which was denied.²

Defendant wrote a note from jail stating that he wished to appeal his case:

yes my name is Ethan M. High and I wish to file for appeal for my felony probation case I was just sentenced to. In Supreme Court. [sic] My sentence was two 6-8 suspended sentences.

This note was dated 6 August 2012 and was filed with the New Hanover County Superior Court on 8 August 2012. Appellate counsel was thereafter appointed to represent defendant. However, recognizing that his note does not comply with the Rules of Appellate procedure governing notices of appeal and court designation, defendant has filed and served a petition for a writ of certiorari with his brief.

Under the North Carolina Rules of Appellate Procedure,

[t]he writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of

2. The trial court acknowledged and sought to clarify defendant's request before denying it: "[t]hat's what the judge that sentenced you—you're asking if you can run it concurrently, and I do not do that because to do so would be to reward bad behavior. That's the judgment of the Court."

STATE v. HIGH

[230 N.C. App. 330 (2013)]

the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to N.C.G.S. § 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief.

N.C.R. App. P. 21(a)(3) (2013).

Defendant made a handwritten statement on 8 August 2012 without the assistance of counsel, stating:

yes my name is Ethan M. High and I wish to file for appeal for my felony probation case I was just sentenced to. In Supreme Court. [sic] My sentence was two 6-8 suspended sentences.

Defendant's statement, purporting to be a notice of appeal, does not meet the requirements of Rule 4 of the Rules of Appellate Procedure for an appeal in a criminal case.

(a) Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a criminal action may take appeal by

(1) giving oral notice of appeal at trial, or

(2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days

(b) The notice of appeal required to be filed and served . . . shall designate the . . . court to which appeal is taken

N.C.R. App. P. 4(a-b) (2013).

Here, defendant's notice of appeal was timely but lacked both proper notice and court designation. Defendant acknowledges that these required elements were omitted, but points to his lack of counsel. Defendant requests that his petition for writ of certiorari be granted because of his good faith efforts in making a timely appeal and because his appeal has merit. We agree and grant defendant's petition for writ of certiorari.

On appeal, defendant raises the following issues: (I) whether the trial court had subject matter jurisdiction to revoke defendant's probation;

STATE v. HIGH

[230 N.C. App. 330 (2013)]

and (II) whether defendant's waiver of the right to counsel was knowing and voluntary or in compliance with N.C. Gen. Stat. § 15A-1242.

I.

Defendant first argues that the trial court did not have subject matter jurisdiction to revoke his probation. Specifically, defendant contends that the trial court erred in entering an order of revocation and extending defendant's probation after the expiration of his original probation period in violation of N.C. Gen. Stat. § 15A-1344(f). We agree.

A claim that the trial court lacks subject matter jurisdiction presents a question of law which is reviewed *de novo*. *State v. Satanek*, 190 N.C. App. 653, 656, 600 S.E.2d 623, 625 (2008). An appellate court conducts a statutory analysis when determining whether a trial court has subject matter jurisdiction in a probation revocation hearing and thus conducts a *de novo* review. *Id.* at 656, 600 S.E.2d at 625. The issue of a court's jurisdiction over a matter may be raised at any time, even on appeal or by a court *sua sponte*. *State v. Gorman*, ___ N.C. App. ___, ___, 727 S.E.2d 731, 733 (2012).

Here, in the judgment appealed, the trial court extended defendant's probation period pursuant to N.C.G.S. § 15A-1344(f):

(f) The court may extend, modify, or revoke probation after the expiration of the period of probation if all of the following apply:

(1) Before the expiration of the period of probation the State has *filed a written violation report with the clerk* indicating its intent to conduct a hearing on one or more violations of one or more conditions of probation.

(2) The court finds that the probationer did violate one or more conditions of probation prior to the expiration of the period of probation.

(3) The court finds for good cause shown and stated that the probation should be extended, modified, or revoked.

(4) If the court opts to extend the period of probation, the court may extend the period of probation up to the maximum allowed under G.S. 15A-1342(a).

N.C.G.S. § 15A-1344(f) (2011) (emphasis added).

When a sentence has been suspended and defendant placed on probation on certain named conditions, the

STATE v. HIGH

[230 N.C. App. 330 (2013)]

court may, *at any time during the period of probation*, require defendant to appear before it, inquire into alleged violations of the conditions, and, if found to be true, place the suspended sentence into effect [pursuant to] G.S. 15A-1344(d) (Supp. 1979). But the State may not do so *after the expiration of the period of probation* except as provided in G.S. 15A-1344(f).

State v. Hicks, 148 N.C. App. 203, 204-05, 557 S.E.2d 594, 595 (2001) (citations omitted).

Defendant's period of probation was extended by the trial court on 20 September 2010, after the original period expired on 20 June 2010. The State argues that the language of N.C.G.S. § 15A-1344(f) has been met because N.C. Gen. Stat. § 15A-101.1(7)(a) does not require a file stamp to establish the filing date of a document such as a probation report:

(7) "Filing" or "filed" means:

a. When the document is in paper form, delivering the original document to the office where the document is to be filed. Filing is complete when the original document is received in the office where the document is to be filed.

N.C.G.S. § 15A-101.1(7)(a) (2011). The State further argues that a time stamp is not necessary to establish a time of filing because this requirement, as stated in *State v. Moore*, 148 N.C. App. 568, 559 S.E.2d 565 (2002), has been supplanted by N.C.G.S. § 15A-101.1(7)(a). We disagree.

In *State v. Moore*, defendant was charged with violating her probation and ordered to continue on probation and serve a split sentence of 120 days incarceration. *Moore*, 148 N.C. App. at 569, 559 S.E.2d at 566. Defendant appealed, arguing that the trial court lacked jurisdiction because the probation violation reports upon which the trial court relied lacked time stamps showing that the time and date of filing was within defendant's original period of probation. *Id.* This Court held that the State failed to meet its burden in showing that the extension of defendant's probation period was timely filed.

In a criminal case . . . North Carolina requires the State to prove jurisdiction beyond a reasonable doubt. *In the absence of a file stamped motion or any other evidence of the motion's timely filing as required by N.C.G.S. § 15A-1344(f)(1) the trial court is without jurisdiction.* On appeal, when the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the

STATE v. HIGH

[230 N.C. App. 330 (2013)]

appellate court is to arrest judgment or vacate any order entered without authority.

Id. at 570, 559 S.E.2d at 566 (emphasis added) (citations and internal quotation omitted).

The State argues that the *signature* and *date* of the Clerk of Superior Court on the probation reports should be considered as “any other evidence” of filing. However, because the signature and date on the March 2010 violation reports (the reports critical to defendant’s appeal) do not bear the file stamp, and the subsequent violation reports bear a file stamp on the same date as the signature and notarization of the Clerk of Superior Court, what the State urges as “any other evidence” constitutes a lack of evidence of filing. Therefore, even assuming we viewed the signature and date of the Deputy Clerk of Superior Court on the reports to be some evidence of filing, it is not sufficient to meet the jurisdictional requirement. Under these facts, the lack of a file stamp on the March 2010 reports was fatal to jurisdiction.

Moreover, our Court recently found a lack of jurisdiction due to the absence of a filing stamp on a probation violation report in *State v. Mullet*, NO. COA12-862, 2013 N.C. App. LEXIS 38 (N.C. App. 2013).³ In *Mullet*, defendant appealed from judgments revoking his probation on grounds that the trial court lacked subject matter jurisdiction to revoke his probation after the probationary period had expired. *Id.* This Court agreed with defendant.

In this case, the State has failed to prove the trial court’s jurisdiction beyond a reasonable doubt. Section 15A-1344(f)(1) requires that the violation reports must be *filed* before the period of probation expires. Although the violation reports in this case are signed by the probation officer, a deputy clerk of court, and defendant, none of those signatures verify that the reports were timely filed. The reports are not file stamped, nor is there other evidence in the record indicating that the reports were actually filed within the period of probation. Without a file stamp, or other evidence beyond a reasonable doubt that the reports were timely filed, the trial court lacked jurisdiction to revoke defendant’s probation. Accordingly, we vacate the judgments revoking defendant’s probation.

3. We note that while *Mullet* is an unpublished opinion by this Court, *Mullet* is on point with the facts in the instant case.

STATE v. HOLLAND

[230 N.C. App. 337 (2013)]

Id. at *3-4 (citation omitted). Consequently, we hold that the State failed to satisfy the requirements of N.C.G.S. § 15A-1344(f) and that the trial court lacked jurisdiction over defendant.

In light of our conclusion, other arguments on appeal need not be reached. Accordingly, the trial court's judgment that defendant violated terms of his probation is arrested and the order modifying the terms of his probation and sentencing is vacated.

Judgment arrested and sentences vacated.

Judges STEPHENS and DILLON concur.

STATE OF NORTH CAROLINA
v.
KEVIN TEROD HOLLAND

No. COA12-1447

Filed 5 November 2013

1. Constitutional Law—competency to stand trial—hearing not required

The trial court did not err in a robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon case by failing to inquire, *sua sponte*, into defendant's competency after he was involuntarily committed to a psychiatric unit before the second day of his trial. The trial court had no record or information during trial that defendant was involuntarily committed. Further, defendant's distrust of counsel, decision to proceed to trial, mistaken understanding of criminal procedure, and refusal to attend his trial did not constitute substantial evidence requiring the trial court to conduct a hearing.

2. Appeal and Error—motion for appropriate relief—no substantial evidence

The trial court did not err in a robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon case by denying defendant's motion for appropriate relief (MAR). Even assuming *arguendo* that the challenged finding of fact was unsupported, defendant failed to show that the trial court erred in its ultimate conclusion to deny the MAR. There was not substantial

STATE v. HOLLAND

[230 N.C. App. 337 (2013)]

evidence requiring the trial court to conduct a hearing into defendant's competency.

Appeal by Defendant from judgment entered 1 June 2012 by Judge D. Jack Hooks in Superior Court, New Hanover County. Heard in the Court of Appeals 13 August 2013.

Attorney General Roy Cooper, by Assistant Attorney General Anne Goco Kirby, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Jon H. Hunt and Assistant Appellate Defender Benjamin Dowling-Sendor, for Defendant.

McGEE, Judge.

Kevin Terod Holland ("Defendant") was convicted of robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon on 1 June 2012. Defendant appeals from that conviction. Defendant subsequently filed a motion for appropriate relief ("MAR"), which the trial court denied in an order entered 3 May 2013. This Court granted Defendant's motion for supplemental briefing, by both parties, regarding the trial court's denial of Defendant's MAR.

I. Appeal from Conviction

[1] Defendant's sole argument on appeal from his conviction is that the trial court erred by failing "to inquire, *sua sponte*, into his competency after he was involuntarily committed to a psychiatric unit before the second day of his trial." We disagree.

A "criminal defendant may not be tried unless he is competent. As a result, [a] trial court has a constitutional duty to institute, *sua sponte*, a competency hearing *if there is substantial evidence before the court* indicating that the accused may be mentally incompetent." *State v. Badgett*, 361 N.C. 234, 259, 644 S.E.2d 206, 221 (2007) (alteration in original) (internal quotation marks and citations omitted). "[T]he standard for competence to stand trial is whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings against him." *Id.* (internal quotation marks omitted).

In arguing that the trial court erred in failing to *sua sponte* conduct a competency hearing, Defendant points to evidence showing that: he

STATE v. HOLLAND

[230 N.C. App. 337 (2013)]

believed there was a conspiracy to rush him into court; he rejected the State's favorable offer to allow him to plead guilty to a Class I felony; he believed his attorney should file motions to dismiss "heard in anticipation/prior to trial[;]" and he believed his attorney conspired to get him convicted.

The key fact upon which Defendant relies is that he was involuntarily committed on or just before the second day of his trial. However, as Defendant acknowledges in his brief, the trial court had information indicating only that Defendant "might have been involuntarily committed." (emphasis added). The trial court had no record or information during trial that Defendant was involuntarily committed.

Defendant was in court for the first day of trial on 29 May 2012. When court resumed for the second day of trial on 30 May 2012, counsel for both the State and Defendant were present at 9:34 a.m., but Defendant was absent. Defendant's counsel was unable to reach Defendant by telephone. According to Defendant's counsel, Defendant was supposed to "show at 8:30[a.m.] in [Defendant's counsel's] office to talk" but Defendant did not appear. Defendant's counsel told the trial court that Defendant indicated on 29 May 2012 that "he had to go back to Greensboro, and [Defendant's counsel] suggested that [Defendant] not do that[.]" Defendant's counsel noted "an objection for the record" to the trial court's decision to proceed with trial without Defendant present in court.

The trial court, in its order denying Defendant's MAR, made the following relevant findings describing the remainder of Defendant's trial:

Before proceeding further, [the trial court] gave a precautionary instruction to the jury regarding the State's burden of proof. The [trial court] also specifically instructed the jury about Defendant's absence, informing them to not form any negative inference therefrom.

....

[Defendant's counsel] reported to the [trial court] that he had obtained some vague information about Defendant being in a hospital, in High Point, NC. It was unclear to [Defendant's counsel] who made the call to his office, but suspected it might have been from Defendant's aunt (at [Defendant's] mother's request).

[Defendant's counsel] could not vouch for the accuracy of the message. He could not provide documentation

STATE v. HOLLAND

[230 N.C. App. 337 (2013)]

regarding the name of the hospital, the reason for the alleged hospitalization, or how long it might last. [Defendant's counsel] could not provide any information about how to contact Defendant, or provide information from anyone who could explain Defendant's absence.

....

The State rested and Defendant offered no evidence. The evidence presented by the State was conclusive and overwhelming.

Despite Defendant's failure to appear, [Defendant's counsel] cross-examined the witnesses, participated in the charge conference, made appropriate motions, and delivered a closing argument.

At no time during the trial did the [trial court] have credible information as to Defendant's whereabouts.

At 2:56 p.m., as part of [the trial court's] general instructions to the jury [the trial court] again charged that Defendant's absence from trial was not to affect their consideration of the evidence, or to affect their duty to apply the law as given to them by the [trial court].

At approximately 4:40 p.m. (during jury deliberations), [Defendant's counsel] received information (from either Defendant's aunt or mother), which indicated that Defendant might have been involuntarily committed at Wesley Long Hospital, in Greensboro, NC.

The information was disclosed to the [trial court] and discussed while the jury was deliberating. The [trial court] stated on the record that Defendant "had potentially been involuntarily committed."

[Defendant's counsel] informed the [trial court] that he was still unable to obtain anything official from Defendant (or [Defendant's] relatives) about the purported hospitalization and that he was uncertain about the accuracy of the information.

Without having anything credible upon which to rely, [Defendant's counsel] chose not to make a motion to continue.

STATE v. HOLLAND

[230 N.C. App. 337 (2013)]

. . . .

During the sentencing hearing, Defendant did not provide (nor did anyone else) any documentation about [Defendant's] hospital admission. [Defendant] did not make any statements or offer any evidence about the reason for his hospitalization, about his purported involuntary commitment, or his incapacity to proceed.

. . . .

[Defendant's counsel] maintained he had no reason to believe anything was wrong with Defendant and thought Defendant's hospitalization was part of [Defendant's] plan to avoid prosecution.

The record shows that, on the second day of trial, the trial court had no evidence of an involuntary commitment of Defendant. Evidence Defendant produced at the MAR hearing showed that "Defendant was, in fact, involuntarily committed at Wesley Long Hospital in Greensboro, NC on the morning of May 30, 2012." However, this finding does not diminish the fact that, on the second day of trial, the trial court had no evidence of Defendant's involuntary commitment.

"Evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant" in determining whether the trial court should conduct a competency hearing. *State v. Staten*, 172 N.C. App. 673, 678, 616 S.E.2d 650, 655 (2005). "There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated." *Id.* at 679, 616 S.E.2d at 655.

In *Badgett*, the defendant pointed to evidence that he "wrote numerous letters to the trial court and the district attorney expressing his desire for a speedy trial resulting in a death sentence[.]" "read a statement to the jury during the penalty phase in which he impliedly asked for a death sentence[.]" and "had an emotional outburst coupled with verbal attacks on the assistant district attorney who delivered the [S]tate's closing argument during the sentencing proceeding." *Badgett*, 361 N.C. at 259-60, 644 S.E.2d at 221. Our Supreme Court held that this evidence did not constitute substantial evidence requiring the trial court to *sua sponte* institute a competency hearing. *Id.* at 260, 644 S.E.2d at 221.

STATE v. HOLLAND

[230 N.C. App. 337 (2013)]

Defendant cites *State v. Whitted*, 209 N.C. App. 522, 705 S.E.2d 787 (2011), in support of his argument. In *Whitted*, the evidence included the defendant's past history of mental illness; her rejection of a favorable plea offer; her emotional outburst after opening statements; her refusal to return to the courtroom; her loud chanting, singing, and "religious imprecations[;]" her refusal to "cooperate with trial proceedings[;]" and her further "singing, crying, screaming and mumbling as the trial court pronounced sentence." *Whitted*, 209 N.C. App. at 527-28, 705 S.E.2d at 791-92. In *Whitted*, this Court held that, in light of the defendant's "history of mental illness, including paranoid schizophrenia and bipolar disorder," the defendant's "remarks that her appointed counsel was working for the State and that the trial court wanted her to plead guilty, coupled with her irrational behavior in the courtroom, constituted substantial evidence" that required the trial court to conduct a competency hearing. *Id.* at 528, 705 S.E.2d at 792.

In the present case, the trial court had no information at the time of trial that Defendant had any history of mental illness. Defendant's behavior in the courtroom was not disruptive or irrational. Rather, Defendant's conduct and interactions with the trial court during the first day of trial on 29 May 2012 indicate that he was able to communicate clearly and "with a reasonable degree of rational understanding[.]" *Badgett*, 361 N.C. at 259, 644 S.E.2d at 221. Relevant portions of the trial court's interactions with Defendant before trial follow:

THE COURT: . . . I have called Mr. Waters over and made inquiry in chambers as to whether he was representing you, and at that time he advised me that he is not representing you as to these charges, that he has had discussions with you, but has not been retained and cannot participate absent being paid. Are you aware of this?

THE DEFENDANT: Yes, sir. I indicated to Mr. Lambeth that I was seeking to retain Mr. Waters.

THE COURT: All right, sir. But that has not been accomplished at this point?

THE DEFENDANT: No, sir. We were in discussions, Mr. Waters and I.

THE COURT: Well, you do understand that the jury is here. They're not in the courtroom, but they're down in the jury room, and it's time for trial.

STATE v. HOLLAND

[230 N.C. App. 337 (2013)]

THE DEFENDANT: Yes, sir.

THE COURT: All right. Do you see Mr. Waters being retained in the next few moments and being ready?

THE DEFENDANT: As far as being ready for trial today, I don't, but being retained in the next few moments, yes, sir.

The trial court heard from the State regarding the attorneys that had withdrawn from representation of Defendant, and the trial court denied Defendant's motion to continue.

Although Defendant apparently disagreed with counsel, attempted to retain a different attorney, and failed to appear for the second day of trial, Defendant's actions do not constitute substantial evidence that Defendant was incompetent to stand trial. The transcript indicates Defendant had a rational and factual understanding of the proceedings. Allegations that Defendant may have been involuntarily committed in Guilford County, coupled with the fact that Defendant told his attorney that he planned to return to Greensboro, does not suggest incompetency. Rather, the evidence suggests that Defendant chose not to attend the second day of trial. This suggestion is bolstered by the representations of Defendant's counsel to the trial court. In its order denying Defendant's MAR, the trial court found as fact that "[Defendant's counsel] maintained he had no reason to believe anything was wrong with Defendant and thought Defendant's hospitalization was part of [Defendant's] plan to avoid prosecution."

Defendant's distrust of counsel, decision to proceed to trial, mistaken understanding of criminal procedure, and refusal to attend his trial do not constitute substantial evidence requiring the trial court to conduct a hearing into Defendant's competency to stand trial. The trial court did not err in failing to, *sua sponte*, hold a hearing on Defendant's competency to stand trial.

II. Appeal from Denial of MAR

[2] Defendant's sole argument on appeal from the denial of his MAR is that the trial court erred because "the crucial finding of fact that [Defendant] had been diagnosed as 'malingering' and 'feigning illness' was not supported by any evidence, and the crucial conclusions of law rested on that finding." We disagree.

"When a trial court's findings on a motion for appropriate relief are reviewed, these findings are binding if they are supported by competent evidence and may be disturbed only upon a showing of manifest abuse

STATE v. HOLLAND

[230 N.C. App. 337 (2013)]

of discretion. However, the trial court's conclusions [of law] are fully reviewable on appeal." *State v. Taylor*, 212 N.C. App. 238, 243, 713 S.E.2d 82, 86 (2011).

Defendant does not specify which finding he challenges on appeal. Rather, Defendant states that the "trial court made a finding of fact that Dr. Readling diagnosed [Defendant] as a malingerer. In the same finding, the trial court also found that the hospital records stated that [Defendant] was feigning his mental illness." We assume Defendant intended to challenge the finding which appears on page 8 of the trial court's order, as follows:

Upon learning of Defendant's legal issues (and that law enforcement would be taking Defendant back to Wilmington), Dr. Read[ing] changed his discharge diagnosis by adding "Malingering" to his original diagnosis. Cone Health Behavioral Health Hospital's coding record for Defendant's final diagnosis also included (among others) "person feigning illness."

Defendant contends that "[f]rom this unsupported finding, the trial court concluded the following about [Defendant's] competence to stand trial:"

Defendant's failure to attend the second day of trial, his untruthfulness to the hospital admissions staff, his refusal to release admission information to court officials, his involuntary commitment diagnosis based on incomplete information, and the discharge diagnosis of "malingering" and "person feigning illness," was not substantial evidence indicating Defendant may have been mentally incompetent.

Defendant faked and feigned his illness.

Defendant has failed to carry his burden with credible evidence as to his incompetence to stand trial.

Defendant was not entitled to a hearing on the issue of his competency whereby the [trial] court was required to conduct a thorough inquiry before it allowed Defendant's trial to proceed.

Even assuming *arguendo*, without deciding, that the challenged finding of fact was unsupported, Defendant fails to show that the trial court erred in its ultimate conclusion to deny Defendant's MAR. With the exception of the conclusion that "Defendant faked and feigned his illness[,] " the above conclusions are supported by other unchallenged findings of fact,

STATE v. HOLLAND

[230 N.C. App. 337 (2013)]

quoted in Section I of this opinion, and additional unchallenged findings, which are quoted below:

Defendant was required to answer a number of questions and submit to an assessment before admission. When asked by admissions staff whether he had “any legal issues,” “any criminal charges pending,” or “any court dates,” Defendant answered “No” to each. When the staff provided Defendant with a standard form entitled “*Consent to Release Information*,” he refused to check the box that would give the staff permission to release information to “Law Enforcement, Probation, (or his) Attorney.”

....

Defendant was transferred to Cone Health Behavioral Health Hospital for admission and treatment. Defendant did not inform the staff at Cone that he was supposed to be in Wilmington in court for his armed robbery trial, or that he had “any legal issues.”

The record demonstrates that there was not substantial evidence requiring the trial court to conduct a hearing into Defendant’s competency. The trial court did not err in denying Defendant’s MAR.

III. Conclusion

Defendant has not shown error in either his conviction or the trial court’s denial of his MAR. We note that, although Defendant refers to the right to be present at trial in his brief challenging the denial of his MAR, Defendant does not argue that the trial court deprived him of this right under the Confrontation Clause of either the Constitution of North Carolina or the United States Constitution. We therefore express no opinion as to that issue.

No error in part, affirmed in part.

Judges STEELMAN and ERVIN concur.

STATE v. JAMES

[230 N.C. App. 346 (2013)]

STATE OF NORTH CAROLINA

v.

KELVIN JAMES, JR.

No. COA13-353

Filed 5 November 2013

Jury—Batson challenge—prima facie showing of discrimination—moot—no purposeful discrimination

The trial court's findings of fact supporting the dismissal of a *Batson* objection were not clearly erroneous, and the trial court's judgment was left undisturbed. The trial court erroneously found that defendant had failed to make out a *prima facie* showing of discrimination because the trial court heard the State's reasons for striking the jurors prior to making a ruling on defendant's *Batson* objection, rendering the issue of whether defendant made a *prima facie* showing moot. Nonetheless, the trial court conducted a full *Batson* inquiry based on defendant's *Batson* objection and determined there was no showing of purposeful discrimination.

Appeal by defendant from judgments entered 29 March 2012 by Judge W. Allen Cobb in Wayne County Superior Court. Heard in the Court of Appeals 11 September 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General K. D. Sturgis and Assistant Attorney General Berkley Carrington Skinner, IV, for the State.

Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for defendant-appellant.

BRYANT, Judge.

Where the trial court's findings of facts supporting a dismissal of a *Batson* objection are not clearly erroneous, we will not disturb the trial court's judgment based upon those findings.

On 26 August 2010, police responded to a report of a shooting at 1170 Richards Street. James Taylor, a resident of Richards Street, reported to police that he saw a person lean out of the passenger window of a car and fire multiple shots at a car in front of it.

STATE v. JAMES

[230 N.C. App. 346 (2013)]

Shortly after Taylor's call to police, Shonsi Chavez took Marcus Johnson to a local hospital. Johnson had been shot in the back, neck, and back of the hand. The hospital was able to stabilize Johnson, but he was left paralyzed from the armpits down.

Police were summoned to the hospital where they met with Chavez. Chavez told the investigating officer that he had been driving a blue rental Chevrolet Cobalt on Richards Street, with Johnson sitting in the front passenger seat, when a person in the car behind them began to fire at their car. Johnson was struck several times and rushed to the hospital by Chavez. Chavez went with the officer to the scene of the shooting where spent 9 millimeter shell casings were found. Chavez also gave a written statement identifying Trevis Kinsey as the driver of the vehicle which had followed him and identifying defendant Kelvin James as the passenger in Kinsey's vehicle who fired at Chavez's car.

Johnson testified he was riding with Chavez when the shots were fired, striking him. When asked why defendant had shot at Chavez's car, Johnson stated he had heard that Chavez and Kinsey "had gotten into it" and that a lot of people did not like Chavez.

On 14 September 2010, Kinsey was arrested for assault with a deadly weapon for the shooting of Johnson. In June 2011, Kinsey wrote to his lawyer stating that he wanted "to cooperate" with the investigation. As part of his agreement with prosecutors, Kinsey pled guilty to conspiracy to shoot into an occupied moving vehicle and assault with a deadly weapon with intent to kill inflicting serious injury. Kinsey also agreed to testify against defendant and gave a statement in which he admitted driving the car that followed Chavez. Kinsey identified defendant as the shooter.

Defendant was charged with assault with a deadly weapon with intent to kill inflicting serious injury on Johnson, assault with a deadly weapon with intent to kill on Chavez, and four counts of discharging a firearm into occupied property. During jury selection, defendant made a *Batson* objection regarding the State's preemptory challenges against four black potential jurors, 3, 5, 8, and 12. During questioning by the trial court, defendant reduced his *Batson* objection to jurors 5 and 8. The trial court then overruled defendant's *Batson* objection against juror 8, citing the juror's statements that he was fearful of reprisal by defendant's family as showing that the State's use of a preemptory challenge against that juror was not racially motivated. After hearing both defendant and the State discuss the State's preemptory challenge against juror 5, the trial court overruled defendant's *Batson* objection as to her as well. The trial court concluded defendant failed to make a *prima facie*

STATE v. JAMES

[230 N.C. App. 346 (2013)]

showing of racial discrimination by the State, and announced that formal findings of fact and conclusions of law would be made at the conclusion of the trial.

The jury convicted defendant of the lesser included offense of assault with a deadly weapon inflicting serious injury on Johnson, the lesser included offense of assault with a deadly weapon on Chavez, and four counts of discharging a firearm into occupied property. Defendant was sentenced to twenty-nine to forty-four months for assault with a deadly weapon inflicting serious injury, a consecutive sentence of twenty-nine to forty-four months for discharging a firearm into an occupied moving vehicle, and a consecutive sentence of seventy-five days for assault with a deadly weapon.

Defendant appeals.

On appeal, defendant raises two issues: whether the trial court erred in (I) overruling his objection to the State's use of a preemptory challenge against juror 5; and (II) ruling that the State's use of a preemptory strike against juror 5 was not pretextual.

I.

Defendant first argues the trial court erred in overruling his objection to the State's preemptory challenge against juror 5 by finding that he failed to establish a *prima facie* case of race discrimination. We disagree.

"The 'clear error' standard is a federal standard of review adopted by our courts for appellate review of the *Batson* inquiry." *State v. Cofield*, 129 N.C. App. 268, 275 n.1, 498 S.E.2d 823, 829 n.1 (1998). "Since the trial judge's findings . . . largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." *State v. Mays*, 154 N.C. App. 572, 576, 573 S.E.2d 202, 205 (2002) (quoting *Batson v. Kentucky*, 476 U.S. 79, 98 n.21, 90 L. Ed. 2d 69, 89 n.21 (1986)). "The trial court's ultimate *Batson* decision will be upheld unless the appellate court is convinced that the trial court's determination is clearly erroneous." *Id.* at 576, 573 S.E.2d at 205 (citation and internal quotation omitted.)

"The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 26 of the North Carolina Constitution prohibit race-based preemptory challenges during jury selection." *State v. Taylor*, 362 N.C. 514, 527, 669 S.E.2d 239, 253-54 (2008). A *Batson* objection involves a three-part test as set forth

STATE v. JAMES

[230 N.C. App. 346 (2013)]

by the United States Supreme Court in *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986), and adopted by our Supreme Court for determining whether a juror was impermissibly excluded on the basis of race. *Taylor*, 362 N.C. at 527, 669 S.E.2d 239, 254. To make a *Batson* objection,

[f]irst, the defendant must make a *prima facie* showing that the state exercised a race-based peremptory challenge. If the defendant makes the requisite showing, the burden shifts to the state to offer a facially valid, race-neutral explanation for the peremptory challenge. Finally, the trial court must decide whether the defendant has proved purposeful discrimination.

Id. (internal citations omitted).

“Step one of the *Batson* analysis, a *prima facie* showing of racial discrimination, is not intended to be a high hurdle for defendants to cross. Rather, the showing need only be sufficient to shift the burden to the State to articulate race-neutral reasons for its peremptory challenge.” *State v. Hoffman*, 348 N.C. 548, 553, 500 S.E.2d 718, 722 (1998). However,

if the trial court requires the prosecutor to give his reasons without ruling on the question of a *prima facie* showing, the question of whether the defendant has made a *prima facie* showing becomes moot, and it becomes the responsibility of the trial court to make appropriate findings on whether the stated reasons are a credible, nondiscriminatory basis for the challenges or simply pretext.

State v. Williams, 343 N.C. 345, 359, 471 S.E.2d 379, 386 (1996) (citations omitted).

Defendant made his *Batson* objection during jury selection regarding four potential black jurors that the State used peremptory challenges against. Before ruling on defendant’s *Batson* objection, the trial court gave the State “[the] opportunity to express the racially neutral reasons for [its] exercise of [its] peremptory challenges.” As the trial court heard the State’s reasons for striking the jurors prior to making a ruling on defendant’s *Batson* objection, the issue of whether defendant made a *prima facie* showing is moot. Accordingly, we must now consider whether the State has met its burden of providing a race-neutral explanation for its peremptory challenges.

The second part of the *Batson* test requires the State to articulate legitimate reasons which are clear and reasonably specific and related to the particular case to be

STATE v. JAMES

[230 N.C. App. 346 (2013)]

tried which give a neutral explanation for challenging jurors of the cognizable group. Defendant has a right of surrebuttal to show that the prosecutor's explanations are a pretext. Finally, it is for the trial court to decide whether the defendant has proved purposeful discrimination.

State v. Spruill, 338 N.C. 612, 631, 452 S.E.2d 279, 288 (1994) (citations and internal quotations omitted).

As defendant abandoned his *Batson* objection to jurors 3 and 12, and the trial court itself dismissed defendant's objection as to juror 8 because of his statements at *voir dire*, we must consider whether the State gave a legitimate explanation for why it peremptorily challenged juror 5. During the *Batson* objection hearing, the State explained that:

Juror No. 5 . . . indicated she is not employed. I generally do not like to have jurors who are not employed. In addition, she has indicated she has been in domestic violence. Her name sounds familiar to me. I have been one of the primary prosecutors of domestic violence cases for some time now. That's not as much recently, but it gives me some cause for concern with me sort of thinking her name sounds familiar, and it being domestic violence, to think I have been associated in some fashion with a case involving her.

Defendant, on rebuttal, contended that:

I would rebut the reasoning concerning [juror 5]. The State clearly stated because she was unemployed, that's why she was let go. Obviously the State kept [a white juror] whose first statement to the State was that he was unemployed and had been so for a while and that he worked in construction. So I would argue against the unemployment reason.

The trial court overruled defendant's objection as to juror 5, finding that "[d]efendant has not made a prima facie showing of discrimination" We note that the language the trial court used referencing defendant's *Batson* objection is misleading, as the order's conclusion that "[d]efendant has failed to make out a prima facie showing of discrimination" implies that defendant's objection was dismissed under the first part of a *Batson* inquiry. While we think the trial court erred in finding "[d]efendant has failed to make out a prima facie showing of discrimination," as indicated earlier, the issue of whether or not defendant made a *prima*

STATE v. JAMES

[230 N.C. App. 346 (2013)]

facie showing is moot. On this record it is clear the trial court ultimately determined there was no purposeful discrimination in the State's exclusion of juror 5.

Factors to which this Court has looked in the past to help determine the existence or absence of purposeful discrimination include (1) the susceptibility of the particular case to racial discrimination; (2) whether similarly situated whites were accepted as jurors; (3) whether the State used all of its peremptory challenges; (4) the race of the witnesses in the case; (5) whether the early pattern of strikes indicated a discriminatory intent; and (6) the ultimate racial makeup of the jury. In addition, [a]n examination of the actual explanations given by the district attorney for challenging black veniremen is a crucial part of testing defendant's *Batson* claim. It is satisfactory if these explanations have as their basis a "legitimate hunch" or "past experience" in the selection of juries.

State v. Robinson, 336 N.C. 78, 93-94, 443 S.E.2d 306, 312-13 (1994) (citations and internal quotations omitted).

Here, the State accepted a white male juror who was unemployed while using a preemptory challenge against a black female juror who was also unemployed. The State used four of its six preemptory challenges against black potential jurors. The race of defendant, his victims, and all witnesses to the instant case is black. The trial court asked the State to explain its preemptory challenges against the four potential jurors, and defendant was allowed to rebut. In making its formal order as to defendant's *Batson* objection, the trial court made fourteen findings of fact:

No. 1. The Court has observed the manner and appearance of counsel and jurors during voir dire and has made all relevant determinations of credibility for purposes of this order.

No. 2. In making these findings of fact the undersigned has made determinations as to the race of various individuals. As to the jurors, any findings of race are based upon statements provided by the jurors themselves. As to the parties, lawyers, and witnesses, findings of race are based upon statements of counsel, stipulations of counsel, and the lack of objections to observations of the undersigned

STATE v. JAMES

[230 N.C. App. 346 (2013)]

noted at the time of the announcement of this order.

No. 3. The Defendant in this case is black. The alleged victim in this case was black. The key witnesses in this case are black.

No. 4. As of the time that the State attempted to exercise the peremptory challenges, eight jurors had been accepted by the State.¹

No. 5. As of the time that the State attempted to exercise the peremptory challenges the State had exercised zero peremptory challenges.

No. 6. The State made no statements or questions which tend to support an inference of discrimination in the jury selection process.

No. 7. The State made no statements or questions which tend to refute an inference of discrimination in the jury selection process.

No. 8. The State has not repeatedly used peremptory challenges against blacks so as to tend to establish a pattern of strikes against blacks in the venire.

No. 9. The State has not used a disproportionate number of peremptory challenges to strike black jurors in this case.

No. 10. The State's acceptance rate of potential black jurors does not indicate a likelihood of discrimination in the jury selection process.

No. 11. In the exercise of discretion the Court proceeds with consideration of racially neutral reasons for exercise of the peremptory challenges without first determining whether or not a prima facie case of discrimination has been shown. The reasons offered by the State were as follows:

As to Juror No. 3 . . . the State alleged that he had been previously charged by an officer with assaulting his wife,

1. The record does not indicate the racial make-up of these eight jurors. The final jury list shows that the State and defendant each made five peremptory challenges during jury selection. Defendant made one challenge for cause and the State made two. The record does not indicate the race of any of the jurors challenged by defendant.

STATE v. JAMES

[230 N.C. App. 346 (2013)]

and that . . . the Assistant District Attorney in this case, had prosecuted this juror. Further, she indicated that she will call a witness in this case that was a witness in this juror's prosecution.

As to Juror No. 5 . . . that Juror 5 indicated that she was unemployed, and [the Assistant District Attorney] indicated that she does not like to have unemployed jurors on her juries. She further said that she was skeptical of this juror because this juror indicated she had been involved in a domestic violence case. [The Assistant District Attorney] is a prosecutor of domestic violence cases and was afraid that she may have prosecuted the case that this juror was involved with.

As to Juror No. 8 . . . that Juror No. 8 indicated that he thinks the Defendant's family members have been to his house for a party. Juror No. 8 further said he is afraid that the family members may come over to his house after the trial of this matter and said that he would try to be fair, but he remained very concerned as to his personal safety.

As to Juror No. 12 . . . [the Assistant District Attorney] indicated that she had checked criminal backgrounds and had discovered that this juror had been charged with assault by pointing a gun; he was ultimately found not guilty of that charge, but she indicated a concern that the nature of that charge is similar to the charge in this case.

No. 12. The Defendant then was offered an opportunity to rebut the reasons offered by the State and in such rebuttal stated (1) that Defendant abandoned its challenges to Jurors No. 3 and 12; and that their challenges as to 5 and 8 were based solely on race.

No. 13. The Court finds the Assistant District Attorney to be credible in stating racially neutral reasons for the exercise of the peremptory challenges.

No. 14. In response to such reasons stated by the Assistant District Attorney Defendant's Counsel has not shown the Assistant District Attorney's explanations are pretextual.

In its conclusions of law, the trial court noted that:

STATE v. JAMES

[230 N.C. App. 346 (2013)]

[B]ased upon consideration of presentations made by both sides and taking into account the various arguments presented, the Defendant has not proven purposeful discrimination in the jury selection process in this case.

Based upon the foregoing findings of fact the Court makes the following conclusions of law:

(1) No determination has been made as to the presence or absence of sufficient racially neutral reasons for the State's exercise of peremptory challenges as to the four jurors as Defendant has failed to make out a prima facie showing of discrimination in the jury selection process. It is, THEREFORE, ORDERED, that Defendant's objection to the State's exercise of the peremptory challenges as to potential Jurors No. 3, 5, 8 and 12, are overruled, and the peremptory challenges are allowed.

These findings of fact adhere to the requirements of a *Batson* inquiry, as the trial court made specific findings as to race, the prevalence of minority jurors being dismissed, and the State's reasoning for its use of the peremptory challenges. *See State v. Barden*, 356 N.C. 316, 344, 572 S.E.2d 108, 127-28 (2002) (holding that although numerical analysis of peremptory challenges used may be useful to a *Batson* analysis, it is not dispositive). Defendant's opportunity to rebut the State's reasoning was also considered. Moreover, the trial court made particular findings as to the State's reasons for peremptorily challenging each of the four potential jurors. *See State v. Smith*, 328 N.C. 99, 124, 400 S.E.2d 712, 726 (1991) ("As . . . jury selection is more "art than science," . . . [s]o long as the motive does not appear to be racial discrimination, the prosecutor may exercise peremptory challenges on the basis of "legitimate hunches" and past experience." (citation and internal quotations omitted)). As such, the trial court's findings of fact and conclusions of law follow the line of inquiry set forth in *Batson* and do not indicate that the State acted with racial purpose in exercising its peremptory challenges.

Notwithstanding the language referencing a "prima facie showing" in the trial court's order, it is clear the trial court conducted a full *Batson* inquiry based on defendant's *Batson* objection and determined there was no showing of purposeful discrimination. As the trial court's determination was not clearly erroneous, we uphold the trial court's ultimate decision to dismiss defendant's *Batson* objection. *See Mays*, 154 N.C. App. at 576, 573 S.E.2d at 205.

STATE v. MALUNDA

[230 N.C. App. 355 (2013)]

As we find the trial court conducted a full *Batson* inquiry, we need not reach defendant's second argument on appeal.

No error.

Judges HUNTER, Robert C., and STEELMAN concur.

STATE OF NORTH CAROLINA

v.

JOHN KWAME MALUNDA III

No. COA13-372

Filed 5 November 2013

Search and Seizure—probable cause—vehicle passenger—no particularized suspicion

The trial court erred in a possession of cocaine case by concluding the police had probable cause to conduct the warrantless search of defendant's person. Although the officers had probable cause to search the vehicle in which defendant was a passenger when they detected the odor of marijuana on the driver's side of the vehicle, there was insufficient evidence to support the trial court's conclusion that the search of defendant was supported by probable cause particularized with respect to defendant.

Appeal by defendant from judgment entered 27 September 2012 by Judge Paul G. Gessner in Wake County Superior Court. Heard in the Court of Appeals 24 September 2013.

Attorney General Roy Cooper, by Assistant Attorney General Catherine F. Jordan, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Constance E. Widenhouse, for defendant appellant.

McCULLOUGH, Judge.

John Kwame Malunda, III, ("defendant") appeals from his conviction for possession of cocaine on the ground that the trial court erred in

STATE v. MALUNDA

[230 N.C. App. 355 (2013)]

denying his motion to suppress evidence found on his person. For the following reasons, we reverse.

I. Background

Defendant was arrested on 5 April 2012 and indicted by a Wake County Grand Jury on 6 August 2012 for possession with intent to sell or deliver cocaine. Prior to defendant's case being called for trial, defendant filed a motion to suppress evidence seized during what he alleged was an illegal warrantless search of his person.

Defendant's motion came on for hearing before the Honorable Paul G. Gessner at the 27 September 2012 Criminal Session of Wake County Superior Court. Evidence produced at the hearing tended to show the following: Just after midnight on 5 April 2012, Officer B.A. Brinkley, a member of the gang suppression unit of the Raleigh Police Department, was on patrol when he performed a security check of 1910 Poole Road, a gas station parking lot known for drug activity. Officer Brinkley testified that, as he pulled into the parking lot, a silver vehicle caught his attention because the driver immediately exited the vehicle and entered the gas station, followed by the passenger, later identified as defendant, who turned around 180 degrees, looked towards Officer Brinkley's marked patrol car, and then exited the vehicle and entered the gas station. At that time, Officer Brinkley backed out of the area to observe from afar.

After waiting for the driver and defendant to exit the gas station for approximately five minutes, Officer Brinkley returned to the gas station parking lot. Officer Brinkley testified he briefly lost sight of the parking lot while making his return and the driver and defendant were back in the vehicle upon his arrival. At that time, the vehicle began to pull out of the gas station parking lot. Officer Brinkley testified "[t]he vehicle didn't have its headlights on . . . and it partially pulled out into the roadway. . . . [W]hen the vehicle observed me backing up, the vehicle immediately put it in reverse and erratically parked . . . or attempted to back into a parking spot. It was not well parked." Officer Brinkley believed his marked patrol car caught the driver's attention and the driver was being "extremely evasive." Due to the suspiciousness of the vehicle and the fact that the vehicle began to enter traffic without its headlights on, Officer Brinkley, now joined by Officer Trybulski¹, approached the vehicle. Officer Cooper and Officer Wilkins arrived just after Officer Brinkley and Officer Trybulski approached the vehicle.

1. We note that the incident report in the record and the transcript are inconsistent in the spelling of the name of the second officer on the scene. For purposes of this appeal, we refer to the second officer on the scene as "Officer Trybulski."

STATE v. MALUNDA

[230 N.C. App. 355 (2013)]

Officer Brinkley initially approached the passenger side of the vehicle and spoke with defendant. Officer Brinkley testified defendant immediately identified himself as John but failed to immediately produce identification. Officer Cooper informed Officer Brinkley that he was familiar with defendant as a result of defendant's prior drug activity.

Officer Brinkley testified there was an open container of alcohol in the vehicle near defendant and "[t]hroughout the encounter [defendant] appeared very, very nervous[.]" Specifically, Officer Brinkley recounted that he could see defendant's heart beating rapidly through his shirt and defendant was breathing heavily. Officer Brinkley testified that, "[d]ue to the nervousness, the high drug area, the open container in the vehicle, and other officers arrived on scene, [defendant] was escorted out of the vehicle." Upon exit, defendant was frisked for weapons. No weapons were found. Officer Brinkley then asked defendant to sit on the curb. When defendant refused, he was detained and sat on the curb for officer safety reasons.

Officer Trybulski and Officer Wilkins approached the driver side of the vehicle and noticed a strong odor of marijuana. Officer Brinkley testified he also observed the odor of marijuana on the driver side of the vehicle, but did not observe the odor on the passenger side. As a result of the odor, the driver was removed from the vehicle and a warrantless search of the vehicle was performed. Marijuana was found in the driver side door. A warrantless search of defendant was then performed. During the search, Officer Cooper found a small brown plastic bag in defendant's pocket. The bag contained ten smaller bags, eight of which appeared to contain crack cocaine and two of which appeared to contain powder cocaine. Defendant also had \$275 dollars in his wallet.

At the conclusion of the suppression hearing, the trial court found there was probable cause for police to conduct the warrantless search of defendant and denied defendant's motion to suppress. Defendant then entered a plea of guilty to the reduced charge of possession of cocaine, reserving the right to appeal the denial of his motion to suppress. Following defendant's plea, judgment was entered sentencing defendant to a term of six to seventeen months imprisonment with the sentence suspended on condition that defendant complete twenty four months of supervised probation. Defendant filed notice of appeal from his conviction on 31 September 2012 and now challenges the denial of his motion to suppress.

II. Discussion

"An order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a

STATE v. MALUNDA

[230 N.C. App. 355 (2013)]

judgment entered upon a plea of guilty.” N.C. Gen. Stat. § 15A-979(b) (2011). Our review of a trial court’s denial of a motion to suppress is “strictly limited to determining whether the trial judge’s underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge’s ultimate conclusions of law.” *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). “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).

At the outset of our analysis, we note that the trial court did not issue findings of fact or conclusions of law as required by statute. *See* N.C. Gen. Stat. § 15A-977(f) (2011) (“The judge must set forth in the record his findings of facts and conclusions of law.”). Instead the trial court announced the denial of the defendant’s motion to suppress in open court and requested that the State “prepare an order with the appropriate findings of fact and conclusions of law.” Despite the trial court’s request, no such order appears in the record.

Notwithstanding, where defendant does not argue the lack of a written order as a basis for relief and acknowledges in his reply brief that it is not an issue on appeal, we do not reach the issue. *See* N.C.R. App. P. 28(a) (2013) (“The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party’s brief are deemed abandoned.”); *see also State v. Watkins*, ___ N.C. App. ___, ___, 725 S.E.2d 400, 403 (2012) and *State v. McCain*, 212 N.C. App. 157, 165 n. 3, 713 S.E.2d 21, 27 n. 3 (2011) (both citing N.C. R. App. P. 28(a) and declining to address the lack of a written order denying the defendants’ motions to suppress where the defendants did not raise the issue on appeal). Furthermore, the trial court does not err in failing to issue specific findings of fact where there is no material conflict in the evidence. *State v. Phillips*, 300 N.C. 678, 685, 268 S.E.2d 452, 457 (1980). In this case, defendant does not challenge the evidence. Rather, defendant argues the trial court erred as a matter of law in denying his motion to suppress.

“The Fourth Amendment of the United States Constitution and Article I, Section 20 of the North Carolina Constitution prohibit unreasonable searches and seizures.” *State v. Downing*, 169 N.C. App. 790, 794, 613 S.E.2d 35, 38 (2005). “The same provisions ‘require the exclusion of evidence obtained by unreasonable searches and seizures.’ ” *State v. Smith*, ___ N.C. App. ___, ___, 729 S.E.2d 120, 122 (2012) (quoting *State v. McLamb*, 186 N.C. App. 124, 125–26, 649 S.E.2d 902, 903 (2007)). “Searches conducted without a warrant are ‘*per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions.’ ” *State*

STATE v. MALUNDA

[230 N.C. App. 355 (2013)]

v. Cline, 205 N.C. App. 676, 679, 696 S.E.2d 554, 556 (2010) (quoting *Katz v. United States*, 389 U.S. 347, 357, 19 L. Ed. 2d 576, 585 (1967)). However, “[a] warrantless search is lawful if probable cause exists to search and the exigencies of the situation make search without a warrant necessary.” *State v. Mills*, 104 N.C. App. 724, 730, 411 S.E.2d 193, 196 (1991) (citing *State v. Allison*, 298 N.C. 135, 141, 257 S.E.2d 417, 421 (1979)).

Defendant’s sole argument on appeal is that the trial court erred in concluding the police had probable cause to conduct the warrantless search of his person.² We agree.

“Probable cause has been defined as a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty.” *State v. Yates*, 162 N.C. App. 118, 122, 589 S.E.2d 902, 904 (2004) (internal quotation marks omitted). “This Court has determined that probable cause to search exists when a reasonable person acting in good faith could reasonably believe that a search of the defendant would reveal the controlled substances sought which would aid in his conviction.” *State v. Pittman*, 111 N.C. App. 808, 813, 433 S.E.2d 822, 825 (1993) (internal quotation marks omitted). We hold the evidence in this case supports a finding of a reasonable suspicion, but does not amount to probable cause to conduct a search of defendant’s person.

Both our Supreme Court and this Court have held “the odor of marijuana to be sufficient to establish probable cause to search for the contraband drug in an automobile.” *Yates*, 162 N.C. App. at 122, 589 S.E.2d at 904 (citing *State v. Greenwood*, 301 N.C. 705, 708, 273 S.E.2d 438, 441 (1981)). Thus, the officers in this case had probable cause to search the vehicle when they detected the odor of marijuana on the driver side of the vehicle. Probable cause to search a vehicle does not, however, amount to probable cause to search a passenger in the vehicle. See *United States v. Di Re*, 332 U.S. 581, 587, 92 L. Ed. 210, 216 (1948) (declining to expand the ruling in *Carroll v. United States*, 267 U.S. 132, 280, 69 L.Ed. 543 (1924), to justify warrantless searches of persons incident to the search of a vehicle based on “mere presence in a suspected car[.]”).

Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search

2. On appeal, defendant does not challenge the initial stop, the frisk of his person for weapons, or the search of the vehicle.

STATE v. MALUNDA

[230 N.C. App. 355 (2013)]

or seize another or to search the premises where the person may happen to be.

Ybarra v. Illinois, 444 U.S. 85, 91, 62 L. Ed. 2d 238, 245 (1979). As subsequently noted by the Supreme Court, the decisions in *Di Re* and *Ybarra* “turned on the unique, significantly heightened protection afforded against searches of one’s person.” *Wyoming v. Houghton*, 526 U.S. 295, 303, 143 L. Ed. 2d 408, 417 (1999).

Upon review of the record in this case, we find insufficient evidence to support the trial court’s conclusion that the search of defendant’s person was supported by probable cause particularized with respect to defendant. The officers detected the odor of marijuana on the driver side of the vehicle. The officers then conducted a warrantless search of the vehicle and discovered marijuana in the driver side door. Yet, Officer Brinkley testified that he did not notice an odor of marijuana on the passenger side of the vehicle or on defendant. Considering the evidence, there was nothing linking the marijuana to defendant besides his presence in the vehicle. Moreover, there is not a reasonable inference of common enterprise in this case where the marijuana was found in the driver side door. Therefore, *Maryland v. Pringle*, 540 U.S. 366, 373-74, 157 L. Ed. 2d 769, 776-77 (2003) (holding there was probable cause to arrest a front seat passenger of a vehicle for possession of controlled substance found behind the rear seat because the quantity of drugs and cash in the vehicle indicated drug dealing and a reasonable inference of a common enterprise), is not controlling. Lastly, none of the other circumstances, including defendant’s location in an area known for drug activity, defendant’s prior criminal history, defendant’s nervousness, defendant’s failure to immediately produce identification, or the infraction of possessing an open container of alcohol in a motor vehicle, a noncriminal violation pursuant to N.C. Gen. Stat. § 20-138.7(e) (2011) and N.C. Gen. Stat. § 14-3.1 (2011), when considered separately or in combination, amount to probable cause to search defendant’s person. They merely provide reasonable suspicion.

III. Conclusion

For the reasons discussed above, we hold the trial court erred in concluding there was probable cause to conduct a warrantless search of defendant’s person. Therefore, we reverse the trial court’s denial of defendant’s motion to suppress and vacate defendant’s conviction for possession of cocaine.

Reversed and vacated.

Judges McGEE and DILLON concur.

STATE v. MARTINEZ

[230 N.C. App. 361 (2013)]

STATE OF NORTH CAROLINA

v.

EDGARD JOEL MARTINEZ

No. COA13-492

Filed 5 November 2013

1. Appeal and Error—certiorari granted—different theory on appeal

The Court of Appeals granted defendant's petition for *certiorari*, invoking its authority under N.C.R. App. P. 2, to review the merits of defendant's appeal where defendant acknowledged that his argument in Court of Appeals presented a different theory for dismissal than that argued in the trial court.

2. Crimes, Other—altering court documents—insufficient evidence

The trial court erred by denying defendant's motion to dismiss the charge of altering court documents. While the evidence suggested that defendant forged signatures on a document before it was filed in the clerk of court's office, the evidence did not show that defendant materially altered or changed any process, pleading, or other official case record.

Appeal by Defendant from judgment entered 15 November 2012 by Judge Tanya T. Wallace in Superior Court, Onslow County. Heard in the Court of Appeals 8 October 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Mabel Y. Bullock, for the State.

W. Michael Spivey for Defendant.

McGEE, Judge.

Edgard Joel Martinez ("Defendant") was indicted on 11 September 2012 for altering court documents, using the seal or notarial records of a notary without authority, and obstructing justice. At trial, Defendant testified that he and Marcia Martinez ("Ms. Martinez") married in February 2010 and separated in March 2010. Defendant filed an action for divorce on 23 May 2011.

STATE v. MARTINEZ

[230 N.C. App. 361 (2013)]

Ms. Martinez testified that she did not sign her name to a document titled “Acceptance of Service, Answer and Waiver of Notice” filed in the Office of the Clerk of Superior Court in Onslow County on 20 June 2011. Stanley McCormick (“Mr. McCormick”), a notary public, testified that the signature which reads “Stanley D. McCormick” was not his signature and that he did not sign the document titled “Acceptance of Service, Answer and Waiver of Notice.” Defendant was convicted of altering court documents and obstructing justice on 15 November 2012. Defendant appeals.

On appeal, Defendant argues the trial court erred by denying Defendant’s motion to dismiss the charge of altering court documents. Defendant does not challenge his conviction for obstructing justice on appeal.

I. Preservation

Preliminarily, we address the question of whether Defendant preserved this issue for review. “In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.” N.C.R. App. P. 10(a)(1). Defendant preserves only those arguments that he presented to the trial court. *See, e.g., State v. Sharpe*, 344 N.C. 190, 194-95, 473 S.E.2d 3, 5-6 (1996).

The defendant in *Sharpe* argued at trial that evidence “should be admitted under the state of mind and dying declarations exceptions to the rule against hearsay.” *Id.* at 195, 473 S.E.2d at 5-6. The defendant argued on appeal that the evidence was admissible as statements against penal interest. *Id.* at 194, 473 S.E.2d at 5. Our Supreme Court held that “where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount[.]” *Sharpe*, 344 N.C. at 194, 473 S.E.2d at 5 (internal quotation marks omitted).

In the present case, at the conclusion of the State’s evidence, Defendant moved to dismiss, arguing the State failed to present evidence that Defendant was the perpetrator.

[Defense counsel]. Judge, obviously, there has been evidence that shows, perhaps, a forgery was committed. There’s been testimony it was not the signature of Mr. McCormick; however, Judge, there has been absolutely no evidence that points toward this defendant. There has

STATE v. MARTINEZ

[230 N.C. App. 361 (2013)]

been no evidence, taken in the light most favorable to the [S]tate, that shows he's the one that altered these court documents. . . .

I would ask the court that, based on the elements of this particular crime or these particular crimes, because the [S]tate is only proceeding, Your Honor, with the altering the court documents and obstructing justice, that there's not enough evidence for this to go to the jury for them to make any type of decision based on my client is the one that did this. Yes, there has been some evidence of a forgery. Who? Not one person has gotten on that stand and said, based on this, that, or the other, he did it. I would ask the court to dismiss this case[.]

Defendant renewed his motion to dismiss at the conclusion of all evidence, as follows:

[Defense counsel]. Judge, I want to renew my motion to dismiss at the close of all of the evidence and ask that the court enter directed verdict. Judge, it would be under the grounds I stated previously in my argument.

Defendant acknowledges "that his argument in this Court presents a different theory for dismissal than that argued in the trial court." Defendant requests that this Court invoke N.C.R. App. P. 2 to review the sufficiency of the evidence.

To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative[.]

N.C.R. App. P. 2.

This Court invoked N.C.R. App. P. 2 to review the merits of an argument in *State v. Gayton-Barbosa*, 197 N.C. App. 129, 676 S.E.2d 586 (2009). In that case, the defendant failed to renew his motion to dismiss the charge of felonious larceny. *Id.* at 133, 676 S.E.2d at 589. The defendant limited his argument in support of his motion at the close of the State's evidence to the lack of "evidence that the firearm in question was not returned to the owner[.]" *Id.* The defendant argued on appeal that there existed a variance between the indictment and the evidence. *Id.*

STATE v. MARTINEZ

[230 N.C. App. 361 (2013)]

In *Gayton-Barbosa*, this Court invoked N.C.R. App. P. 2 for three reasons: (1) Supreme Court precedent [*State v. Brown*, 263 N.C. 786, 140 S.E.2d 413 (1965)] indicated that “fatal variances of the type present here are sufficiently serious to justify the exercise of our authority under N.C.R. App. P. 2[;]” (2) “a variance-based challenge is, essentially, a contention that the evidence is insufficient to support a conviction[.]” and this Court and our Supreme Court “have regularly invoked N.C.R. App. P. 2 in order to address challenges to the sufficiency of the evidence to support a conviction[;]” and (3) “it is difficult to contemplate a more ‘manifest injustice’ to a convicted defendant than that which would result from sustaining a conviction that lacked adequate evidentiary support[.]” *Gayton-Barbosa*, 197 N.C. App. at 134-35, 676 S.E.2d at 590.

The challenge in the present case concerns the sufficiency of the evidence. After careful consideration, we invoke our authority under N.C.R. App. P. 2 to review Defendant’s argument. Defendant contends that the “filing of a forged document does not violate N.C. Gen. Stat. § 14-221.2.”

II. Standard of Review

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.” *Bradshaw*, 366 N.C. at 92, 728 S.E.2d at 347. “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.” *Bradshaw*, 366 N.C. at 93, 728 S.E.2d at 347 (internal citations and quotation marks omitted).

III. Analysis

[2] “Any person who without lawful authority intentionally enters a judgment upon or materially alters or changes any criminal or civil process, criminal or civil pleading, or other official case record is guilty of a Class H felony.” N.C. Gen. Stat. § 14-221.2 (2011).

In *State v. Burke*, 185 N.C. App. 115, 648 S.E.2d 256 (2007), this Court held that evidence that the defendant swapped the second page of

STATE v. MARTINEZ

[230 N.C. App. 361 (2013)]

an order with another page was sufficient to survive a motion to dismiss the charge of altering court documents. In the order, the defendant was required to pay child support and provide health insurance for the children. *Id.* at 116, 648 S.E.2d at 257.

The defendant's employer sent DSS a letter stating that the defendant was "not required to have health insurance on his children" and attached a copy of an order. *Id.* DSS "knew that an order from a show cause hearing would not have an effect on [the] defendant's obligations regarding his children's medical insurance" and confirmed this knowledge by checking the original order in the clerk of court's office. *Id.* at 117, 648 S.E.2d at 258. The copy "included handwritten portions relieving [the] defendant of his obligation to provide medical insurance to his children through his employer." *Id.* at 117, 648 S.E.2d at 257-58. The original order "did not contain the hand-written language[.]" *Id.* at 117, 648 S.E.2d at 258.

However, an employee of DSS was later "summoned to the clerk's office, where she learned that the order in the file had been changed to match the one sent to her by" the defendant's employer. *Id.* A handwriting analyst testified that the handwriting on the altered portion of the order was consistent with the defendant's handwriting samples, in the opinion of the analyst.

In the present case, the State presented testimony from two witnesses, Ms. Martinez and Mr. McCormick. Ms. Martinez testified that, on the document titled "Acceptance of Service, Answer and Waiver of Notice," the signature which reads "Marcia Martinez" was a "horrible signature" and was not her own signature. Ms. Martinez further testified that she and Defendant were having "disagreements about the dissolution of the marriage[.]" Mr. McCormick, the notary public, testified that the signature which reads "Stanley D. McCormick" was not his signature and that he did not sign the document titled "Acceptance of Service, Answer and Waiver of Notice."

The State urges a plain reading of N.C.G.S. § 14-221.2. A plain reading of the statute, with the precedent in *Burke, supra*, compels us to conclude that the evidence does not show that Defendant materially altered or changed any process, pleading, or other official case record. Rather, the evidence suggests that Defendant forged the signatures of Ms. Martinez and Mr. McCormick on the document before it was filed in the clerk of court's office.

The trial court erred in denying Defendant's motion to dismiss the charge of altering court documents. We need not reach Defendant's

STATE v. MAY

[230 N.C. App. 366 (2013)]

argument concerning jury instructions because of our holding on the first issue.

Vacated.

Judges McCULLOUGH and DILLON concur.

STATE OF NORTH CAROLINA
v.
FLOYD EDWARD MAY, SR.

No. COA13-37

Filed 5 November 2013

1. Jury—deadlocked—instruction

The trial court's third charge to a deadlocked jury in a prosecution for first-degree statutory rape violated N.C.G.S. § 15A-1235 in several respects, including a reference to the time and expense of the trial and a reference to only a portion of the four-part instruction contained in the statute.

2. Jury—deadlocked—instruction—standard of review

Errors in the third charge to a deadlocked jury in a prosecution for first-degree statutory rape were reviewed for harmless error beyond a reasonable doubt. The North Carolina Supreme Court has not clarified whether it intended for its rationale in *State v. Wilson*, 363 N.C. 478, to apply to all situations involving alleged N.C. Const. art. I, § 24 violations or whether it intended *Wilson* to apply only to N.C. Const. art. I, § 24 challenges involving a trial court speaking to fewer than all the members of the jury. However, the Court of Appeals has held on at least two occasions that the rationale in *Wilson* does extend to situations involving a coercive charge to a fully empaneled jury.

3. Jury—deadlocked—instruction—harmless error

The State did not carry its burden of showing that an error in an instruction to a deadlocked jury was harmless beyond a reasonable doubt. Moreover, the evidence against defendant was not overwhelming, unlike many cases in which error was found to be harmless.

STATE v. MAY

[230 N.C. App. 366 (2013)]

4. Evidence—statutory rape—testimony of doctor and nurse

Although the appeal was decided on other grounds, the trial court did not commit plain error in a prosecution for first-degree statutory rape by allowing the expert testimony of a doctor and nurse where defendant contended that their testimony included impermissible opinion evidence that the victim had been sexually abused. Neither witness stated that the victim was sexually abused or attempted to draw conclusions or make a diagnosis; instead, they testified to their experience and knowledge, examination procedures and treatment, and the victim's symptoms and characteristics.

5. Evidence—prior crimes or bad acts—first-degree statutory rape—temporal proximity—sufficiently similar

Although the appeal was decided on other grounds, there was no plain error in a prosecution for first-degree statutory rape in admitting evidence of other incidents where the alleged conduct and the charged conduct were not too remote in time and were sufficiently similar.

Appeal by Defendant from judgment entered 19 April 2012 by Judge Howard E. Manning in Alamance County Superior Court. Heard in the Court of Appeals 23 May 2013.

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

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel R. Pollitt, for Defendant.

DILLON, Judge.

Floyd Edward May, Sr., (Defendant) appeals from judgment convicting him of one count of first-degree statutory rape. We conclude that Defendant is entitled to a new trial because the State has failed to meet its burden to prove that the trial court's error in charging a deadlocked jury in violation of N.C. CONST. art. I, § 24 was harmless beyond a reasonable doubt.

I. Facts and Procedural History

Defendant is a divorced adult male in his mid-60's living on social security disability. Defendant has an adult son, Mike May. Mike May lives

STATE v. MAY

[230 N.C. App. 366 (2013)]

with his wife Shannon May and their two daughters, Beth and Tammy,¹ in a mobile home park in Alamance County. This case involves two episodes of Defendant's alleged sexual abuse of Tammy, his younger granddaughter.

For the better part of fourteen years, Defendant lived with his son's family in their mobile home, sharing a bedroom with his older granddaughter Beth. At some point, Defendant began sleeping in a playhouse/shed behind the mobile home.² By 2011, Defendant moved in with a woman in another mobile home in the same park.

The two alleged episodes between Defendant and Tammy forming the basis for the charges against Defendant occurred during the summer of 2011, when Tammy was ten years old. Regarding the first episode, Tammy testified that she went into her older sister's bedroom where Defendant was lying on a bed watching television. Tammy lay down beside Defendant while the door to the bedroom was closed. She testified that while they were watching television, Defendant "moved her shorts to the side and put his 'wee-wee' in [her] 'moo-moo'³," and that Defendant also "stuck his wee-wee" in her mouth.

The second episode occurred on 15 July 2011 in the swimming pool behind the mobile home. Tammy testified that on that day, while she and Defendant were in the pool, Defendant moved her bathing suit to the side and put his "wee-wee" in her "moo-moo." That same day, Tammy told her mother what Defendant had done to her. Also, Tammy's father confronted Defendant regarding Tammy's allegations, which Defendant denied.⁴

Later on 15 July 2013, Tammy's parents took her to Alamance Regional Hospital where she was seen by Dr. Jade Sung. Dr. Sung

1. Pursuant to N.C.R. App. 4(e), the minor children will be referenced with the use of pseudonyms, Beth and Tammy.

2. Ms. May testified that she forced Defendant to move out of Beth's bedroom and into the shed after she walked in on Defendant lying in the same bed with Beth, who was around thirteen years old at the time, with his legs "all the way around [Beth][.]" while they were watching television – an account which Defendant denied during his testimony. In any case, Ms. May testified that she thought the "issue" was resolved and had no problem with her daughters continuing to spend time with Defendant.

3. The evidence showed that Tammy was not allowed to use anatomical terms, but rather was taught to use the term "wee-wee" to describe the male sex organ and "moo-moo" for the female sex organ.

4. The State offered evidence of a third episode involving improper sexual conduct by Defendant with Tammy which allegedly occurred in the playhouse/shed some time prior to the 15 July 2011 episode.

STATE v. MAY

[230 N.C. App. 366 (2013)]

testified that Tammy told her about Defendant “vaginally penetrat[ing] her in the swimming pool.” Dr. Sung examined Tammy and noted that Tammy had no inner-thigh bruising, no contusions on her external genitalia, no tears, rips, cuts or bleeding and “no signs of physical assault.” Dr. Sung testified that Tammy had some inflammation and irritation around her cervix, which could have been caused by a number of things such as chlorine. Dr. Sung testified, in sum, that her physical examination of Tammy was “unremarkable.”

The following day on 16 July 2011, Tammy was examined by nurse Rebecca Wheeler and two physicians at UNC Hospital. Ms. Wheeler testified that Tammy told her that she had discomfort in her mid-abdominal area and that Defendant had “put his thing in her moo-moo.”⁵ She testified that their physical examination of Tammy revealed that she had a “normal” hymen and “no evident signs of physical assault.”

On 8 September 2011, Tammy was seen by Dr. Dana Hagele at Crossroads, a child advocacy center in Alamance County. Dr. Hagele testified that Tammy told her about all three episodes. Dr. Hagele also conducted a physical exam of Tammy, an exam which she described as “completely unremarkable.”

Deputy Bobby Baldwin testified that he interviewed Tammy in November 2011. He stated that the account Tammy gave during the interview was consistent with her trial testimony, except in one regard. Specifically, Deputy Baldwin testified that in the November 2011 interview, Tammy had stated that the first episode, which occurred in Beth’s bedroom, *only* consisted of Defendant putting his “wee wee” in her mouth, whereas during the trial, she testified that Defendant had also put his “wee wee” in her “moo moo.”

On 31 October 2011, Defendant was indicted on two counts of first-degree statutory rape, one count of first-degree sexual offense of a child, and one count of indecent liberties with a child. Defendant was tried on 16 April 2012 in Alamance County Superior Court. At the close of evidence, the trial court dismissed the charge of indecent liberties with a child but submitted the other three charges to the jury.

The trial court charged the jury three different times: The first charge was given just before the jury began deliberations; the second charge was given after the jury had deliberated for about two hours,

5. Tammy testified that she felt pain, which included a burning sensation when she attempted to use the bathroom after each of the three episodes.

STATE v. MAY

[230 N.C. App. 366 (2013)]

and after it had sent a written note to the trial court indicating that they “were deadlocked”; and the third charge was given when, after thirty more minutes of deliberation, the jury sent another written note to the trial court indicating that “it is 10-2 and we are hopelessly deadlocked.” In its third charge⁶, the trial court addressed the jury as follows:

[Foreperson], you don’t need to sit down. I have you all’s note. And I’m going, in my discretion, I’m going to ask you to resume your deliberations for another half an hour. I’m not going to stretch it any farther than that, but I’m going to ask you to give it your best shot. And it’s your choice, not mine, but I’m not going to hot bond you, and we’re not going to make you to stay until 5 o’clock, but I’m going to ask you to go back and try again, remembering the instructions I gave you. And at 3:30 I’m going to ask you to come out, unless you’ve hit, hit the button and reached the decision prior to that. And that’s your choice.

I mean, I can’t tell you what to do. I appreciate your note letting me know, but I’m going to ask you, since the people have so much invested in this, and we don’t want to have to redo it again, but anyway, if we have to we will. That’s not my call either. That doesn’t belong to me.

I’ll ask you just to give us another half hour an hour and continue to deliberate with a view towards reaching an agreement if it can be done without violence to your individual judgment. As I said earlier, none of you should change your opinion if you, you know, if you feel like that’s what your conscience dictates, you stick by it.

So with that, I’m going to ask you to go back and continue.

After this third charge, the jury deliberated for exactly thirty minutes, upon which it convicted Defendant of one count of first-degree statutory rape based on the episode in Beth’s bedroom. The jury, however, failed to reach a unanimous verdict as to the other two charges; and, accordingly, the trial court declared a mistrial as to those charges. Based on

6. This third charge, was, in essence, an *Allen* charge, named for the United States Supreme Court case *Allen v. United States*, 164 U.S. 492, 41 L. Ed. 528 (1896), in which the Court held that it was permissible under the Federal Constitution for a trial court to give certain instructions to a deadlocked jury for the purpose of encouraging the dissenting jurors to reconsider their position. A brief history regarding *Allen* charges can be found in our opinion, *State v. Lamb*, 44 N.C. App. 251, 261 S.E.2d 130 (1979).

STATE v. MAY

[230 N.C. App. 366 (2013)]

the single conviction, the trial court sentenced Defendant to 230 to 285 months imprisonment. From this judgment, Defendant appeals.⁷

II. Analysis

On appeal, Defendant contends that he is entitled to a new trial because the trial court (A) coerced the jury's guilty verdict; (B) erroneously admitted inadmissible expert opinion evidence from State's witnesses Dr. Dana Hagele and Ms. Rebecca Wheeler; and (C) erroneously allowed the State to offer evidence of "other crimes" allegedly committed by Defendant for which he was not indicted. We address each argument in order below.

A. Jury Instruction

Defendant contends that he is entitled to a new trial because the trial court's third charge to the jury was in violation of the standards established by our Legislature in N.C. Gen. Stat. § 15A-1235, and that these errors — when viewed in light of the totality of the circumstances — resulted in an unconstitutional coercion of "a hopelessly deadlocked" jury to return a guilty verdict, in violation of N.C. CONST. art. I, § 24. In our analysis, we must determine (a) whether the trial court committed error in its third charge; (b) if there was error, by what standard this Court is to conduct its review; and (c) whether, after applying this standard, the error warrants a new trial. We conclude Defendant is entitled to a new trial.

1. Did the Instruction Constitute Error?

[1] Defendant argues that the trial court erred in that its third charge violated the standards adopted by our Legislature in N.C. Gen. Stat. § 15A-1235 in a number of respects. N.C. Gen. Stat. § 15A-1235 was enacted in 1978 to serve as "the proper reference for standards applicable to charges which may be given a jury that is apparently unable to agree upon a verdict." *State v. Easterling*, 300 N.C. 594, 608, 268 S.E.2d

7. Defendant was found guilty of first degree rape and judgment was entered on 19 April 2012. On 30 April 2012, Defendant entered oral notice of appeal. The trial court entered appellate entries and appointed the Appellate Defender. N.C.R. App. P. 4(a)(1) and (a)(2) require that Defendant must appeal by "giving oral notice of appeal *at trial*," or by "filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment[.]" Defendant did not comply with N.C.R. App. P. 4(a). However, on 10 January 2013, Defendant filed a petition for writ of certiorari. The State does not oppose the granting of the writ, stating, in its response, that "the State respectfully submits that it is within this Court's discretion to allow" the writ. In any event, in our discretion, we grant Defendant's petition for writ of certiorari.

STATE v. MAY

[230 N.C. App. 366 (2013)]

800, 809 (1980) (citation omitted). N.C. Gen. Stat. § 15A-1235(a) provides that a trial court *must* instruct a jury that a verdict must be unanimous. *Id.* N.C. Gen. Stat. § 15A-1235(b) provides a four-part instruction that a trial court *may* give regarding a juror's obligations in reaching his individual verdict. *Id.* N.C. Gen. Stat. § 15A-1235(c) provides for the instructions that may be given to a deadlocked jury as follows:

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.

Id.

We agree with Defendant that the trial court's third charge violated N.C. Gen. Stat. § 15A-1235. For instance, when the trial judge was informing the jury that he was requiring them to deliberate for an additional thirty minutes, he erred by stating, "I'm going to ask you, since the people have so much invested in this, and we don't want to have to redo it again, but anyway, if we have to we will." Our Courts have held that instructing a deadlocked jury regarding the time and expense associated with the trial and a possible retrial constitutes error. *See State v. Lippford*, 302 N.C. 391, 276 S.E.2d 161 (1981); *State v. Easterling*, 300 N.C. 594, 268 S.E.2d 800 (1980); *see also State v. Pate*, 187 N.C. App. 442, 663 S.E.2d 212 (2007); *State v. Burroughs*, 147 N.C. App. 693, 556 S.E.2d 344 (2001); *State v. Johnson*, 80 N.C. App. 311, 341 S.E.2d 776 (1993); *State v. Lamb*, 44 N.C. App. 251, 260, 261 S.E.2d 130 (1979). In *Easterling*, our Supreme Court noted that prior to the passage of N.C. Gen. Stat. § 15A-1235 in 1978, "the general rule [was] that a trial judge may state to the jury the ills attendant upon disagreement including the resulting expense . . . and that the case will in all probability have to be tried by another jury in the event that the jury fails to agree." *Id.* at 607, 268 S.E.2d at 808 (quoting *State v. Alston*, 294 N.C. 577, 594, 243 S.E.2d 354, 365 (1977)). The Court then stated that it was the Legislature's intent, with the passage of N.C. Gen. Stat. § 15A-1235 in 1978, that "a North Carolina jury may no longer be advised of the potential expense and inconvenience of retrying the case should the jury fail to agree." *Id.* at 608, 268 S.E.2d at 809.

Further, as argued by Defendant, we believe the trial court erred in referencing only *a portion* of the four-part instruction contained in N.C. Gen. Stat. § 15A-1235(b) during its third charge. Though, pursuant to N.C. Gen. Stat. § 15A-1235(c), a trial court is *not required* to give

STATE v. MAY

[230 N.C. App. 366 (2013)]

a re-instruction under subsection (b) to a deadlocked jury; however, “[w]hen[] a trial judge gives a deadlocked jury any of the instructions authorized by N.C.G.S. § 15A-1235(b), he *must* give them all.” *State v. Aikens*, 342 N.C. 567, 579, 467 S.E.2d 99, 106 (1996) (emphasis added) (citation omitted).

2. What is the Appropriate Standard of Review?

[2] Having concluded that the trial court committed errors while giving its third charge to the jury, we must determine the proper standard by which this Court reviews those errors. Both parties agree that the *scope* of our review is based on a “totality of circumstances.” *State v. Patterson*, 332 N.C. 409, 416, 420 S.E.2d 98, 101 (1992). In other words, we do not simply review the allegedly offending statements in the charge in isolation; but rather, we review those statements in the context of the entire charge. *Alston*, 294 N.C. at 593, 243 S.E.2d at 365 (stating that “the isolated mention of the expense and inconvenience of retrying a case does not warrant a new trial unless the charge as a whole coerces a verdict”) (internal citation omitted). However, the parties disagree as to the proper *standard* of appellate review. The State argues that the proper standard of review is plain error because Defendant failed to lodge any objection, or move for mistrial, in response to the trial court’s third charge to the jury. Defendant argues, however, that, notwithstanding his failure to object at trial, the proper standard of review is harmless error beyond a reasonable doubt because the errors violated his rights under the North Carolina Constitution.

N.C. CONST. art. I, § 24 provides that “[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court.” *Id.* Our Supreme Court has held that “[i]t is well settled that Article I, Section 24 of the Constitution of North Carolina prohibits a trial court from coercing a jury to return a verdict.” *Patterson*, 332 N.C. at 415, 420 S.E.2d at 101.

As the State argues, our Supreme Court has held that where a defendant has failed to object to an offending charge during the trial, any argument raised on appeal based on a violation of N.C. CONST. art. I, § 24 of our State’s constitution is waived, and any argument based on a violation of N.C. Gen. Stat. § 15A-1235 is reviewed for plain error. *See Aikens*, 342 N.C. at 578, 467 S.E.2d at 106 (1996) (stating that the “defendant[,] having failed to object to the instruction, our review is to determine whether the error, if any, constituted plain error”). In *State v. Bussey*, our Supreme Court stated as follows:

STATE v. MAY

[230 N.C. App. 366 (2013)]

Defendant's sole assignment of error concerns the trial judge's instructions and remarks to the jury following a report by it that it was deadlocked. Because defendant made no objection to the additional instructions or remarks by the trial judge, the plain error standard is applicable. It is defendant's contention that the judge coerced a guilty verdict, thereby violating defendant's right to a fair trial and an impartial jury under both the federal and state constitutions and N.C.G.S. §§ 15A-1232 and -1235. Because defendant failed to raise the alleged constitutional issues before the trial court, he has waived these arguments, and they may not be raised for the first time in this Court. We turn then to the question of whether the trial court's instructions and remarks constitute plain error under the applicable statute and decisions of this Court.

321 N.C. 92, 97, 361 S.E.2d 564, 567 (1987) (citations omitted).

In 2007, we reviewed an allegedly coercive charge based on a violation of N.C. Gen. Stat. § 15A-1235 *for plain error* in a case where a defendant failed to object when a trial judge charged a deadlocked jury concerning the time and expense of a retrial. *Pate*, 187 N.C. App. at 449, 653 S.E.2d at 217.

In 2009, however, our Supreme Court stated that “[w]hile a 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.” *State v. Wilson*, 363 N.C. 478, 484, 681 S.E.2d 325, 330 (2009). The N.C. CONST. art. I, § 24 violation in *Wilson*, though, did not involve a coercive jury charge, but rather a situation where the trial judge instructed a single juror outside the presence of the other jurors.

Defendant implicitly argues that the language employed by the Supreme Court in *Wilson* demonstrates that the Court intended that the scope of its ruling extend to all situations involving violations of N.C. CONST art. I, § 24. For instance, the Supreme Court stated that it was basing its holding on the fact that “the right to a unanimous jury verdict is fundamental to our system of justice.” *Wilson*, 363 N.C. at 486, 681 S.E.2d at 331 (citations omitted). We note that it has long been the concern that a coerced jury verdict would result in “what really is a majority, rather than a unanimous, verdict.” *State v. McKissick*, 268 N.C. 411, 415, 150 S.E.2d 767, 770-71 (1966). Further, the plain language used by the Supreme Court that “where the error violates the right to a unanimous

STATE v. MAY

[230 N.C. App. 366 (2013)]

jury verdict under Article I, Section 24, it is preserved for appeal without any action by counsel” suggests that its rationale is to be applied to all Article I, Section 24 violations. *Wilson*, 363 N.C. at 484, 681 S.E.2d at 330.

On the other hand, there is language in *Wilson* which suggests that the Supreme Court intended the scope of its holding to be that N.C. CONST. art. I, § 24 violations are automatically preserved only in the context of a trial court instructing fewer than all jurors, and not in the context of a coerced jury instruction given to the entire jury. For instance, the following specific holding in *Wilson* is more limited than other language in the opinion:

[W]e hold that where the trial court instructed a single juror in violation of defendant’s right to a unanimous jury verdict under Article I, Section 24, the error is deemed preserved for appeal notwithstanding defendant’s failure to object.

Id. at 486, 681 S.E.2d at 331. By arguing for a broad interpretation of *Wilson*, Defendant is effectively contending that the Supreme Court intended to overrule its prior holdings in *Aiken*, *Bussey* and *Patterson* — where our Supreme Court held that an argument based on N.C. CONST. art. I, § 24 in the context of a trial court’s allegedly coercive charge to a fully empaneled jury was waived if not preserved by objection — without explicitly stating that this was its intent. However, the *Wilson* Court cites a ruling, handed down two years *prior* to *Patterson*, which held that where a defendant failed to object when the trial court addressed the jury foreman outside the presence of the rest of the jury, “the error violates defendant’s right to a trial by a jury of twelve, [and the] defendant’s failure to object is not fatal to his right to raise the question on appeal.” *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985).

Neither party cites any Supreme Court opinion subsequent to *Wilson* in their arguments pertaining to the appropriate standard of review. Further, we have found no case in which the Supreme Court clarified whether it intended for its rationale in *Wilson* to apply to all situations involving alleged N.C. CONST. . art. I, § 24 violations — thus, effectively overruling *Patterson*, *Bussey* and *Aiken* — or whether it intended *Wilson* to apply only to N.C. CONST. . art. I, § 24 challenges involving a trial court speaking to fewer than all the members of the jury.

Our Court, however, has held on at least two occasions that the rationale in *Wilson* does extend to situations involving a coercive charge to a fully empaneled jury. Specifically, in *State v. Blackwell*, we held as follows:

STATE v. MAY

[230 N.C. App. 366 (2013)]

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.

__ N.C. App. __, __, 747 S.E.2d 137, 140 (2013) (relying on *State v. Wilson*, *supra*). Likewise, in *State v. Gillikin*, our Court, also relying on *Wilson*, applied a harmless error analysis to a challenge by the defendant that a “the trial court’s re-instructions to a deadlocked jury did not contain the substance of N.C. Gen. Stat. § 15A-1235(b) and unconstitutionally coerced guilty verdicts in violation of Article I, Section 24 of the North Carolina Constitution[,]” notwithstanding the fact that the defendant did not lodge an objection to the charge at trial. __ N.C. App. __, __, 719 S.E.2d 164, 167 (2011).⁸ We are bound by these holdings, and, accordingly, will review the errors contained in the third charge for harmless error beyond a reasonable doubt. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36-37 (1989).

3. Was the Error Harmless Beyond a Reasonable Doubt?

[3] The State “bears the burden of showing that the error was harmless beyond a reasonable doubt.” *Wilson*, 363 N.C. at 487, 681 S.E.2d at 331. In its brief, the State does not put forth any argument to meet its burden of demonstrating how the trial judge’s errors were not harmless beyond a reasonable doubt. Rather, the State contends that it “is not burdened with showing error, if any, was harmless (sic), where the alleged constitutional error is first raised on appeal, because such an argument is not properly raised on appeal.” Accordingly, because the State has failed to meet its burden, we hold that Defendant is entitled to a new trial.

In any event, after considering the totality of the circumstances, we do not believe the errors were harmless beyond a reasonable doubt. Unlike many cases in which the courts have found error to be harmless, *see, e.g., State v. Francis*, 343 N.C. 436, 471 S.E.2d 348 (1996) (holding an error was harmless in light of the “plenary” competent evidence of

8. *Blackwell*, from 2013, and *Gillikin*, from 2011, are both published opinions. We note that in an unpublished 2012 opinion, our Court refused to extend the holding in *Wilson* and *Ashe* to an N.C. CONST. art. I, § 24 challenge where a trial judge instructed a jury on alternate theories of a crime. *State v. Guy*, __ N.C. App. __, 729 S.E.2d 128 (2012) (COA12-197) (reviewing for plain error and explaining that “[t]he holdings of both *Ashe* and *Wilson* are narrow[;] [and] [w]e distinguish the facts of the present case and decline to extend the holdings of *Ashe* and *Wilson*”).

STATE v. MAY

[230 N.C. App. 366 (2013)]

the defendant's guilt of two murders, including testimony by defendant's accomplice that defendant shot both victims and defendant's own trial testimony admitting that he and the accomplice, with weapons, followed the victims into an alley where both victims were shot), the evidence in this case is not overwhelming. There was no physical evidence suggesting Defendant committed statutory rape on a young girl. Rather, the only direct evidence was the testimony of the alleged victim. Further, not only did the trial court fail to include all the elements of N.C. Gen. Stat. § 15A-1235(b) in its third charge, it included a statement regarding the expense and inconvenience associated with the trial and possible retrial, *see, e.g., State v. Lipfird*, 302 N.C. 391, 276 S.E.2d 161 (1981), and it imposed a 30-minute time limit, which the jury was able to meet just in time to reach one guilty verdict, *see, e.g., State v. Sutton*, 31 N.C. App. 697, 702, 230 S.E.2d 572, 575 (1976) (stating that "the mere fact that a judge prescribes a time limit for the jury's decision does not amount to coercion where the jury does not actually come to a decision within the general limits imposed by the judge").⁹

B. Expert Witnesses

[4] Having ordered a new trial for Defendant, we need not address Defendant's remaining arguments. However, we address those arguments as they may arise in a re-trial.

Defendant contends that the trial court committed plain error by allowing the expert testimony of Dr. Dana Hagele and UNC Hospital nurse Ms. Rebecca Wheeler.¹⁰ Specifically, Defendant argues that Dr. Hagele and Ms. Wheeler's testimony included impermissible opinion evidence that Tammy had, in fact, been sexually abused. We disagree.

This Court has well established 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). Furthermore, in prosecutions of a sexual offense involving a child victim, our Supreme Court has found that "the trial court should not admit expert opinion that sexual abuse has in fact occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility." *State v. Stancil*, 355 N.C. 266, 559 S.E.2d 788, 789

9. Defendant advances a number of other arguments as to why the trial court's errors were not harmless beyond a reasonable doubt. However, we do not address the merit of these arguments since the State failed to meet its burden.

10. Defendant did not lodge an objection at trial to the experts' testimony as it pertained to the issue now presented on appeal.

STATE v. MAY

[230 N.C. App. 366 (2013)]

(2002). Thus, “[t]estimony that a child has been ‘sexually abused’ based solely on interviews with the child are improper.” *State v. Grover*, 142 N.C. App. 411, 419, 543 S.E.2d 179, 183, *aff’d*, 354 N.C. 354, 553 S.E.2d 679 (2001) (citation omitted).

“However, an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith.” *Stancil*, 355 N.C. at 267, 559 S.E.2d at 789. “The nature of the experts’ jobs and the experience which they possess make them better qualified than the jury to form an opinion as to the characteristics of abused children.” *Grover*, 142 N.C. App. at 419, 543 S.E.2d at 184. “Thus, while it is impermissible for an expert, in the absence of physical evidence, to testify that a child has been sexually abused, it is permissible for an expert to testify that a child exhibits ‘characteristics [consistent with] abused children.’” *Id.* (alterations in original).

1. Testimony of Dr. Dana Hagele

At trial, Dr. Hagele, a pediatrician that specializes in child abuse pediatrics, testified regarding her medical interview and physical examination of Tammy at Crossroads on 8 September 2011. Defendant contends that Dr. Hagele’s testimony amounted to her expert opinion that sexual abuse had in fact occurred. Defendant relies on a number of decisions including *State v. Ryan*, __ N.C. App. __, 734 S.E.2d 598 (2012), *disc. review denied*, __ N.C. __, 736 S.E.2d 189 (2013), *State v. Towe*, __ N.C. __, 732 S.E.2d 564 (2012), *State v. Ewell*, 168 N.C. App. 98, 606 S.E.2d 914, *disc. review denied*, 359 N.C. 412, 612 S.E.2d 326 (2005), and *State v. Couser*, 163 N.C. App. 727, 594 S.E.2d 420 (2004), for this contention. However, we believe these cases are distinguishable because Dr. Hagele never stated that Tammy was, in fact, the victim of sexual abuse or attempted to make conclusions or a diagnosis as to such. Instead, Dr. Hagele testified to her experience and knowledge regarding sexually abused children and her medical interview and physical examination of Tammy, along with an explanation of the procedures she followed for Tammy’s examination and treatment. Accordingly, we conclude that the trial court did not err, much less commit plain error, by admitting her testimony regarding her experience and professional expertise concerning sexually abused children and whether Tammy exhibited “symptoms or characteristics consistent therewith.” *Stancil*, 355 N.C. at 267, 559 S.E.2d at 789.

2. Testimony of Ms. Rebecca Wheeler

At trial, Ms. Wheeler, a registered nurse with a specialty in pediatric sexual assault examination, testified that she physically examined

STATE v. MAY

[230 N.C. App. 366 (2013)]

Tammy on 16 July 2011 for possible sexual assault injuries, but the examination showed no signs of assault.

Defendant contends that Ms. Wheeler's testimony, like that of Dr. Hagele, amounted to opinion evidence that sexual abuse had in fact occurred. Defendant specifically objects to Ms. Wheeler's use of the phrases, "it had happened[,]" and, "it occurred[,]" when responding to a question concerning the amount of time that had lapsed between the alleged assault and the medical examination.

However, like Dr. Hagele, at no time during her testimony did Ms. Wheeler state that Tammy was the victim of sexual abuse or attempt to make conclusions or a diagnosis as to such. Ms. Wheeler merely testified as to her examination procedures, her experience and knowledge of "the profiles of sexually abused children[,]" and whether Tammy "ha[d] symptoms or characteristics consistent therewith." *Stancil*, 355 N.C. at 267, 559 S.E.2d at 789. Therefore, we conclude that the trial court did not err, much less commit plain error, in admitting Ms. Wheeler's testimony as it did not include impermissible opinion testimony that Tammy had, in fact, been sexually abused.

C. Admission of "Other Crimes" Evidence

[5] Finally, Defendant contends that the trial court committed plain error¹¹ by admitting the State's "other crimes" evidence regarding Defendant's uncharged alleged sexual conduct involving Tammy in the playhouse/shed and involving her sister, Beth, in Beth's bedroom. Specifically, Defendant claims this evidence was irrelevant and inadmissible under N.C. Gen. Stat. § 8C-1, Rules 401-404. We disagree.

N.C. Gen. Stat. § 8C-1, 404(b) (2011) states the following:

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.

Id. "[O]ur courts have been markedly liberal in admitting evidence of similar sex offenses by a defendant for the purposes now enumerated in Rule 404(b)[.]" *State v. Summers*, 177 N.C. App. 691, 696, 629 S.E.2d 902, 906, *disc. review denied*, 360 N.C. 653, 637 S.E.2d 192 (2006) (citation

11. Defendant did not lodge any objection to the "other crimes" testimony at trial.

STATE v. MAY

[230 N.C. App. 366 (2013)]

and quotation marks omitted). Moreover, “evidence of prior incidents is admissible to show, *inter alia*, motive, opportunity, intent, knowledge, and common plan or scheme if the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of Evidence Code Rule 403.” *State v. Stevenson*, 169 N.C. App. 797, 798, 611 S.E.2d 206, 208 (2005) (citation omitted). In *Summers*, we stated the following:

[E]vidence of another crime is admissible to prove a common plan or scheme to commit the offense charged. But, the two acts must be sufficiently similar as to logically establish a common plan or scheme to commit the offense charged, not merely to show the defendant’s character or propensity to commit a like crime.

Id. at 697, 629 S.E.2d at 907 (citation and quotation marks omitted). “Remoteness in time [between the other crimes and the current charges] generally goes to the weight of the evidence not its admissibility.” *Id.* (alteration in original).

“Once the trial court determines evidence is properly admissible under Rule 404(b), it must still determine if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice.” *State v. Bidgood*, 144 N.C. App. 267, 272, 550 S.E.2d 198, 202, *cert. denied*, 354 N.C. 222, 554 S.E.2d 647 (2001) (citation omitted). North Carolina Rule of Evidence 403 states, “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]” N.C. Gen. Stat. § 8C-1, Rule 403 (2011). “That determination is within the sound discretion of the trial court, whose ruling will be reversed on appeal only when it is shown that the ruling was so arbitrary that it could not have resulted from a reasoned decision.” *Bidgood*, 144 N.C. App. at 272, 550 S.E.2d at 202 (citation omitted).

This Court has stated:

Although not enumerated in Rule 404(b) itself, evidence may also be admitted to establish a chain of circumstances leading up to the crime charged:

Evidence, not part of the crime charged but pertaining to the chain of events explaining the context, motive and set-up of the crime, is properly admitted if linked in time and circumstances with the charged crime, or [if it] forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury.

STATE v. MAY

[230 N.C. App. 366 (2013)]

State v. Smith, 152 N.C. App. 29, 34-35, 566 S.E.2d 793, 798, *cert. denied*, 356 N.C. 311, 571 S.E.2d 208 (2002) (citation and quotation marks omitted).

We find no error in the testimony by Tammy’s parents regarding Defendant’s alleged conduct involving Beth in her bedroom. This testimony established the time period during which Defendant lived with the family, and the circumstances surrounding Defendant’s move from Beth’s bedroom to the playhouse/shed. This testimony “pertained to the chain of events explaining the context . . . and set-up of the crime[]” and it was “linked in time and circumstances with the charged crime[.]” *Id.* at 35, 566 S.E.2d at 798 (citation omitted).

Further, we find no error regarding the admission of the testimony about the alleged episode involving Defendant and Tammy in the playhouse/shed. This incident happened during the same summer as the charged offenses. In both the alleged conduct in the playhouse/shed and the charged conduct, Defendant and Tammy lay down together in his bed to watch television when Defendant allegedly sexually abused her. In both the alleged and charged conduct, Tammy testified that Defendant moved her shorts to the side to penetrate her. In both the alleged and charged conduct, Tammy testified that the penetration hurt and that it made her urine burn.

Because the alleged conduct in the playhouse/shed and the charged conduct were not too remote in time and sufficiently similar, and because this Court takes an approach that is “markedly liberal in admitting evidence of similar sex offenses by a defendant for the purposes now enumerated in Rule 404(b)[,]” we believe that the testimony of the three witnesses regarding the alleged conduct in the playhouse/shed was admissible under Rule 404(b). *Summers*, 177 N.C. App. at 696, 629 S.E.2d at 906 (citation omitted). Moreover, the determination of whether the evidence failed the test in Rule 403 “is within the sound discretion of the trial court[,],” and we do not find a sufficient showing “that the ruling was so arbitrary that it could not have resulted from a reasoned decision” in order to reverse the trial court. *Bidgood*, 144 N.C. App. at 272, 550 S.E.2d at 202 (citation omitted). As such, we do not believe the admission of the foregoing evidence constituted error, much less plain error.

III. Conclusion

The trial court’s third charge to the jury did not follow the guidelines set forth in N.C. Gen. Stat. § 15A-1235. Defendant argues that these errors coerced the deadlocked jury into returning a guilty verdict against him,

STATE v. PHILLIPS

[230 N.C. App. 382 (2013)]

in violation of his right to a unanimous jury verdict under N.C. CONST. art. I, § 24. The State has failed to meet its burden of proving that these errors were harmless beyond a reasonable doubt. Accordingly, Defendant is entitled to a new trial.

NEW TRIAL

Judge ELMORE and Judge GEER concur.

STATE OF NORTH CAROLINA

v.

JAMES PHILLIPS

No. COA13-449

Filed 5 November 2013

Contempt—criminal—standard of proof—deficient

A criminal contempt order against an attorney for trying to obtain a signed order through subterfuge was reversed where the trial court made numerous findings about defendant's inexcusable and unacceptable behavior, but did not indicate that it had used "beyond a reasonable doubt" as the standard of proof.

Appeal by defendant from order entered 5 December 2012 by Judge Theodore S. Royster, Jr., in Stanly County Superior Court. Heard in the Court of Appeals 26 September 2013.

Attorney General Roy Cooper, by Assistant Attorney General Kathleen N. Bolton, for the State.

Arnold & Smith, PLLC, by Matthew R. Arnold and J. Bradley Smith, for defendant-appellant.

BRYANT, Judge.

Where the trial court failed to indicate in its criminal contempt order that the standard of proof applied in making its findings of fact was proof beyond a reasonable doubt, the order is fatally deficient. Accordingly, we must reverse.

STATE v. PHILLIPS

[230 N.C. App. 382 (2013)]

During the Criminal Session of Superior Court in Stanly County commencing 16 July 2012, defendant James A. Phillips, Jr. – an attorney, appeared before the Honorable Sharon Tracey Barrett, Judge presiding, for an unscheduled matter at the request of Assistant District Attorney Robyn Singletary. The assistant district attorney brought to the Superior Court’s attention a matter involving a 9 July 2012 district court order entered pursuant to an *ex parte* motion made by Phillips. The 9 July 2012 district court order was for the disposition of physical evidence held by the Stanly County Sheriff’s Department. The order was entered following the dismissal of a civil action filed pursuant to Chapter 50B but prior to the conclusion of a related criminal action against Phillip’s client – the defendant in both the civil and criminal actions.

In open court on 19 July, Phillips acknowledged that his client, Ryan Van McLain, had been charged with six criminal offenses and had been the defendant in the related civil action seeking a domestic violence protective order pursuant to Chapter 50B. Both criminal and civil matters were heard in Stanly County District Court. The trial court dismissed the civil action. Thereafter, Phillips prepared an order for the disposition of physical evidence seeking the return of his client’s cell phone, which had been seized by law enforcement officers. The order presented to and entered by Judge Redwing included both civil and criminal docket numbers. Phillips acknowledged to Judge Barrett that while the civil matter had been dismissed, the remaining criminal charge – trespassing – was pending on appeal. Phillips also acknowledged that prior to submitting the proposed order to Judge Redwing, he had no contact with the plaintiff in the civil action or the district attorney’s office prosecuting the criminal charges. The assistant district attorney argued before Judge Barrett to stay or set aside the 9 July 2012 district court order on the grounds that the cell phone had been seized by law enforcement officers during the investigation of the pending criminal matter.

On 19 July 2012, Judge Barrett issued an order to stay the disposition of physical evidence and ordered that Phillip’s client’s cell phone be retained pending trial. Judge Barrett also ordered Phillips, both individually and as attorney for the defense, to later appear before the Stanly County Superior Court and show cause why he should not be punished for contempt of court for preparing and submitting an order *ex parte* which was thereafter entered by the district court.

On 5 December 2012, following a show cause hearing before the Honorable Theodore S. Royster, Jr., Judge presiding, the trial court entered an order in which it concluded that Phillips “[was] in contempt of court through gross negligence and subject to the contempt sanctions

STATE v. PHILLIPS

[230 N.C. App. 382 (2013)]

of this Court” and decreed that Phillips was “hereby publicly CENSURED” and “fined \$500.00.” The trial court made the following findings of fact:

2. [Phillips] attempted to obtain ex parte an order returning seized property in a pending criminal matter in violation of both the law and ethics.
3. In spite of the fact that [Phillips] used a civil docket number on the order, [Phillips] knew of the pending criminal case and intentionally tried to obtain the signing of the said order through subterfuge.
- ...
5. [Phillips] violated G. S. 15-11.1 by not contacting the District Attorney and / or by not filing a motion for return of seized property and having a hearing (See also *State v. Hill*, 153 NCApp 718 (2002)) [sic].
6. Criminal contempt is necessary in this case in order to be administered as punishment for acts already committed that have impeded the administration of justice.
7. The actions of Defendant have impeded the administration of justice and have brought the court system into disrepute.
8. The defendant has violated his ethical duties as an attorney-at-law and as an officer of this Court
9. Pursuant to Chapter 5A of the N. C. General Statutes, the Court has the following criminal contempt punishment available: censure, Imprisonment up to 30 days and/or a fine of up to \$500.00 (or any combination of the three); in addition, the Court has the inherent power of disbarment.

Phillips appeals.

On appeal, Phillips raises the following issues: whether the trial court (I) failed to apply the correct standard to its findings of fact; (II) lacked subject matter jurisdiction and personal jurisdiction; (III) erred as a matter of law in finding Phillips guilty of indirect criminal contempt; and (IV) violated Phillips’ Fifth Amendment right against self-incrimination.

STATE v. PHILLIPS

[230 N.C. App. 382 (2013)]

I

Phillips first argues that the trial court's 5 December 2012 order concluding he was in contempt of court failed to apply the standard of proof "beyond a reasonable doubt" when making its findings of fact, as required by General Statutes, section 5A-15(f). For this reason, Phillips contends that the trial court's order should be reversed. We agree.

This Court has previously held a trial court's failure to state the standard of proof for findings of fact in a criminal contempt order to be a fatal deficiency. See *In re Contempt Proceedings Against Cogdell*, 183 N.C. App. 286, 644 S.E.2d 261 (2007). The defendant attorney in *Cogdell* was found guilty of criminal contempt following a summary proceeding when, as counsel for the defense in a criminal action, defendant attorney questioned two State witnesses regarding whether a polygraph test had been administered to a witness for the State. The trial court entered a contempt order finding Cogdell in direct criminal contempt. On appeal, this Court stated that the requirements of General Statutes, section 5A-14(b), governing summary proceedings for direct criminal contempt, included that a trial court "must find facts supporting the summary imposition of measures in response to contempt[, and] [t]he facts must be established beyond a reasonable doubt." *Id.* at 289, 644 S.E.2d 263 (emphasis suppressed). Applying the statutory requirements to the trial court order, the *Cogdell* Court held the contempt order fatally deficient where "the trial court's order failed to indicate that he applied the beyond a reasonable doubt standard to his findings as required by N.C.G.S. § 5A-14(b)." *Id.* at 290, 644 S.E.2d at 264. In reaching its conclusion, this Court also acknowledged its holdings in *State v. Ford*, 164 N.C. App. 566, 596 S.E.2d 846 (2004) (contempt orders were fatally deficient where the lower court failed to indicate in its findings that the standard of proof of beyond a reasonable doubt was applied), and *State v. Verbal*, 41 N.C. App. 306, 254 S.E.2d 794 (1979) (reversing a trial court order holding attorney in criminal contempt where "we find implicit in the statute the requirement that the judicial official's findings should indicate that [the 'beyond a reasonable doubt'] standard was applied to his findings of fact").

In the matter currently before us, the trial court's 5 December 2012 order does not specify whether Phillips was found guilty of direct or indirect criminal contempt; however, the order does not support a conclusion of direct criminal contempt.

- (a) Criminal contempt is direct criminal contempt when the act:

STATE v. PHILLIPS

[230 N.C. App. 382 (2013)]

- (1) Is committed within the sight or hearing of a presiding judicial official; and
- (2) Is committed in, or in immediate proximity to, the room where proceedings are being held before the court; and
- (3) Is likely to interrupt or interfere with matters then before the court.

N.C. Gen. Stat. § 5A-13(a) (2011). The 5 December order does not contain any finding satisfying a requisite for direct criminal contempt. “Any criminal contempt other than direct criminal contempt is indirect criminal contempt and is punishable only after proceedings in accordance with the procedure required by G.S. 5A-15.” N.C.G.S. § 5A-13(b). In accordance, we review the trial court’s 5 December 2012 order to determine whether Phillips was convicted of indirect criminal contempt pursuant to N.C. Gen. Stat. § 5A-15 and look to the procedure required therein for such convictions.

Pursuant to North Carolina General Statutes, section 5A-15,

[w]hen a judicial official chooses not to proceed summarily against a person charged with direct criminal contempt or when he may not proceed summarily, he may proceed by an order directing the person to appear before a judge at a reasonable time specified in the order and show cause why he should not be held in contempt of court.

N.C. Gen. Stat. § 5A-15(a) (2011). “At the conclusion of the hearing, the judge must enter a finding of guilty or not guilty. If the person is found to be in contempt, the judge must make findings of fact and enter judgment. The facts must be established beyond a reasonable doubt.” N.C.G.S. § 5A-15(f).

In the instant case, the trial court made numerous findings of fact regarding defendant’s inexcusable and unacceptable behavior. However, none of the trial court’s findings indicate that the trial court used “beyond a reasonable doubt” as the standard of proof, nor was there a finding of guilt. On the contrary, the trial court concluded that defendant “is in contempt of Court through *gross negligence* and subject to the contempt sanctions of this Court.” In accordance with *Cogdell, supra*, the trial court’s failure to indicate that he applied “beyond a reasonable doubt” as the standard of proof in finding facts, as required by N.C.G.S. § 5A-15(f), renders the contempt order fatally deficient. Accordingly, we must reverse.

STATE v. SMITH

[230 N.C. App. 387 (2013)]

Because we find this matter dispositive of the appeal, we do not reach the remaining issues.

Reversed.

Judges McGEE and HUNTER, Robert C., concur.

STATE OF NORTH CAROLINA

v.

PHILIP WARNEW SMITH

No. COA13-463

Filed 5 November 2013

1. Constitutional Law—effective assistance of counsel—failure to show prejudice

Defendant did not receive ineffective assistance of counsel and could not show prejudice when there was no reasonable probability that, in the absence of the counsel's alleged errors, the result of the proceeding would have been different. Further, the obstruction of justice and attempted obstruction of justice charges were dismissed at the close of the State's evidence and defendant was acquitted of all but one of the sexual misconduct charges.

2. Sexual Offenders—registration during appeals process—public safety outweighs stigma

The trial court did not err by requiring defendant to register as a sex offender even though defendant contended that his conviction was not yet "final" insofar as his right to direct appeal under N.C. R. App. P. 4(a)(2) had not yet expired. Protecting public safety and facilitating law enforcement by requiring registration during the appeals process outweighs the stigma the accused may suffer from his registration during the appeals process.

Appeal by Defendant from judgment entered 18 October 2012 by Judge Zoro J. Guice, Jr., in Swain County Superior Court. Heard in the Court of Appeals 25 September 2013.

Attorney General Roy Cooper, by Assistant Attorney General Creecy Johnson, for the State.

STATE v. SMITH

[230 N.C. App. 387 (2013)]

John T. Barrett for Defendant.

STEPHENS, Judge.

Evidence and Procedural History

Defendant Phillip Warren Smith was tried on two sets of charges: (1) attempted second-degree rape, second-degree sexual offense, and sexual battery for events occurring on 9 May 2011 and (2) obstruction of justice and attempted obstruction of justice for events occurring on 1 September 2011. The evidence at Defendant's trial tended to show the following: Defendant was manager of a trailer park on Stillhouse Branch Road in Swain County. On 9 May 2011, Easter Octavia Ramsey met Defendant outside her father's trailer in the park. Ramsey asked Defendant to replace her father's carpet. Ramsey assisted Defendant in measuring the unit's living room and hallway while her father watched cartoons in the living room. They then entered the bathroom together. Ramsey testified that inside the bathroom, Defendant shoved Ramsey against the counter and started kissing her. She further testified that Defendant pressed himself against her and proceeded to pull her breasts out of her shirt. Defendant then forced his hand up Ramsey's shorts and stuck his fingers inside her vagina. Defendant exposed his penis and forced Ramsey to touch it. After Ramsey warned Defendant that she thought her father was coming down the hallway, Defendant allowed her to leave the bathroom.

Ramsey reported the incident to the Swain County Sheriff's Office immediately. After reviewing Ramsey's interview, Detective Sarah Miller Hofecker sought and secured a warrant for Defendant's arrest on charges of attempted second-degree rape, second-degree sexual assault, and sexual battery.

Several months following his arrest, Defendant was also charged with one count each of obstruction of justice and attempted obstruction of justice. These charges stemmed from allegations made by Ramsey's mother, Dot Shuler, who testified that Defendant repeatedly asked Shuler to make her daughter drop the charges. Ramsey and Schuler reported Defendant's statements to the Swain County Sheriff's Department. The Sheriff's Department attempted to set up a recorded conversation between Ramsey or Schuler and Defendant; however, requests for adequate recording equipment took approximately a month to process.

Due to the slow pace of the official investigation, Ramsey and Shuler decided to try to take action on their own. Ramsey and Shuler visited

STATE v. SMITH

[230 N.C. App. 387 (2013)]

Defendant's attorney, Frank Lay. Although Shuler testified that Defendant set up the meeting a day in advance, Lay, who acted as Defendant's trial counsel, indicated during his cross-examination of Ramsey and Shuler that he had no prior knowledge of his client's actions and was not complicit in the scheme.

At the meeting, Ramsey took the lead in the conversation. However, she was heavily sedated from a dental procedure earlier in the morning. Due to the procedure, her mouth was stuffed with cotton gauze, hindering her ability to speak clearly and causing her to mumble. Further, she was heavily medicated and the sedatives left her unable to recall most of the meeting.

At the meeting, Ramsey offered to recant her accusations in exchange for \$5,000 apiece for herself and her mother. She also requested that her mother be allowed to live in her trailer rent-free. Ramsey testified this was in keeping with the instructions Defendant had given her mother the previous evening. Schuler stated she believed her daughter was "just curious" to see what might be offered. Schuler further testified "I knew he wasn't going to do it and she knew I wasn't going to do it, so we left and laughed about it and went on back, went on back home." Ramsey testified:

[T]he only reason I even kept up the charade about money is because I wanted to catch him on tape trying to bribe me. I had no intentions of letting anything drop ever. I refuse. I've been living with it for almost two years, and I mean there's no way, there's no way I could let it drop.

At trial, Lay stipulated that the meeting took place but asserted that he had no prior knowledge of Ramsey and Shuler's intention to visit. Lay had attempted to record the conversation but later discovered his attempt had failed. As soon as he realized the ethical ramifications of the conversation, Lay asked Shuler and Ramsey to leave and then informed the District Attorney's office via email about what had happened. At trial, Lay thoroughly cross-examined Ramsey, Shuler, and the investigating officers about the meeting itself and the broader investigation of Defendant's alleged attempts to obstruct justice. Lay did not testify.

Defendant was tried by jury before the Honorable Zoro J. Guice, Jr., Superior Court judge presiding, at the 15 October 2012 session of superior court in Swain County. The obstruction of justice and attempted obstruction of justice charges were dismissed at the close of the State's evidence. Defendant was acquitted on attempted second-degree rape and second-degree sexual offense, but convicted of sexual battery.

STATE v. SMITH

[230 N.C. App. 387 (2013)]

Judgment on the sexual battery guilty verdict was entered on 18 October 2012. Defendant was placed on probation and required to register as a sex offender. Defendant appeals. We find no error in his trial or sentence.

Discussion

On appeal, Defendant argues that (1) he received ineffective assistance of counsel and (2) the trial court erred in concluding that Defendant has a “reportable conviction” which subjects him to the Sex Offender and Public Protection Registration Program. We disagree.

I. Ineffective Assistance of Counsel

[1] Defendant first argues that he received ineffective assistance (“IAC”) from his trial counsel. We disagree.

To prevail in a claim for IAC, a defendant must show that his “(1) counsel’s performance was deficient, meaning it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defense, meaning counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *State v. Garcell*, 363 N.C. 10, 51, 678 S.E.2d 618, 644 (2009) (citations and internal quotation marks omitted). As to the first prong of the IAC test, “[a] strong presumption exists that a counsel’s conduct falls within the range of reasonable professional assistance.” *State v. Frazier*, 142 N.C. App. 361, 367, 542 S.E.2d 682, 687 (2001). Further, if “there is no reasonable probability that in the absence of counsel’s alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel’s performance was actually deficient.” *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 249 (1985).

Defendant urges that, here, he is relieved of the burden to establish prejudice, citing *State v. Choudry*, 365 N.C. 215, 717 S.E.2d 348 (2011), and *State v. James*, 111 N.C. App. 785, 433 S.E.2d 755 (1993). However, we find *James* and *Choudry* inapposite as the IAC claims in both cases were based on a narrow and specific circumstance not present here, to wit, alleged conflicts of interest arising from defense counsel’s representation of multiple adverse parties. For example, in *James*, counsel represented both the defendant and a key prosecution witness. 111 N.C. App. at 790, 433 S.E.2d at 758. We observed that

representation of the defendant as well as a prosecution witness (albeit in another matter) creates several avenues of possible conflict for an attorney. Confidential communications from either or both of a revealing nature which might otherwise prove to be quite helpful in the

STATE v. SMITH

[230 N.C. App. 387 (2013)]

preparation of a case might be suppressed. Extensive cross-examination, particularly of an impeaching nature, may be held in check. Duties of loyalty and care might be compromised if the attorney tries to perform a balancing act between two adverse interests.

Id. Because of these risks to the defendant's constitutional rights, we held that "the trial court must take control of the situation[and conduct a hearing]" *Id.* at 791, 433 S.E.2d at 758-59 (citation and internal quotation marks omitted). "[Thus] the failure of the trial judge to conduct an inquiry, in and of itself, constitutes reversible error." *Id.* at 791, 433 S.E.2d at 759 (citation and internal quotation marks omitted); *see also Choudry*, 365 N.C. at 226, 717 S.E.2d at 356 (noting the same presumption of prejudice in the absence of a hearing, but upholding the defendant's conviction because the trial court had conducted a conflict inquiry).

Here, there was no conflict of interest based on multiple or prior representations. Defendant's counsel never represented Ramsey or Shuler. Further, their testimony indicates they never considered Lay their attorney or contemplated retaining his services. Therefore, Defendant's argument that he is entitled to a presumption of prejudice is without merit. Accordingly, to prevail in his IAC claim, Defendant must show both deficient performance by his trial counsel and prejudice therefrom.

Defendant claims that his counsel's performance was deficient in that he was a necessary witness at Defendant's trial such that his representation of Defendant at trial violated Rule 3.7(a) of the North Carolina Rules of Professional Conduct. We are not persuaded.

Rule 3.7(a) provides:

A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client.

N.C.R. of Prof'l Conduct Rule 3.7(a). A witness's "testimony is 'necessary' within the meaning of the rule when it is relevant, material, and unobtainable by other means." *State v. Rogers*, __ N.C. App. __, __, 725 S.E.2d 342, 348 (citing N.C. St. Bar, 2011 Formal Ethics Opinion 1), *disc. review denied*, 366 N.C. 232, 731 S.E.2d 171 (2012).

In *Rogers*, this Court found no error in a trial court's decision to disqualify the defendant's chosen counsel based on his significant

STATE v. SMITH

[230 N.C. App. 387 (2013)]

relationship with the defendant's girlfriend, who was also a key prosecution witness in the defendant's trial for the attempted murder of her husband:

By virtue of his relationships with both parties, [defense counsel] was aware of personal and sensitive information, including the nature of their affair, which was a major factor leading to the shooting. Had [defense counsel] remained as [the] defendant's counsel, he might have been called to testify, at which time he might have been asked to disclose confidential information regarding the relationship between [the] defendant and [the defendant's girlfriend/victim's wife], which information may have divulged [the] defendant's motive for shooting [the victim], which in turn could compromise his duty of loyalty to his client.

Id. at ___, 725 S.E.2d at 347.

Here, the testimony from Lay which Defendant claims was necessary concerned Lay's meeting with Ramsey and Shuler. Defendant contends this testimony could have potentially (1) cast doubt on Ramsey's motives and character so as to undercut her credibility and (2) shown that Defendant's trial counsel was not corrupt. As to the second contention, we fail to see how Lay's character was at all relevant or material to the charges Defendant faced. We further observe that, to the extent Lay's testimony on either point was relevant and material, it most certainly was not "unobtainable by other means." *Id.* at ___, 725 S.E.2d at 348. As Defendant notes in his brief, Lay cross-examined Ramsey and Shuler extensively about their visit to his office and the resulting discussion. Both women admitted that Lay did not give them any money or otherwise cooperate with their demands. Ramsey admitted that she was heavily medicated during the meeting and retained little memory of it. Her mother likewise testified to having "fluid on the brain" which affected her memory and thinking. The women agreed that they met with Lay because the police investigation into the obstruction was too slow. They testified that they went to Lay's office and agreed to what Defendant had told them he wanted. They further testified that they knew Defendant would not actually follow through with the alleged scheme. A police detective testified that Lay told law enforcement officers about the meeting.

In sum, through cross-examination and closing arguments, Defendant's counsel amply called issues with the women's credibility

STATE v. SMITH

[230 N.C. App. 387 (2013)]

to the jury's attention, and their testimony along with that of the police officer reflected well on Lay's character and suggested no corruption on his part. Because Defendant's counsel was able to make the same points through his vigorous cross-examination as he would have made as a witness, there is no reasonable probability that in the absence of the counsel's alleged errors the result of the proceeding would have been different. Ultimately, the obstruction of justice and attempted obstruction of justice charges were dismissed at the close of the State's evidence and Defendant was acquitted of all but one of the sexual misconduct charges. Defendant cannot show prejudice, and therefore cannot establish IAC. Accordingly, this argument is overruled.

II. Sex Offender Registration

[2] Defendant next argues that he was wrongfully forced to register as a sex offender prematurely because his conviction is not yet "final" insofar as his right to direct appeal under N.C. R. App. P. 4(a)(2) had not yet expired. We disagree.

This issue is a matter of statutory construction, raising only questions of law, and thus we review *de novo*. *In re Borden*, __ N.C. App. __, __, 718 S.E.2d 683, 685 (2011) (citations omitted).

When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required. However, when the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment. Moreover, when confronted with a clear and unambiguous statute, courts are without power to interpolate, or superimpose, provisions and limitations not contained therein.

The best indicia of the legislature's intent are the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish. Moreover, in discerning the intent of the General Assembly, statutes *in pari materia* should be construed together and harmonized whenever possible. *In pari materia* is defined as upon the same matter or subject.

Id. (citations and internal quotation marks omitted).

North Carolina's General Assembly has declared that "protection of the public from sex offenders is of paramount governmental interest."

STATE v. SMITH

[230 N.C. App. 387 (2013)]

N.C. Gen. Stat. § 14-208.5 (2011). The General Assembly enacted legislation requiring sex offenders to register with government agencies in order to assist law enforcement in its effort to protect the public at large. *Id.* Section 14-208.6 (4)(a) defines reportable convictions to include “a final conviction for an offense against a minor, a sexually violent offense, or an attempt to commit any of those offenses unless the conviction is for aiding and abetting.” N.C. Gen. Stat. § 14-208.6 (4)(a) (2011). The definition of a “sexually violent offense” provided by section 14-208.6(5) includes any convictions for sexual battery in violation of N.C. Gen. Stat. § 14-27.5A.

At trial, the jury found Defendant guilty of sexual battery pursuant to section 14-27.5A. Therefore, Defendant has a reportable conviction and it was proper for the trial court to instruct him to register as a sex offender. Defendant, however, contends that his conviction is not yet “final” because his right to appeal under N.C. R. App. 4(a)(2) had not expired. In support of this argument, Defendant relies primarily on this court’s recent decision in *Walters v. Cooper*, __ N.C. App. __, 739 S.E.2d 185, *stay granted*, __ N.C. __, 739 S.E.2d 838 (2013). However, the General Assembly’s intent and the holding of *Walters* make clear that Defendant’s reliance is misplaced.

In *Walters*, this Court confronted the question of whether a “Prayer for Judgment Continued (‘PJC’) entered upon a conviction makes that conviction a ‘final conviction,’ and therefore a ‘reportable conviction’ for the purposes of the [sex offender] registration statute.” *Id.* at __, 739 S.E.2d at 186-87. This Court noted that “the term ‘final conviction’ has no ordinary meaning and is not otherwise defined by the [sex offender registration] statute.” *Id.* This Court ultimately concluded that a PJC does not qualify as a “final conviction” due to the specific nature of a PJC sentence. *Id.* at __, 739 S.E.2d at 188.

In terms of criminal sentencing, a PJC is a unique remedial measure:

After a defendant has been found guilty or entered a guilty plea, a trial court may (1) pronounce judgment and place it into immediate execution; (2) pronounce judgment and suspend or stay its execution; or (3) enter a PJC. A prayer for judgment continued upon payment of costs, without more, does not typically constitute an entry of judgment. However, our Supreme Court has acknowledged that a continuation of entry of judgment may lose its character as [a] true PJC and is converted into a judgment when it includes conditions amounting to punishment.

STATE v. SMITH

[230 N.C. App. 387 (2013)]

Id. at ___, 739 S.E.2d at 187 (citations and internal quotation marks omitted). In *Walters*, we “presume[d] that the legislature was aware of our prior case law, albeit in another context, interpreting the term ‘final conviction’ as excluding convictions which are followed by true PJCs.” *Id.* at ___, 739 S.E.2d at 188.

The fact that PJCs are excluded from the court’s interpretation of the term “final conviction” implies they are an exception from the general rule under section 14-208.6(5) that everyone convicted of a sexually violent offense must register as a sex offender. Because Defendant did not receive a PJC, Walters does not provide him relief.

Further, common sense and the General Assembly’s intent undermine Defendant’s argument. By Defendant’s reasoning, no conviction for a sexually violent offense would be “final” until all appeals are exhausted. This would frustrate the General Assembly’s purpose in enacting the law and make it more difficult for law enforcement to monitor dangerous sex offenders and protect public safety. Extending the registration requirement deadline to the expiration of the appeals process is unnecessary, as a defendant who successfully appeals his conviction and obtains a reversal is entitled to relief by having his name removed from the sex offender registry. Protecting public safety and facilitating law enforcement by requiring registration during the appeals process outweighs the stigma the accused may suffer from his registration during the appeals process.

NO ERROR.

Judges CALABRIA and ELMORE concur.

WASHINGTON v. CLINE

[230 N.C. App. 396 (2013)]

FRANKIE DELANO WASHINGTON AND
FRANKIE DELANO WASHINGTON, JR., PLAINTIFFS

v.

TRACEY CLINE, ANTHONY SMITH, WILLIAM BELL, JOHN PETER, ANDRE T.
CALDWELL, MOSES IRVING, ANTHONY MARSH, EDWARD SARVIS, BEVERLY
COUNCIL, STEVEN CHALMERS, PATRICK BAKER, THE CITY OF DURHAM, NC, AND
THE STATE OF NORTH CAROLINA, DEFENDANTS

No. COA13-224

Filed 5 November 2013

1. Appeal and Error—interlocutory orders and appeals—preventing fragmentary appeals

Although the orders from which plaintiffs and defendant Baker appealed were interlocutory, Baker's appeal was found to be proper in order to prevent fragmentary appeals. Additionally, the appeals from the trial court's orders denying plaintiffs' motion to amend the summons against the City and denying defendants' motion to dismiss for failure of the summons to "contain the title of the cause" were also properly before the Court pursuant to N.C.G.S. § 1-278 since plaintiffs properly appealed from a final judgment, and the orders involved the merits and necessarily affected that judgment.

2. Process and Service—sufficiency—failure to contain title of cause

The trial court did not err in a violations of federal and state constitutional provisions, malicious prosecution, negligence, negligent and intentional infliction of emotional distress, conspiracy, and supervisory liability case by granting the City's motion to dismiss for insufficient service of process, denying defendant Baker's motion to dismiss for insufficient service of process, denying plaintiffs' motion to amend the summons, and denying Baker's motion to dismiss for failure of the summons to contain the "title of the cause." However, the trial court's order granting all other defendant appellees' motions to dismiss for insufficient service of process was reversed.

3. Pleadings—denial of motion to amend summons—name of person currently holding office

The trial court did not abuse its discretion by denying plaintiffs' motion to amend the summons against the City to correct the name of the person currently holding the office of city manager because it would confer jurisdiction over the City without proper service of process.

WASHINGTON v. CLINE

[230 N.C. App. 396 (2013)]

4. Appeal and Error—preservation of issues—failure to cite authority

Although defendant Baker contended the trial court erred by denying his motion to dismiss the action for failure of the summonses to contain all of the necessary information required by N.C.G.S. § 1A-1, Rule 4(b), namely the “title of the cause,” this argument was deemed abandoned based on a failure to cite authority.

Appeals by plaintiffs and defendant Patrick Baker from orders entered 6 November 2012 by Judge W. Osmond Smith, III in Durham County Superior Court. Heard in the Court of Appeals 28 August 2013.

Ekstrand & Ekstrand LLP, by Robert C. Ekstrand, for plaintiffs-appellants.

Wilson & Ratledge, PLLC, by Reginald B. Gillespie, Jr., and Office of the City Attorney, by Kimberly M. Rehberg, for defendant-appellant Patrick Baker and defendants-appellees the City of Durham, North Carolina, Edward Sarvis, Beverly Council, and Steven Chalmers.

Kennon Craver, PLLC, by Joel M. Craig and Henry W. Sappenfield, for defendants-appellees Anthony Smith, William “Doug” Bell, John Peter, Moses Irving, and Anthony Marsh.

HUNTER, Robert C., Judge.

Plaintiffs Frankie Washington (“Washington”) and Frankie Washington, Jr. (“Washington, Jr.”) and defendant Patrick Baker (“Baker”), appeal from interlocutory orders entered by Judge W. Osmond Smith III on 6 November 2012 in Durham County Superior Court. Plaintiffs appeal from orders granting nine of twelve defendants’ motions to dismiss for insufficient service of process and denying plaintiffs’ motion to amend the summons against defendant City of Durham (“the City”). Baker appeals from orders denying his motion to dismiss for insufficient service of process and denying a motion to dismiss the action for failure of the summonses to contain the “title of the cause” as is required by North Carolina Rule of Civil Procedure 4(b).

On appeal, plaintiffs assert that: (1) the trial court erred by granting nine defendants-appellees’ motion to dismiss for insufficient service of process because plaintiffs properly served those defendants via designated delivery service and defendants are estopped from asserting such

WASHINGTON v. CLINE

[230 N.C. App. 396 (2013)]

defense, and (2) the trial court erred by denying plaintiffs' motion to amend the summons for the City because such amendment would not prejudice the City. Baker argues that: (1) the trial court erred by denying his motion to dismiss for insufficient service of process because plaintiffs failed to meet the statutory requirements for designated delivery service, and (2) the trial court erred by failing to dismiss the action because the summonses did not "contain the title of the cause" as is required by statute.

After careful review, we affirm the trial court's orders granting the City's motion to dismiss for insufficient service of process, denying Baker's motion to dismiss for insufficient service of process, denying plaintiffs' motion to amend the summons, and denying Baker's motion to dismiss for failure of the summons to contain the "title of the cause." However, we reverse the trial court's order granting all other defendants-appellees' motions to dismiss for insufficient service of process.

Background

Plaintiffs' claims against defendants arise out of the arrest, prosecution, conviction, and ultimate release of Washington that took place over a six-year period between 30 May 2002 and 22 September 2008. After a four-year, nine-month delay between arrest and trial, Washington was convicted of first-degree burglary, two counts of second-degree kidnapping, robbery with a dangerous weapon, attempted robbery with a dangerous weapon, assault and battery, and attempted first-degree sex offense. This Court vacated his convictions due to delays attributed to the State in violation of Washington's right to a speedy trial under the Sixth Amendment of the United States Constitution and Article I, Section 18 of the North Carolina Constitution. On 21 September 2011, Washington and Washington, Jr. filed a complaint and obtained civil summonses against Baker, Tracey Cline, Anthony Smith, William Bell, John Peter, Andre T. Caldwell, Moses Irving, Anthony Marsh, Edward Sarvis, Beverly Council, Steven Chalmers, the State of North Carolina, and the City of Durham¹ for, *inter alia*, violations of federal and state constitutional provisions, malicious prosecution, negligence, negligent and intentional infliction of emotional distress, conspiracy, and supervisory liability.

1. Baker is the only defendant-appellant. Caldwell, although named in the complaint, is not listed in the briefs as an appellee, and does not appear to have been a party to the suit at the time the trial court entered its orders. Therefore, the nine defendants whose motions to dismiss were granted, and thus the nine defendants-appellees to plaintiffs' appeal, are Chalmers, Council, Smith, Bell, Peter, Irving, Marsh, Sarvis, and the City ("defendants-appellees").

WASHINGTON v. CLINE

[230 N.C. App. 396 (2013)]

Plaintiffs attempted to serve process on defendants using FedEx, a designated delivery service. All defendants except Council were served between 23 and 27 September 2011; Council was served on 25 October 2011.

The packages containing summonses and copies of the complaint sent to the City and Baker contained the following directory paragraphs, respectively:

City of Durham
c/o Patrick Baker
101 City Hall Plaza
Durham NC 27701

Patrick Baker City Manager
City of Durham
101 City Hall Plaza
Durham NC 27701

At the time of service, Baker was the City Attorney, not the City Manager. Both packages were received by April Lally (“Lally”), a receptionist and administrative assistant in the City Attorney’s Office; Lally signed for the packages and later handed them to Baker. Baker later filed an affidavit with the trial court in which he admitted to receiving the summons and complaint against him.

Plaintiffs attempted to serve Chalmers at his home, but left the package containing the summons and complaint with Chalmers’ visiting twelve-year-old grandson who was playing in the front yard. Chalmers’ grandson went inside and gave Chalmers the package; Chalmers later filed an affidavit with the trial court admitting that he received the summons and complaint against him.

Plaintiff attempted to serve Council by delivering the package via FedEx to her home, but no one was there at the time of delivery. The driver left the package on the door step to the side door; Council later filed an affidavit with the trial court admitting that she received the summons and complaint against her later that evening when she returned home.

Plaintiff attempted to serve Bell, Irving, Marsh, Peter, Sarvis, and Smith by having a FedEx driver deliver their summonses and copies of the complaint to the City Police Department’s loading dock. Bell and Irving were former employees of the City’s Police Department at the time of delivery; Marsh, Peter, Sarvis, and Smith were still employees. The

WASHINGTON v. CLINE

[230 N.C. App. 396 (2013)]

driver left the package with Brenda T. Burrell (“Burrell”), an employee for the City’s Police Department who is responsible for “receiving materials and supplies delivered to the Police Department for use in its operations.” Each of these defendants filed an affidavit with the trial court admitting that he received the summons and copy of the complaint against him.

Plaintiffs filed with the trial court affidavits of service and receipts generated by the designated delivery service for each defendant. They also re-filed the defendants’ affidavits in which they admitted to receiving the summonses and copies of the complaint against them as evidence of effective service of process.

On 11 January 2012, Cline and the State of North Carolina filed motions to dismiss for insufficient service of process, among other claims not relevant to this appeal. On 23 March 2012, all remaining defendants also filed motions to dismiss for insufficient service of process. That same day plaintiffs filed a motion to amend the summons issued to the City to replace Baker with the then-current City Manager. On 6 November 2012 Judge Smith entered orders: (1) denying plaintiffs’ motion to amend the summons; (2) denying motions to dismiss for insufficient service of process filed by Baker, Cline, and the State of North Carolina²; and (3) granting motions to dismiss for insufficient service of process entered by defendants-appellees. On 15 November 2012, plaintiffs filed a timely notice of appeal. On 27 November 2012, Baker also filed timely notice of appeal.

Grounds for Appellate Review

[1] The orders from which plaintiffs and Baker appeal are interlocutory. “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). However, the Court does allow immediate appeal of interlocutory orders in some circumstances.

[I]mmediate appeal of interlocutory orders and judgments is available in at least two instances. First, immediate review is available when the trial court enters a final judgment as to one or more, but fewer than all, claims or parties and certifies there is no just reason for delay Second, immediate appeal is available from an interlocutory order or judgment which affects a substantial right.

2. Only Baker appeals from this order.

WASHINGTON v. CLINE

[230 N.C. App. 396 (2013)]

Sharpe v. Worland, 351 N.C. 159, 161-62, 522 S.E.2d 577, 579 (1999) (quotation marks omitted); see also N.C. Gen. Stat. § 1-277(a) (2011) (“An appeal may be taken from every judicial order . . . which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action.”).

Here, plaintiffs appeal from an order dismissing defendants-appellees, who comprise more than one but not all parties. This order is in effect a final judgment as to those defendants-appellees, and the trial court certified in the order dismissing them that there was no just reason for delay in appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. As such, plaintiffs appeal of the trial court’s order granting defendants-appellees’ motion to dismiss is properly before this Court. See *DKH Corp. v. Rankin-Patterson Oil Co.*, 348 N.C. 583, 585, 500 S.E.2d 666, 668 (1998) (“[I]f the trial court enters a final judgment as to a party or a claim and certifies there is no just reason for delay, the judgment is immediately appealable.”).

Although Baker admits that his appeal does not stem from a final judgment or an order affecting a substantial right, he argues that the Court should hear his appeal in order to prevent “fragmentary appeals.” The circumstances here are comparable to those in *RPR & Assocs., Inc. v. State*, 139 N.C. App. 525, 530-31, 534 S.E.2d 247, 251-52 (2000), in which this Court chose to hear an appeal from the trial court’s denial of a motion to dismiss for insufficient service of process that was not itself immediately appealable, but was related to an issue properly before the Court. The Court reasoned that “to address but one interlocutory or related issue would create fragmentary appeals.” *Id.* at 531, 534 S.E.2d at 252. Here, Baker’s appeal involves the application of the same rules to the same facts and circumstances as plaintiffs’ appeal, which is properly before us. Therefore, in order to prevent fragmentary appeals, we find that Baker’s appeal is also proper at this time.

Additionally, we find the appeals from the trial court’s orders denying plaintiffs’ motion to amend the summons against the City and denying defendants’ motion to dismiss for failure of the summons to “contain the title of the cause” are also properly before the Court pursuant to N.C. Gen. Stat. § 1-278, which provides that “[u]pon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment.” Here, plaintiffs properly appeal from a final judgment, and the above orders involve the merits and necessarily affect that judgment. Therefore, appellate review is appropriate at this stage of litigation.

WASHINGTON v. CLINE

[230 N.C. App. 396 (2013)]

Discussion**I. Sufficiency of Service of Process**

[2] Plaintiffs first argue that the trial court erred by granting defendants-appellees' motion to dismiss for insufficient service of process. Baker argues that the trial court erred by denying his motion to dismiss for insufficient service of process. After careful review, we reverse the trial court's order dismissing all defendants-appellees except the City, and affirm the trial court's order denying Baker's motion to dismiss.

A. Estoppel

At the outset, plaintiffs cite *Storey v. Hailey*, 114 N.C. App. 173, 441 S.E.2d 602 (1994) in support of their argument that defendants are estopped from asserting the defense of insufficient service of process. In *Storey*, this Court ruled that the defendants were estopped from asserting insufficient service of process as a defense where they asked for and received extensions of time without alerting the plaintiff to any possible defects in service, and plaintiffs ran out of time to effect valid service due to the extensions. The Court reasoned that by doing so, the defendants in effect "lulled [the] plaintiff into a 'false sense of security' and probably prevented [the] plaintiff from discovering her error and effecting valid service within the statutory period." *Storey*, 114 N.C. App. at 176, 441 S.E.2d at 604. Here, although defendants did receive extensions of time from the trial court, they explicitly stated that the reason for the extensions was to "determine whether any Rule 12 or other defenses [were] appropriate." Defendants-appellees' and Baker's motions to dismiss for insufficient service of process were entered pursuant to Rule 12(b)(5). Therefore, plaintiffs had notice that such motions could be filed. Furthermore, defendants-appellees in fact served plaintiffs with their answer containing the defenses on 16 December 2012, four days before the last day in which plaintiffs could have obtained extensions of the summonses. It is evident that plaintiffs had actual notice of the defenses, because they served their reply to the answer on 20 December 2011, the same day that the summonses expired. Therefore, because defendants were not responsible for plaintiffs' failure to extend the life of the summonses, we find that *Storey* is inapposite and defendants are not estopped from asserting the defense of insufficient service of process.

B. Natural persons

Our Court first reviews the trial court's findings of fact to determine whether they are supported by competent evidence. *Ryals v. Hall-Lane*

WASHINGTON v. CLINE

[230 N.C. App. 396 (2013)]

Moving and Storage Co., 122 N.C. App. 242, 246, 468 S.E.2d 600, 603, *disc. review denied*, 343 N.C. 514, 472 S.E.2d 19 (1996). We then review the court's conclusions of law *de novo*. See *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004) ("Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal."). "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) (citations and quotation omitted).

Rule 4(j)(1)(d) of the North Carolina Rules of Civil Procedure sets forth the requirements for service of process on natural persons via designated delivery service, the method utilized by plaintiffs here:

(d) By depositing with a designated delivery service . . . a copy of the summons and complaint, addressed to the party to be served, delivering to the addressee, and obtaining a delivery receipt.

N.C. Gen. Stat. § 1A-1 Rule 4(j)(1)(d) (2011). Where defendants appear in an action and challenge the service of the summons (as all defendants did here), service by designated delivery service may be proved in the following manner:

(5) Service by Designated Delivery Service. - In the case of service by designated delivery service, by affidavit of the serving party averring all of the following:

- a. That a copy of the summons and complaint was deposited with a designated delivery service as authorized under G.S. 1A-1, Rule 4, delivery receipt requested.
- b. That it was in fact received as evidenced by the attached delivery receipt or other evidence satisfactory to the court of delivery to the addressee.
- c. That the delivery receipt or other evidence of delivery is attached.

N.C. Gen. Stat. § 1-75.10(a)(5) (2011).

At issue in this case is the interpretation of the phrase "delivering to the addressee" found in Rule 4(j)(1)(d) and section 1-75.10(a)(5) above. Defendants argue that a designated delivery service must personally serve natural persons or service agents with specific authority to accept service with the summons and complaint in order to sufficiently

WASHINGTON v. CLINE

[230 N.C. App. 396 (2013)]

“deliver to the addressee.” Even if defendants in fact received copies of the summons and complaint on the same day that they left control of the designated delivery service, service of process would be insufficient to confer personal jurisdiction if the addressees or their service agents were not personally handed the documents. However, we find that this strict construction of the statute goes against explicit legislative intent. Article 6A, which contains section 1-75.10, “shall be liberally construed to the end that actions be speedily and finally determined on *their merits*. The rule that statutes in derogation of the common law must be strictly construed does not apply to this Article.” N.C. Gen. Stat. § 1-75.1 (2011) (emphasis added). Because “[t]he principal goal of statutory construction is to accomplish the legislative intent,” we find that defendants’ strict interpretation is improper. *Goad v. Chase Home Fin., LLC*, 208 N.C. App. 259, 262, 704 S.E.2d 1, 3 (2010) (citation omitted).

Furthermore, application of commonly utilized statutory construction principles leads us to find that defendants’ argument is without merit and the trial court’s conclusion was in error. “The best indicia of [legislative] intent are the language of the statute . . . the spirit of the act and what the act seeks to accomplish.” *Concrete Co. v. Bd. of Comm’rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980). Here, the plain language of section 1-75.10 allows a plaintiff to prove service by designated delivery service with evidence that copies of the summons and complaint were “in fact received” by the addressee, not evidence that the delivery service agent personally served the individual addressee. N.C. Gen. Stat. § 1-75.10(a)(5)(b) (2011). Therefore, the crucial inquiry is whether addressees received the summons and complaint, not who physically handed the summons and complaint to the addressee. “[T]he entire sentence, section, or statute must be taken into consideration, and every word must be given its proper effect and weight.” *Nance v. S. Ry. Co.*, 149 N.C. 366, 63 S.E. 116, 118 (1908). Defendants’ interpretation would provide almost no weight to the phrase “in fact received,” and therefore we cannot espouse it without running afoul of legislative intent.

Second, viewed under the doctrine of *expressio unius est exclusio alterius*, which means the expression of one thing is the exclusion of another, the fact that the legislature failed to include a personal delivery requirement in Rule 4(j)(1)(d) when it did so in other subsections throughout the statute indicates its intention to exclude it. See N.C. Gen. Stat. § 1A-1 Rule 4(j)(5)(a) (2011) (prescribing “personal service” on a city, town, or village as an effective method of service); *Haywood v. Haywood*, 106 N.C. App. 91, 99-100, 415 S.E.2d 565, 570 (1992) *rev’d in part*, 333 N.C. 342, 425 S.E.2d 696 (1993) (finding that the failure to mention a requirement in a statute indicated an intent to exclude it).

WASHINGTON v. CLINE

[230 N.C. App. 396 (2013)]

Finally, “where a literal interpretation of the language of a statute will lead to absurd results, or *contravene the manifest purpose of the Legislature, as otherwise expressed*, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded.” *Frye Reg'l Med. Ctr., Inc. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999) (emphasis added) (citation omitted). Under defendants’ strict interpretation, a designated delivery service agent could hand a copy of a summons and complaint to an addressee’s spouse, at his domicile, while he was in the next room, and still be insufficient without personal delivery to the addressee or his service agent. Such an interpretation contravenes the express legislative intent codified in section 1-75.1 to liberally construe its jurisdiction statutes so that cases may be speedily reached on their merits.

Here, plaintiffs provided sufficient evidence in the form of delivery receipts and affidavits pursuant to section 1-75.10 to prove that all defendants-appellees except the City were properly served under Rule 4(j) (1)(d). Based on these facts, the trial court’s conclusion that plaintiffs failed to properly serve defendants-appellees (except the City) was in error. Therefore its order dismissing all defendants-appellees except the City is reversed.

The trial court seemed to apply the law differently for Baker. The court noted that Baker’s affidavit wherein he admitted to receiving a copy of the summons and complaint cut against his argument that service was not valid or effective, and in fact provided enough evidence to satisfy the court that the summons and complaint were in fact delivered to Baker. Based on the foregoing analysis, we find that the trial court did not err in denying Baker’s motion to dismiss for insufficient service of process because he, like the other defendants-appellees, was properly served as a natural person under Rule 4(j)(1)(d) and plaintiffs properly proved service under section 1.75-10.

C. The City

Unlike natural persons, service may only be valid and effective upon a city:

[b]y personally delivering a copy of the summons and of the complaint to its mayor, city manager or clerk; by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to its mayor, city manager or clerk; or by depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint,

WASHINGTON v. CLINE

[230 N.C. App. 396 (2013)]

addressed to the mayor, city manager, or clerk, 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)(5)(a) (2011) (emphasis added). The list of parties named in the statute is exclusive; service upon anyone other than the mayor, city manager, or clerk is insufficient to confer jurisdiction over a city. *See Johnson v. City of Raleigh*, 98 N.C. App. 147, 149-50, 389 S.E.2d 849, 851-52, *disc. review denied*, 327 N.C. 140, 394 S.E.2d 176 (1990) (holding that service of summons was insufficient to confer personal jurisdiction over defendant city where a copy of the summons and complaint was delivered to a person other than an official named in Rule 4(j)(5)).

Here, the summons and complaint were not addressed to either the mayor, city manager, or clerk, as is required by Rule 4(j)(5)(a); they were addressed to Baker, who was the City Attorney. Delivery to Baker, although technically delivery to the addressee, was insufficient to confer jurisdiction over the City because he is not a named official capable of receiving service on behalf of the City. Furthermore, there is no direct evidence that the City’s mayor, city manager, or clerk ever received a copy of the summons and complaint or were otherwise served in any way. The only evidence plaintiffs provide is a newspaper article wherein the City’s mayor said that he would discuss the lawsuit with other city officials and council members. “Although defective service of process may sufficiently give the defending party actual notice of the proceedings, such actual notice does not give the court jurisdiction over the party.” *Fulton v. Mickle*, 134 N.C. App. 620, 624, 518 S.E.2d 518, 521 (1999) (citation and quotation omitted).

Unlike the service on defendants who are natural persons, service on the City was defective because plaintiffs did not comply with Rule 4. Therefore, we find that the trial court did not err in granting the City’s motion to dismiss for insufficient service of process.

II. Motion to Amend the Summons Against the City

[3] Plaintiffs next argue that the trial court abused its discretion by denying its motion to amend the summons against the City to correct the name of the person currently holding the office of city manager. We find no abuse of discretion.

The North Carolina Rules of Civil Procedure vest discretion in the hands of the trial courts to allow or disallow parties to amend summonses.

WASHINGTON v. CLINE

[230 N.C. App. 396 (2013)]

At any time, before or after judgment, in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to substantial rights of the party against whom the process issued.

N.C. Gen. Stat. § 1A-1 Rule 4(i) (2011). This Court therefore reviews such orders for abuse of discretion. *See White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (“It is well established that 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.”). Although the trial courts have wide discretion in this arena, that power has been limited by this Court to those cases where the trial court initially acquired jurisdiction over the defendant. *See Carl Rose & Sons, Ready Mix Concrete, Inc. v. Thorp Sales Corp.*, 30 N.C. App. 526, 529, 227 S.E.2d 301, 303 (1976), *overruled on other grounds, Wiles v. Welparnel Const. Co., Inc.*, 295 N.C. 81, 86, 243 S.E.2d 756, 758-59 (1978) (“The broad discretionary power given the court . . . does not extend so far as to permit the court by amendment of its process to acquire jurisdiction over the person of a defendant where no jurisdiction has yet been acquired. A defendant cannot, in this short-hand manner by amendment, be brought into court without service of process.”) (citation and quotations omitted).

Here, the trial court did not provide findings of fact or conclusions of law in its order denying plaintiffs’ motion to amend the summons against the City. As stated above, in order to confer jurisdiction over the City, plaintiffs needed to comply with Rule 4(j)(5) by sending the summons and complaint addressed to either the City’s mayor, city manager, or clerk and delivering to one of those three parties. Because plaintiffs failed to do so, the trial court never acquired jurisdiction over the City. *Glover v. Farmer*, 127 N.C. App. 488, 490, 490 S.E.2d 576, 577 (1997) (“Absent valid service of process, a court does not acquire personal jurisdiction over the defendant and the action must be dismissed.”).

Therefore, based on the rule set out in *Carl Rose & Sons*, we find that the trial court did not abuse its discretion by denying plaintiff’s motion to amend the summons, as it would confer jurisdiction over the City without proper service of process.

III. Title of the Cause

[4] Baker argues on appeal that the trial court erred by denying his motion to dismiss the action for failure of the summonses to contain all

WASHINGTON v. CLINE

[230 N.C. App. 396 (2013)]

of the necessary information required by Rule 4(b), namely the “title of the cause.” We disagree.

This Court reviews the conclusions of law entered by the trial court in its order *de novo*. *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004) (“Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal.”).

Pursuant to Rule 4(b) of the North Carolina Rules of Civil Procedure, “[t]he summons shall . . . contain the title of the cause.” N.C. Gen. Stat. § 1A-1 Rule 4(b) (2011). Here, the title of the cause in the summons listed “Frankie Washington and Frankie Washington, Jr.” as plaintiffs and “CITY OF DURHAM (N.C.) ET AL” as defendants. Baker argues that the title of the cause in the summons is defective because it does not list all defendants and does not mirror the title of the cause in the complaint. He cites to no authority for the proposition that these characteristics render the title of the cause in the summons defective, and we find none. Therefore, we find that the argument is abandoned. *Metric Constructors, Inc. v. Industrial Risk Insurers*, 102 N.C. App. 59, 64, 401 S.E.2d 126, 129, *aff’d*, 330 N.C. 439, 410 S.E.2d 392 (1991) (“[b]ecause the appellee cites no authority for this argument, it is deemed abandoned.”)

Conclusion

Because plaintiffs properly served all defendants-appellees who are natural persons in the manner prescribed by Rule 4(j)(1), we reverse the court’s order granting motions to dismiss for insufficient service of process as to those defendants-appellees, and we affirm the court’s order denying Baker’s motion to dismiss for insufficient service of process. We also affirm the court’s order granting the City’s motion to dismiss for insufficient service of process, because the record reveals that plaintiffs failed to properly serve the City. Finally, we affirm the trial court’s denial of plaintiff’s motion to amend the summons against the City and Baker’s motion to dismiss for failure of the summonses to contain the title of the cause.

AFFIRMED in part and REVERSED in part.

Judges GEER and McCULLOUGH concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 5 NOVEMBER 2013)

ATKINSON v. REIKOWSKY No. 13-526	Surry (11CVS575)	Affirmed in part, reversed and remanded in part
BASS v. HARNETT CNTY. No. 13-356	N.C. Industrial Commission (W93571)	Affirmed
BHATHELA v. CURRIE No. 13-319	Wake (11CVD19076)	Reversed and Remanded
BRANCH BANKING & TR. CO. v. HARRIS No. 13-489	Pitt (12CRS5003) (12CVS949)	Dismissed in part; affirmed in part
COATS v. NC DEP'T OF HEALTH & HUM. SERVS. No. 13-275	Wake (09CVS17880)	Reversed
CORALDI v. PICKETT No. 13-43	New Hanover (11CVS178) (12CVD511)	Dismissed
FSI, INC. v. ANDY NEWSON & BENTON & PARKER CO., INC. No. 13-219	Mecklenburg (11CVS11635)	Dismissed
FSI, INC. v. ANDY NEWSON & BENTON & PARKER CO., INC. No. 13-222	Mecklenburg (11CVS11635)	Affirmed in part; vacated in part
GUILFORD CNTY. EX v. SUTTON No. 13-310	Guilford (05CVD9515)	Affirmed
HOLLIFIELD v. COMMCN'S INSTALLATIONS SPECIALISTS No. 13-378	N.C. Industrial Commission (W68730)	Affirmed
IN RE A.S.B. No. 13-400	Mecklenburg (12JT452)	Affirmed
IN RE B.G.A.S. No. 13-583	Wilson (11JA4) (11JT2) (11JT3) (11JT47)	Affirmed

IN RE B.O. No. 13-568	Orange (11JT91-92)	Affirmed
IN RE J.N.M. No. 13-567	Catawba (07JT357-358)	Affirmed
IN RE JERRYS SHELL, LLC No. 13-223	Rowan (12CVS660)	Reversed and Remanded
IN RE K.R.G. No. 13-505	Union (12JT6)	Affirmed
IN RE S.E.W. No. 13-582	Wake (10JT149)	Affirmed
IN RE S.J.S. No. 13-682	Burke (12JT181)	Affirmed
IN RE S.R. No. 13-644	Lincoln (11JT47)	Affirmed
LIBERATORE v. LIBERATORE No. 12-1571	Cleveland (11CVD2094)	Affirmed
MOORE v. G & I VI FOREST HILLS GP, LLC No. 13-3	New Hanover (11CVS3263)	Reversed
POWELLS MED. FACILITY v. NC DEPT. OF HEALTH & HUM. SERVS. No. 13-166	Sampson (12CVS572)	Affirmed
QUACKENBUSH v. STEELMAN No. 13-240	Wake (12CVS5743)	Affirmed
ROBINSON v. DISCOVERY INS. CO. No. 13-226	Duplin (09CVS1232)	Affirmed
STATE v. BEST No. 13-498	Buncombe (12CRS366) (12CRS53996)	No Error
STATE v. BOWMAN No. 12-1565	Davidson (10CRS57434)	No Error
STATE v. BRADLEY No. 13-524	Iredell (11CRS51731-32)	Affirmed
STATE v. BRYANT No. 13-440	Cleveland (11CRS4001)	Dismissed

STATE v. CARSON No. 13-235	Mecklenburg (09CRS215715)	No Error
STATE v. CARVER No. 13-592	Buncombe (11CRS64269)	No Error
STATE v. CHAPLIN No. 13-393	Guilford (09CRS69536-37)	No prejudicial error
STATE v. CHILDRESS No. 13-470	Pasquotank (10CRS2126) (10CRS51362) (10CRS51372)	10CRS051372 and 10CRS002126 NO ERROR 10CRS051362 REVERSED
STATE v. COLLINS No. 13-410	Moore (11CRS51961) (12CRS236)	No Error
STATE v. GREENE No. 13-245	Edgecombe (11CRS52664)	No Error in Part, Dismissed in Part.
STATE v. HALEY No. 13-261	Wake (11CRS221128-29)	No Error
STATE v. HALL No. 13-154	Forsyth (11CRS52412)	Affirmed
STATE v. LARSON No. 13-163	Guilford (11CRS24522) (11CRS78597)	No Error in Part, Remanded in Part
STATE v. LEE No. 13-205	Onslow (10CRS57452)	No Prejudicial Error
STATE v. LEWIS No. 13-555	Craven (12CRS357)	Vacated
STATE v. LONG No. 13-347	Mecklenburg (10CRS249021)	No prejudicial error
STATE v. MATTHEWS No. 13-277	Mecklenburg (09CRS256093) (10CRS12648)	No Error
STATE v. MILLER No. 13-216	Duplin (10CRS50519-20) (12CRS51263)	No Error

STATE v. MUIR No. 13-267	Wake (10CRS38)	No error in part; dismissed in part
STATE v. NORRIS No. 13-282	Rutherford (11CRS50720) (11CRS50730)	No Error
STATE v. OWNBEY No. 13-407	Cherokee (12CRS50718)	No Error
STATE v. SHACKLEFORD No. 13-548	Edgecombe (12CRS52735)	Affirmed
STATE v. WIGGINS No. 13-233	Nash (10CRS53168) (10CRS53170) (10CRS53171) (10CRS53182) (10CRS53298)	No Error
STATE v. WILEY No. 13-409	Jackson (99CRS1121) (99CRS4760)	Vacated and Remanded
STEVENS v. UNITED STATES COLD STORAGE, INC. No. 13-150	N.C. Industrial Commission (661260)	Reversed and Remanded
THOMPSON v. GUTIERREZ No. 13-59	Forsyth (09CVS4187)	Affirmed

ALLMOND v. GOODNIGHT

[230 N.C. App. 413 (2013)]

GERALD ALLMOND, AS ADMINISTRATOR OF THE ESTATE OF
SANDRA GAIL ALLMOND, PLAINTIFF

v.

JAMES D. GOODNIGHT, INDIVIDUALLY AND JAMES D. GOODNIGHT, IN HIS CAPACITY AS A
MEMBER OF THE NORTH CAROLINA HIGHWAY PATROL, DEFENDANT

GERALD ALLMOND, AS GUARDIAN AD LITEM FOR ELLJAH ALLMOND, A MINOR, PLAINTIFF

v.

JAMES D. GOODNIGHT, INDIVIDUALLY AND JAMES D. GOODNIGHT, IN HIS CAPACITY AS A
MEMBER OF THE NORTH CAROLINA HIGHWAY PATROL, DEFENDANT

No. COA12-1270

Filed 19 November 2013

1. Appeal and Error—interlocutory orders and appeals—summary judgment—public official immunity—substantial right

Orders denying summary judgment based on public official immunity affect a substantial right and are immediately appealable.

2. Immunity—state trooper—auto accident—public official immunity—summary judgment

The trial court did not err by denying summary judgment for defendant, a state trooper, in a traffic accident case where defendant drove 120 mph in a 55 mph zone and struck an automobile making a legal left turn, cutting it in half and killing two people. Defendant maintained that he was pursuing a speeder and claimed public official immunity, but some witnesses saw the speeder and some did not. Plaintiff was required to allege one of the “piercing” exceptions to the public official immunity; although plaintiffs did not specifically state that defendant was acting outside the scope of his official duties, the relevant language in plaintiffs’ complaint could not be read any other way.

3. Immunity—public official—traffic accident—state trooper

Plaintiffs’ evidence in a traffic accident case involving a state trooper was sufficient to overcome the state trooper’s motion for summary judgment. The trooper relied upon public official immunity and its presumption of good faith and lawful conduct.

4. Collateral Estoppel and Res Judicata—traffic accident—state trooper—sued in individual and official capacities

The trial court did not err by refusing to hold that plaintiffs were judicially estopped from asserting their claims against

ALLMOND v. GOODNIGHT

[230 N.C. App. 413 (2013)]

defendant state trooper in his individual capacity where defendant was involved in a traffic accident and was sued in both his individual and official capacities.

Appeal by defendant from orders entered 19 April and 18 May 2012 by Judge Robert S. Albright in Guilford County Superior Court. Heard in the Court of Appeals 27 March 2013.

Abrams & Abrams, P.A., by Douglas B. Abrams, Margaret S. Abrams, and Noah B. Abrams; Davis Law Group, P.A., by Brian F. Davis, for Plaintiffs-Appellees.

Roberts & Stevens, P.A., by Wyatt S. Stevens and Ann-Patton Hornthal, for Defendant-Appellant.

ERVIN, Judge.

Defendant James L. Goodnight appeals from orders denying his motions for the entry of summary judgment in his favor and to reconsider the denial of his summary judgment motions. More specifically, Defendant contends that the trial court erred by denying his summary judgment and reconsideration motions on the grounds that the claims that had been asserted against him in his individual capacity by Gerald Allmond, in both his capacity as administrator of the estate of Sandra Gail Allmond and as guardian *ad litem* for his son, Elijah Allmond, were barred by the doctrines of public official immunity and judicial estoppel. After careful consideration of Defendant's challenges to the trial court's orders in light of the record and the applicable law, we conclude that the trial court's orders should be affirmed.

I. Factual Background

A. Substantive Facts

After attending church on 23 May 2010, Ms. Allmond decided to take her grandson, Elijah Allmond; Taylor Strange; and Steven Strange home and did so by heading northbound on Business 85 near High Point. The weather in the area was sunny and clear and traffic was light as Ms. Allmond drove north.

On the same morning, Defendant, who had served as a trooper with the North Carolina State Highway Patrol since 2000, was on duty and traveling north on Business 85 in his marked 2009 Dodge Charger. At some point, however, Defendant subsequently turned his vehicle

ALLMOND v. GOODNIGHT

[230 N.C. App. 413 (2013)]

around and began traveling in a southbound direction. As he drove south, Defendant accelerated to a speed which exceeded 120 miles per hour. Although he activated his emergency lights when he accelerated, Defendant did not sound his siren. At the location at which Defendant accelerated, the speed limit on Business 85 was 55 miles per hour.

As she neared Defendant's location, Ms. Allmond entered the left turn lane and began making a left turn from Business 85 onto River Road at an intersection in which the traffic signal was green for both northbound and southbound traffic. Before Ms. Allmond could complete her turn, Defendant's vehicle entered the intersection at a high rate of speed. Despite his efforts to swerve in order to avoid an accident, Defendant's car collided with Ms. Allmond's vehicle with such force that the portion of her vehicle in front of the dashboard was severed from the remainder of the vehicle. Ms. Allmond and Taylor Strange died and Elijah Allmond was injured as a proximate result of the accident.

Defendant testified that, as he was traveling northbound on Business 85, he noticed a vehicle which he clocked at 80 miles per hour heading southbound in a 55 mile per hour zone. However, Defendant lost sight of the vehicle after it passed him. Instead of crossing the median in order to pursue the speeding vehicle, Defendant continued up the road and turned at a paved crossover given that recent rains had impaired his ability to cross the grassy median safely. While pursuing the speeding vehicle, Defendant saw a truck driven by Terry Wayne Johnson in the right lane. As he approached Mr. Johnson's truck, Defendant moved into the left lane and sped up in order to catch the speeder. Further along, Defendant passed a second truck driven by Michael Wayne Perry. Defendant reached a speed of 121 miles per hour 2.1 seconds before the accident. As Defendant approached the intersection between Business 85 and River Road, he observed Ms. Allmond's vehicle coming from the opposite direction in the left turn lane and beginning to turn in front of him. Defendant began applying his brakes 1.6 seconds before the time of impact.

Mr. Perry testified that he was heading southbound on Business 85 in a white pickup truck with his cruise control set between 55 and 60 miles per hour shortly before the accident. According to Mr. Perry, he was passed by a dark-colored speeding vehicle shortly after going by the Vickery Chapel Road exit. As the speeding vehicle passed, Mr. Perry thought, "where is a trooper when you need one." At that moment, he saw Defendant, who was traveling in a northbound direction, turn around and begin to drive southbound. Eventually, Defendant passed Mr. Perry in the left lane with his emergency lights activated. As Defendant went

ALLMOND v. GOODNIGHT

[230 N.C. App. 413 (2013)]

by, Mr. Perry noticed through his rearview mirror a Dodge pickup truck traveling in the same direction that he and Defendant were proceeding. As the accident between Defendant and Ms. Allmond occurred, Mr. Perry observed the dark-colored speeding vehicle heading over a hill in the distance. After the accident, Mr. Perry pulled over to the side of the road and called for emergency assistance.

According to Theodis Duff, who was traveling in a southbound direction on Business 85, his son noticed a light blue car approaching them from the rear at an excessive rate of speed while darting in and out of traffic in a dangerous manner. Although the speeding vehicle continued past him toward the direction in which the wreck occurred, Mr. Duff eventually lost sight of it and did not know where the light blue vehicle eventually went. Even though Mr. Duff did not witness the collision between Ms. Allmond and Defendant, he did come upon the debris left by the two vehicles involved in the wreck shortly thereafter.

Floyd Ross saw the light at the intersection at which the accident occurred turn green as he traveled south on Business 85 on the morning of the accident between Defendant and Ms. Allmond. At that point, Mr. Ross' attention was diverted by flashing blue lights emanating from some type of emergency vehicle. However, he did not hear any siren or other audible signal that an emergency vehicle was approaching. Although he was not looking for any speeding vehicle, Mr. Ross believed that he would have noticed a speeding vehicle if one had passed him, in light of the good view he had as the result of the fact that he was seated high in his truck, and explicitly stated that he had not noticed a speeding vehicle pass him that morning.

Mr. Ross did not notice Ms. Allmond's vehicle until after the accident had occurred. At that point, Mr. Ross approached Ms. Allmond's vehicle and used his knife to cut the seatbelt of the front passenger in an attempt to assist her. Subsequently, Mr. Ross went to check on Defendant, who had to climb out of the passenger side in order to exit his vehicle. At or immediately after the time that he exited his vehicle, Defendant asked Mr. Ross why Ms. Allmond had not seen his lights and inquired if Mr. Ross had seen them.

Mr. Johnson, who was driving his vehicle south on Business 85 at the posted speed limit on the morning of the accident, entered the highway from Vickery Chapel Road, which was less than a mile away from River Road, and did not notice any cars pass him prior to the accident other than the marked patrol vehicle operated by Defendant. Mr. Johnson testified that he "would have never seen" a speeding vehicle because

ALLMOND v. GOODNIGHT

[230 N.C. App. 413 (2013)]

it would have been out of his line of vision if it had been traveling at a high speed. As Mr. Johnson turned into the right lane of Business 85, he observed Defendant's vehicle in a stationary position at the median. After Mr. Johnson went past Defendant at a location approximately one half mile from the intersection of Business 85 and River Road, he observed Defendant pull behind him in the right lane while traveling 55 miles per hour. Although Defendant denied having ever paused behind Mr. Johnson, Mr. Johnson estimated that Defendant was behind his car for approximately twenty seconds, during which time Mr. Johnson assumed that Defendant had been checking his license tags. Mr. Johnson did not sense any urgency on Defendant's part at the time that Defendant was behind him.

According to Mr. Johnson, Defendant suddenly pulled out into the left lane of Business 85, accelerated rapidly, and activated his blue lights as he reached a point about three car lengths in front of Mr. Johnson and about 1,000 feet from the intersection at which the accident occurred. As Ms. Allmond attempted to make a left turn, Defendant's vehicle ran into the side of her car, ripping it in half. After the accident, Mr. Johnson went to the vehicle driven by Ms. Allmond, where he found Ms. Allmond and her front seat passenger in an unconscious condition and two hysterical young boys in the back seat.¹ Ms. Allmond died in Mr. Johnson's arms.

Steven H. Farlow, an accident reconstruction expert, visited the scene of the collision between Defendant and Ms. Allmond a little over a month after the accident. According to Mr. Farlow, Mr. Johnson's version of the events that occurred shortly prior to the accident could be accurate depending on the manner in which one interpreted Mr. Johnson's testimony. For example, Mr. Farlow stated that the timetable spelled out in Mr. Johnson's account of the events leading up to the accident was physically possible in the event that, even if he passed Mr. Johnson at the 1,000 foot marker, Defendant began accelerating prior to reaching that point. Mr. Farlow also testified that Mr. Johnson's version of events could be possible if Defendant had not passed him at exactly the 1,000 foot mark or if Mr. Farlow used a less conservative acceleration rate for his calculation.

B. Procedural History

On 27 May 2011, Mr. Allmond, acting in his capacity as the administrator of Ms. Allmond's estate, filed a complaint seeking to recover

1. In his deposition, Elijah testified that he did not see a speeding vehicle heading in the opposite direction from the car in which he was riding before the accident other than Defendant's patrol vehicle.

ALLMOND v. GOODNIGHT

[230 N.C. App. 413 (2013)]

compensatory and punitive damages from Defendant in both his official and individual capacities stemming from Ms. Allmond's death. On 29 July 2011, Mr. Allmond, acting in his capacity as Elijah's guardian *ad litem*, filed a substantially identical complaint seeking to recover compensatory and punitive damages from Defendant in both his official and individual capacities as a result of the injuries which Elijah sustained. On 25 July 2011, Defendant filed an answer in the wrongful death action in which he denied the material allegations of the complaint and sought dismissal of the complaint on sovereign immunity and public official immunity grounds. On 15 August 2011, Defendant filed an answer in the personal injury case which was substantially similar to the one which he had filed in the wrongful death action coupled with a motion to consolidate the wrongful death and personal injury cases. On 27 September 2011, Defendant filed a third party claim against Ms. Allmond's estate in the personal injury case, alleging that, in the event that he was found liable in the personal injury action, Defendant was entitled to contribution from the estate on the grounds that the accident in which Elijah was injured resulted from Ms. Allmond's negligence.

On 11 October 2011, Judge L. Todd Burke entered an order allowing Defendant's motion to dismiss the claims that had been lodged against him in his official capacity while denying Defendant's motion to dismiss the claims that had been lodged against him in his individual capacity.² On 21 February 2012, Defendant filed a motion seeking the entry of summary judgment in his favor. On 19 April 2012, the trial court entered an order denying Defendant's summary judgment motion. On 26 April 2012, Defendant filed a motion seeking reconsideration of the trial court's order denying his summary judgment motion. The trial court denied Defendant's reconsideration motion on 18 May 2012. Defendant noted an appeal to this Court from the trial court's orders denying his summary judgment and reconsideration motions.

II. Legal Analysis

A. Summary Judgment Motion

1. Appealability

[1] "As an initial matter, we note that the trial court's order denying defendant's motion for summary judgment is interlocutory, and thus, not

2. The version of the order granting Defendant's dismissal motion in part and denying it in part contained in the record presented for our review relates solely to the wrongful death action brought by Ms. Allmond's estate. However, it appears to us that a similar order was entered in the personal injury action brought on behalf of Elijah as well.

ALLMOND v. GOODNIGHT

[230 N.C. App. 413 (2013)]

generally subject to immediate appeal. ‘Orders denying summary judgment based on public official immunity, however, affect a substantial right and are immediately appealable.’ ” *Fraley v. Griffin*, __ N.C. App. __, __, 720 S.E.2d 694, 696 (2011) (citations omitted) (quoting *Dempsey v. Halford*, 183 N.C. App. 637, 638, 645 S.E.2d 201, 203 (2007)) (citing *Snyder v. Learning Servs. Corp.*, 187 N.C. App. 480, 482, 653 S.E.2d 548, 550 (2007), *disc. review petition withdrawn*, 362 N.C. 383, 670 S.E.2d 236 (2008)). As a result, Defendant’s appeal is properly before us despite the fact that he seeks review of an interlocutory order.

2. Standard of Review

“A party will prevail on a motion for summary judgment only if the moving party . . . can show no material facts are in dispute and entitlement to judgment as a matter of law. In addition, the record is to be viewed in the light most favorable to the non-movant[s], giving [them] the benefit of all inferences which reasonably arise therefrom.” *Epps v. Duke Univ., Inc.*, 122 N.C. App. 198, 202, 468 S.E.2d 846, 849 (citations omitted) (citing *Moore v. City of Creedmoor*, 120 N.C. App. 27, 36, 460 S.E.2d 899, 904 (1995), *aff’d in part and rev’d in part on other grounds*, 345 N.C. 356, 481 S.E.2d 14 (1997)), *disc. review denied*, 344 N.C. 436, 476 S.E.2d 115 (1996) (hereinafter *Epps II*). “A genuine issue of material fact arises when the ‘facts alleged . . . are of such nature as to affect the result of the action.’ ” *N.C. Farm Bureau Mut. Ins. Co. v. Sadler*, 365 N.C. 178, 182, 711 S.E.2d 114, 116 (2011) (omission in original) (quoting *Kessing v. Nat’l Mortg. Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971)). In other words, an “issue is material if, as alleged, facts ‘would constitute a legal defense, or would affect the result of the action or if its resolution would prevent the party against whom it is resolved from prevailing in the action.’ ” *City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 654, 268 S.E.2d 190, 193 (1980) (quoting *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972)). A party may “show[] that no triable issue of fact exists by demonstrating that the non-moving party cannot surmount an affirmative defense.” *Greene v. Barrick*, 198 N.C. App. 647, 652, 680 S.E.2d 727, 731 (2009). “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)).

ALLMOND v. GOODNIGHT

[230 N.C. App. 413 (2013)]

3. Public Official Immunitya. Availability of Public Official Immunity

[2] According to well-established North Carolina law, law enforcement officers such as Defendant are public officials for immunity-related purposes. *Isenhour v. Hutto*, 350 N.C. 601, 610, 517 S.E.2d 121, 127 (1999). “A suit against a public official in his official capacity is basically a suit against the public entity (*i.e.*, the state) he represents.” *Epps II*, 122 N.C. App. at 203, 468 S.E.2d at 850. For that reason, a civil action seeking the recovery of damages brought against a protected individual in his or her official capacity may only proceed in the event that the State consents to the maintenance of that action or has otherwise waived sovereign immunity. *See Id.* at 204, 468 S.E.2d at 851. On the other hand, “[w]hether or not the official capacity suit moves forward, the plaintiff may simultaneously proceed against the official as an individual.” *Id.* Under public official immunity, which “is a derivative form of sovereign immunity,” public officials sued in their individual capacity may not be held personally liable unless their actions were “ ‘corrupt, malicious or perpetrated outside and beyond the scope of official duties.’ ” *Id.* at 203-04, 468 S.E.2d at 850-51 (quoting *Locus v. Fayetteville State Univ.*, 102 N.C. App. 522, 526, 402 S.E.2d 862, 865 (1991)).

b. Sufficiency of Plaintiffs’ Complaints

As a result of the fact that a plaintiff who “wishes to sue a public official in his personal or individual capacity . . . must, at the pleading stage and thereafter, demonstrate that the official’s actions . . . are commensurate with one of the ‘piercing’ exceptions,” *Id.* at 207, 468 S.E.2d at 853; *see also Baker v. Smith*, __ N.C. __, __, 737 S.E.2d 144, 152 (2012) (noting that the plaintiff had not “alleged in her complaint . . . that defendant [had] acted maliciously, corruptly, or outside the scope of her official authority” and holding that the plaintiff had, for that reason, “failed to allege an element necessary to overcome defendant’s affirmative defense of public official immunity”), “we must [first] determine whether the complaint sufficiently alleges corrupt or malicious conduct or that [Defendant] acted outside the scope of his official duties.”³ *Epps v. Duke Univ., Inc.*, 116 N.C. App. 305, 309, 447 S.E.2d 444, 447 (1994)

3. Plaintiffs do not appear to have sufficiently alleged that their claims are entitled to proceed in the face of Defendant’s invocation of public official immunity on any basis other than a contention that Defendant exceeded the scope of his official authority, so we will limit the discussion in the text to the sufficiency of Plaintiffs’ showing that Defendant is not entitled to a finding of immunity on the basis of a contention that Defendant was acting outside the scope of his official authority at the time of the collision.

ALLMOND v. GOODNIGHT

[230 N.C. App. 413 (2013)]

(hereinafter *Epps I*). As a result of the fact that Defendant contends that Plaintiffs failed to adequately plead that he is not entitled to public official immunity, we must examine the extent to which Plaintiffs adequately pled that Defendant was not entitled to the benefit of public official immunity.

In their complaints, Plaintiffs alleged that:

Defendant Goodnight was not acting in response to any official duty of any form, or kind whatsoever nor was he involved in any pursuit, or emergency activity that required, mandated, or permitted the excessive speed at which he was traveling, as he was accelerating up to approximately 120 miles per hour.

Although Plaintiffs did not specifically state that Defendant was acting outside the scope of his official duties in those exact words, we are unable to read the relevant language from Plaintiffs' complaint as asserting anything other than that, at the time of the collision, Defendant was acting outside the scope of his official duties by accelerating to a speed far in excess of the legal speed limit for no legitimate reason. As a result, given that Plaintiffs have alleged that Defendant was "not acting in response to any official duty," their complaints do, when read in light of the ordinary meaning of the words in which their allegations are couched, assert that Defendant was acting outside of the scope of the official duties he was required to perform at the time of the collision in which Ms. Allmond was killed and Elijah was injured.

Admittedly, Plaintiffs did allege in their complaints that:

At all times relevant hereto, Defendant Goodnight was employed by the State of North Carolina . . . and was operating the automobile in the course and scope of his employment for his employer, in furtherance of the business of his employer, and incident to the performance of duties entrusted to Defendant Goodnight even though as described Defendant Goodnight acted negligently, grossly negligently, wantonly negligently and recklessly.

As Defendant notes, we have recently held that a complaint containing similar language did not suffice to satisfy the requirement that a pleading allege grounds for concluding that public official immunity did not apply, stating that:

As [the plaintiff] did not allege that the Individual Defendants acted beyond the scope of their authority — and, indeed,

ALLMOND v. GOODNIGHT

[230 N.C. App. 413 (2013)]

instead alleged that the Individual Defendants “were acting in the course and scope of their employment and their agency as [] police officers” — Wilcox may not now attempt to establish that the Individual Defendants acted beyond the scope of their authority.

Wilcox v. City of Asheville, __ N.C. App. __, __, n.2, 730 S.E.2d 226, 230, n.2 (2012) (alteration in original), *disc. review denied*, __ N.C. __, 738 S.E.2d 363 and 366 N.C. 298, 738 S.E.2d 401 (2013). Unlike the pleading at issue in *Wilcox*, however, the complaint at issue here, in addition to containing language similar to that which this Court has held to be insufficient, also specifically alleged that Defendant was acting outside the scope of his official duties. As a result, particularly given that a party’s evidentiary forecast and pleadings must be reviewed in the light most favorable to the non-movant, *Coley v. State*, 360 N.C. 493, 494, 631 S.E.2d 121, 123 (2006) (stating that, when considering a motion to dismiss based upon N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), courts are to consider “whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory”); *Epps II*, 122 N.C. App. at 202, 468 S.E.2d at 849 (stating that, in considering a motion for summary judgment, the “record is to be viewed in the light most favorable to the non-movant, giving it the benefit of all inferences which reasonably arise therefrom”), we conclude that Plaintiffs’ complaints contained sufficient allegations to preclude a determination that they had failed to adequately allege that Defendant was not entitled to rely on public official immunity as a defense to Plaintiffs’ claims.

c. Adequacy of Plaintiffs’ Evidentiary Forecast

[3] After concluding that Plaintiffs’ complaints sufficiently alleged the inapplicability of the doctrine of public official immunity, we must next determine whether Plaintiffs forecast sufficient evidence to permit a determination that Defendant was acting outside the scope of his official authority at the time of the collision in which Ms. Allmond was killed and Elijah was injured. We believe that the trial court correctly concluded that Plaintiffs adduced sufficient evidence to support a determination that Defendant was not entitled to summary judgment in his favor under the doctrine of public official immunity.

As we have already noted, “[t]o sustain the personal or individual capacity suit, the plaintiff must initially make a *prima facie* showing that the defendant-official’s tortious conduct falls within one of the immunity exceptions, *i.e.*, that the official’s conduct is malicious, corrupt, or

ALLMOND v. GOODNIGHT

[230 N.C. App. 413 (2013)]

outside the scope of official authority.” *Epps II*, 122 N.C. App. at 205, 468 S.E.2d at 851-52. For that reason, “the first order of business for a plaintiff bringing an individual capacity suit against an official is a showing of an applicable ‘piercing’ exception,” since “[m]ere allegations of negligence, in and of themselves, will not suffice.” *Id.* at 207, 468 S.E.2d at 853. In analyzing the sufficiency of the plaintiff’s evidentiary forecast in *Epps II*, we observed that:

Defendant’s argument and evidence fall far short of the “no material fact in dispute” standard long adopted by this Court. We held in *Epps I* that defendant Hjelmstad, acting in his capacity as a county medical examiner, is a public officer. *Epps I*, 116 N.C. App. at 311, 447 S.E.2d at 448. The *Epps I* Court also held that[,] “because plaintiffs’ complaint contains allegations indicating that Hjelmstad acted outside the scope of his official duties, they have stated a valid claim against Hjelmstad in his individual capacity as a public officer.” *Id.* Thus, to prevail on his motion for summary judgment, defendant must show that plaintiffs’ presentation of properly considered evidence falls short of the allegations found in their complaint.

Id. at 202, 468 S.E.2d at 850. As a result, in order to avoid the entry of summary judgment in Defendant’s favor on the basis of public official immunity, Plaintiffs must show that, assuming that the facts alleged in their complaints are sufficient to support a determination that Defendant had acted outside the scope of his official duties, the evidentiary forecast which they provided supported the allegations in question. In this instance, we are compelled to conclude that Plaintiffs made the required evidentiary showing.

In their complaint, Plaintiffs alleged that, for reasons unrelated to the performance of any official duty, Defendant accelerated to a speed of 120 miles per hour in an area in which the posted speed limit was only 55 miles per hour and collided with the vehicle driven by Ms. Allmond after entering a marked intersection while travelling at that speed. Although Defendant would have clearly been performing an official duty in the event that he operated his motor vehicle at the indicated rate of speed in pursuit of a speeding motorist such as the one described in his own testimony and that of Mr. Duff and Mr. Perry, he acknowledges that he would not have been acting within the scope of his official authority in the event that he was operating his vehicle at a speed of 120 miles per hour for no law enforcement-related purpose. As a result, the validity of Defendant’s challenge to the denial of his summary judgment motion

ALLMOND v. GOODNIGHT

[230 N.C. App. 413 (2013)]

risers or falls based upon the extent to which Plaintiffs were able to forecast sufficient evidence which, when taken in the light most favorable to Plaintiffs, sufficed to support a determination that Defendant was not pursuing a speeding motorist at the time that he accelerated to a speed of 120 miles per hour.

In the evidentiary materials that he presented in support of his request for summary judgment, Defendant asserts that he was “enforc[ing] all laws and regulations respecting travel and the use of vehicles upon the highways of the State and all laws for the protection of the highways of the State,” N.C. Gen. Stat. § 20-188, by pursuing a speeding vehicle at the time of the accident in which Ms. Allmond was killed and Elijah was injured. To support this claim, Defendant presented his deposition testimony, along with that of Mr. Perry and Mr. Duff, to the effect that a speeding vehicle had been traveling in the southbound lane of Business 85 and that Defendant was pursuing that vehicle when his car collided with that driven by Ms. Allmond. In the event that a jury was to believe this evidence, Defendant would clearly be entitled to prevail. For that reason, the burden shifted to Plaintiffs to forecast evidence tending to show that no speeding motorist existed at the time that Defendant began operating his patrol vehicle at a speed of 120 miles per hour in order to preclude the entry of summary judgment in Defendant’s favor.

As we have already noted, Mr. Ross testified that he had a clear view of the road from a seat high in the truck that he was operating; that, in the event that Defendant had been pursuing a speeding vehicle, he would have seen it; and that Mr. Ross had not seen any such speeding vehicle. For that reason, Mr. Ross’ deposition testimony tends to show that there was no speeding vehicle in the vicinity at the time that Defendant accelerated his patrol vehicle to a speed of 120 miles per hour. As a result, we conclude that the record reveals the existence of a genuine issue of material fact concerning the extent, if any, to which Defendant was acting outside the scope of his official duties immediately before and at the time of the accident in which Ms. Allmond was killed and Elijah was injured.⁴

In his brief, Defendant argues that Mr. Ross’ testimony to the effect that he would have seen a speeding vehicle is “simply speculative.”

4. In light of our conclusion that the testimony of Mr. Ross, considered in isolation, is sufficient to preclude the entry of summary judgment in Defendant’s favor, we need not address the extent to which the testimony of Mr. Johnson, which Defendant contends to rest upon assertions that violate the laws of physics, and Elijah, which Defendant does not address in detail, would have also sufficed to defeat Defendant’s public official immunity claim.

ALLMOND v. GOODNIGHT

[230 N.C. App. 413 (2013)]

As part of his effort to persuade us of the validity of this contention, Defendant points out that Mr. Ross failed to notice Ms. Allmond's vehicle prior to the accident, notes that Mr. Ross admitted that he could not say with absolute certainty that there were no other vehicles, and argues that a decision to find that there was no speeding vehicle based upon Mr. Ross' testimony would rest on the logical fallacy of "negative evidence." In essence, however, Defendant's argument is tantamount to a request that we weigh the credibility of Mr. Ross' testimony and find it wanting, which is an action that we lack the authority to take. *Ragland v. Moore*, 299 N.C. 360, 363, 261 S.E.2d 666, 668 (1980) (stating that, "[i]n ruling on a motion for summary judgment, the court does not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact"). Unlike the "negative evidence" decisions upon which Defendant relies, *Young v. Woodall*, 343 N.C. 459, 463, 471 S.E.2d 357, 360 (1996) (holding that the fact that "[a] witness said [that] she could not tell whether [an officer's headlights] were on" did not tend to show "that the headlights were off"), Mr. Ross indicated that he would have seen a speeding vehicle had one existed and that he made no such observation. Thus, Defendant's argument in reliance upon the "speculative" nature of Mr. Ross' testimony does not justify a decision to overturn the trial court's orders.

In addition, Defendant places substantial reliance on our prior statement that:

"It is well settled that absent evidence to the contrary, it will always be presumed 'that public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law.' This presumption places a heavy burden on the party challenging the validity of public officials' actions to overcome this presumption by competent and substantial evidence." Moreover, "[e]vidence offered to meet or rebut the presumption of good faith must be sufficient by virtue of its reasonableness, not by mere supposition. It must be factual, not hypothetical; supported by fact, not by surmise."

Strickland v. Hedrick, 194 N.C. App. 1, 10-11, 669 S.E.2d 61, 68 (2008) (alteration in original) (citations omitted) (quoting *Leete v. Cnty. of Warren*, 341 N.C. 116, 119, 462 S.E.2d 476, 478 (1995) and *Dobson v. Harris*, 352 N.C. 77, 85, 530 S.E.2d 829, 836 (2000)). As a result, *Strickland* and related decisions require trial and appellate courts to presume that "public officials will discharge their duties in good faith

ALLMOND v. GOODNIGHT

[230 N.C. App. 413 (2013)]

and exercise their powers in accord with the spirit and purpose of the law.” *Id.* at 10, 669 S.E.2d at 68; *see also Henderson Cnty. v. Osteen*, 297 N.C. 113, 116, 254 S.E.2d 160, 162 (1979) (stating that “[t]he presumption of regularity of official acts is applicable to tax proceedings in this state”); *Dempsey*, 183 N.C. App. at 641, 645 S.E.2d at 205 (applying the presumption to analyze a potential malice exception after determining that the “challenged actions of both defendants were committed within the scope of their official duties”).

As the excerpt from *Strickland* upon which Defendant relies clearly indicates, however, the presumption in question is rebuttable rather than irrebuttable. In light of that fact, the ultimate issue raised by Defendant’s reliance upon the presumption that a public official acts in good faith and consistently with the spirit and intent of the applicable law is whether Plaintiffs successfully rebutted that presumption. In other words, the issue raised by Defendant’s reliance upon the presumption set out in *Strickland* and related cases is whether Plaintiff adduced sufficient evidence that would, if believed, suffice to support a determination that, the presumption of good faith and lawful conduct to the contrary notwithstanding, Defendant exceeded the scope of his legal authority at the time that he accelerated his vehicle to a high rate of speed on Business 85 shortly before the collision in which Ms. Allmond was killed and Elijah was injured. Having previously concluded that Plaintiffs did, in fact, adduce such evidence in the form of Mr. Ross’ testimony, we further conclude that Defendant’s reliance upon the presumption of good faith and lawful conduct does not justify a decision to overturn the trial court’s decision to deny Defendant’s summary judgment motions given that the evidence adduced by Plaintiffs, rather than resting upon surmise or supposition, constituted affirmative evidence that Defendant had no valid law enforcement-related justification for his conduct immediately prior to the accident.

According to well-established North Carolina law, “[t]he jury’s role is to weigh evidence, assess witness credibility, assign probative value to the evidence and testimony, and determine what the evidence proves or fails to prove.” *State v. Moore*, 366 N.C. 100, 108, 726 S.E.2d 168, 174 (2012). In light of that fact and the fact that the validity of Defendant’s public official immunity claims hinges upon the resolution of a disputed factual issue, a jury, rather than a trial court ruling on a summary judgment motion, must decide whether Defendant was acting within the scope of his official duties when he accelerated to a high rate of speed immediately prior to the collision in which Ms. Allmond was killed and Elijah was injured. In the event that the jury determines that Defendant was pursuing a speeding motorist at the time that he entered

ALLMOND v. GOODNIGHT

[230 N.C. App. 413 (2013)]

the intersection in which the collision occurred, he will be immune from liability. Although there are certainly grounds for challenging the weight and credibility that should be afforded to the evidence which Plaintiffs have forecast with respect to this issue, it is not for this Court or the trial court to make such weight and credibility determinations. In the event that the jury determines that Defendant was not pursuing such a speeding motorist at that time, the jury must then determine whether, applying the applicable substantive legal principles, Plaintiffs are entitled to recover damages from Defendant. *See Epps II*, 122 N.C. App. at 206, 468 S.E.2d at 852 (holding that, in the event that a public official is not immune, “it is as if the *official* never committed the tortious act, as one stripped of the cloak of office, the tortfeasor is then liable for simple negligence”).⁵ Thus, the trial court did not err by refusing to grant summary judgment in Defendant’s favor on the basis of public official immunity.

B. Motion for Reconsideration

[4] Secondly, Defendant contends that the trial court erred by refusing to hold that Plaintiffs’ claims were barred by principles of judicial estoppel, the theory relied on by Defendant in his motion for reconsideration. More specifically, Defendant argues, in reliance upon our decision in *T-Wol Acquisition Co. v. ECDG South, LLC*, ___ N.C. App. ___, 725 S.E.2d 605 (2012), that Plaintiffs should be judicially estopped from claiming that Defendant acted outside the scope of his official duties on the grounds that Mr. Allmond filed an affidavit in a State Tort Claims Act proceeding stemming from the same accident before the Industrial Commission in which he stated that, “[a]t the time of the subject wreck, Trooper Goodnight was [acting] in the course and scope of his employment with the North Carolina State Highway Patrol.” We do not find this argument persuasive.⁶

5. Although Plaintiffs contend that N.C. Gen. Stat. § 20-145 provides a basis for concluding that Defendant is not entitled to rely on a defense of public official immunity in this case, we are unable to accept their argument in light of the fact that nothing in N.C. Gen. Stat. § 20-145 explicitly addresses immunity-related issues and the fact that no decision of either the Supreme Court or this Court has ever held that N.C. Gen. Stat. § 20-145 has any bearing on the extent to which a defendant is entitled to invoke public official immunity.

6. Defendant has not argued that we are entitled to consider his challenges to the trial court’s decision to reject his judicial estoppel defense on the merits on an interlocutory basis at any point in his brief. Although we would be entitled to dismiss this portion of his challenge to the trial court’s orders as having been taken from an unappealable interlocutory order on this basis, *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994) (holding that “the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right”), we elect to issue a writ of *certiorari* pursuant to N.C.R. App. P. 21 on our own motion in order to permit review of Defendant’s judicial estoppel argument on the merits in the interest of judicial efficiency.

ALLMOND v. GOODNIGHT

[230 N.C. App. 413 (2013)]

In determining whether a party should be judicially estopped from taking a particular position, the following principles must guide our analysis:

First, a party's subsequent position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding might pose a threat to judicial integrity by leading to inconsistent court determinations or the perception that either the first or the second court was misled. Third, courts consider whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Whitacre P'ship v. Biosignia, Inc., 358 N.C. 1, 29, 591 S.E.2d 870, 888-89 (2004) (citations and quotation marks omitted). After carefully analyzing the facts of this case in light of the principles that the Supreme Court has deemed pertinent, we conclude that Plaintiffs are not judicially estopped from asserting a claim against Defendant.

As an initial matter, this Court has specifically held that a plaintiff "may simultaneously proceed against the official as an individual" while maintaining a suit against him in his official capacity. *Epps II*, 122 N.C. App. at 204, 468 S.E.2d at 851. Although a litigant's right to proceed with both official capacity and individual capacity actions does not necessarily authorize a plaintiff to take inconsistent positions, the fact that a plaintiff is entitled to assert both types of claims necessarily creates the potential for assertions that are in tension with each other. Secondly, Defendant has not cited us to any authority holding that a representation that a particular state employee was acting within the course and scope of his employment for State Tort Claims Act purposes is identical to a representation that, for purposes of addressing an issue arising from a claim of public official immunity, the public officer was acting outside the scope of his official authority, and we know of none. Thirdly, given that judicial estoppel "forbids a party from asserting a legal position inconsistent with one taken earlier in the same or related litigation," *Price v. Price*, 169 N.C. App. 187, 191, 609 S.E.2d 450, 452 (2005), and given that Plaintiffs' State Tort Claims Act proceeding was filed with the Industrial Commission after the filing of the present cases, we are unable to see why Plaintiffs should be estopped in this action, rather than the State Tort Claims Act proceeding, if their claims are subject to

ATL. COAST CONF. v. UNIV. OF MD.

[230 N.C. App. 429 (2013)]

the application of estoppel-related principles at all. Finally, the record contains no indication that Plaintiffs have prevailed in the Industrial Commission on the basis of the assertion upon which Defendant relies, or that Plaintiffs have been unfairly benefitted or Defendant unfairly disadvantaged by this assertion. As a result, the trial court did not err by refusing to hold that Plaintiffs were judicially estopped from asserting their claims against Defendant in his individual capacity.

III. Conclusion

Thus, for the reasons set forth above, we conclude that Defendant's challenges to the trial court's orders lack merit. As a result, the trial court's orders should be, and hereby are, affirmed.

AFFIRMED.

Judges CALABRIA and DILLON concur.

ATLANTIC COAST CONFERENCE, PLAINTIFF

v.

UNIVERSITY OF MARYLAND, COLLEGE PARK; BOARD OF REGENTS, UNIVERSITY
SYSTEM OF MARYLAND, DEFENDANTS

No. COA13-532

Filed 19 November 2013

1. Appeal and Error—interlocutory orders and appeals—sovereign immunity—substantial right

The Court of Appeals had jurisdiction to hear defendants' interlocutory appeal from the trial court's denial of their motion to dismiss for lack of personal jurisdiction. Defendants' claim of sovereign immunity was immediately appealable as affecting a substantial right.

2. Appeal and Error—standard of review—comity—question of law—de novo

The question of whether a North Carolina court should extend comity to a sister state's sovereign immunity request is a question of law reviewable *de novo*.

ATL. COAST CONF. v. UNIV. OF MD.

[230 N.C. App. 429 (2013)]

3. Immunity—comity—obligations in contract

The trial court did not err by denying defendant’s motion to dismiss on the grounds of sovereign immunity. Because public policy does not allow the State of North Carolina to avoid its obligations in contract, the extension of comity in this case would have violated public policy. Based on this conclusion, the Court of Appeals declined to consider whether defendants would have been entitled to sovereign immunity as a matter of Maryland law.

Appeal by defendants from order entered 25 February 2013 by Judge John O. Craig, III in Guilford County Superior Court. Heard in the Court of Appeals 26 September 2013.

Smith Moore Leatherwood LLP, by D. Clark Smith, Jr. and Alexander L. Maultsby, and Van Laningham Duncan LLP, by Alan W. Duncan, for plaintiff-appellee.

Hagan Davis Mangum Barrett & Langley PLLC, by Charles T. Hagan, III, J. Alexander S. Barrett, and Jason B. Buckland, for defendants-appellants.

HUNTER, JR., Robert N., Judge.

The University of Maryland, College Park (“the University of Maryland”) and the Board of Regents for the University System of Maryland (“the Board of Regents”) (collectively “Defendants”) appeal from an order denying their motion to dismiss for lack of personal jurisdiction pursuant to Rule 12(b)(2) of the North Carolina Rules of Civil Procedure. Despite the interlocutory nature of their appeal, Defendants contend that this Court has jurisdiction pursuant to N.C. Gen. Stat. § 1-277(a) and (b) (2011). Furthermore, Defendants contend that the complaint should be dismissed because they are entitled to sovereign immunity under the principle of comity. While we agree that this Court has jurisdiction to hear Defendants’ appeal, we disagree with Defendant’s comity argument and affirm the trial court’s order.

I. Factual & Procedural History

On 26 November 2012, the Atlantic Coast Conference (“the ACC”) filed a complaint in Guilford County Superior Court seeking a declaratory judgment that a withdrawal payment provision in the ACC Constitution is a valid liquidated damages clause enforceable against Defendants. The facts as alleged in the complaint are as follows.

ATL. COAST CONF. v. UNIV. OF MD.

[230 N.C. App. 429 (2013)]

The ACC is a North Carolina unincorporated nonprofit association with its principal place of business in Greensboro, North Carolina. When the complaint in this action was filed, the ACC's membership consisted of twelve colleges and universities located along the eastern seaboard. In addition to the University of Maryland, the ACC's membership included Boston College, Clemson University, Duke University, Florida State University, the Georgia Institute of Technology, the University of Miami, the University of North Carolina, North Carolina State University, the University of Virginia, Virginia Polytechnic Institute and State University, and Wake Forest University.¹

With its principal place of business in College Park, Maryland, the University of Maryland is a public institution organized and existing under the laws of the State of Maryland. The University of Maryland has been a member of the ACC since the ACC's founding in 1953. The Board of Regents is the governing body for the University System of Maryland and takes official actions on behalf of its constituent universities.

Each member of the ACC, including the University of Maryland, has agreed to conduct business with each other according to the terms of the ACC Constitution. The ACC Constitution grants the complete responsibility for and authority over the ACC to the Council of Presidents ("the Council"), comprised of the chief executive officer of each member institution. Each member, including the University of Maryland, has agreed to be bound by the vote of the Council.

On 13 September 2011, in response to a growing concern that a member institution's withdrawal from the ACC could cause financial damage to the conference, the Council unanimously voted to amend the ACC Constitution to establish a mandatory withdrawal payment at one and one-quarter times the total operating budget of the ACC.² Defendants' representative on the Council proposed the factor used in the calculation and voted for the amendment.

The ACC alleges that after the September 2011 vote, the potential financial damage that would result from a member institution's withdrawal substantially increased. In response, the Council voted in

1. Since the filing of the complaint, the University of Notre Dame, the University of Pittsburgh, and Syracuse University have joined the ACC.

2. The annual operating budget of the ACC for the 2012—2013 year was \$17,422,114. Multiplying this figure by the agreed upon factor of one and one-quarter makes the total withdrawal penalty \$21,777,642.50.

ATL. COAST CONF. v. UNIV. OF MD.

[230 N.C. App. 429 (2013)]

September 2012 to change the formula used to calculate the withdrawal payment from one and one-quarter to three times the total operating budget of the ACC.³ Defendants' representative on the Council voted against this measure.

Not long after the Council voted to increase the withdrawal payment, Defendants informed the ACC on 19 November 2012 of their decision to withdraw from the ACC. On the same day, Defendants held a press conference publicly announcing their decision to withdraw from the ACC and to join the Big Ten Conference.

The ACC alleges that the University of Maryland's withdrawal from the ACC subjects them to a mandatory withdrawal payment in the amount of \$52,266,342. The ACC further alleges that Defendants' public statements and conduct since their decision to leave the ACC make it clear that Defendants do not intend to make the withdrawal payment. Accordingly, the ACC filed this action seeking a declaration that the withdrawal payment is a valid and enforceable liquidated damages sum and that the University of Maryland is obligated to pay the sum under the terms of its membership in the ACC.

On 18 January 2013, Defendants filed a pre-answer motion to dismiss the ACC's complaint for lack of personal jurisdiction under Rule 12(b)(2) of the North Carolina Rules of Civil Procedure. Specifically, Defendants asserted that the trial court lacked jurisdiction "based upon the sovereign immunity of the State of Maryland."⁴ Following briefing and a hearing on the matter, the trial court denied Defendants' motion on 25 February 2013. In so doing, the trial court refused to extend comity to Defendants' claim of sovereign immunity in North Carolina's courts.

On 4 March 2013, Defendants filed a notice of appeal in the trial court from the order denying their motion to dismiss. Thereafter, the ACC responded with its own motion to deny Defendants' implied request for a stay of the trial court's proceedings and asked the trial court to retain jurisdiction.⁵ Following briefing and a hearing on the matter, the trial

3. Multiplying the annual operating budget of the ACC for the 2012–2013 year by the new factor of three increases the total withdrawal penalty to \$52,266,342.

4. On the same day, Defendants filed their own complaint in the Circuit Court for Prince George's County, Maryland seeking, among other things, a declaration that the withdrawal payment is invalid and unenforceable. The Maryland action has been stayed pending resolution of the present action in North Carolina, an order that was recently affirmed by Maryland's highest court.

5. N.C. Gen. Stat. § 1-294 (2011) provides that "[w]hen an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment

ATL. COAST CONF. v. UNIV. OF MD.

[230 N.C. App. 429 (2013)]

court granted the ACC's motion to retain jurisdiction on 28 March 2013 and ordered Defendants to file a responsive pleading.

On 4 April 2013, Defendants filed a petition for the issuance of a writ of supersedeas in this Court asking us to stay the trial court's proceeding pending resolution of Defendants' appeal. By order of this Court on 18 April 2013, Defendants' petition was allowed and all proceedings in the court below were stayed pending our review of Defendants' appeal.

II. Jurisdiction

[1] At the outset, we must determine whether this Court has jurisdiction to hear Defendants' interlocutory appeal. Defendants contend that the trial court's order denying Defendants' claim of sovereign immunity is immediately appealable as affecting a substantial right. We agree.

"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). "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, 362, 57 S.E.2d 377, 381 (1950). Thus, because the trial court's denial of Defendants' motion to dismiss did not dispose of the case below, Defendants' appeal is interlocutory in nature.

However, an "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); accord N.C. Gen. Stat. §§ 1-277(a), 7A-27(d) (2011). Our Supreme Court has defined a "substantial right" as "a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a [person] is entitled to have preserved and protected by law: a material right." *Sharpe*, 351 N.C. at 162, 522 S.E.2d at 579 (quotation marks and citation omitted) (alteration in original).

"Admittedly the 'substantial right' test for appealability of interlocutory orders is more easily stated than applied. It is usually necessary

appealed from." It is the ACC's position that Defendants have appealed a nonappealable interlocutory order. Thus, their motion asked the trial court to proceed as if the appeal had not been taken. *See, e.g., Velez v. Dick Keffer Pontiac GMC Truck, Inc.*, 144 N.C. App. 589, 591, 551 S.E.2d 873, 875 (2001) (stating that "a litigant cannot deprive the trial court of jurisdiction to determine a case on its merits by appealing from a nonappealable interlocutory order of the trial court").

ATL. COAST CONF. v. UNIV. OF MD.

[230 N.C. App. 429 (2013)]

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*, 326 N.C. at 726, 392 S.E.2d at 736. “The burden is on the appellant to establish that a substantial right will be affected unless he is allowed immediate appeal from an interlocutory order.” *Embler v. Embler*, 143 N.C. App. 162, 166, 545 S.E.2d 259, 262 (2001).

Here, Defendants contend that their claim of sovereign immunity implicates a substantial right sufficient to warrant our immediate review. See generally *Petroleum Traders Corp. v. State*, 190 N.C. App. 542, 545, 660 S.E.2d 662, 664 (2008) (“[A]lthough Defendants’ appeal is interlocutory, it is properly before us because orders denying dispositive motions grounded on the defense of governmental immunity are immediately reviewable as affecting a substantial right.” (quotation marks and citation omitted)); *Kawai Am. Corp. v. Univ. of North Carolina at Chapel Hill*, 152 N.C. App. 163, 165, 567 S.E.2d 215, 217 (2002) (“This Court has repeatedly held that appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review.” (quotation marks and citation omitted)). Defendants cite *Smith v. Phillips*, 117 N.C. App. 378, 380, 451 S.E.2d 309, 311 (1994) for the proposition that “when [a] motion is made on the grounds of sovereign and qualified immunity, . . . a denial is immediately appealable, because to force a defendant to proceed with a trial from which he should be immune would vitiate the doctrine of sovereign immunity.” The ACC takes no exception to these decisions, but contends they are inapplicable here because they deal with sovereign immunity defenses raised by the actual sovereign in its own courts. Here, as the ACC correctly asserts, sovereign immunity will only be extended to the State of Maryland, if at all, through the rule of comity. Accordingly, the ACC contends that Defendants are not entitled to comity as of right and that the State of Maryland therefore has no substantial right to appeal based on sovereign immunity in North Carolina’s courts. Upon consideration of this distinction, we cannot agree with the ACC’s argument.

The ability of a sister state to appeal an interlocutory order refusing to extend comity to that state’s sovereign immunity request is a question of first impression in this Court. However, as to the rule of comity generally, our Supreme Court has said that

ATL. COAST CONF. v. UNIV. OF MD.

[230 N.C. App. 429 (2013)]

comity is not a right of any State or country, but is permitted and accepted by all civilized communities from mutual interest and convenience, and from a sense of the inconvenience which would otherwise result, and from moral necessity to do justice in order that justice may be done in return.

Cannaday v. Atl. Coast Line R.R. Co., 143 N.C. 439, 443-44, 55 S.E. 836, 838 (1906). Thus, while sister states have no legal right to comity, practical considerations warrant the conclusion that they should have comity decisions, particularly those relating to claims of sovereign immunity, reviewed by an appellate court on an interlocutory basis pursuant to N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d). The same considerations that permit the State of North Carolina to assert sovereign immunity in our courts lead us to this conclusion. Specifically, the defense of sovereign immunity is a material right of the State. *See, e.g., Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 534, 299 S.E.2d 618, 625 (1983) (“It has long been established that an action cannot be maintained against the State of North Carolina or an agency thereof unless it consents to be sued or upon its waiver of immunity, and that this immunity is absolute and unqualified.” (emphasis removed)). Second, denial of a state’s sovereign immunity claim works injury because it potentially forces a party who would otherwise be immune from suit to continue in the litigation. *Smith*, 117 N.C. App. at 380, 451 S.E.2d at 311.

Accordingly, because Defendants’ underlying interest in asserting sovereign immunity is substantial, we will, with the aim of fostering beneficial relationships with our sister states and “doing justice in order that justice may be done in return,” accept jurisdiction of Defendants’ appeal pursuant to the authority conferred by N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d).

Notably, Defendants also contend that their appeal to this Court is permitted by N.C. Gen. Stat. § 1-277(b), which provides that “[a]ny 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.” Thus, because the order being appealed from denied Defendants’ 12(b)(2) motion, Defendants contend that this Court has jurisdiction over this appeal under § 1-277(b). *See Data Gen. Corp. v. Cnty. of Durham*, 143 N.C. App. 97, 99-100, 545 S.E.2d 243, 245-46 (2001) (holding that a denial of a 12(b)(2) motion for lack of personal jurisdiction on the ground of sovereign immunity is immediately appealable).

ATL. COAST CONF. v. UNIV. OF MD.

[230 N.C. App. 429 (2013)]

However, while “[a] motion to dismiss based on sovereign immunity is a jurisdictional issue[,] whether sovereign immunity is grounded in a lack of subject matter jurisdiction or personal jurisdiction is unsettled in North Carolina.” *M Series Rebuild, LLC v. Town of Mount Pleasant*, ___ N.C. App. ___, ___, 730 S.E.2d 254, 257 (2012). As our Supreme Court has noted:

A viable argument may be propounded that the State, as a party, is claiming by the doctrine of sovereign immunity that the particular forum of the State courts has no jurisdiction over the State’s person. On the other hand, the doctrine may be characterized as an objection that the State courts have no jurisdiction to hear the particular subject matter of [the] claims against the State. Although the federal courts have tended to minimize the importance of the designation of a sovereign immunity defense as either a Rule 12(b)(1) motion regarding subject matter jurisdiction or a Rule 12(b)(2) motion regarding jurisdiction over the person, the distinction becomes crucial in North Carolina because [N.C. Gen. Stat. §] 1-277(b) allows the immediate appeal of a denial of a Rule 12(b)(2) motion but not the immediate appeal of a denial of a Rule 12(b)(1) motion.

Teachy v. Coble Dairies, Inc., 306 N.C. 324, 327-28, 293 S.E.2d 182, 184 (1982) (internal citations omitted). Thus, because our case law remains ambiguous as to the type of jurisdictional challenge presented by a sovereign immunity defense, the ability of a litigant raising the defense to immediately appeal may vary, to some extent, based on the manner in which the motion is styled. For example, in *Data Gen. Corp.*, Durham County moved to dismiss the plaintiff’s complaint on the grounds of sovereign immunity under Rules 12(b)(1) and 12(b)(2), which the trial court denied. 143 N.C. App. at 99, 545 S.E.2d at 245. On appeal, this Court held that Durham County’s 12(b)(1) motion was not immediately appealable, but then decided the underlying sovereign immunity question on the basis of Durham County’s 12(b)(2) motion. *Id.* at 99-100, 545 S.E.2d at 245-46. Here, we decline to determine this Court’s jurisdiction on such formulaic grounds. Indeed, because we have already accepted substantial right jurisdiction pursuant to N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d), we leave the type of jurisdictional challenge presented by a sovereign immunity claim for resolution by a future court and refrain from addressing Defendants’ contention that we have jurisdiction to hear their appeal pursuant to N.C. Gen. Stat. § 1-277(b).

ATL. COAST CONF. v. UNIV. OF MD.

[230 N.C. App. 429 (2013)]

III. Standard of Review

[2] Having determined that this Court has jurisdiction to review Defendants' appeal, we now consider, also as a matter of first impression, the appropriate standard of review to apply to the trial court's comity decision. Defendants contend that the question of whether a North Carolina court should extend comity is a question of law reviewable *de novo*. For the following reasons, we agree.

As an initial matter, we note that the decision of whether to extend comity to a sister state's sovereign immunity request is solely determined by our state's common law. *See Nevada v. Hall*, 440 U.S. 410, 416 (1979) (holding that the United States Constitution does not entitle one state to sovereign immunity in a second state's courts and stating, "a claim of immunity in another sovereign's courts . . . necessarily implicates the power and authority of a second sovereign; its source must be found either in an agreement . . . or in the voluntary decision of the second to respect the dignity of the first as a matter of comity"). Thus, the United States Constitution, particularly the Eleventh Amendment, leaves the decision of whether to extend comity in such situations to each state's individual discretion.

Consistent with this view, our cases have emphasized the discretion that North Carolina enjoys in deciding whether the extension of comity is appropriate. *See Cox v. Roach*, ___ N.C. App. ___, ___, 723 S.E.2d 340, 345 (2012) (stating that "North Carolina courts are not required to respect Virginia's claim of sovereign immunity, [but] may do so as a matter of comity" (quotation marks and citation omitted)); *see also In re Chase*, 195 N.C. 143, 148, 141 S.E. 471, 473 (1928) ("While comity is a rule of practice and not a rule of law, it has substantial value in securing uniformity of decision; it does not command, but it persuades; it does not declare how a case shall be decided, but how with propriety it may be decided . . . [a]nd this is a matter which each state must decide itself."); *Sainz v. Sainz*, 36 N.C. App. 744, 749, 245 S.E.2d 372, 375 (1978) ("Comity rests in the discretion of the courts of the state in which enforcement is sought."). Based on these propositions, the ACC would have us review the trial court's decision under an abuse of discretion standard. However, while the decision as to whether comity should be extended in any given case has been assigned to the discretion of our courts as a general matter, it does not follow that our courts should leave each comity decision to the sound discretion of the trial judge.

On the contrary, our courts have chosen to apply a proposition of law when deciding whether the extension of comity is appropriate in a

ATL. COAST CONF. v. UNIV. OF MD.

[230 N.C. App. 429 (2013)]

given case, namely, that rights acquired under the laws or judgments of a sister state will be given force and effect in North Carolina if they are not against public policy. *Boudreau v. Baughman*, 322 N.C. 331, 341-42, 368 S.E.2d 849, 857-58 (1988); *Davis v. Davis*, 269 N.C. 120, 125, 152 S.E.2d 306, 310 (1967); *Howard v. Howard*, 200 N.C. 574, 579, 158 S.E. 101, 103 (1931); *In re Chase*, 195 N.C. at 148, 141 S.E. at 473; *Cox*, ___ N.C. App. at ___, 723 S.E.2d at 346. Such propositions of law are reviewed by this Court *de novo*. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (“Conclusions of law are reviewed *de novo* and are subject to full review.”). Accordingly, we review the trial court’s decision to deny comity in this case *de novo*. “Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (quotation marks and citation omitted). Such a review will increase uniformity of decision across the state—a goal consistent with fostering mutual respect for and extending courtesy to our sister states.

IV. Analysis

[3] Having determined that this Court has jurisdiction to hear Defendants’ appeal and the appropriate standard of review, we now address whether the trial court erred in denying Defendants’ motion to dismiss on the grounds of sovereign immunity. Defendants contend that the extension of comity in this case would not violate public policy and that they are entitled to sovereign immunity under the laws of Maryland. We disagree and affirm the trial court’s order.

As previously stated, under the rule of comity in North Carolina, rights acquired under the laws or judgments of a sister state will be given force and effect in North Carolina if not against public policy.⁶ *See, e.g., Cox*, ___ N.C. App. at ___, 723 S.E.2d at 346. Moreover,

[t]o render foreign law unenforceable as contrary to public policy, it must violate some prevalent conception of good morals or fundamental principle of natural justice or

6. The rule and its rationale were reflected ably in the words of Chief Justice Taney in *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 590 (1839): “The intimate union of these states, as members of the same great political family; the deep and vital interests which bind them so closely together; should lead us, in the absence of proof to the contrary, to presume a greater degree of comity, and friendship, and kindness towards one another, than we should be authorized to presume between foreign nations. And when (as without doubt must occasionally happen) the interest or policy of any state requires it to restrict the rule, it has but to declare its will, and the legal presumption is at once at an end.”

ATL. COAST CONF. v. UNIV. OF MD.

[230 N.C. App. 429 (2013)]

involve injustice to the people of the forum state. This public policy exception has generally been applied in cases such as those involving prohibited marriages, wagers, lotteries, racing, gaming, and the sale of liquor.

Id. (quoting *Boudreau*, 322 N.C. at 342, 368 S.E.2d at 857—58) (quotation marks omitted).

In the context of the sovereign immunity doctrine, our Supreme Court has used public policy to effectively waive the State's sovereign immunity in causes of action grounded in contract. *Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 423-24 (1976). In making this decision, the *Smith* Court was moved by the following public policy considerations:

(1) To deny the party who has performed his obligation under a contract the right to sue the state when it defaults is to take his property without compensation and thus to deny him due process; (2) To hold that the state may arbitrarily avoid its obligation under a contract after having induced the other party to change his position or to expend time and money in the performance of his obligations, or in preparing to perform them, would be judicial sanction of the highest type of governmental tyranny; (3) To attribute to the General Assembly the intent to retain to the state the right, should expedience seem to make it desirable, to breach its obligation at the expense of its citizens imputes to that body "bad faith and shoddiness" foreign to a democratic government; (4) A citizen's petition to the legislature for relief from the state's breach of contract is an unsatisfactory and frequently a totally inadequate remedy for an injured party; and (5) The courts are a proper forum in which claims against the state may be presented and decided upon known principles.

Id. at 320, 222 S.E.2d at 423. Accordingly, public policy is violated in North Carolina when the State is allowed to assert sovereign immunity as a defense to causes of action based on contract. It would seem plain, then, that because the ACC is seeking a declaration as to the parties' rights and obligations under the terms of the ACC Constitution,⁷ it would violate public policy to extend comity to Defendants' claim of sovereign

7. The ACC Constitution was alleged in the ACC's complaint to be "a contract by and among the member institutions, pursuant to which the members have agreed to conduct the business affairs of the ACC."

ATL. COAST CONF. v. UNIV. OF MD.

[230 N.C. App. 429 (2013)]

immunity. To this line of reasoning, Defendants raise three objections that we address in turn.

First, Defendants contend that *Boudreau* limits the public policy exception to matters of marriages, family, and morals. *See Boudreau*, 322 N.C. at 342, 368 S.E.2d at 858 (“This public policy exception has generally been applied in cases such as those involving prohibited marriages, wagers, lotteries, racing, gaming, and the sale of liquor.”). However, as the language of *Boudreau* makes clear, the examples provided therein are non-exclusive and merely represent what has qualified under the exception as a general matter. Moreover, other language in *Boudreau* is consistent with the policy considerations at issue in *Smith*. *Compare id.* at 342, 368 S.E.2d at 857-58 (“To render foreign law unenforceable as contrary to public policy, it must violate some prevalent conception of good morals or fundamental principle of natural justice *or involve injustice to the people of the forum state.*” (emphasis added)), *with Smith*, 289 N.C. at 320, 222 S.E.2d at 423 (“To hold that the state may arbitrarily avoid its obligation under a contract . . . would be judicial sanction of the highest type of governmental tyranny.”). Thus, the language of *Boudreau* explicitly provides that any injustice to the people of the forum state implicates the public policy exception, not merely matters of marriages, family, and morals. Here, Defendants’ are attempting to immunize themselves from a determination of their responsibilities under an alleged contract with the ACC—a North Carolina entity. Under the rationale of *Smith*, such an action violates public policy.

Second, Defendants contend that *Cox* stands for the proposition that “North Carolina courts extend sovereign immunity to and are to dismiss an action brought by North Carolina residents in North Carolina Courts against the educational institutions of sister states which enjoy sovereign immunity in the courts of those states.” In *Cox*, this Court extended comity to the University of Virginia’s claim of sovereign immunity and affirmed the trial court’s decision to grant the University’s motion to dismiss. *Cox*, ___ N.C. App. at ___, 723 S.E.2d at 346-47.

However, it does not follow that because we decided to extend comity to the University of Virginia in *Cox* we must, *ipso facto*, extend sovereign immunity to all the educational institutions of our sister states irrespective of the attendant circumstances. *Cox* is distinguishable from the present case because it dealt with tort claims being asserted against the University of Virginia, not a cause of action on a contract. *See id.* at ___, 723 S.E.2d at 342; *see also Kawai*, 152 N.C. App. at 166, 567 S.E.2d at 217 (“ ‘Suits against the State, its agencies and its officers for alleged tortious acts can be maintained only to the extent

ATL. COAST CONF. v. UNIV. OF MD.

[230 N.C. App. 429 (2013)]

authorized by the Tort Claims Act, and that Act authorizes recovery only for negligent torts. Intentional torts committed by agents and officers of the State are not compensable under the Tort Claims Act.’ ” (quoting *Wojsko v. State*, 47 N.C. App. 605, 610, 267 S.E.2d 708, 711 (1980)). Thus, at least with respect to torts not covered by the Torts Claims Act, the state is entitled to defend tort suits by claiming sovereign immunity. Such a defense does not contravene public policy in North Carolina. Thus, this Court properly extended comity to the University of Virginia in *Cox*. Here, however, extending comity to Defendants in a cause of action based on an alleged contract would violate the clear public policy articulated in *Smith*. For these reasons, the same principles that we applied in *Cox* lead us to the opposite conclusion here—comity will not be extended to allow Defendants to escape a determination as to their rights and obligations under an alleged contract.

Third, Defendants contend that the holding in *Smith*—that the State has no sovereign immunity defense in causes of action based on contract—is limited to actions claiming a breach of contract. Accordingly, Defendants contend that because the ACC seeks declaratory relief, the waiver found in *Smith* does not apply and Defendants are entitled to sovereign immunity.

As an initial matter, we note that even though the underlying claim in *Smith* was for breach of contract, our Supreme Court did not limit its holding to such actions:

We hold, therefore, that whenever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract. Thus, in this case *and in causes of action on contract* arising after the filing date of this opinion, . . . the doctrine of sovereign immunity will not be a defense to the State. The State will occupy the same position as any other litigant.

Smith, 289 N.C. at 320, 222 S.E.2d at 423-24 (emphasis added). Nevertheless, Defendants cite *Petroleum Traders Corp.* for the proposition that sovereign immunity bars a declaratory judgment claim concerning a contract with the State. However, *Petroleum Traders Corp.* did not involve a declaratory judgment action seeking to ascertain the rights and obligations owed by the parties under the terms of an existing contract. Rather, the plaintiff in that case sought a declaration that a statutorily authorized bidding fee, which is charged against the

ATL. COAST CONF. v. UNIV. OF MD.

[230 N.C. App. 429 (2013)]

vendor with the winning bid, violated the North Carolina Constitution. *See Petroleum Traders Corp.*, 190 N.C. App. at 545, 660 S.E.2d at 663. We held that the Declaratory Judgment Act does not act as a general waiver of the State's sovereign immunity. *Id.* at 547, 660 S.E.2d at 664. Here, the ACC argues that *Smith*, not the Declaratory Judgment Act, acts as a waiver to Defendants' claim of sovereign immunity.

Furthermore, even though the underlying claim in *Smith* was for breach of contract, the public policy considerations underlying the Court's rationale are equally persuasive here. Specifically, we are moved by the consideration in *Smith* that

[t]o hold that the state may arbitrarily avoid its obligation under a contract after having induced the other party to change his position or to expend time and money in the performance of his obligations, or in preparing to perform them, would be judicial sanction of the highest type of governmental tyranny.

Smith, 289 N.C. at 320, 222 S.E.2d at 423. The Court's holding in *Smith* explicitly waived the State's sovereign immunity in "causes of action on contract" and we can discern no sound reason to limit that language to breach of contract claims when the Court's stated rationale is equally persuasive with respect to declaratory relief actions seeking to ascertain the rights and obligations owed under an alleged contract. *See Ferrell v. Dep't of Transp.*, 334 N.C. 650, 654-55, 435 S.E.2d 309, 312-13 (1993) (relying on the public policy considerations articulated in *Smith* to find a waiver of the State's sovereign immunity in a declaratory judgment action). Such declaratory relief actions are a "cause of action on contract" sufficient to waive the State's sovereign immunity.

Accordingly, because the public policy of this state does not allow the State of North Carolina to avoid its obligations in contract, we cannot extend comity to Defendants' claim of sovereign immunity. Furthermore, because we find that the extension of comity in this case would violate public policy, we decline to consider—as would be required if we had reached the opposite conclusion—whether Defendants would be entitled to sovereign immunity as a matter of Maryland law.⁸

8. Indeed, pursuant to the rule of comity, rights acquired under the laws or judgments of a sister state will be given force and effect in North Carolina if not against public policy. *Cox*, ___ N.C. App. at ___, 723 S.E.2d at 346. Thus, had we determined that public policy permitted the extension of comity in this case, the burden would still be on Defendants to show that they would be entitled to sovereign immunity under Maryland law. In light of our holding, however, we decline to address this issue.

AUTO. GRP., LLC v. A1 AUTO CHARLOTTE, LLC

[230 N.C. App. 443 (2013)]

V. Conclusion

For the foregoing reasons, we affirm the order of the trial court denying Defendants' motion to dismiss and terminate the stay entered by this Court on 18 April 2013.

Affirmed.

Judges ERVIN and DILLON concur.

AUTOMOTIVE GROUP, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY, PLAINTIFF
v.
A-1 AUTO CHARLOTTE, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY, DEFENDANT

No. COA13-608

Filed 19 November 2013

1. Collateral Estoppel and Res Judicata—change in circumstances—res judicata doctrine not applicable

The trial court did not err in a case involving the lease of a used car lot by denying defendant's motion for a new trial. Plaintiff's third complaint was not barred by the doctrine of *res judicata* where a change in circumstance after the first complaint eliminated plaintiff's waiver of defendant's lease breaches that previously prevented it from ejecting defendant.

2. Pleadings—sanctions—Rule 11—insufficient findings

The trial court erred in a case involving the lease of a used car lot by concluding that defendant's motion for a new trial violated Rule 11 of the North Carolina Rules of Civil Procedure and was filed in bad faith. Each of the trial court's findings related only to defendant's repeated attempts to re-argue the issue of *res judicata* and were, thus, insufficient to support its conclusion that a Rule 11 violation occurred.

Appeal by defendant from order entered 7 November 2012 by Judge Tyyawdi M. Hands in Mecklenburg County District Court. Heard in the Court of Appeals 23 October 2013.

Gardner & Hughes P.L.L.C., by Attorney Jared E. Gardner, for plaintiff.

AUTO. GRP., LLC v. A1 AUTO CHARLOTTE, LLC

[230 N.C. App. 443 (2013)]

*Miller, Walker, & Austin Attorneys, by Carol L. Austin,
for defendant.*

Elmore, Judge.

I. Background

Automotive Group, LLC (plaintiff) and A-1 Auto Charlotte, LLC (defendant) are companies involved in the business of operating used car parking lots. On 1 March 2010, defendant signed a lease agreement (lease) set to expire at midnight on 28 February 2011 with Jordan Motors, Inc., (Jordan Motors), to use a premises located at 4700 E. Independence Boulevard in Charlotte. The renewal provision of that lease required defendant to give written notice to the landlord at least 180 days prior to the expiration of the lease. In September 2010, plaintiff purchased the premises from Jordan Motors and had not received notice from defendant regarding lease renewal. Defendant did not exercise its option to renew until 15 October 2010. Plaintiff then notified defendant that because it had not received notice of defendant's lease renewal within 180 days of the lease's termination date, plaintiff was not going to renew defendant's lease. Plaintiff requested that defendant leave the premises upon expiration of the lease on 28 February 2011.

Defendant did not vacate the premises on or after 28 February 2011, and plaintiff filed an ejectment action (first complaint) to evict defendant. The first complaint was dismissed with prejudice on 8 April 2011 by Magistrate Angela Ranson (magistrate). The magistrate found that plaintiff did not "prove the case by the greater weight of the evidence" and because "plaintiff accepted rent for a month beyond the expiration of the initial lease term[.]" it waived any alleged lease breaches by defendant. After the first complaint was dismissed, plaintiff subsequently returned each rent check it received from defendant.

Thereafter, a second complaint was filed and dismissed with prejudice. Defendant continued to remain on the premises, and on 9 April 2012, plaintiff filed a third ejectment action (third complaint). The third complaint alleged that the lease period ended and "defendant [was] holding over after the end of the lease period." Plaintiff further alleged that defendant breached the lease by failing to: 1) install an electric meter on the premises and 2) provide plaintiff with valid liability insurance coverage. On 24 April 2012, the magistrate also dismissed the third complaint. The magistrate found that the third complaint alleged the same cause of action as the first complaint. Her ultimate conclusion of law

AUTO. GRP., LLC v. A1 AUTO CHARLOTTE, LLC

[230 N.C. App. 443 (2013)]

dismissed the third complaint with prejudice because “plaintiff [was] barred from the relief sought under the [d]octrine of [*r*]es [*j*]udicata.” (emphasis added). Plaintiff timely appealed the magistrate’s order *de novo* in District Court.

Before trial, defendant made an oral motion to dismiss plaintiff’s action based on *res judicata*, which the trial court denied. During trial, defendant objected to admitted evidence premised on the theory that plaintiff’s evidence was barred by *res judicata*. The trial court denied each of defendant’s *res judicata* arguments and ultimately entered an order on 13 July 2012 in favor of plaintiff that required defendant to vacate the premises.

On 19 July 2013, defendant filed a motion for a new trial pursuant to Rule 59(a)(8). The only argument in support of defendant’s motion was that the doctrine of *res judicata* barred defendant’s third complaint and subsequent appeal to District Court. The trial court denied defendant’s motion in an order entered 7 November 2012 and also sanctioned defendant pursuant to N.C.R. Civ. P. § 1A-1, Rule 11 because of its “repeated attempts to re-litigate” the issue of *res judicata*. Defendant appeals from the 7 November 2012 order denying its motion for a new trial and granting plaintiff’s motion for sanctions. After careful consideration, we affirm, in part, and reverse, in part.

II. Analysis

a.) Motion for a New Trial

[1] First, defendant argues that the trial court erred in denying its motion for a new trial pursuant to Rule 59(a)(8). Specifically, defendant avers that the trial court erroneously admitted evidence and heard plaintiff’s case on the merits when its claim was barred by the doctrine of *res judicata*. We disagree.

“While an order for new trial pursuant to Rule 59 which satisfies the procedural requirements of the Rule may ordinarily be reversed on appeal only in the event of ‘a manifest abuse of discretion,’ when the trial court grants or denies a new trial ‘due to some error of law,’ then its decision is fully reviewable.” *Chiltoski v. Drum*, 121 N.C. App. 161, 164, 464 S.E.2d 701, 703 (1995) (quoting *Garrison v. Garrison*, 87 N.C. App. 591, 594, 361 S.E.2d 921, 923 (1987)), *disc. review denied*, 343 N.C. 121, 468 S.E.2d 777 (1996). “Appellate courts thus must utilize the ‘abuse of discretion’ standard only in those instances where there is no question of ‘law or legal inference.’ ” *Id.* (quoting *Seaman v. McQueen*, 51 N.C. App. 500, 505, 277 S.E.2d 118, 121 (1981)). Rule 59(a)(8) allows for a

AUTO. GRP., LLC v. A1 AUTO CHARLOTTE, LLC

[230 N.C. App. 443 (2013)]

party to motion for a new trial where an “error in law” occurred at trial. N.C.R. Civ. P. § 1A-1, Rule 59 (2011). Thus, we review the trial court’s denial of defendant’s motion for a new trial *de novo*.

Under the doctrine of *res judicata*, “a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies.” *Williams v. Peabody*, ___ N.C. App. ___, ___, 719 S.E.2d 88, 92 (2011) (citation and quotation omitted). The party seeking to assert *res judicata* has the burden of establishing its elements. *Bluebird Corp. v. Aubin*, 188 N.C. App. 671, 679, 657 S.E.2d 55, 62 (2008). A party must show “(1) a final judgment on the merits in an earlier suit, (2) an identity of the causes of action in both the earlier and the later suit, and (3) an identity of the parties or their privies in the two suits” in order to prevail on a theory of *res judicata*. *Herring v. Winston-Salem/Forsyth Cnty. Bd. of Educ.*, 188 N.C. App. 441, 444, 656 S.E.2d 307, 310 (2008) (citation omitted). However, “where subsequent to the rendition of judgment in the prior action, new facts have occurred which may alter the legal rights of the parties, the former judgment will not operate as a bar to the later action.” *Trustees of Garden of Prayer Baptist Church v. Geraldco Builders, Inc.*, 78 N.C. App. 108, 112, 336 S.E.2d 694, 697 (1985) (citations omitted).

Here, a new circumstance arose after dismissal of the first complaint that changed the legal rights of plaintiff. In her dismissal of the first complaint, the magistrate ruled that plaintiff waived all lease breaches by defendant because “plaintiff accepted rent for a month beyond the expiration of the initial lease term. Plaintiff did not cash defendant’s check however [sic] he did not return it to the defendant either.” The magistrate cited *Office Enterprises, Inc. v. Pappas* in support of her ruling. *Pappas*, 19 N.C. App. 725, 200 S.E.2d 205 (1973). In *Pappas*, this Court ruled that a landlord, who received a check from a tenant after rent was due, could not allege breach of the lease even though the landlord did not cash the check. *Id.* at 728, 200 at 207-08. However, in the case *sub judice*, plaintiff returned each check it received from defendant after the first complaint was dismissed. This change in circumstance eliminated plaintiff’s waiver of defendant’s lease breaches that previously prevented it from ejecting defendant. Therefore, the third complaint was not barred by *res judicata*, and the trial court did not err in denying defendant’s motion for a new trial.

b.) Sanctions

[2] Defendant also argues that the trial court erred in concluding that its Rule 59 Motion violated Rule 11 and was filed in bad faith because the conclusion is not supported by the trial court’s findings of fact. We agree.

AUTO. GRP., LLC v. A1 AUTO CHARLOTTE, LLC

[230 N.C. App. 443 (2013)]

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).

"In reviewing a trial judge's findings of fact, we are '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. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)); *see also Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010) (" '[F]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary.' " (quoting *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 100-01, 655 S.E.2d 362, 369 (2008))).

An analysis of sanctions under Rule 11 consists of a three-pronged analysis: "(1) factual sufficiency, (2) legal sufficiency, and (3) improper purpose." *Peters v. Pennington*, 210 N.C. App. 1, 27, 707 S.E.2d 724, 742 (2011) (citation and quotation omitted). A violation of any of these prongs requires the imposition of sanctions. *Id.* (citation omitted). In determining factual sufficiency, we must decide "(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." *Id.* (citation and quotation omitted). Whether a motion is legally sufficient requires this Court to look at "the facial plausibility of the pleading and only then, if the pleading is implausible under existing law, to the issue of whether to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, the complaint was warranted by the existing law." *Polygenex Int'l, Inc. v. Polyzen, Inc.*, 133 N.C. App. 245, 249, 515 S.E.2d 457, 460 (1999) (citation and quotation omitted). "An objective standard is used

AUTO. GRP., LLC v. A1 AUTO CHARLOTTE, LLC

[230 N.C. App. 443 (2013)]

to determine whether a paper has been interposed for an improper purpose, with the burden on the movant to prove such improper purpose.” *Coventry Woods Neighborhood Ass’n Inc. v. City of Charlotte*, 213 N.C. App. 236, 241, 713 S.E.2d 162, 166 (2011) (citation and quotation omitted). A signer’s purpose is heavily influenced by “whether or not a pleading has a foundation in fact or is well grounded in law[.]” *Id.* at 242, 713 S.E.2d at 166 (citation and quotation omitted).

We first note that defendant does not challenge the trial court’s findings of fact. Thus, these facts are binding on appeal. *See Tillman, supra*. Accordingly, our review is limited to whether the trial court’s findings of fact support its conclusion of law that defendant’s Rule 59 Motion violated Rule 11 and was filed in bad faith.

In support of its legal conclusion, the trial court’s findings of fact solely focus on defendant’s multiple attempts pre-trial, at trial, and post-trial to re-argue the issue of *res judicata* to the trial court. Importantly, the trial court found that a sanction was necessary because defendant “unjustifiably persisted in its disregard of state law, in praying for [the trial court] to, again, permit argument on the decided fact that [plaintiff’s] claims are not barred by . . . *res judicata*.” However, these findings do not in any way address the factual sufficiency of defendant’s motion as required by Rule 11. *See Peters, supra*.

To the extent that the trial court’s findings address the legal sufficiency and improper purpose of defendant’s motion, they do not support a sanction for violating Rule 11. Generally, a motion pursuant to Rule 59 is not proper when its purpose is merely to “reargue matters already argued or to put forward arguments which were not made but could have been made” in front of the trial court. *Battle v. Sabates*, 198 N.C. App. 407, 414, 681 S.E.2d 788, 794 (2009) (citation and quotation omitted). However, Rule 59(a)(8) allows for a party to motion for a new trial where an “error in law” occurred at trial and was “objected to by the party making the motion[.]” N.C.R. Civ. P. § 1A-1, Rule 59. Accordingly, the only way for a party to make a proper Rule 59(a)(8) motion is to have specifically objected to that issue at trial. *Davis v. Davis*, 360 N.C. 518, 522, 631 S.E.2d 114, 118 (2006). It necessarily follows that a party filing a Rule 59(a)(8) motion will reassert the same arguments presented at trial. *See Smith v. White*, 213 N.C. App. 189, 193, 712 S.E.2d 717, 719 (2011) (finding that a motion pursuant to Rule 59(a)(8) was proper on the issue of the cost of repairs where defendant sought to exclude that evidence at trial, but trial court admitted it over defendant’s objection); *See also Kinsey v. Spann*, 139 N.C. App. 370, 373, 533 S.E.2d 487, 490

AUTO. GRP., LLC v. A1 AUTO CHARLOTTE, LLC

[230 N.C. App. 443 (2013)]

(2000) (addressing defendant's Rule 59(a)(8) motion on the "merits of [her] objection" made at trial).

Here, defendant properly filed a legally sufficient Rule 59(a)(8) motion that alleged an error of law at trial because the trial court improperly admitted evidence and heard the merits of the case over defendant's *res judicata* objection. Furthermore, unlike the trial court, we cannot conclude that defendant's motion pursuant to Rule 59(a)(8) was filed with an improper purpose only on the basis that defendant sought to re-argue the same issue elicited at trial. *See Grover v. Norris*, 137 N.C. App. 487, 495, 529 S.E.2d 231, 235 (2000) (noting that "just because a [party] is eventually unsuccessful in her claim, does not mean the claim was inappropriate or unreasonable."); *See also Smith and Kinsey, supra*.

Accordingly, we hold that because each of the trial court's findings relate only to defendant's repeated attempts to re-argue the issue of *res judicata*, they are insufficient to support its conclusion that a Rule 11 violation occurred.

III. Conclusion

In sum, the trial court did not err in denying defendant's motion for a new trial. Thus, we affirm this issue on appeal. However, the trial court erred in concluding that defendant's motion pursuant to Rule 59(a)(8) violated Rule 11 and was filed in bad faith. Therefore, we reverse the trial court's sanction that required defendant to pay plaintiff's attorney fees.

Affirmed, in part. Reversed, in part.

Judges McCULLOUGH and DAVIS concur.

BANK OF AM., N.A. v. RICE

[230 N.C. App. 450 (2013)]

BANK OF AMERICA, N.A., PLAINTIFF

v.

CHRISTOPHER HARVEY RICE, DAVID HALVORSEN, HALEY BECK HILL,
JENNIFER BURKHARDT-BLEVINS, MARK GROW, AND
UBS FINANCIAL SERVICES, INC., DEFENDANTS

No. COA13-180

Filed 19 November 2013

1. Arbitration and Mediation—novations to notes—original agreement superseded

In an action to compel arbitration, an agreement between plaintiff's affiliate and defendant (the BAI Series 7 Agreement) had no effect because subsequent novations to notes unambiguously stated that they superseded all previous commitments and understandings.

2. Arbitration and Mediation—novation to note—earlier agreements superseded—no agreement to arbitrate

There was no agreement to arbitrate where a 2010 novation to a 2004 note did not contain an agreement to arbitrate, the novation was between the same parties, and the novation superseded any agreement the parties may have made in the 2004 note or the original agreement (the BAI Series 7 Agreement).

3. Negotiable Instruments—novations—parties not the same—arbitration not compelled

Defendant could not compel arbitration under 2010 novations to 2005 and 2006 notes because the parties were not the same and there was no evidence that the missing party (BAI) agreed, acquiesced, ratified, or in any other way accepted the 2010 novations.

Appeal by defendant Christopher Harvey Rice from orders entered 16 April 2012 and 22 August 2012 by Judge F. Lane Williamson in Superior Court, Mecklenburg County. Heard in the Court of Appeals 15 August 2013.

Johnston, Allison & Hord, P.A., by Martin L. White and John C. Lindley III, for defendant-appellant Christopher Harvey Rice.

Williams Mullen, by Kelly Colquette Hanley, Michael C. Lord, Kevin W. Benedict, and Robert Ward Shaw, for plaintiff-appellee.

STROUD, Judge.

BANK OF AM., N.A. v. RICE

[230 N.C. App. 450 (2013)]

Defendant appeals orders denying his motions to compel arbitration. For the following reasons, we affirm.

I. Background

“No man, for any considerable period, can wear one face to himself, and another to the multitude, without finally getting bewildered as to which may be the true.” Nathaniel Hawthorne, *The Scarlet Letter* 197 (Bantam Books 1986) (1850). Indeed, the wearing of multiple “faces” may bewilder not only men, but also corporations. The record before us contains multiple documents regarding plaintiff Bank of America, N.A. and/or some variation of plaintiff and/or one of plaintiff’s corporate affiliates; these include, but may not be limited to, Bank of America Corporation; NB Holdings Corporation; BAC North America Holding Company; BANA Holding Corporation; Bank of America, National Association; Banc of America Investment Services, Inc. (which is often referred to in various documents as “BAI,” although some documents also use “BAI” to refer to several of the entities affiliated with it); U.S. Trust, N.A.; Merrill Lynch & Co.; and Merrill Lynch, Pierce, Fenner and Smith, Incorporated. Indeed, an attorney for plaintiff explained in an affidavit:

Bank of America Corporation owns 100% of its subsidiary NB Holdings Corporation, which in turn holds 100% of BAC North America Holding Company, which in turn holds 100% of BANA Holding Corporation, which in turn holds 100% of Bank of America, N.A. U.S. Trust is a line of business within a division of Bank of America, N.A. Bank of America Corporation also owns 100% of another subsidiary, Merrill Lynch & Co., which in turn holds 100% of Merrill Lynch, Pierce, Fenner & Smith, Incorporated. Thus Merrill Lynch Pierce Fenner & Smith, Inc. is a separate legal entity from Bank of America, N.A. and its U.S. Trust line of business.

The trial court found that defendant “Rice was initially employed by BOA’s corporate affiliate Banc of America Investment Services, Inc. (“BAI”), and later became employed by BOA’s U.S. Trust[;]” defendant does not challenge this finding on appeal. In its brief plaintiff summarized some of the facts regarding the corporate entities involved in stating that

[f]ollowing BOA’s acquisition of the U.S. Trust line of business in July 2007, Rice transferred his employment

BANK OF AM., N.A. v. RICE

[230 N.C. App. 450 (2013)]

from BAI to the new and separate division of BOA. . . . Thereafter, the Rice Team provided wealth management services only to U.S. Trust clients. Any brokerage services performed by the Rice Team were nominal because U.S. Trust is not a retail securities broker.

Plaintiff further stated that

[a]s a result of its 23 October 2009 merger into Merrill Lynch, Pierce, Fenner and Smith Incorporated (“MLPF&S”), BAI was no longer an affiliate of BOA . . . , and BAI terminated or withdrew its registration with FINRA . . . MLPF&S is a separate legal entity from BOA and its U.S. Trust line of business. . . . Rice was never an employee of MLPF&S.

While this Court both respects and values the variety of methods available for creating various business entities, when a business entity dons multiple corporate masks for various purposes, the results may be what no one intended. We will not seek to set forth the entire history of defendant’s employment with plaintiff or some related entity and the reorganization of the various corporate structures but will summarize only those facts which are necessary for an understanding of the disposition of this case.

On 24 September 2004, plaintiff’s corporate affiliate BAI hired defendant as an employee. On this same date defendant and Banc of America Investments Services, Inc. (“BAI”), entered into an agreement entitled “BAI SERIES 7 AGREEMENT[.]”¹ The BAI Series 7 Agreement contained provisions regarding the following general topics: “employment ‘at-will[.]’ ” “customer lists and other proprietary and confidential information[.]” “non-solicitation covenants[.]” “right to an injunction[.]” “compliance with applicable laws, rules, policies and procedures[.]” “hold harmless[.]” “arbitration[.]” “assignment[.]” “non-waiver[.]” “invalid provisions[.]” “choice of law[.]” and “terms and modifications[.]” (Original in all caps.) The arbitration provision provided:

7.1 With the limited exception of statutory discrimination claims, all controversies or claims arising out of or relating to Employee’s employment with BAI including, but not limited to, the voluntary or involuntary suspension or termination of employment, or claims for

1. There is some dispute about whether the BAI Series 7 Agreement should be characterized as an “employment agreement.” Although it seems to look like an employment agreement, this characterization is not relevant for our purposes.

BANK OF AM., N.A. v. RICE

[230 N.C. App. 450 (2013)]

compensation, this Agreement, and/or the construction, performance or breach of this Agreement, shall be brought in arbitration before the National Association of Securities Dealers, Inc., (NASD), and any judgment upon the award rendered by the Arbitrator(s) may be entered in any Court having jurisdiction thereover. In the event Employee brings a statutory discrimination claim arising out of or relating to employment with BAI, no other claims relating to those statutory claims may be arbitrated.

7.2 Paragraph 7.1 shall not be deemed a waiver of BAI's right to seek injunctive relief in a court of competent jurisdiction as provided for in paragraph 4.1 above.

Also, on 24 September 2004, defendant executed a promissory note payable to plaintiff Bank of America, National Association, *not* BAI ("2004 Note"). The 2004 Note provided for defendant to pay to plaintiff the sum of \$500,000.00, to be paid in six separate annual payments between 2005 and 2010. The 2004 Note provided that "[a]ny controversy or claim arising out of or relating to this Note or breach thereof shall be settled by arbitration in accordance with the rules of the National Association of Securities Dealers, Inc. or the New York Stock Exchange, Inc." For the following two years, defendant executed substantially similar promissory notes, with almost verbatim arbitration provisions, but these two notes are payable to BAI, *not* plaintiff Bank of America, National Association.² The promissory note from 2005 was for \$219,928.50, payable from 2006 to 2011 ("2005 Note") and the promissory note from 2006 was for \$219,928.50, payable from 2007 to 2012 ("2006 Note").

On 4 May 2010, plaintiff entered into three "PROMISSORY NOTE NOVATION AGREEMENT[s];" ("2010 Novations").³ The 2010 Novations all stated they were between plaintiff Bank of America, *not* BAI, and defendant and they were "replac[ing]" the prior 2004 Note, 2005 Note, and 2006 Note; the 2010 Novations did not contain arbitration provisions and provided that

[t]his Note contains the complete understanding between the undersigned and the Lender [, Bank of

2. We are unable to discern from the record why the 2004 Note differs from the 2005 Note and 2006 Note in this regard, but must read the Notes as written and construe them accordingly.

3. As discussed below, we conclude that the 2010 Novations are not valid legal novations, but we refer to them as novations as this is what they were entitled by the parties.

BANK OF AM., N.A. v. RICE

[230 N.C. App. 450 (2013)]

America, National Association,] relating to the matters contained herein and *supersedes all prior oral, written and contemporaneous oral negotiations, commitments and understandings between and among Lender and the undersigned*. The undersigned did not rely on any statements, promises or representations made by the Lender or any other party in entering into this Note. (emphasis added.)

On 2 March 2011, plaintiff filed a “COMPLAINT, MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION, AND MOTION FOR EXPEDITED DISCOVERY” against defendants, including Mr. Christopher Harvey Rice, the only defendant in this appeal. (Original in all caps.) Plaintiff summarized its allegations of the case as follows,

This Complaint arises from the Individual Defendants’ breach of contract and misappropriation of the Plaintiff’s confidential, proprietary and trade secret information which occurred at the time of their coordinated and abrupt resignation from Plaintiff’s U.S. Trust business on January 28, 2011. BOA is informed and believes that the Individual Defendants continue to breach their contractual duties and continue to commit tortious acts by misappropriating the Plaintiff’s confidential, proprietary and trade secret information (despite a demand for its return) and by soliciting certain clients and customers of Plaintiff’s U.S. Trust business. BOA is informed and believes that the Individual Defendants are engaged in this misconduct for the benefit of UBS.

Plaintiff brought claims for breach of contract, conversion, computer trespass, misappropriation of trade secrets, tortious interference with contractual relations, tortious interference with contractual relations with plaintiff’s U.S. Trust business clients, unfair competition, and breach of the 2010 Novations of the promissory notes. On 23 April 2011, pursuant to Rule 41 of the North Carolina Rules of Civil Procedure, plaintiff stipulated to dismissal of its first seven claims against defendants with prejudice; thus, the only remaining claim was for breach of the promissory notes identified in plaintiff’s complaint as the 2010 Novations.⁴

4. We note that plaintiff has not made any claim based upon the 2005 Note or the 2006 Note but instead relies solely on the 2010 Novations.

BANK OF AM., N.A. v. RICE

[230 N.C. App. 450 (2013)]

On or about 31 May 2011, defendant filed a motion “to compel arbitration and stay litigation” contending that the “[o]riginal [p]romissory [n]otes [m]andate [a]rbitration” and “[p]laintiff is bound to [a]rbitrate even without [a]rbitration [a]greement[.]” On or about 1 July 2011, defendant amended his motion, adding to his initial motion that “[t]he [a]mended [p]romissory [n]otes do not replace the [o]riginal [p]romissory [n]otes” and “[p]laintiff is bound to [a]rbitrate regardless of language of [a]mended [p]romissory [n]otes[.]” On 16 April 2012, the trial court denied defendant’s amended motion.

On 26 April 2012, defendant filed a motion requesting the trial court amend its findings in its 16 April 2012 order denying his amended motion. This same date, defendant also filed a second motion “to compel arbitration and stay litigation[,]” (original in all caps), wherein defendant asserted that “[t]he instant motion arises from a completely different arbitration provision than the one upon which the First Motion was based;” this motion heavily relied upon the BAI Series 7 Agreement as the basis for arbitration. On 22 August 2012, the trial court denied defendant’s motion to amend the 16 April 2012 order and defendant’s second motion to compel arbitration and stay litigation. Defendant appeals both the 16 April and 22 August 2012 orders.

II. Standard of Review

Whether a dispute is subject to arbitration is an issue for judicial determination. Our review of the trial court’s determination is *de novo*. Pursuant to this standard of review,

the trial court’s findings regarding the existence of an arbitration agreement are conclusive on appeal where supported by competent evidence, even where the evidence might have supported findings to the contrary. Accordingly, upon appellate review, we must determine whether there is evidence in the record supporting the trial court’s findings of fact and if so, whether these findings of fact in turn support the conclusion that there was no agreement to arbitrate.

A two-part analysis must be employed by the court when determining whether a dispute is subject to arbitration: (1) whether the parties had a valid agreement to arbitrate, and also (2) whether the specific dispute falls within the substantive scope of that agreement.

BANK OF AM., N.A. v. RICE

[230 N.C. App. 450 (2013)]

The law of contracts governs the issue of whether there exists an agreement to arbitrate. Accordingly, the party seeking arbitration must show that the parties mutually agreed to arbitrate their disputes.

Harbour Point Homeowners' Ass'n, Inc. v. DJF Enters., Inc., 201 N.C. App. 720, 723-24, 688 S.E.2d 47, 50 (citations, quotation marks, and brackets omitted), *review denied*, 364 N.C. 239, 698 S.E.2d 397 (2010).

III. BAI Series 7 Agreement

[1] Defendant first contends that he was entitled to arbitration under the BAI Series 7 Agreement which he contends is an employment agreement. While both parties argue vigorously about what exactly the BAI Series 7 Agreement is and exactly which entities it binds, it is unnecessary to engage in this analysis as the only remaining claim left after the dismissal of plaintiff's first seven claims is for breach of the 2010 Novations. For the reasons stated below, we conclude that the BAI Series 7 Agreement has no effect in determining the terms of the promissory notes. *See Stovall v. Stovall*, 205 N.C. App. 405, 410, 698 S.E.2d 680, 684 (2010).

With all contracts, the goal of construction is to arrive at the intent of the parties when the contract was issued. The intent of the parties may be derived from the language in the contract.

It is the general law of contracts that the purport of a written instrument is to be gathered from its four corners, and the four corners are to be ascertained from the language used in the instrument. 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.

Id. (citation omitted).

While it is true that the BAI Series 7 Agreement included an extremely broad arbitration provision, parties to any agreement are free at any time to enter into additional agreements and to state the specific terms of those documents within the four corners of those particular documents. Indeed, the 2004 Note, 2005 Note, and 2006 Note each included arbitration provisions, and the 2010 Novations "replac[ing]" the 2004 Note, 2005 Note, and 2006 Note all provided that they are "the complete

BANK OF AM., N.A. v. RICE

[230 N.C. App. 450 (2013)]

understanding between the undersigned and the Lender relating to the matters contained herein and *supersedes all prior oral, written and contemporaneous oral negotiations, commitments and understandings between and among Lender and the undersigned.*” (Emphasis added.) The 2010 Novations are unambiguous in stating that they “supersede all prior . . . written . . . commitments and understandings between and among the Lender [Bank of America, National Association,] and the undersigned [defendant;]” the prior written “commitments and understandings” would include any prior promissory notes or agreements between defendant and plaintiff to the extent that the 2010 Novations are valid.⁵ *See id.* Accordingly, defendant’s argument as to the BAI Series 7 Agreement is overruled.⁶

IV. Promissory Notes

Defendant next contends that “the trial court committed reversible error when ruling the various [2010] ‘novations’ replaced and superseded promissory notes since there was no mutuality of parties between the ‘novations’ and the original promissory notes.” (Original in all caps.) Defendant is partially correct.

A. 2004 Note

Defendant makes no specific argument regarding the 2004 Note, presumably because the 2004 Note was between defendant and plaintiff, and the 2010 Novation “replac[ing]” the 2004 Note was also between defendant and plaintiff. Accordingly, the 2004 Note and the 2010 Novation both have the same parties, defendant and plaintiff. Defendant has not attacked the 2010 Novation on any other ground. As the 2010 Novation replacing the 2004 Note stated that it is the entirety of the parties’ agreement regarding the 2004 Note obligation it is replacing and as it does not contain an agreement to arbitrate, there was no agreement to arbitrate the 2004 Note since the 2010 Novation superseded any agreement the parties may or may not have made in the 2004 Note and/or the BAI Series 7 Agreement. *See generally Harbour Point Homeowners’ Ass’n, Inc.*, 201

5. Likewise, the 2010 Novations would have no effect on the rights by and between defendant and BAI, since BAI was the entity which entered into the BAI Series 7 Agreement with defendant, but BAI has not brought any claim against defendant and is not a party to this action.

6. Defendant contends that “Equitable Estoppel Bars BOA from Selectively Affirming Provisions in the Employment Agreement While Eschewing Others[.]” Even assuming *arguendo* that plaintiff could be equitably barred from denying the validity of the BAI Series 7 Agreement, the result in this case does not depend upon the BAI Series 7 Agreement, as explained below, so we will not address equitable estoppel.

BANK OF AM., N.A. v. RICE

[230 N.C. App. 450 (2013)]

N.C. App. at 724, 688 S.E.2d at 50 (“A two-part analysis must be employed by the court when determining whether a dispute is subject to arbitration: (1) whether the parties had a valid agreement to arbitrate”) Thus, the 2010 Novation as to the 2004 Note is a valid novation which is enforceable and not subject to arbitration.

B. 2005 Note and 2006 Note

[3] Defendant contends that the 2005 Note and 2006 Note are between defendant and BAI, but the 2010 Novations “replac[ing] those documents were between defendant and plaintiff; thus, contends defendant, a valid novation could not have occurred because BAI was not a party to the 2010 Novations replacing the 2005 and 2006 Notes. This is correct.

Novation may be defined as a substitution of a new contract or obligation for an old one which is thereby extinguished . . . *The essential requisites of a novation are a previous valid obligation, the agreement of all the parties to the new contract, the extinguishment of the old contract, and the validity of the new contract[.]*

Oil Co. v. Oil Co., 34 N.C. App. 295, 300, 237 S.E.2d 921, 925 (1977) (citation and quotation marks omitted) (emphasis added) (quoting *Tomberlin v. Long*, 250 N.C. 640, 644, 109 S.E.2d 365, 367-68 (1959)).

Plaintiff first directs our attention to findings of fact which it contends are binding; however, these findings of fact are regarding the BAI Series 7 Agreement which we have already concluded is not applicable to the resolution of this case. Plaintiff also contends that “the parties’ mutual performance under the New Notes confirms the novation.” But the 2010 Novations would have to be confirmed by the performance of the original party to the 2005 and 2006 Notes, BAI. Any performance by defendant or plaintiff would not indicate that BAI, the original party to the 2005 Note and the 2006 Note which the 2010 Novation purportedly “replace[d,]” agreed to the 2010 Novations. Indeed, BAI is not even a party to this lawsuit. See *Oil Co.*, 34 N.C. App. at 300, 237 S.E.2d at 925. Similarly, plaintiff contends that “[i]t is not necessary for all parties to expressly agree to a novation in order for it to be effective” and cites to one case wherein a party was found to be bound by a novation although he did not expressly agree to it; however, in plaintiff’s cited case, the party took some action to acquiesce to the novation. See *Westport 85 Limited Partnership v. Casto*, 117 N.C. App. 198, 204-05, 450 S.E.2d 505, 510 (1994) (noting that the defendant who was a party to a contract “ratif[ied]” a novation to which he was not a party “by acknowledging receipt of the . . . [novation], negotiating the \$7,500 check, and

BANK OF AM., N.A. v. RICE

[230 N.C. App. 450 (2013)]

accepting. . . performance under the [novation]”). Here, plaintiff has not directed us to nor are we aware of any action taken by BAI which shows acquiescence to the “replace[ment]” of its 2005 Note and 2006 Note with the 2010 Novations to which it was not a party. We conclude that the 2010 Novations regarding the 2005 Note and 2006 Note are invalid and unenforceable because BAI was not a party to the 2010 Novations purporting to “replace” the 2005 Note and 2006 Note, as the record does not contain any evidence indicating that BAI agreed, acquiesced, ratified or in any other form accepted the 2010 Novations purportedly “replac[ing]” the 2005 Note and 2006 Note.⁷ As such, the purported 2010 Novations between plaintiff and defendant had no effect upon the 2005 Note and 2006 Note. Both the 2005 Note and 2006 Note, which, we assume without deciding, are in full force and effect, contained arbitration provisions, but plaintiff has not brought any claim based upon the 2005 Note and 2006 Note. Furthermore, plaintiff is not even a party to the 2005 Note or 2006 Note. Accordingly, defendant cannot compel arbitration as to plaintiff’s claims under the 2010 Novations of the 2005 and 2006 Notes, because a valid novation could not occur without BAI, *see Oil Co.*, 34 N.C. App. at 300, 237 S.E.2d at 925, and plaintiff was not a party to the 2005 Note and 2006 Note.

V. Conclusion

In conclusion, we affirm the trial court’s order denying arbitration as to the 2010 Novation regarding the 2004 Note, because the 2010 Novation includes the entire agreement of the parties as to the 2004 Note and that novation does not contain an arbitration provision. We further affirm the trial court’s denial of arbitration as to plaintiff’s claims based upon the 2010 Novations regarding the 2005 Note and 2006 Note, but for a different reason than the trial court; here we affirm because there is no claim as currently pled to be arbitrated. Because of the narrow issue presented in this appeal, we express no opinion on the enforceability of the 2005 Note, the 2006 Note, or the 2010 Novations.

AFFIRMED.

Judges CALABRIA and DAVIS concur.

7. Nor is there any indication that the 2005 and 2006 Notes were ever transferred by BAI to plaintiff.

BROWN v. CAVIT SCI., INC.

[230 N.C. App. 460 (2013)]

CHRISTOPHER BROWN, D.D.S., PLAINTIFF

v.

CAVIT SCIENCES, INC., ROBERT HENNEN, RAYMOND BAZLEY, MCCOY ENTERPRISES, LLC, JOSEPH CONNELL, AND RANDALL MCCOY, DEFENDANTS

No. COA13-165

Filed 19 November 2013

1. Appeal and Error—interlocutory orders and appeals—default judgment for monetary sum—substantial right affected

Defendant's appeal from the trial court's interlocutory order denying his motion to set aside a default judgment against him for a monetary sum affected a substantial right and the Court of Appeals addressed the merits of the appeal.

2. Contracts—breach of contract—unfair and deceptive trade practices—default judgment—no excessive relief granted—sufficient allegations

The trial court did not err in a breach of contract and unfair and deceptive trade practices case by denying defendant Connell's motion to set aside a default judgment against him made pursuant to North Carolina Rule of Civil Procedure 60(b). The relief granted did not exceed the relief sought by plaintiff based upon the allegations set forth in the complaint and the allegations in the complaint were sufficient to state claims for relief against Connell with respect to each of the nine asserted claims.

Appeal by Defendant Joseph Connell from order entered 12 October 2012 by Judge Yvonne Mims Evans in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 August 2013.

Hamilton Stephens Steele & Martin, PLLC, by Adam L. Horner, for Defendant Joseph Connell.

Moore & Van Allen PLLC, by Mark A. Nebrig and Matthew D. Lincoln, for Plaintiff.

DILLON, Judge.

Defendant Joseph Connell (Connell) appeals from the trial court's order denying his Rule 60(b) motion for relief from judgment. For the following reasons, we affirm.

BROWN v. CAVIT SCI., INC.

[230 N.C. App. 460 (2013)]

I. Factual & Procedural Background

On 16 June 2011, Christopher Brown (Plaintiff) filed a complaint in Mecklenburg County Superior Court alleging claims for relief against Defendants Cavit Sciences, Inc., Robert Hennen, Raymond Bazley, McCoy Enterprises, LLC, Randall McCoy, and Connell (collectively, Defendants). The complaint alleges, *inter alia*, that Defendants solicited from Plaintiff a short-term \$100,000.00 loan; that during negotiations for the loan, Defendants represented to Plaintiff that they were “engaged in discussions to enter into a business combination” of Cavit Sciences and McCoy Enterprises; that Cavit Sciences agreed to fund for McCoy Enterprises an escrow account, which McCoy Enterprises needed to secure a \$16,000,000.00 loan for the benefit of the combined companies; that Defendants contacted Plaintiff to solicit a loan to be used to fund the escrow account; that the loan funds would remain in the escrow account, would not be withdrawn, and would be returned to Plaintiff with interest within 15 days; that the terms of the loan were reduced to writing in a “Short Term Note Agreement” executed by Cavit Sciences, as the borrower, in favor of Plaintiff and dated 31 August 2009; that Defendants individually guaranteed repayment of the principal amount of the loan plus interest; that, at the time the loan was made, Defendants knew that Cavit Sciences and McCoy Enterprises were not merger partners and that the \$16,000,000.00 financing was neither imminent nor likely to be secured in the short term; that, over the next nine months, Defendants corresponded with Plaintiff numerous times via email to reassure Plaintiff that the \$16,000,000.00 financing was imminent and that his loan would be repaid with interest; and that, notwithstanding these assurances, Defendants reneged on their obligations to repay the loan.

Supported by the foregoing allegations, Plaintiff’s complaint alleges nine claims for relief, including breach of contract, breach of guaranty, fraudulent concealment, and unfair and deceptive trade practices (UDTP). The complaint seeks damages for the loan principal plus interest, in addition to trebled damages and attorneys’ fees in connection with the UDTP claim.

All Defendants were served with Plaintiff’s complaint. However, several of the Defendants, including Connell, failed to file responsive pleadings, prompting Plaintiff to move for an entry of default as to those Defendants. The Mecklenburg County Clerk of Superior Court entered default against the defaulting Defendants, including Connell, on 31 August 2011. On 4 January 2012, the trial court entered default judgment against the defaulting Defendants, jointly and severally, in the

BROWN v. CAVIT SCI., INC.

[230 N.C. App. 460 (2013)]

amount of \$1,906,000.00 plus post-judgment interest. The amount of the judgment was based upon (1) Plaintiff's allegations that, as a result of Defendants' actions, he had incurred damages "of at least \$110,000 plus interest compounded every fifteen days from September 15, 2009 to present"; (2) trebling of Plaintiff's damages pursuant to N.C. Gen. Stat. § 75-16, in connection with his UDTP claim; and (3) attorneys' fees awarded pursuant to N.C. Gen. Stat. § 75-16.1, also in connection with his UDTP claim. Connell was served with the default judgment on 10 January 2012.

Connell did not appeal from the default judgment entered against him. However, on or about 4 April 2012, Connell wrote a letter to the trial court stating, in pertinent part, that there were "various substantial and compelling reasons why [he] should not be a party (defendant) to this case"; that he "apologize[d] for not responding earlier but [had] a valid excuse in that [he] truly believed this case did not involve [him] in any manner whatsoever"; that he was not affiliated with the other named Defendants; that he had not solicited or received any funds from Plaintiff; and that he had "no assets . . . to attack[.]"¹

Notwithstanding Connell's representations to the court, Plaintiff avers that during the course of his attempt to execute judgment against Connell, he discovered that Connell had acquired 10,000,000 shares of Regenicin, Inc., stock. Upon Plaintiff's motion, the trial court entered an order on 24 July 2012 stating that Connell was "forbidden" from transferring or disposing of any property, including the purported Regenicin, Inc., stock.

On 9 August 2012, approximately one month after Plaintiff's unsuccessful attempt to execute on the judgment and approximately nine months after Connell had been served with the judgment, Connell filed a motion for relief from judgment pursuant to Rule 55(d) and Rule 60(b) of the North Carolina Rules of Civil Procedure. In his motion, Connell contended that he was entitled to relief because the judgment "exceed[ed] the relief requested in [Plaintiff's] Complaint"; "the vast majority of [Plaintiff's] allegations [were] against other defendants, thereby depriving [Connell] of reasonable notice of his potential liability to Plaintiff"; "[t]he Court's award of \$1,906,000 [was] unreasonably large given that

1. Connell also filed with the trial court a Motion to Claim Exempt Property (Statutory Exemptions), in which he exempted certain items of personal property valued at less than the exemption threshold amount – such that none of the items was subject to execution – and represented that he owned no property that he was not claiming exempt.

BROWN v. CAVIT SCI., INC.

[230 N.C. App. 460 (2013)]

Plaintiff's claim [was] predicated upon Defendants' purported breach of a \$100,000 loan agreement"; and "[s]etting aside the judgment serve[d] the interest of justice."

Connell's motion for relief from judgment came on for hearing in Mecklenburg County Superior Court on 18 September 2012. On 12 October 2012, the trial court entered an order denying Connell's motion for relief from judgment. From this order, Connell appeals.

II. Jurisdiction

[1] Preliminarily, we recognize that this appeal is interlocutory in nature, as Plaintiff's claims against the non-defaulting Defendants remain pending before the trial court. *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). Generally, an interlocutory order is not immediately appealable. N.C. Gen. Stat. § 1A-1, Rule 54(b) (2011). An exception lies, however, where the order appealed from "affects a substantial right." N.C. Gen. Stat. § 1-277(a) (2011); N.C. Gen. Stat. § 7A-27(d)(1).

Connell contends that the trial court's order denying his motion for relief from judgment affects a substantial right. Although neither party has cited any North Carolina case law that squarely addresses whether a substantial right is affected in the specific context presented,² we find it dispositive that this Court has previously held that entry of summary judgment for a monetary sum against one of multiple defendants affects a substantial right, rendering the defendant's interlocutory appeal from the summary judgment order immediately appealable under N.C. Gen. Stat. §§ 1-277 and 7A-27. *Equitable Leasing Corp. v. Myers*, 46 N.C. App. 162, 172, 265 S.E.2d 240, 247 (1980). We conclude, therefore, that the trial court's order denying Connell's motion to set aside the default judgment entered against him for a monetary sum affects a substantial right, and we proceed to address the merits of the present appeal.

III. Analysis

[2] A motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court, and will be disturbed on appeal only upon a showing of an abuse of that discretion. *Gallbrunner v. Mason*, 101 N.C. App. 362, 364, 399 S.E.2d 139, 140 (1991). The trial court's findings of fact are conclusive on appeal if there is any competent evidence in the record to support them. *Id.*

2. We note that our Supreme Court has held that a judgment *granting* a defendant's motion to set aside judgment does not affect a substantial right and is not immediately appealable. *Bailey v. Gooding*, 301 N.C. 205, 210-11, 270 S.E.2d 431, 434-35 (1980).

BROWN v. CAVIT SCI., INC.

[230 N.C. App. 460 (2013)]

Connell advances several arguments in support of his position that the trial court abused its discretion in denying his motion for relief. We note that Connell has not specified, either in his brief on appeal or at the hearing below, which particular subsection of Rule 60(b) he relies upon in seeking relief. Nevertheless, we glean from the substance of Connell's arguments that he seeks to set aside the default judgment pursuant to Rule 60(b)(6), which "permits the trial court to set aside a judgment or order 'for any reason justifying relief from the operation of the judgment[,]'" *Royal v. Hartle*, 145 N.C. App. 181, 184, 551 S.E.2d 168, 171 (2001) (citation omitted), so long as the motion to set aside the judgment is "made within a reasonable time" after the judgment was entered, N.C. Gen. Stat. §1A-1, Rule 60(b)(6) (2011). We tailor our review accordingly.

A. Whether the Default Judgment was "Irregular"

Connell first contends that the trial court erred in entering a default judgment against him in the amount of \$1,906,000.00, "because such relief [was] in excess of the relief requested in the complaint and attached promissory note" and was, therefore, "irregular, irrational and should have been set aside." We disagree.

At the outset, we clarify that the scope of our review precludes us from addressing any alleged errors of law relating to the merits of the judgment itself. *Baxley v. Jackson*, 179 N.C. App. 635, 638, 634 S.E.2d 905, 907 (2006) ("[I]t is well settled that Rule 60(b)(6) does not include relief from errors of law or erroneous judgments."). It is well-established that a judgment need not be free from error in order to be valid, *King v. Grindstaff*, 284 N.C. 348, 360, 200 S.E.2d 799, 808 (1973), and, in short, Rule 60(b)(6) may not be invoked as a substitute for appellate review of the merits of a contested judgment. *Garrison ex rel. Chavis v. Barnes*, 117 N.C. App. 206, 210, 450 S.E.2d 554, 557 (1994). We are thus unable to consider the portion of Connell's argument challenging the trial court's interpretation of the terms of the note, as this pertains to questions of law, *Lee v. Scarborough*, 164 N.C. App. 357, 360, 595 S.E.2d 729, 732 (2004) (providing that "[t]he issue of contract interpretation is a question of law"), which, as previously stated, are not now properly before us. *Baxley*, 179 N.C. App. at 638, 634 S.E.2d at 907. We do, however, consider Connell's contention to the extent that it challenges the judgment as "irregular" in the sense that the *amount* of the judgment exceeded the relief sought based on the allegations set forth in Plaintiff's complaint.

A party seeking to set aside an irregular judgment may properly do so by filing a motion for relief from judgment pursuant to Rule 60(b)(6). *City of Salisbury v. Kirk Realty Co., Inc.*, 48 N.C. App. 427, 429, 268

BROWN v. CAVIT SCI., INC.

[230 N.C. App. 460 (2013)]

S.E.2d 873, 875 (1980); *see also Collins v. N.C. State Highway & Pub. Works Comm'n*, 237 N.C. 277, 284, 74 S.E.2d 709, 715 (1953) (explaining that “[a]n irregular judgment is not void . . . [but] stands as the judgment of the court unless and until it is set aside by a proper proceeding”). A motion to set aside an irregular judgment should be granted where the moving party demonstrates that “the judgment affects his rights injuriously and that he has a meritorious defense.” *Id.* Notably, this Court has specifically held that “[a] default judgment which grants [the] plaintiff[] relief in excess of that to which [the plaintiff is] entitled upon the facts alleged in the verified complaint is irregular.” *Taylor v. Triangle Porsche-Audi, Inc.*, 27 N.C. App. 711, 717, 220 S.E.2d 806, 811 (1975); *see also Pruvitt v. Taylor*, 247 N.C. 380, 381, 100 S.E.2d 841, 842 (1957).

Connell cites this Court’s decision in *Sharyn’s Jewelers, LLC v. Ipayment, Inc.*, 196 N.C. App. 281, 674 S.E.2d 732 (2009), in support of his contention that the judgment entered against him in this case was irregular and, as such, should be set aside. In *Sharyn’s*, the plaintiff asserted nine claims for relief against three defendants – Ipayment, Inc., Vericomm, and JP Morgan Chase Bank. *Id.* at 283, 674 S.E.2d at 734. Only JP Morgan filed a responsive pleading; and default judgments were ultimately entered against both Vericomm and Ipayment, Inc., who were held “jointly and severally liable for compensatory damages, attorneys’ fees, and punitive damages.” *Id.* Approximately seventeen months later, Vericomm filed a motion for relief from judgment, contending, *inter alia*, that it was entitled to relief under Rule 60(b)(6). *Id.* The trial court denied the motion. *Id.* On appeal, this Court examined the plaintiff’s complaint and determined that seven of the plaintiff’s nine claims for relief either “made no factual allegations against Vericomm” or made “no specific allegations against Vericomm” and that the plaintiff’s claims for punitive damages, attorneys’ fees, and injunctive relief arose from claims that had not been asserted against Vericomm. *Id.* at 285-88, 674 S.E.2d at 735-37. Accordingly, we held that the trial court had awarded “excessive relief which constituted extraordinary circumstances justifying relief from the default judgment” and that the seventeen-month delay in moving for relief was not unreasonable under these “extraordinary” circumstances. *Id.* at 284, 674 S.E.2d at 734.

Even if we were to assume *arguendo* that Connell filed his motion for relief within a reasonable time under the circumstances, we believe that this case is readily distinguishable from *Sharyn’s*. Unlike the complaint in *Sharyn’s*, which specifically asserted several claims against only two of the three named defendants, the complaint in the case *sub judice* sets forth allegations supporting *each claim* against *each individual*

BROWN v. CAVIT SCI., INC.

[230 N.C. App. 460 (2013)]

Defendant, including Connell. With respect to Plaintiff's breach of guaranty claim, the complaint alleges that "Defendants Cavit, Bazley, Hennen, McCoy, and *Connell* each guaranteed repayment of [Plaintiff's] money with interest." (Emphasis added.) As to Plaintiff's claims for fraud, fraudulent concealment, negligent misrepresentation, civil conspiracy, and UDTP, the allegations encompass the actions of and are directed indiscriminately toward *all* Defendants. For instance, the complaint alleges that Plaintiff incurred damages as a result of "Defendants' fraud"; that "Defendants" had superior knowledge of and concealed material facts; that "Defendants" owed a "duty of care to render accurate information" to Plaintiff and "Defendants negligently provided incorrect, misleading, and false information regarding the purpose and use of [Plaintiff's] funds"; that "Defendants acted together, in concert" to defraud Plaintiff; and that "Defendants' actions . . . constitute[d] unfair and deceptive acts or practices in the procurement of a loan for business purposes." Any contention that the trial court's judgment exceeded the relief sought in Plaintiff's complaint based upon this Court's reasoning in *Sharyn's* — i.e., that fewer than all of the claims were directed towards Connell — is meritless.

Connell's contentions that "Plaintiff's claim [for] treble damages [was] not supported by findings in the judgment or by applicable law" and that "[t]he award of attorneys' fees [was] not supported by findings in the judgment or the filed affidavit" are likewise without merit. Again, to the extent that these arguments raise questions of law relating to the underlying judgment, such challenges are beyond the scope of our review, and we do not consider them. *Baxley*, 179 N.C. App. at 638, 634 S.E.2d at 907. Moreover, both the award of treble damages and the award of attorneys' fees arise from Plaintiff's UDTP claim, which, as discussed *supra*, was asserted against all Defendants, including Connell. Accordingly, we reject Connell's contention that the relief granted exceeded the relief sought by Plaintiff based upon the allegations set forth in the complaint.

B. Legal Sufficiency of the Complaint

Connell further contends that the default judgment cannot be upheld against him because the allegations in Plaintiff's complaint failed to state claims for relief against him as a matter of law. In other words, while the substance of Connell's contentions disposed of in Part III(A), *supra*, asserted that the allegations underlying Plaintiff's claims were not directed towards *him*, Connell also contends that the allegations pertinent to him were legally insufficient to state claims for relief. We disagree.

BROWN v. CAVIT SCI., INC.

[230 N.C. App. 460 (2013)]

A default judgment admits only the averments in the complaint, and the defendant may still show that such averments are insufficient to warrant the plaintiff's recovery. A complaint which fails to state a cause of action is not sufficient to support a default judgment for plaintiff. Accordingly, if the complaint in the present action failed to state a cause of action as against [the defendant], the default judgment against her cannot be supported and must be set aside even without any showing of mistake, surprise or excusable neglect.

Lowe's of Raleigh, Inc. v. Worlds, 4 N.C. App. 293, 295, 166 S.E.2d 517, 518 (1969) (internal citations omitted). In determining whether the allegations are sufficient to state a claim for relief, we must "give to the allegations a liberal construction, and . . . if [] any portion of the complaint . . . presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose fairly can be gathered from it, the pleading will stand," regardless of " 'however inartificially [the complaint] may have been drawn, or however uncertain, defective, and redundant may be its statements, for, contrary to the common-law rule, every reasonable intentment and presumption must be made in favor of the pleader.' " *Presnell v. Beshears*, 227 N.C. 279, 281-82, 41 S.E.2d 835, 837 (1947) (citations omitted).

Viewing the allegations liberally and in the light most favorable to Plaintiff, *see id.*, we summarily reject this contention. Plaintiff's complaint sets forth ample allegations supporting each of the claims for relief against Connell. For example, paragraphs 41 through 44 of the complaint allege the following:

41. It was known to all Defendants that Connell and McCoy were expecting personal benefits from the use of [Plaintiff's] funds and the purported merger between Cavit and McCoy.

42. Defendants' use of [Plaintiff's] money for their own benefit or to advance their own business prospects occurred at the same time some or all Defendants were providing false information with regard to the use and whereabouts of [Plaintiff's] money.

43. Defendants Cavit, Bazley, Hennen, McCoy, and Connell each guaranteed repayment of [Plaintiff's] money with interest.

DEPT. OF TRANSP. v. WEBSTER

[230 N.C. App. 468 (2013)]

44. It is apparent from the communications between Defendants and [Plaintiff] that various loan documents, letters of credit, escrow agreements, and merger “agreements” were created by Defendants or with Defendants’ knowledge for the purpose of convincing [Plaintiff] that the return of his money with interest was imminent or that there was no risk to [Plaintiff] in receiving payment under the Note.

We conclude based upon our review of the totality of Plaintiff’s allegations that the allegations were sufficient to state claims for relief against Connell with respect to each of the nine asserted claims. Connell’s contentions to the contrary are without merit and are, accordingly, overruled.

IV. Conclusion

In light of the foregoing, the trial court’s order denying Connell’s motion for relief from judgment is hereby

AFFIRMED.

Judges BRYANT and STEPHENS concur.

DEPARTMENT OF TRANSPORTATION, PLAINTIFF

v.

RAY F. WEBSTER AND WIFE, DOROTHY WALTON WEBSTER, DEFENDANTS

No. COA12-1546

Filed 19 November 2013

1. Appeal and Error—interlocutory orders and appeals—Section 108 hearing—vital preliminary issue—immediate appeal

An order from a trial court’s judgment in an N.C.G.S. § 136-108 hearing concerning title to property and area taken is a vital preliminary issue and is subject to immediate review on appeal.

2. Highways and Streets—increased traffic flow—private road—public use—police power—damage to property

The trial court did not err in a case seeking damages for increased traffic flow on a private road taken for public use by failing to dismiss plaintiff Department of Transportation’s (DOT) motion for an

DEPT. OF TRANSP. v. WEBSTER

[230 N.C. App. 468 (2013)]

N.C.G.S. § 136-108 hearing. Where DOT argues that it acted within the authority of its police power and that damage to defendants' property as a result is not compensable, the trial court has authority to rule on this issue pursuant to section 108.

3. Evidence—exclusion—increased traffic—compensation

The trial court did not err in a case seeking damages for increased traffic flow on a private road taken for public use by ordering that the evidence and arguments pertaining to increased traffic on Rescue Lane be excluded from the trial on compensation purportedly owed defendants due to plaintiff Department of Transportation's expansion of Brawley School Road.

Appeal by defendant from order entered 8 August 2012 by Judge Joseph N. Crosswhite in Iredell County Superior Court. Heard in the Court of Appeals 5 June 2013.

Attorney General Roy Cooper, by Assistant Attorney General Alexandra M. Hightower, for the State.

Sigmon, Clark, Mackie, Hanvey & Ferrell, PA, by Forrest A. Ferrell and Jason White, for defendant-appellants.

BRYANT, Judge.

Where the issue before the trial court was whether increased traffic flow on a private road taken for public use was a compensable damage subject to determination by jury, it was proper for the trial court to conduct a section 108 hearing. Where the trial court determined that the area taken by DOT did not include a subsequent driveway permit and related effects of that permit, we affirm the trial court order excluding evidence of such driveway permit and effects at a subsequent trial on damages.

In 2007, the Department of Transportation ("DOT") was involved in a highway construction project in Mooresville, North Carolina known as the "Brawley School Road widening project". DOT condemned and took through eminent domain a 0.67 acre strip of land owned by defendants Ray and Dorothy Webster ("defendants") after DOT and defendants were unable to agree on a purchase price for the property. The strip of land was taken from a portion of a 20-foot-wide private road known as Rescue Lane that intersected with Brawley School Road. Brawley School Road had been an undivided two-lane road that ran in front of defendant's

DEPT. OF TRANSP. v. WEBSTER

[230 N.C. App. 468 (2013)]

property. The purpose of DOT's Brawley School Road widening project was to improve motorist safety on Brawley School Road. DOT expanded Brawley School Road from two to four lanes and installed medians between east and westbound traffic, including a median break at the intersection of Brawley School Road and Rescue Lane.

Sometime before the commencement of the DOT project, defendants, fee simple owners of 32.93 acres of land adjacent to Brawley School Road, had dedicated the right of way of Rescue Lane to private use. Adjacent to defendants' property, also bordered by Rescue Lane and Brawley School Road, was Brawley Market, a commercial development owned by Southern Properties, LLC. Following DOT's expansion of Brawley School Road and the construction of medians separating east and westbound traffic, drivers entering and exiting Brawley Market directly from and onto Brawley School Road were limited to traveling west. To travel east on Brawley School Road, drivers exiting Brawley Market had to travel west and then make a u-turn at an available median break.

Once defendants' property was condemned, a portion of Rescue Lane became a public roadway, maintained by DOT. On 26 February 2008, Southern Properties applied to DOT for a driveway permit to access Rescue Lane. Because of a break in the median at the intersection of Rescue Lane and Brawley School Road, traffic could enter and exit Rescue Lane onto Brawley School Road from or to the east and west. DOT approved Southern Properties' application in March 2009, eighteen months after the taking of defendants' property.

On or about 21 March 2012, DOT filed a motion for hearing pursuant to North Carolina General Statutes, section 136-108 requesting a determination of any and all issues raised by the pleadings other than the issue of damages, along with a memorandum in support of the motion for hearing. In its motion, DOT urged:

In particular, the Court, sitting without a jury pursuant to G.S. § 136-108, needs to hear and decide whether [DOT]'s actions in granting a driveway access to a business 18 months after the date of taking in this matter and not a part of the project constitutes a compensable taking of the defendants' property, or whether said actions constitute a non-compensable exercise of the State's police power.

On 27 March 2012, defendants filed an objection and motion to dismiss plaintiff's motion for a section 108 hearing and, alternatively,

DEPT. OF TRANSP. v. WEBSTER

[230 N.C. App. 468 (2013)]

motion to continue the hearing. On 12 April 2012, the trial court entered an order granting defendants' motion to continue the hearing.

A section 108 hearing was held during the 25 June 2012 Civil Session of Iredell County Superior Court, the Honorable Joseph N. Crosswhite presiding. On 8 August 2012, the trial court entered its order finding and concluding that the grant of Southern Properties' driveway permit application was a function of DOT's police power as a State agency. Any effects of the permit, including the impact of an increase in traffic along defendants' property as a result of the adjacent driveway from Brawley Market, did not constitute a taking or result in compensable damages. The trial court ordered that evidence of the driveway permit and its effects "shall not be included as elements of damage at the trial of this matter." Defendants appeal.

On appeal, defendants raise the following issues: whether the trial court erred (I) in overruling defendants' objection and motion to dismiss the section 108 hearing; and (II) in excluding evidence and arguments regarding increased traffic on Rescue Lane at the trial of this action.

Appeal of an interlocutory order

[1] "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." *Edwards v. GE Lighting Sys., Inc.*, 193 N.C. App. 578, 581, 668 S.E.2d 114, 116 (2008) (citation and quotations omitted); *see also* N.C. Gen. Stat. § 1A-1, Rule 54(b) (2011). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Hammer Publ'n v. Knights Party*, 196 N.C. App. 342, 345, 674 S.E.2d 720, 722 (2009) (citation and quotations omitted). However, an order from a trial court's judgment in a Section 108 hearing concerning title to property and area taken is a vital preliminary issue and is subject to immediate review on appeal:

One of the purposes of G.S. 136-108 was to eliminate from the jury trial any question as to what land . . . [is being condemned] and any question as to its title. Therefore, should there be a fundamental error in the judgment resolving these vital preliminary issues, ordinary prudence requires an immediate appeal, for that is the proper method to obtain relief from legal errors.

DEPT. OF TRANSP. v. WEBSTER

[230 N.C. App. 468 (2013)]

N.C. State Highway Comm'n v. Nuckles, 271 N.C. 1, 14, 155 S.E.2d 772, 784 (1967).

Defendants appeal from the trial court order ruling on a question of whether increased traffic flow on a private road taken for public use was a compensable damage subject to a jury's determination. We grant defendant's review of this order. *See id.*

I

[2] Defendants argue that the matters raised by DOT in the section 108 hearing related solely to the issue of damages and thus, were outside the scope of the purpose of a section 108 hearing. Therefore, defendants contend the trial court erred in failing to dismiss DOT's motion for the section 108 hearing. We disagree.

Preservation of arguments

Defendants begin their argument by asserting that the trial court failed to rule on their motion to dismiss DOT's motion for a section 108 hearing. We note that generally, the failure to obtain a ruling on a motion presented to a trial court renders the argument raised in the motion unpreserved on appeal. *See* N.C.R. App. P. 10 (a)(1) (2012) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion."). Therefore, we first consider whether this issue is properly before this Court.

On 26 March 2012, defendants filed an objection and motion to dismiss or alternatively, motion to continue hearing on DOT's motion for a section 108 hearing. Defendants listed the following as grounds for objection:

- A. [DOT] failed, without cause or excuse, to meet the ten day notice requirements of North Carolina General Statute § 136-108;
- B. The contents of [DOT]'s Motion and the issues raised therein are not subject to a hearing under North Carolina General Statute § 136-108 in that the matters are directly related to the issue of damages;
- C. [Defendants] would be deprived of the opportunity to marshal evidence in opposition of said Motion should the Court proceed with the Motion on March 26, 2012.

DEPT. OF TRANSP. v. WEBSTER

[230 N.C. App. 468 (2013)]

On 20 April 2012, the trial court entered an order continuing the section 108 hearing, noting that “Defendants have shown good cause to continue this matter” A section 108 hearing was conducted during the 25 June 2012 civil session of Iredell County Superior Court.

In its order entered 8 August 2012, in a sub-section entitled “Hearing Pursuant to N.C. Gen. Stat. § 136-108,” the trial court stated the following:

17. N.C. Gen. Stat. § 136-108 provides that, “After the filing of the plat, the judge, upon motion and 10 days’ notice by either the Department of Transportation or the owner, shall, either in or out of term, hear and determine any and all issues raised by the pleadings other than the issue of damages, including, but not limited to, if controverted, questions of necessary and proper parties, title to the land, interest taken, and area taken.” *Defendants objected to the hearing alleging that the matters raised therein were not proper subjects enumerated under N.C. Gen. Stat. § 136-108. The Court overruled Defendants’ objection.*

(emphasis added). Thus, the trial court ruled on defendants’ objection to DOT’s motion for a section 108 hearing. Therefore, the arguments defendants presented to the trial court were preserved, and this issue is properly before this Court.

Analysis

It is the trial court’s function at a section 108 hearing “to decide all questions of fact.” *N.C. State Highway Comm’n v. Farm Equip. Co.*, 281 N.C. 459, 467, 189 S.E.2d 272, 277 (1972). “In cases where the trial judge sits as the trier of facts, he is required to (1) find the facts on all issues joined in the pleadings; (2) declare the conclusions of law arising on the facts found; and (3) enter judgment accordingly.” *Gilbert Eng’g Co. v. Asheville*, 74 N.C. App. 350, 364, 328 S.E.2d 849, 857 (1985) (citations omitted).

Pursuant to North Carolina General Statutes, section 136-108, “[a]fter the filing of the plat, the judge, upon motion . . . by either the Department of Transportation or the owner, shall . . . hear and determine any and all issues raised by the pleadings *other than the issue of damages*” N.C. Gen. Stat. § 136-108 (emphasis added). As to the question presented in DOT’s motion for a section 108 hearing, where DOT argues that it acted within the authority of its police power and that damage to defendants’ property as a result is not compensable, the trial court

DEPT. OF TRANSP. v. WEBSTER

[230 N.C. App. 468 (2013)]

has authority to rule on this issue pursuant to section 136-108. *See id.*; *see also Nuckles*, 271 N.C. 1, 155 S.E.2d 772 (holding that the trial court had authority to determine whether the interest was compensable). Moreover, as the arguments presented at the section 108 hearing raised the issue of whether defendants could present evidence on the damage to their property as a direct result of DOT's exercise of a police power and a taking, the trial court had authority to address this issue within a section 108 hearing. *See Nuckles*, 271 N.C. 1, 155 S.E.2d 772 (holding that it was proper for the trial court to decide the issue in question in a section 108 hearing, regardless of whether the issue was phrased as one of interference with a defendant's access to his property or a proper regulation by the DOT of traffic flow). Accordingly, we overrule defendants' argument that the trial court erred in failing to dismiss DOT's motion for a section 108 hearing.

II

[3] Defendants next argue that the trial court erred in ordering that the evidence and arguments pertaining to increased traffic on Rescue Lane be excluded from the trial on compensation purportedly owed defendants due to DOT's expansion of Brawley School Road. We disagree.

"Unchallenged findings of fact are presumed correct and are binding on appeal." *In re Schiphof*, 192 N.C. App. 696, 700, 666 S.E.2d 497, 500 (2008) (citations omitted). Here, the trial court made the following unchallenged findings of fact:

5. The right of way area taken by [DOT] starts at the intersection of Rescue Lane and Brawley School Road . . . and extends approximately 500 feet along Rescue Lane

6. The portion of Rescue Lane now owned by [DOT] is designated as a State road, open for use by Defendants and the public, and maintained by [DOT].

9. Defendants contended that [DOT] took additional interests from Defendants, as Defendants stated in their verified responses to [DOT]'s Interrogatory Number 5, that "DOT took not only [defendants'] private road, but adjoining access to it."

. . .

24. The project plans [for widening and improvement of Brawley School Road] also called for various improvements to be made to Rescue Lane

DEPT. OF TRANSP. v. WEBSTER

[230 N.C. App. 468 (2013)]

. . .

26. The project plans did not call for or include the construction of a driveway connecting any property owners to Rescue Lane, nor did the project include the construction of any improvements to Rescue Lane that interfere with or restrict access to Defendants' remaining property from Brawley School Road.

27. On February 26, 2008, Southern Properties, LLC, owners of a convenience store property abutting Rescue Lane on the corner of Brawley School Road and Rescue Lane, applied to [DOT]'s District Engineer's office for a driveway permit to connect its parking lot to Rescue Lane. The application was approved on April 6, 2009, and the driveway was subsequently constructed.

28. The driveway was constructed in response to the driveway permit application submitted by Southern Properties, LLC. The driveway was not authorized or constructed in furtherance of the Brawley School Road project . . . nor was the driveway necessitated by said project.

29. The driveway permit was approved approximately 18 months after the date of taking of the property acquired from Defendants in this matter, at which time Rescue Lane was a public road.

30. Prior to the condemnation action in this matter, Defendants' ability to control and restrict access to Rescue Lane was minimal as at least four private driveways accessed Rescue Lane: those belonging to the Mooresville Rescue Squad, two houses at the end of the Rescue Lane cul-de-sac, and Thompson Farm Road, the latter of which allowed traffic in and out of a dance studio and plumbing supply house on the adjoining property northeast of Rescue Lane.

. . .

32. Prior to the taking, Defendants' property, in the form of Rescue Lane, fronted Brawley School Road. After the taking, Defendants' property continues to front a public road, i.e., Rescue Lane, and continues to have direct access to Brawley School Road, except that Defendants will now be

DEPT. OF TRANSP. v. WEBSTER

[230 N.C. App. 468 (2013)]

required to travel about 500 feet down Rescue Lane to get to Brawley School Road.

The trial court then entered the following pertinent conclusions of law:

5. Regulation of traffic and the granting of driveway permits are the non-compensable police powers of the State. N.C. Gen. Stat. § 136-18(5) gives [DOT] the power “to make rules, regulations and ordinances for the use of, and to police traffic on, the State highways . . .” N.C. Gen. Stat. § 136-93 provides that [DOT] shall have sole authority to grant street and driveway permits onto State roads.

6. The question of what constitutes a taking is often interwoven with the question of whether a particular act is an exercise of the police power or of the power of eminent domain. If the act is a proper exercise of the police power, the constitutional provision that private property shall not be taken for public use, unless compensation is made, is not applicable. The State must compensate for property rights taken by eminent domain; damages resulting from the exercise of police power are noncompensable. *Barnes v. Highway Commission*, 257 N.C. 507, 514; 127 S.E.2d 732, 738 (1962) (citations omitted).

...

8. The estate or interest taken by [DOT] consists of right of way only.

9. The driveway subsequently permitted and constructed on property owned by Southern Properties, LLC, adjacent to the subject property did not exist on the date of taking, was not part of the highway project which necessitated the partial acquisition of Defendants’ property, and any subsequent change in the value of the subject property as a result of traffic from the driveway is not properly considered an area or estate taken on the date of taking. N.C. Gen. Stat. § 136-112.

11. Defendants retain reasonable access to Brawley School Road from their remaining property, and their access to said road has not been substantially interfered with as a result of any of [DOT]’s actions and/or improvements it made to Rescue Lane. *Board of Transp.*

DEPT. OF TRANSP. v. WEBSTER

[230 N.C. App. 468 (2013)]

v. Terminal Warehouse Corp., 300 N.C. 700, 268 S.E.2d 180 (1980).

12. The approval of the Southern Properties, LLC, driveway permit application by [DOT] was a legitimate exercise of [DOT]'s police power, and any effects of the permit do not constitute a taking or compensable damages in this matter. N.C. Gen. Stat. §§ 136-18(5), 136-93.

“The standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court’s findings of fact and whether the findings support the conclusions of law and ensuing judgment.” *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (2002) (citation and quotations omitted). As stated, “[u]nchallenged findings of fact are presumed correct and are binding on appeal.” *In re Schiphof*, 192 N.C. App. at 700, 666 S.E.2d at 500. The trial court’s conclusions of law are subject to *de novo* review. *City of Charlotte v. BMJ of Charlotte, LLC*, 196 N.C. App. 1, 9, 675 S.E.2d 59, 64 (2009).

Defendants contend that the trial court erred in not considering the effects of increased traffic on Rescue Lane. Although “[t]he state must compensate for property rights taken by eminent domain[,] damages resulting from the exercise of the police power are noncompensable.” *Barnes v. N.C. State Highway Comm’n*, 257 N.C. 507, 514, 126 S.E.2d 732, 738 (1962) (citations and quotations omitted).

Pursuant to North Carolina General Statutes, section 136-18, DOT is vested with the power “[t]o make rules, regulations and ordinances for the use of, and to police traffic on, the State highways” N.C. Gen. Stat. § 136-18(5) (2011). DOT is also vested with specific authority to pave driveways. *See id.* § 136-18(24) (“The [DOT] is further authorized to pave driveways leading from state-maintained roads to rural fire district firehouses which are approved by the North Carolina Fire Insurance Rating Bureau and to facilities of rescue squads furnishing ambulance services which are approved by the North Carolina State Association of Rescue Squads, Inc.”). Further, “[n]o opening or other interference whatsoever shall be made in any State road or highway . . . except in accordance with a written permit from [DOT]” *Id.* § 136-93; *see also Haymore v. N.C. State Highway Comm’n*, 14 N.C. App. 691, 695, 189 S.E.2d 611, 614-15 (1972) (“[T]he Commission requires driveway permits for the purpose of assuring that a proposed driveway will be constructed in a safe manner and so as not to endanger travel upon the highway. This is an exercise of the general police power”).

DEPT. OF TRANSP. v. WEBSTER

[230 N.C. App. 468 (2013)]

[W]hile a substantial or unreasonable interference with an abutting landowner's access constitutes the taking of a property right, the restriction of his right of entrance to reasonable and proper points so as to protect others who may be using the highway does not constitute a taking. Such reasonable restriction is within the police power of the sovereign and any resulting inconvenience is *damnum absque injuria*.

State Highway Comm'n v. Yarborough, 6 N.C. App. 294, 301, 170 S.E.2d 159, 164 (1969) (citations omitted).

DOT cites *Barnes* in support of its position that the exercise of its police power is noncompensable. See *Barnes*, 257 N.C. at 514, 126 S.E.2d at 737-38. In *Barnes*, the petitioner raised the question of whether he was entitled to compensation from the State for diminution in value of his commercial property due to the construction of medians in a highway adjacent to his businesses. The construction of the highway medians limited access to his businesses — a filling station, a bulk oil premises, and Frozen Custard Place — to the highway's southbound lanes. In addressing the petitioner's argument, our Supreme Court quoted the following regarding the petitioner's property rights:

Plaintiffs have no property right in the continuation or maintenance of the flow of traffic past their property. They still have free and unhampered ingress and egress to their property. . . . Re-routing and diversion of traffic are police power regulations. Circuity of route, resulting from an exercise of the police power, is an incidental result of a lawful act. It is not the taking or damaging of a property right.

Id. at 516, 126 S.E.2d at 738-39 (citation and quotations omitted). We acknowledge that there is a "significant distinction between 'right of access' and 'regulation of traffic flow.'" 4 NICHOLS ON EMINENT DOMAIN § 13.23[2] (Julius L. Sackman ed., 3d ed. 2012 (Matthew Bender)). Specifically, there is no right to compensation for increased traffic flow.

Although an abutting property owner may be inconvenienced by [a] traffic regulation immediately in front of his property, he has no remedy if such regulation be reasonably adapted to the benefit of the traveling public.

Barnes, 257 N.C. at 516, 126 S.E.2d at 739 (citation and quotations omitted); see also *Nuckles*, 271 N.C. at 22, 155 S.E.2d at 789 ("(A)n abutting

DEPT. OF TRANSP. v. WEBSTER

[230 N.C. App. 468 (2013)]

property owner is not entitled to compensation because of the construction of a highway . . . if he be afforded direct access by local traffic lanes That access is provided by the service roads. These service roads are part of the highway system. They serve not only the petitioners but any member of the public who desires to use the same.” (citation and internal quotations omitted)).

Here, the trial court made numerous findings of fact regarding DOT’s granting of a driveway permit to Southern Properties. In its conclusions of law, the trial court held that the DOT’s actions were “a legitimate exercise of police power, and any effects of the permit do not constitute a taking or compensable damages in this matter.” *See Barnes*, 257 N.C. 507, 126 S.E.2d 732. As the trial court’s findings of fact were supported by competent evidence and those findings supported its conclusions of law, we hold the trial court did not err in excluding evidence concerning increased traffic on Rescue Lane from defendants’ trial over compensation purportedly owed to defendants by DOT. Accordingly, we overrule defendants’ argument and affirm the trial court’s order to exclude from a jury trial on damages evidence regarding the increase in traffic along Rescue Lane.

Affirmed.

Judges STEPHENS and DILLON concur.

DUPLIN CNTY. DEP'T OF SOC. SERVS. EX REL. PULLEY v. FRAZIER

[230 N.C. App. 480 (2013)]

DUPLIN COUNTY DSS ON BEHALF OF DEBBIE L. PULLEY, PLAINTIFF

v.

WELDON E. FRAZIER, JR., DEFENDANT

No. COA13-619

Filed 19 November 2013

Child Custody and Support—child support arrearages—periodic payments—no valid basis to set aside provision

The trial court erred in a child support case by granting defendant's motion pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure and setting aside a provision in a prior judgment for child support requiring defendant to make periodic payments towards his child support. There was no valid basis under Rule 60(b) that would permit the trial court's modification of the prior judgment.

Appeal by plaintiff from order entered 4 March 2013 by Judge James Lloyd Moore, Jr. in Duplin County District Court. Heard in the Court of Appeals 23 October 2013.

Warrick and Bradshaw, P.A., by Frank L. Bradshaw, for plaintiff-appellant.

No brief filed on behalf of defendant-appellee.

DAVIS, Judge.

Duplin County Department of Social Services, on behalf of Debbie L. Pulley ("Plaintiff"), appeals from the trial court's order setting aside a portion of a prior judgment for child support arrearages pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure. The primary issue on appeal is whether the trial court erred in setting aside the provision in the prior judgment requiring Weldon E. Frazier, Jr. ("Defendant") to make periodic payments towards his child support arrearages. After careful review, we vacate the trial court's order and reinstate the prior judgment.

Factual Background

On 24 September 1991, Plaintiff filed a complaint to establish paternity and compel child support, alleging that Defendant was the natural father of the minor child, Jonathan.¹ The trial court entered an order

1. A pseudonym is used throughout this opinion to protect the privacy of the child.

DUPLIN CNTY. DEP'T OF SOC. SERVS. EX REL. PULLEY v. FRAZIER

[230 N.C. App. 480 (2013)]

12 November 1991 adjudicating Defendant to be the natural and biological father of Jonathan and requiring Defendant to pay \$400 a month in child support and \$20 a month in arrearages for past public assistance disbursed to aid in the support of Jonathan.

In 2001, Defendant moved to have his arrearages reduced and sought credit for the time during which he was imprisoned for abandonment of Jonathan. On 5 July 2001, the trial court heard the motion, and on 12 July 2001, the court (1) decreased the arrearages by \$2,420; (2) determined that there were remaining arrearages in the amount of \$23,600; and (3) ordered that those remaining arrearages be reduced to judgment.

On 4 June 2010, Plaintiff filed a complaint requesting the entry of an order (1) “renewing” the judgment for \$23,600 in child support arrearages; and (2) requiring Defendant to make monthly payments towards those arrearages. The matter was heard on 3 August 2010 by the Honorable Paul G. Hardison. In a judgment entered on 30 August 2010 (“the 30 August Judgment”), Judge Hardison ruled that the arrearages of \$23,600 remained valid and enforceable and ordered Defendant to pay \$275 per month towards those arrearages pursuant to N.C. Gen. Stat. § 50-13.4(f)(8), which allows for provisions requiring periodic payments towards arrearages.

On 21 October 2010, Defendant filed a motion to set aside the 30 August Judgment pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure, asserting that “[t]he judgment entered in this matter is void in that pursuant to NCGS Section 1-302, a judgment requiring the payment of money may be enforced by execution and Defendant cannot be ordered to pay a sum certain per month to satisfy the judgment.” The Honorable James Lloyd Moore, Jr. heard Defendant’s motion on 15 January 2013 and entered an order on 4 March 2013 setting aside the portion of the 30 August Judgment requiring Defendant to make the periodic payments of \$275 a month “[d]ue to the vagueness of N.C. Gen. Stat. § 50-13.4.” Plaintiff gave timely notice of appeal to this Court.

Analysis

It is well established that “[a] judge of the District Court cannot modify a judgment or order of another judge of the District Court” absent a showing of mistake, inadvertence, fraud, newly discovered evidence, satisfaction, or that the judgment is void. *Town of Sylva v. Gibson*, 51 N.C. App. 545, 548, 277 S.E.2d 115, 117 (internal citation omitted), *appeal dismissed and disc. review denied*, 303 N.C. 319, 281 S.E.2d 659 (1981); *see In re Royster*, 361 N.C. 560, 563, 648 S.E.2d 837, 840 (2007) (“[O]ne superior court judge may not ordinarily modify, overrule, or

DUPLIN CNTY. DEP'T OF SOC. SERVS. EX REL. PULLEY v. FRAZIER

[230 N.C. App. 480 (2013)]

change the judgment or order of another superior court judge previously entered in the same case. This rule also applies to district court judges.”) (internal citations omitted).

Rule 60(b) of the North Carolina Rules of Civil Procedure, however, allows a trial judge to grant a party relief from that judge’s or another judge’s order or judgment for the following reasons:

- (1) Mistake, inadvertence, surprise, or excusable neglect;
- (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
- (4) The judgment is void;
- (5) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
- (6) Any other reason justifying relief from the operation of the judgment.

N.C.R. Civ. P. 60(b).

Thus, an order setting aside a judgment or order based on one of the above grounds pursuant to Rule 60(b) “does not overrule a prior [judgment or] order but, consistent with statutory authority, relieves parties from the effect of [the judgment or] order.” *Charns v. Brown*, 129 N.C. App. 635, 639, 502 S.E.2d 7, 10, *disc. review denied*, 349 N.C. 228, 515 S.E.2d 701 (1998). Because we cannot discern a valid basis under Rule 60(b) that would permit the trial court’s modification of Judge Hardison’s 30 August Judgment, we hold that the trial court erred in setting aside the provision for periodic payments contained in said judgment, and, as such, we vacate its 4 March 2013 order.

Defendant’s motion to set aside Judge Hardison’s judgment pursuant to Rule 60(b) alleged that “[t]he judgment entered in this matter is void in that pursuant to NCGS Section 1-302, a judgment requiring the payment of money may be enforced by execution and Defendant cannot be ordered to pay a sum certain per month to satisfy the judgment.”

DUPLIN CNTY. DEPT' OF SOC. SERVS. EX REL. PULLEY v. FRAZIER

[230 N.C. App. 480 (2013)]

A Rule 60(b)(4) motion is only proper where a judgment is “void” as that term is defined by the law. A judgment will not be deemed void merely for an error in law, fact, or procedure. A judgment is void only when the issuing court has no jurisdiction over the parties or subject matter in question or has no authority to render the judgment entered. A judgment, if proper on its face, is not void.

Burton v. Blanton, 107 N.C. App. 615, 616, 421 S.E.2d 381, 382-83 (1992) (internal citations omitted).

We conclude that Judge Hardison had both jurisdiction and authority to enter the 30 August Judgment. When Plaintiff sought to “renew” the judgment of \$23,600 in arrearages for an additional ten years, Plaintiff was bringing an action on the judgment, which was a new action on a prior debt that was “separate and distinct from the original suit in which the prior judgment was rendered.” *NCNB v. Robinson*, 80 N.C. App. 154, 157, 341 S.E.2d 364, 366 (1986). As our Court has previously explained, although “there is no procedure now recognized in this State by which a judgment may be ‘renewed,’” a party may obtain a new judgment on the amount owed by bringing an independent action on the prior judgment. *Raccoon Valley Inv. Co. v. Toler*, 32 N.C. App. 461, 462-63, 232 S.E.2d 717, 718 (1977). This is precisely what Plaintiff did, and when the matter came before Judge Hardison, he entered the 30 August Judgment finding that Defendant owed \$23,600 in arrearages and ordering periodic payments towards those arrearages.

N.C. Gen. Stat. § 50-13.4 expressly authorizes a trial court to order periodic payments towards arrearages, stating, in pertinent part, that “past due periodic payments may by motion in the cause or by a separate action be reduced to judgment which shall be a lien as other judgments and may include provisions for periodic payments.” N.C. Gen. Stat. § 50-13.4(f)(8) (2011). As the new judgment entered by Judge Hardison (1) reduced the past due payments to a judgment in the amount of \$23,600; and (2) included a periodic payments provision, we conclude that it complied with the statute allowing for this particular type of remedy for the enforcement of child support obligations. As such, the 30 August Judgment – including its provision concerning periodic payments towards the arrearages – was not void and should not have been set aside.

We cannot agree with Judge Moore’s conclusion that N.C. Gen. Stat. § 50-13.4 is “vague” and does not authorize periodic payments towards Defendant’s child support arrearages. Indeed, this Court has previously

DUPLIN CNTY. DEP'T OF SOC. SERVS. EX REL. PULLEY v. FRAZIER

[230 N.C. App. 480 (2013)]

held that a party seeking to collect arrearages that have been reduced to a judgment is *not* limited solely to the execution procedures provided by N.C. Gen. Stat. § 1-302. *Griffin v. Griffin*, 103 N.C. App. 65, 66, 404 S.E.2d 478, 479 (1991). In *Griffin*, we determined that reducing the plaintiff's arrearages to judgment and withholding his income to collect the arrearages were not inconsistent remedies to enforce the payment of child support. *Id.* at 67, 404 S.E.2d at 479. We reasoned that

[t]he trial court has broad discretion under G.S. 50-13.4(e) in providing for payment of child support. . . . It would be illogical to conclude that the General Assembly would give the trial court broad discretion in ordering methods of payment of child support and then restrict the court to only one remedy to ensure payment. . . . Additionally, G.S. 50-13.4.(f)(11) provides: "The specific enumeration of remedies in this section shall not constitute a bar to remedies otherwise available." The broad language of the statute suggests that the legislature intended to expand, not limit, the trial court's remedies in enforcing payment of child support.

Id. at 66-67, 404 S.E.2d at 479.

Judge Hardison's 30 August Judgment was a new judgment entered after Plaintiff initiated an action seeking an amount owed from a prior judgment. When entering this new judgment, Judge Hardison had both jurisdiction and the statutory authority — pursuant to N.C. Gen. Stat. § 50-13.4(f)(8) — to reduce the arrearages to a judgment and to make provisions for periodic payments towards the arrearages. Therefore, the 30 August Judgment was not void and could not be set aside under Rule 60(b). Accordingly, we vacate the 4 March 2013 order. *See Draughon v. Draughon*, 94 N.C. App. 597, 599, 380 S.E.2d 547, 548 (1989) ("The order setting aside the equitable distribution award has no authorized basis . . . and must be vacated.").

Conclusion

For the reasons stated above, we vacate the trial court's 4 March 2013 order and reinstate Judge Hardison's 30 August 2010 judgment.

VACATED.

Judges ELMORE and McCULLOUGH concur.

ESTATE OF GARY VAUGHN v. PIKE ELECTRIC, LLC

[230 N.C. App. 485 (2013)]

THE ESTATE OF GARY VAUGHN, TAMMY VAUGHN, ADMINISTRATRIX, PLAINTIFF

v.

PIKE ELECTRIC, LLC, PIKE ELECTRIC, INC., AND
KENNETH SHALAKO PENLAND, DEFENDANTS

No. COA13-448

Filed 19 November 2013

1. Appeal and Error—interlocutory orders and appeals—denial of motions to dismiss—substantial right—Workers’ Compensation Act exclusivity provision

The denial of a motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(1) and the exclusivity provision of the Workers’ Compensation Act in a negligence case affected a substantial right and were immediately appealable. Further, the denial of defendants’ N.C.G.S. § 1A-1, Rule 12(b)(6) motions to dismiss were immediately appealable as affecting a substantial right to the extent that they involved the trial court’s jurisdiction over this matter.

2. Workers’ Compensation—Woodson employer exception—failure to allege intentional misconduct

The trial court’s order denying defendant Pike Electric’s motions to dismiss under N.C.G.S. § 1A-1, Rules 12(b)(1) and 12(b)(6) in a negligence case was reversed. Plaintiff offered no basis to believe that Pike Electric was aware of, intended, or was substantially certain that defendant Penland’s actions on that day would result in decedent’s death. Plaintiff failed to allege uncontroverted evidence of defendant Pike Electric’s intentional misconduct.

3. Workers’ Compensation—Pleasant co-employee exception—willful, wanton, and reckless negligence

The trial court’s order denying defendant Penland’s motions to dismiss under N.C.G.S. § 1A-1, Rules 12(b)(1) and 12(b)(6) in a negligence case was affirmed. An employee may exhibit willful, wanton, and reckless negligence either when he intentionally injures a coworker or when he does so with manifest disregard to the consequences of his actions. Defendant Penland’s alleged direction to send decedent up a utility pole despite decedent’s severe lack of training and expertise was sufficient to create an inference that Penland was manifestly indifferent to the consequences of his actions under either Rule 12(b)(1) or Rule 12(b)(6).

ESTATE OF GARY VAUGHN v. PIKE ELECTRIC, LLC

[230 N.C. App. 485 (2013)]

Appeal by Defendants from order entered 25 February 2013 by Judge Gary M. Gavenus in Rutherford County Superior Court. Heard in the Court of Appeals 11 September 2013.

Podgorny Law, P.A., by George Podgorny, Jr., and Price, Smith, Hargett, Petho & Anderson, by Richard L. Anderson, for Plaintiff.

Roberts & Stevens, P.A., by F. Lachicotte Zemp, Jr. and Robin A. Seelbach, for Defendants Pike Electric, LLC and Pike Electric, Inc.

Bennett & Guthrie, P.L.L.C., by Richard V. Bennett, Roberta King Latham, and Joshua H. Bennett, for Defendant Kineth Shalako Penland.

STEPHENS, Judge.

Factual and Procedural Background

This case arises from the death of Gary Vaughn (“Decedent”). He was electrocuted on 29 October 2009 while working as a groundman for Defendants Pike Electric, LLC and Pike Electric, Inc. (collectively, “Pike Electric”) and died as a result of that injury. Almost three years later, on 4 October 2012, Decedent’s surviving spouse and the administratrix of his estate, Tammy Vaughn (“Plaintiff”), filed a negligence complaint against Pike Electric and Decedent’s supervisor, Defendant Kineth Penland (“Penland”), in Rutherford County Superior Court.¹

In her complaint, Plaintiff alleges the following:

10. . . . Decedent was employed by Pike Electric as a groundman. As a groundman, . . . Decedent assisted foremen, linemen[,] and other employees of Pike Electric who worked on . . . overhead distribution lines

11. [Groundmen] . . . were neither trained nor permitted to perform work on poles with energized lines . . . due to the risk of electrocution and/or death inherent in such work.

. . .

1. Plaintiff’s original complaint was filed on 20 June 2011, less than two years from the date of Decedent’s death. Plaintiff filed a voluntary dismissal, without prejudice, four months later and brought suit in this particular case within one year of the date of that dismissal. *See generally* N.C.R. Civ. Pro. 41(a)(1).

ESTATE OF GARY VAUGHN v. PIKE ELECTRIC, LLC

[230 N.C. App. 485 (2013)]

13. On the morning of October 29, 2009, . . . Decedent was employed as a groundman in a crew overseen by Penland [, which had been] instructed to retrofit transformers on overhead power lines

14. As a groundman, the duties to be performed by . . . Decedent during this work were prescribed and circumscribed by the Pike Electric [work methods and safety manuals]. These duties did not include working on power lines; especially work on energized power lines.

15. [At the time of his death, Decedent had been employed as a groundman for less than two months] and had not received any training or job assessment during that period of time. [Defendants] knew that . . . Decedent had received no training to perform the work required of a lineman.

16. Defendants knew that . . . Decedent had . . . no previous experience with power line distribution and transmission and had worked as a truck driver prior to being employed by . . . Pike Electric.

17. Defendants knew that . . . Decedent had received no training as a lineman and . . . was not [permitted to] climb[] poles or work[] on or near energized lines or equipment

18. Retrofitting transformers is an inherently dangerous activity as it involves de-energizing the transformer by disconnecting the stinger from the primary line, replacing the lightning arrester, installing guy sticks, installing a fused cutout[,] and re-energizing the transformers.

19. . . . Defendants knew that undertaking such a task required specific training and experience and that instructing a novice groundman such as . . . Decedent to perform such work was certain to result in death or serious injury.

20. . . . Penland instructed . . . Decedent to climb the utility pole [that] was supporting [the] overhead power lines . . . and to begin the work of retrofitting the transformer.

21. The power lines that Penland instructed . . . Decedent to work on were high voltage distribution lines. They were energized[,] uninsulated[,] and carried 7200 volts of electricity.

ESTATE OF GARY VAUGHN v. PIKE ELECTRIC, LLC

[230 N.C. App. 485 (2013)]

22. Defendants knew that [groundmen] such as Decedent were not qualified, nor permitted, to undertake any of those dangerous activities.

23. Nevertheless, . . . Decedent was . . . instructed to use a “shotgun” stick to de-energize the pole. This involved the dangerous step of removing the hotline clamp from the primary line which would leave the primary line exposed. This is a task reserved for [a] trained and experienced lineman.

24. Defendants knew that . . . Decedent had neither the training nor experience to safely carry out such a task[,] yet instructed him to do so regardless.

25. . . . Decedent was not supervised nor provided with adequate personal protective equipment while undertaking the tasks assigned to him.

26. Shortly after . . . Decedent climbed the utility pole, the remaining crewman heard a loud noise from the top of the pole and turned to see . . . Decedent hanging limp from the utility pole.

27. The other members of . . . Decedent’s crew were then forced to perform a pole[-]top rescue of . . . Decedent.

28. Resuscitation efforts were attempted[,] but [Decedent] did not survive his injuries.

29. As the foreman and/or employee in charge on October 29, 2009, Penland’s duties and responsibilities were prescribed by . . . OSHA regulations and [the Pike Electric safety manual]. These duties included . . . ensuring that all lines to be worked on were de-energized, . . . all employees followed applicable safety rules, and . . . all of the employees in the work crew possessed the necessary information and work skills . . . to perform the work carefully.

30. . . . Defendants knew, or should have known, that groundmen and other untrained and inexperienced employees were . . . instructed to perform the inherently dangerous activities reserved for trained linemen.

...

ESTATE OF GARY VAUGHN v. PIKE ELECTRIC, LLC

[230 N.C. App. 485 (2013)]

33. . . . OSHA determined that Defendant Pike Electric had previously been cited by North Carolina OSHA for violations . . . in North Carolina as well as in other states where [it provides] similar services.

34. . . . Pike [Electric] . . . was aware that employees such as . . . Decedent were being placed in[] hazardous situations that were substantially certain to cause injury or death.

35. . . . [Pike Electric] was cited for [ten] serious safety violations in the [S]tate of Georgia in 2001 following the fatal electrocution of an employee while upgrading an electrical system.

. . .

37. . . . [Pike Electric] was cited for safety violations in the [S]tate of Florida in 2003 following [an employee injury] after [the injured employee] contact[ed] an energized power line.

38. Following [an] investigation [in this case], OSHA issued citations to [Pike Electric because]:

- a. . . . An employee classified as a groundman[, *i.e.*, Decedent,] was allowed to perform work as a lineman for which he had not been trained[; and]
- b. . . . [Decedent] was working in close proximity to 7200 volts . . . without wearing insulating gloves or . . . sleeves.

Defendants Pike Electric and Penland moved to dismiss Plaintiff's complaint in December of 2012 under Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure and section 97-10.1 ("the exclusivity provision") of the North Carolina Workers' Compensation Act ("the Act"). Pursuant to those rules, Defendants asserted that the trial court lacked subject matter jurisdiction to proceed with the case and that Plaintiff had failed to state a claim on which relief could be granted. The motions were heard on 18 February 2013 and, one week later, denied. Defendants appeal.

ESTATE OF GARY VAUGHN v. PIKE ELECTRIC, LLC

[230 N.C. App. 485 (2013)]

Discussion

Defendants appeal the trial court's order denying their motions to dismiss under Rules 12(b)(1) and 12(b)(6). On both motions, we reverse as to Pike Electric and affirm as to Penland.

I. Appellate Jurisdiction

[1] Defendants' appeal is interlocutory. It is well settled that an order denying a motion to dismiss made pursuant to the exclusivity provision of the Act and either Rule 12(b)(6) or Rule 12(b)(1) is interlocutory. *Trivette v. Yount*, __ N.C. App. __, __, 720 S.E.2d 732, 734 (2011) (“[T]he trial court’s order denying Defendant’s motion to dismiss pursuant to Rule 12(b)(1) . . . is interlocutory.”) [hereinafter *Trivette I*], *affirmed in part, reversed in part on other grounds, and remanded*, 366 N.C. 303, 735 S.E.2d 306 (2012); *Block v. Cnty. of Person*, 141 N.C. App. 273, 276, 540 S.E.2d 415, 418 (2000) (“[A] denial of a motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) is an interlocutory order from which no appeal may be taken immediately.”) (citation, brackets, certain punctuation, and internal quotation marks omitted). “An order is interlocutory if it is made during the pendency of an action and does not dispose of the case[,] but requires further action by the trial court in order to finally determine the entire controversy.” *Trivette I*, __ N.C. App. at __, 720 S.E.2d at 734. Generally, a party cannot immediately appeal from an interlocutory order. *Davis v. Davis*, 360 N.C. 518, 524, 631 S.E.2d 114, 119 (2006). “The rationale behind [disallowing the immediate appeal of interlocutory orders] is that no final judgment is involved in such a denial and the movant is not deprived of any substantial right that cannot be protected by a timely appeal from a final judgment which resolves the controversy on its merits.” *Block*, 141 N.C. App. at 276–77, 540 S.E.2d at 418. Because the trial court’s denial of Defendants’ motions to dismiss did not finally dispose of Plaintiff’s claims in this case, it is interlocutory and, therefore, not generally subject to immediate appellate review.

Nevertheless, an interlocutory order may be reviewed on appeal when either “(1) . . . there has been a final determination as to one or more of the claims and the trial court certifies that there is no just reason to delay the appeal, [or] (2) . . . delaying the appeal would prejudice a substantial right.” *Milton v. Thompson*, 170 N.C. App. 176, 178, 611 S.E.2d 474, 476 (2005). Because the trial court did not certify that there was no just reason to delay Defendants’ appeal, review is proper only if the delay would affect a substantial right. We hold that it would.

ESTATE OF GARY VAUGHN v. PIKE ELECTRIC, LLC

[230 N.C. App. 485 (2013)]

A. *Denial of Defendants' Motions to Dismiss Under Rule 12(b)(1)*

As Pike Electric points out, our Supreme Court has determined that the denial of a motion to dismiss under Rule 12(b)(1) and the exclusivity provision of the Act affects a substantial right “and will work injury if not corrected before final judgment” See *Burton v. Phoenix Fabricators & Erectors, Inc.*, 362 N.C. 352, 661 S.E.2d 242 (2008) (remanding to the Court of Appeals for consideration of the merits of an appeal that was brought on the denial of the defendant’s Rule 12(b)(1) motion to dismiss the plaintiff’s negligence action under the exclusivity provision of the Indiana workers’ compensation statute). Therefore, Defendants’ appeal as to that element of the denial of their respective motions to dismiss — Rule 12(b)(1) — is proper.

B. *Denial of Defendants' Motions to Dismiss Under Rule 12(b)(6)*

In footnote 2 of his brief, Penland states that his argument “will focus [exclusively] on the trial court’s ruling regarding [his motion to dismiss] pursuant to Rule 12(b)(6).” However, he goes on to attempt to preserve review of the denial of his motion to dismiss under Rule 12(b)(1) “should this Court determine that the trial court erred in dismissing his action under [Rule 12(b)(1)].” This is impermissible. Defendant’s *ipse dixit* statement is not sufficient to preserve appellate review.

Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure states that, in order to preserve an issue for appellate review, a party must offer “reason or argument” in support of that issue. If not, the issue will be deemed abandoned. N.C.R. App. P. 28(b)(6). Because Penland intentionally omitted any reason or argument that the trial court erred in dismissing his motion under Rule 12(b)(1), that issue is deemed abandoned. Nevertheless, we elect to review the denial of Penland’s motion to dismiss as a jurisdictional matter under Rule 12(b)(1). *Lee v. Winget Rd., LLC*, 204 N.C. App. 96, 98, 693 S.E.2d 684, 687 (2010) (“[A]n appellate court has the power to inquire into jurisdiction in a case before it at any time, even *sua sponte*.”) (citation and internal quotation marks omitted).

In their briefs, Defendants state that their appeals of the trial court’s denial of their motions to dismiss pursuant to Rule 12(b)(6) are properly before this Court under *Burton*. This is incorrect. The Supreme Court’s opinion in *Burton* allowed appellate review of the trial court’s denial of a motion to dismiss as affecting a substantial right pursuant to Rule 12(b)(1) and the exclusivity provision of another state’s workers’ compensation act. *Id.* It did not address whether jurisdiction was present

ESTATE OF GARY VAUGHN v. PIKE ELECTRIC, LLC

[230 N.C. App. 485 (2013)]

for an appeal of the denial of a motion to dismiss under *Rule 12(b)(6)*. Indeed, neither Pike Electric nor Penland has cited any case allowing review of the denial of a motion to dismiss under Rule 12(b)(6) and the exclusivity provision of the Act on grounds that such denial affects a substantial right.²

After reviewing the case law, we are unable to find a decision of either appellate court addressing the validity of an interlocutory appeal from the denial of a motion to dismiss under Rule 12(b)(6) and the exclusivity provision. Accordingly, whether the trial court's denial of a motion to dismiss under Rule 12(b)(6) and the exclusivity provision of the Act is immediately appealable as affecting a substantial right is a matter of first impression.

As discussed above, our Supreme Court has determined that the denial of a motion to dismiss under Rule 12(b)(1) and the exclusivity provision of the Act is immediately appealable as affecting a substantial right. In this case, Defendants limit their arguments regarding the trial court's denial of their motions to dismiss under Rule 12(b)(6) to the issue of jurisdiction, arguing that Plaintiff failed to state a claim upon which relief may be granted because the superior court did not have jurisdiction to determine her claim since it arose under the exclusivity provision of the Act. Importantly, Defendants do not argue on appeal that Plaintiff failed to state a claim upon which relief can be granted pursuant to North Carolina tort law. Because the Supreme Court has determined that the denial of a motion to dismiss for lack of jurisdiction under the exclusivity provision of the Act affects a substantial right, we conclude that the denial of Defendants' Rule 12(b)(6) motions to dismiss is immediately appealable as affecting a substantial right to the extent that those motions were asserted pursuant to the exclusivity provision of the Act. Accordingly, to the extent that they involve the trial court's jurisdiction over this matter, we review Defendants' appeals on the merits.

2. The cases cited deal with denials of motions for summary judgment, denials of motions to dismiss under 12(b)(1), grants of summary judgment, grants of motions to dismiss under 12(b)(1), or grants of motions to dismiss under 12(b)(6) — not denials of motions to dismiss under 12(b)(6). *See, e.g., Trivette v. Yount*, 366 N.C. 303, 735 S.E.2d 306 (2012) (reviewing the trial court's denial of the defendants' motions to dismiss under 12(b)(1) and for summary judgment) [hereinafter *Trivette II*]; *Hamby v. Profile Products, LLC*, 361 N.C. 630, 632–33, 652 S.E.2d 231, 233 (2007) (reviewing the trial court's denial of summary judgment as to two parties and grant of summary judgment as to two others); *Blow v. DSM Pharms., Inc.*, 197 N.C. App. 586, 587, 678 S.E.2d 245, 247–48 (2009) (reviewing the trial court's grant of the defendant's motions to dismiss under Rules 12(b)(1) and 12(b)(6)); *Edwards v. GE Lighting Sys., Inc.*, 193 N.C. App. 578, 580, 668 S.E.2d 114, 116 (2008) (reviewing the trial court's denial of the defendants' motion for summary judgment).

ESTATE OF GARY VAUGHN v. PIKE ELECTRIC, LLC

[230 N.C. App. 485 (2013)]

II. Standard of Review

“The standard of review on a motion to dismiss under Rule 12(b) (1) for lack of jurisdiction is *de novo*.” *Dare Cnty. v. N.C. Dep’t of Ins.*, 207 N.C. App. 600, 610, 701 S.E.2d 368, 375 (2010) (citations and internal quotation marks omitted).

Under Rule 12(b)(6),

[t]he motion to dismiss . . . tests the legal sufficiency of the complaint. In ruling on the motion the [factual] 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). On a motion to dismiss under Rule 12(b)(6), the court is not, however, required to accept mere conclusory allegations, unwarranted deductions of fact, or unreasonable inferences as true. *Strickland v. Hedrick*, 194 N.C. App. 1, 20, 669 S.E.2d 61, 73 (2008) (citation and internal quotation marks omitted); *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 167 L. Ed. 2d 929, 934 (2007) (“While a complaint attacked by a [Federal] Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions[. Indeed,] a formulaic recitation of the elements of a cause of action will not do[.]”) (citations, internal quotation marks, and brackets omitted).

III. Analysis

The exclusivity provision of the Act states that “the rights and remedies [provided to] the employee, his dependents, next of kin, or personal representative shall exclude all other rights and remedies of the employee . . . as against the employer at common law or otherwise on account of . . . injury or death.” N.C. Gen. Stat. § 97-10.1 (2011).

The social policy behind [this provision] is that injured workers should be provided with dignified, efficient[,] and certain benefits for work-related injuries and that the consumers of the product are the most appropriate group to bear the burden of the payments. The most important feature of the typical workers’ compensation scheme is that the employee and his dependents give up their common law right to sue the employer for negligence in

ESTATE OF GARY VAUGHN v. PIKE ELECTRIC, LLC

[230 N.C. App. 485 (2013)]

exchange for limited but assured benefits. Consequently[,] the negligence and fault of the injured worker ordinarily is irrelevant.

Pleasant v. Johnson, 312 N.C. 710, 712, 325 S.E.2d 244, 246–47 (1985). Under the exclusivity provision, a worker is generally barred from bringing an action in our courts of general jurisdiction against either his employer or a co-employee. *Id.* at 713, 325 S.E.2d at 247. Instead, the worker must pursue his or her action before the North Carolina Industrial Commission.

In cases involving intentional injury by an employer or co-employee, however, our Supreme Court has stated that the worker may bring suit at common law. *Id.* Over time, this rule has been applied to two different circumstances. First, when a worker wishes to maintain an action against his employer, our Supreme Court has directed us to ask (a) *whether the worker suffered injury or death* and (b) *whether the employer intentionally engaged in misconduct knowing that such conduct was substantially certain to cause serious injury or death*. *Woodson v. Rowland*, 329 N.C. 330, 340–41, 407 S.E.2d 222, 228 (1991). If the answer to both questions is “yes,” then the worker “or the personal representative of the estate[,] in [the] case of death, may pursue a civil action against the employer.” *Id.* Second, when a worker wishes to maintain an action against his co-employee(s),³ our Supreme Court has directed that we ask *whether the co-employee(s) acted with willful, wanton, and reckless negligence*. *Pleasant*, 312 N.C. at 717–18, 325 S.E.2d at 250. If so, then the worker may receive benefits under the Act and maintain a separate common law action against his co-employee(s). *Id.*

A. *The Woodson Employer Exception*

[2] As discussed above, a worker seeking to recover against his employer at common law must allege that the employer intentionally engaged in misconduct knowing that such conduct was substantially certain to cause serious injury or death and that the worker in fact suffered such injury or death. *Woodson*, 329 N.C. at 340–41, 407 S.E.2d at 228. “Such misconduct is tantamount to an intentional tort[,]” and our Supreme Court has offered the following guidance when determining whether an employer’s conduct qualifies:

The most aggravated conduct is where the actor actually intends the probable consequences of his conduct. One

3. “The Court of Appeals has long accepted, and we agree, that for purposes of the Act, supervisors and those they supervise are treated as co-employees.” *Trivette II*, 366 N.C. at 309–10, 735 S.E.2d at 311.

ESTATE OF GARY VAUGHN v. PIKE ELECTRIC, LLC

[230 N.C. App. 485 (2013)]

who intentionally engages in conduct knowing that particular results are substantially certain to follow also intends the results for purposes of tort liability. Intent is broader than a desire to bring about physical results. It extends not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow from what the actor does. This is the doctrine of “constructive intent.” As the probability that a certain consequence will follow decreases[] and becomes less than substantially certain, the actor’s conduct loses the character of intent, and becomes mere recklessness. As the probability decreases further[] and amounts only to a risk that the result will follow, it becomes ordinary negligence.

. . . Lying between intent to do harm, which includes proceeding with knowledge that the harm is substantially certain to occur, and the mere unreasonable risk of harm to another involved in ordinary negligence, there is a penumbra of what has been called “quasi intent.” To this area, the words “willful,” “wanton,” or “reckless,” are customarily applied[.]

Id. at 341, 407 S.E.2d at 228–29 (citations, certain internal quotations marks, brackets, and ellipses omitted).

In *Woodson*, the decedent worked for a subcontractor that had been retained to repair a sewer line. *Id.* at 334, 407 S.E.2d at 225. In order to repair the line, the subcontractor was required to dig two trenches. *Id.* Though the subcontractor was responsible for digging both trenches, the general contractor provided men to help dig the first. *Id.* at 335, 407 S.E.2d at 225. The subcontractor intended to build both trenches without the use of a number of required safety precautions, including a “trench box.”⁴ *See id.* Because the foreman for the general contractor refused to allow his men to work on the first trench without such a box, however, one was provided by the subcontractor. *Id.* The second trench never received a trench box. *Id.*

One Sunday, the decedent was laying pipe for the subcontractor in the second trench. *Id.* Though the box used in the first trench was available for protection, the subcontractor’s president expressly declined to

4. “Trench boxes are . . . intended primarily to protect workers from cave-ins and similar incidents.” *Excavations: Hazard Recognition in Trenching and Shoring*, OSHA Technical Manual (OTM), section v, chapter 2 (October 1, 2013), https://www.osha.gov/dts/osta/otm/otm_v/otm_v_2.html.

ESTATE OF GARY VAUGHN v. PIKE ELECTRIC, LLC

[230 N.C. App. 485 (2013)]

employ it. *Id.* The trench later collapsed, and the decedent was killed. *Id.* at 336, 407 S.E.2d at 225–26. Observing the worksite after the accident, the general contractor’s foreman “characterized it as ‘unsafe’ and stated that he ‘would never put a man in it.’” *Id.* at 336, 407 S.E.2d at 226. The decedent’s spouse later filed suit, and the defendant subcontractor moved for summary judgment. *Id.* The trial court granted that motion, the Court of Appeals affirmed, and the Supreme Court reversed. *Id.* at 336–37, 407 S.E.2d at 226.

In reversing the Court of Appeals, the Supreme Court noted that on summary judgment the plaintiff need only forecast sufficient evidence “to show that there is a genuine issue of material fact as to whether [the president’s] conduct satisfies the substantial certainty standard[.]” *Id.* at 345, 407 S.E.2d at 231. Accordingly, the Court cited the following evidence as sufficient to create a genuine issue of material fact and allow the case to proceed to trial:

[The president’s] knowledge and prior disregard of dangers associated with trenching; his presence at the site and opportunity to observe the hazards; his direction to proceed without the required safety procedures; [the foreman’s] experienced opinion that the trench was unsafe; and [an expert witness’s] scientific soil analysis[, which determined that the trench was “substantially certain to fail”].

Id. at 345–46, 407 S.E.2d at 231–32.

Under *Woodson*, Plaintiff argues that Pike Electric should be subject to a negligence action at common law. In support of that position, Plaintiff cites *Arroyo v. Scottie’s Profl Window Cleaning, Inc.*, 120 N.C. App. 154, 461 S.E.2d 13 (1995), where the plaintiff was injured while washing windows at an office building in the Research Triangle Park. *Id.* at 158, 461 S.E.2d at 15–16. In that case, the company’s foreman instructed the plaintiff and a colleague to wash certain windows from the roof of a building, without fall protection. *Id.* at 157, 461 S.E.2d at 15. Because of the unusual geometric design of the building, the foreman decided that safer methods were “too cumbersome and time consuming.” *Id.* Later, the foreman learned that the plaintiff had been locking arms with his colleague in order to keep balance; the foreman instructed them to stop. *Id.* Believing that they would be fired if they did not comply, the plaintiff and his colleague began washing the windows separately. *Id.* at 158, 461 S.E.2d at 15. Shortly thereafter, the plaintiff lost his footing, fell, and suffered a serious and permanent injury. *Id.* at 158, 461

ESTATE OF GARY VAUGHN v. PIKE ELECTRIC, LLC

[230 N.C. App. 485 (2013)]

S.E.2d at 15 16. The plaintiff brought suit, and the company successfully moved to dismiss under Rule 12(b)(6). *Id.* at 154, 461 S.E.2d at 14.

The plaintiff appealed, and we reversed the trial court's dismissal pursuant to the plaintiff's allegations that the company "was aware that the required safe methods for cleaning highly elevated windows were not being practiced, and that [the company's] management accepted and encouraged [that] fact."⁵ *Id.* at 159, 461 S.E.2d at 16–17. In so holding, we noted that the window washing company had been aware of the foreman's "past record of ignoring safety requirements." *Id.*

Plaintiff argues that the facts alleged in this case are "far more egregious and substantially certain to cause serious injury or death than those present in *Arroyo*" and, thus, warrant application of the *Woodson* exception. We disagree.

To the extent that the facts in *Arroyo* are similar to those in this case,⁶ they must be considered in light of subsequent opinions by our Supreme Court. Approximately eight years after *Arroyo*, in *Whitaker v. Town of Scotland Neck, C.T.*, 357 N.C. 552, 597 S.E.2d 665 (2003), the Court again addressed the *Woodson* exception. In that case, the decedent was employed by a North Carolina municipality to assist in the operation of a garbage truck. *Id.* at 553, 597 S.E.2d at 666. While the decedent was hoisting a dumpster, the truck's latching mechanism gave way, allowing the dumpster to swing toward the decedent and pin him against the truck. *Id.* at 553–54, 597 S.E.2d at 666. The decedent ultimately died from his injuries. *Id.* at 554, 597 S.E.2d at 666. Investigators later determined that the truck's latching mechanism had been broken for a number of months, and that the defect had been reported to the decedent's supervisor. *Id.* The Department of Labor also concluded that the accident had resulted from employment conditions not in compliance with OSHA safety standards. *Id.*

The decedent's estate filed suit, and the trial court granted the municipality's motion for summary judgment. *Id.* at 554–56, 597 S.E.2d at 666–67. The Court of Appeals reversed the trial court under a multi-factor

5. Among other things, the plaintiff alleged that the company was aware that permitting or requiring a window washer to work from a great height without a safety line or net was a violation of OSHA rules and safety guidelines and substantially certain to cause serious injury or death. *Id.* at 156, 461 S.E.2d at 14. The plaintiff also alleged that the company nonetheless required such activities on a regular basis, citing previous fines and citations by the Department of Labor for the same. *Id.*

6. We do not suggest that they are.

ESTATE OF GARY VAUGHN v. PIKE ELECTRIC, LLC

[230 N.C. App. 485 (2013)]

test, and the Supreme Court reversed that decision in turn, upholding the trial court's original grant of summary judgment. *Id.* In so holding, the Supreme Court noted that “*Woodson* . . . represents a narrow holding in a fact-specific case . . . [; the] exception applies only in the most egregious cases of employer misconduct. Such circumstances exist where there is uncontroverted evidence of the employer's intentional misconduct” *Id.* at 557, 597 S.E.2d at 668. Distinguishing *Woodson* from *Whitaker*, the Court pointed out that, in *Woodson*, the company president

was on the job site and observed first-hand the obvious hazards of the deep trench in which he directed the decedent-employee to work. Knowing that safety regulations and common trade practice mandated the use of precautionary shoring, the . . . president nonetheless disregarded all safety measures and intentionally placed his employee into a hazardous situation in which experts concluded that only one outcome was substantially certain to follow: an injurious, if not fatal, cave-in of the trench.

Id. at 557–58, 597 S.E.2d. at 668. The Court also noted that: (1) there was no record showing the municipality had been cited for multiple, significant violations of safety regulations in the past; (2) the municipality's supervisors were not on site at the time of the accident; and (3) there was no evidence that the municipality recognized the immediate hazards of its operation and consciously chose to forgo critical safety precautions, as in *Woodson*. *Id.* at 558, 597 S.E.2d at 668–69. Further, the Court pointed out that the decedent was not expressly instructed to proceed in an obviously hazardous situation and there was no evidence that the defendants knew the latching mechanism was substantially certain to fail or that failure would cause serious injury. *Id.*⁷

In this case, the facts articulated by Plaintiff against Pike Electric present a close question of law and fact. Nevertheless, we conclude that they align more closely with those in *Whitaker* than with those in *Woodson* and *Arroyo*. As in *Whitaker*, there is no evidence that Pike Electric had any knowledge of Penland's decision to instruct Decedent to climb the utility pole. Plaintiff has not alleged that the Pike Electric management was present at the site and had the opportunity to observe its hazards, as in *Woodson*, or that Decedent's supervisor had a prior history of ignoring safety requirements, as in *Arroyo*. Further, Plaintiff

7. Pike Electric alleges in its brief, and we have found nothing to contradict this, that no reported case has allowed a plaintiff to proceed to trial under *Woodson* since the Court's decision in *Whitaker*.

ESTATE OF GARY VAUGHN v. PIKE ELECTRIC, LLC

[230 N.C. App. 485 (2013)]

has not included any direct allegations that the Pike Electric management accepted and encouraged the particular risk imposed on Decedent by Penland or that it was even aware of that risk.⁸ Indeed, as Plaintiff points out in her complaint, Penland gave the instruction to Decedent to climb the utility pole *in clear violation of Pike Electric's own work methods and safety manuals*. This suggests that the Pike Electric company, unlike Penland, did not intend for any of its groundmen, including Decedent, to climb utility poles and de-energize transformers.

Plaintiff's allegations against Pike Electric are essentially limited to conclusory statements, asserting (1) that "Defendants knew[] or should have known" that Penland's behavior was common practice, or (2) that "Pike [Electric] . . . was aware . . . employees such as . . . Decedent were being placed in[] hazardous situations that were substantially certain to cause serious injury or death." Plaintiff offers no reason that Pike Electric should have known or was already aware of Penland's actions beyond allegations that Pike Electric had been cited for factually unspecific safety violations occurring in North Carolina and other states. Those violations occurred as many as eight years before Decedent died, and Plaintiff does not provide a factual lens in her complaint through which they can be understood. As such, Plaintiff's conclusory allegation regarding Pike Electric's intention is unwarranted.

Simply put, Plaintiff offers no basis to believe that Pike Electric was aware of, intended, or was substantially certain that Penland's actions on that day would result in Decedent's death. Therefore, given the "narrow" application of the *Woodson* exception under *Whitaker*, we hold that Plaintiff failed to allege "uncontroverted evidence of [Pike Electric's] intentional misconduct." *See id.* at 557, 597 S.E.2d at 668. Plaintiff's deductions of fact and inferential allegations do not allege egregious employer misconduct on the part of Pike Electric and, for that reason, her argument is overruled. *See id.* Accordingly, we reverse the trial court's denial of Pike Electric's motions to dismiss under Rules 12(b)(1) and 12(b)(6).

8. As discussed, *infra*, Plaintiff only asserts that Defendants knew or should have known that "groundmen and other untrained and inexperienced employees were being instructed to perform the inherently dangerous activities reserved for trained linemen." Support for this assertion is offered in the form of allegations that Pike Electric was cited for safety violations in the past, but not by any allegations that Pike Electric, specifically, was aware of the dangers in this case and intentionally disregarded them, as in *Woodson*. This proffered support, *without more*, is not sufficient to raise an inference that Pike Electric knew or should have known about Penland's specific instruction to Decedent. *See Strickland*, 194 N.C. App. at 20, 669 S.E.2d at 73.

ESTATE OF GARY VAUGHN v. PIKE ELECTRIC, LLC

[230 N.C. App. 485 (2013)]

B. The Pleasant Co-Employee Exception

[3] As noted *supra*, a worker may also bring suit against his *co-employee* at common law when the co-employee injured the worker by willful, wanton, and reckless negligence. *Pleasant*, 312 N.C. at 714, 325 S.E.2d at 247. Under *Pleasant*, “willful, reckless, and wanton negligence inhabits a twilight zone which exists somewhere between ordinary negligence and intentional injury.” *Id.* Willful negligence, despite the apparent contradiction in terms, is defined as “the intentional failure to carry out some duty imposed by law or contract which is necessary to the safety of the person or property to which it is owed.” *Id.* at 714, 325 S.E.2d at 248. Wanton conduct is defined “as an act manifesting a reckless disregard for the rights and safety of others.” *Id.* This does not require an actual intent to injure, but can be shown constructively when the co-employee’s “conduct threatens the safety of others and is so reckless or manifestly indifferent to the consequences that a finding of willfulness and wantonness equivalent in spirit to actual intent is justified.” *Id.* at 715, 325 S.E.2d at 248. Therefore, willful, wanton, and reckless negligence is present when a co-employee intentionally fails to carry out some duty with manifest indifference to the consequences resulting from that failure.

In *Pleasant*, a co-employee attempted to drive his truck as close to the plaintiff as possible without actually striking him. *Id.* at 711, 325 S.E.2d at 246. Though the co-employee merely intended to frighten the plaintiff, the co-employee miscalculated and struck him, seriously injuring the plaintiff’s knee. *Id.* “At the close of the plaintiff’s evidence[,] the [co-employee] moved for and was granted a directed verdict.” *Id.* On review, our Supreme Court held that the co-employee’s behavior constituted willful, wanton, and reckless negligence. *Id.* at 718, 325 S.E.2d at 250. Therefore, the Supreme Court reasoned, the plaintiff’s case could proceed at common law. *Id.*

Eight years later, in *Pendergrass v. Card Care, Inc.*, 333 N.C. 233, 236, 424 S.E.2d 391, 393 (1993), our Supreme Court again evaluated the applicability of the exclusivity provision as against a co-employee. In that case, the plaintiff’s arm was seriously injured when it was caught in a “final inspection machine[,] which [the plaintiff] was operating as an employee” *Id.* The plaintiff alleged in his complaint that his co-employees were grossly and wantonly negligent for “directing [him] to work at [a] final inspection machine when they knew that certain dangerous parts of the machine were unguarded, in violation of OSHA regulations and industry standards.” *Id.* at 238, 424 S.E.2d at 394. The trial court allowed the defendant co-employees’ motion to dismiss under

ESTATE OF GARY VAUGHN v. PIKE ELECTRIC, LLC

[230 N.C. App. 485 (2013)]

Rule 12(b)(6) and the exclusivity provision, and the plaintiff appealed. *Id.* at 236–37, 424 S.E.2d at 393.

In declining to apply *Pleasant*, our Supreme Court offered the following rationale:

Although [the co-employees] may have known certain dangerous parts of the machine were unguarded when they instructed [the plaintiff] to work at the machine, we do not believe this supports an inference that they intended that [the plaintiff] be injured or that [the co-employees] were manifestly indifferent to the consequences of his doing so.

Id. at 238, 424 S.E.2d at 394. Given that reasoning, Penland asserts that this Court “need look no further than *Pendergrass* to determine that [his] Rule 12(b)(6) [m]otion to [d]ismiss should have been granted by the trial court.” Despite that invitation, we broaden our review to include our Supreme Court’s most recent opinion on this issue. *Trivette II*, 366 N.C. at 303, 735 S.E.2d at 306.

In *Trivette II*, the plaintiff was sprayed “about her head and upper body” with a fire extinguisher that had been jokingly placed on her desk by her supervisor, who knew she had a medical condition. *Id.* at 305, 312, 735 S.E.2d at 308, 312. When the plaintiff asked her supervisor to remove the fire extinguisher, he scoffed at her requests and assured her that it would not discharge. *Id.* at 312, 735 S.E.2d at 312. The extinguisher went off despite the supervisor’s assurances and covered the plaintiff with a fine, white, powdery mist. *Id.* The plaintiff alleged that this resulted in a relapse and aggravation of her pre-existing medical condition, and she brought suit in superior court. *Id.* at 305, 735 S.E.2d at 306. The supervisor moved for summary judgment and dismissal under Rule 12(b)(1). *Id.* The trial court denied both motions, and the supervisor appealed. *Id.*

In resolving that case, the Supreme Court first determined that this Court correctly upheld the trial court’s denial of the supervisor’s motion to dismiss under Rule 12(b)(1), but declined to discuss the matter at any length.⁹ *Id.* at 310, 735 S.E.2d at 311. Next, the Court rejected our decision affirming the trial court’s denial of the defendant’s motion for summary judgment on grounds that the supervisor could not have been aware of the consequences of his conduct, pointing out that

9. This Court similarly offered little discussion, simply noting that the plaintiff had alleged that the “[supervisor’s] conduct was willful, wanton, and recklessly negligent . . .” *Trivette I*, __ N.C. App. at __, 720 S.E.2d at 737.

ESTATE OF GARY VAUGHN v. PIKE ELECTRIC, LLC

[230 N.C. App. 485 (2013)]

even unquestionably negligent behavior rarely meets the high standard of “willful, wanton, and reckless” negligence established in *Pleasant*. . . . [T]he risk that the discharge of a fire extinguisher might cause a relapse of a neuromuscular disease is less apparent. Despite the assertion . . . that [the] defendant created a hazardous environment and the fire extinguisher was “unsafe equipment,” no evidence indicates that the extinguisher or its effluvia presented any danger, either immediate or latent, and the record is silent as to whether the extinguisher bore any warning labels. Even if we assume that [the] defendant knew that an unexpected discharge would be messy and unpleasant, we do not believe the evidence before us . . . supports an inference that [the] defendant was willfully, wantonly, and recklessly negligent, or that he was manifestly indifferent to the consequences of an accidental outburst.

Id. at 312–13, 735 S.E.2d at 312–13.

Given this legal landscape, Penland argues that the *Pleasant* exception is not applicable because the facts in that case “were considerably more egregious than those alleged [here]” and because the facts in this case are “no more egregious” than those alleged in *Pendergrass*. Arguing that *Pendergrass* and *Trivette* have “limited the circumstances in which an injured employee . . . may sue a co-worker [under *Pleasant*],” Penland contends that Plaintiff’s allegations are insufficient because they mainly center on his simple instruction that Decedent climb a potentially dangerous power pole. Therefore, Penland concludes, Plaintiff’s complaint does not support an inference that Penland either intended Decedent to be injured or was manifestly indifferent to the consequences of doing so. We are not persuaded.

In her complaint, Plaintiff included the following allegations against Penland: “In asking, directing, instructing[,] and requesting that . . . Decedent utilize a ‘shotgun stick’ to de-energize the transformer to be retrofitted[,] while knowing that Decedent had not been trained to do so, . . . Penland demonstrated willful negligence, wanton negligence, reckless negligence, a reckless disregard for the rights and safety of others, and a manifest indifference to the safety of others, including . . . Decedent.” We find that this behavior is not less egregious than that of the co-employee in *Pleasant*, who intentionally aimed his vehicle at the plaintiff despite the obvious risk of personal injury or death. In addition, for purposes of Rule 12(b)(1), we similarly find that this behavior is at least as “egregious” as, if not more than, the supervisor’s decision to

ESTATE OF GARY VAUGHN v. PIKE ELECTRIC, LLC

[230 N.C. App. 485 (2013)]

place a fire extinguisher on his subordinate's desk in *Trivette II* and the co-employees' instruction to the plaintiff in *Pendergrass* to work at the final inspection machine.

Unlike the co-employees in *Pendergrass*, who may have known about certain dangerous elements of the final inspection machine, Plaintiff alleges that Defendant Penland knowingly directed Decedent, an untrained groundman who had previously worked as a truck driver, to climb a power pole and work on highly dangerous and "near energized" power lines, without the necessary training, equipment, or experience. Though it cannot be inferred from these allegations that Penland *intentionally injured* Decedent by requiring him to de-energize the transformer, we hold that his alleged direction to send Decedent up that utility pole despite Decedent's severe lack of training and expertise is sufficient to create an inference that Penland was manifestly indifferent to the consequences of his actions under either Rule 12(b)(1) or Rule 12(b)(6). *See Regan v. Amerimark Bldg. Prods., Inc.*, 118 N.C. App. 328, 332, 454 S.E.2d 849, 852 (1995) (holding that the trial court erred in allowing the supervisor's motion to dismiss under Rule 12(b)(6) when the plaintiff's hand was caught and pulled into a paint machine allegedly because the defendants had failed to provide proper guarding on the machine, failed to maintain the emergency switch at the plaintiff's station, assigned the plaintiff to work at the station despite knowing that the emergency switches were not functioning, and knew it was substantially certain that the plaintiff would assume the switches were functional and be seriously injured or killed); *see also Woodson*, 329 N.C. at 342, 407 S.E.2d at 229 ("[C]ivil actions against employers [are] grounded on more aggravated conduct than actions against co-employees.").

Because our Supreme Court has instructed that an employee may exhibit willful, wanton, and reckless negligence *either* when he intentionally injures a coworker or when he does so with manifest disregard to the consequences of his actions, *see, e.g., Pendergrass*, 333 N.C. at 238, 424 S.E.2d at 394, we affirm the trial court's denial of Penland's motion to dismiss under Rules 12(b)(1) and 12(b)(6).

REVERSED in part; AFFIRMED in part.

Judges CALABRIA and ELMORE concur.

FRAZIER v. CAROLINA COASTAL RY, INC.

[230 N.C. App. 504 (2013)]

NATHALIE FRAZIER, PLAINTIFF

v.

CAROLINA COASTAL RAILWAY, INC., (“CLNA”) AND THE TOWN OF KNIGHTDALE,
ALL JOINTLY AND SEVERALLY, DEFENDANTS

No. COA13-426

Filed 19 November 2013

Negligence—contributory negligence—vehicle collision with train—summary judgment appropriate

The trial court did not err by granting defendant’s motion for summary judgment in a negligence case resulting from a collision between plaintiff’s vehicle and a train. The undisputed evidence established that plaintiff was contributorily negligent as a matter of law in driving across a railroad crossing.

Appeal by plaintiff from order entered 22 June 2012 by Judge Robert H. Hobgood in Wake County Superior Court. Heard in the Court of Appeals 9 October 2013.

The Law Firm of Elesha M. Smith, PLLC, by Elesha M. Smith and Renorda E. Pryor, for plaintiff-appellant.

Millberg Gordon Stewart PLLC, by William W. Stewart, Jr., and B. Tyler Brooks, for defendant-appellee.

BRYANT, Judge.

Where the undisputed evidence establishes that plaintiff was contributorily negligent as a matter of law in driving across a railroad crossing, the trial court’s grant of summary judgment for defendant is appropriate.

On 16 January 2009, plaintiff Nathalie Frazier drove her northbound vehicle onto the railroad track intersecting Fayetteville Street in Knightdale (“the crossing”) and was struck by a westbound train operated by Carolina Coastal Railway, Inc. (“CLNA”). The collision occurred at 12:28 p.m., under clear weather conditions. The railroad crossing featured warning signs, including railroad crossbuck signs, an advance railroad warning disk, railroad crossing pavement warnings, and a stop line for northbound vehicles approaching the crossing.

FRAZIER v. CAROLINA COASTAL RY., INC.

[230 N.C. App. 504 (2013)]

On 17 November 2010, plaintiff filed a complaint alleging negligence against defendants Norfolk Southern Corporation (a.k.a. Norfolk Southern Railway Company, a.k.a. Carolina and Northwestern Railway Co. (“Norfolk Southern”)), Main Line Rail Management, Inc., CLNA, and the Town of Knightdale for damages for personal injuries resulting from the collision and for punitive damages. Plaintiff filed a separate but related action against the North Carolina Department of Transportation (“NCDOT”) on 2 November 2009 and was deposed by NCDOT on 28 April 2011.¹ On 2 February 2011, plaintiff voluntarily dismissed her claims against Norfolk Southern and Main Line Rail Management, Inc. On 23 April 2012, CLNA filed a motion for summary judgment pursuant to N.C.R. Civ. P. 56. On 11 June 2012, the trial court held a hearing on CLNA’s motion for summary judgment; on 22 June, CLNA’s motion was granted. On 28 June 2012, plaintiff gave notice of voluntary dismissal with prejudice to claims against the Town of Knightdale.

Plaintiff appeals.²

On appeal, plaintiff argues that the trial court erred in granting CLNA’s motion for summary judgment. We disagree.

When a motion for summary judgment is brought, “[t]he question before the trial court . . . is whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that a party is entitled to judgment as a matter of law.” N.C.R. Civ. P. 56 (2011); *Parchment v. Garner*, 135 N.C. App. 312, 315, 520 S.E.2d 100, 102 (1999) (citation and internal quotation omitted). As “[o]ur courts have encountered considerable difficulty in enunciating bright-line rules to govern liability in train-automobile grade crossing accidents[,] . . . each case is evaluated on its own facts.” *Parchment*, 135 N.C. App. at 315, 520 S.E.2d at 102. We review a trial court’s grant of a motion for summary judgment *de novo*. See *Falk Integrated Tech., Inc. v. Stack*, 132 N.C. App. 807, 809, 513 S.E.2d 572, 574 (1999).

1. Plaintiff’s deposition transcript from her complaint against NCDOT, *Nathalie Frazier v. N.C. Dep’t of Transp. et al.*, N.C. Industrial Comm’n, I.C. File No. TA-21489, 28 April 2011, was among the transcripts included by defendant CLNA in the instant matter. At the time of plaintiff’s appeal to this Court, her separate action against NCDOT was still pending.

2. As plaintiff’s notice of appeal from the trial court’s granting of defendant CLNA’s motion for summary judgment was filed 24 August 2012, after she dismissed with prejudice her claims against the Town of Knightdale on 28 June 2012, plaintiff’s appeal is from a final judgment as to all parties and is therefore not interlocutory.

FRAZIER v. CAROLINA COASTAL RY., INC.

[230 N.C. App. 504 (2013)]

Plaintiff contends that the trial court erred in granting defendant's motion for summary judgment because the evidence presented at the hearing demonstrated genuine issues of material fact as to whether she was contributorily negligent. "[P]roximate cause is ordinarily a question of fact for the jury, to be solved by the exercise of good common sense in the consideration of the evidence of each particular case." *Williams v. Carolina Power & Light*, 296 N.C. 400, 403, 250 S.E.2d 255, 258 (1979) (citations omitted). However,

[a]lthough summary judgment is seldom fitting in cases involving questions of negligence and contributory negligence, summary judgment will be awarded to a defendant if the evidence is uncontroverted that [the plaintiff] failed to use ordinary care and that want of ordinary care was at least one of the proximate causes of injury.

Parchment, 135 N.C. App. at 315, 520 S.E.2d at 102 (citation and internal quotation omitted).

Here, conflicting evidence was presented by both parties as to whether CLNA's train sounded its horn as it came towards the crossing, how much of plaintiff's vehicle was on the crossing at the time of the collision, and the scope of a motorist's visibility at the crossing. Plaintiff cites *Mansfield v. Anderson*, 299 N.C. 662, 264 S.E.2d 51 (1980), in support of her argument that a motion for summary judgment cannot be granted in the face of such conflicting evidence.

In *Mansfield*, our Supreme Court reversed the trial court's granting of the defendant's motion for summary judgment on grounds that the plaintiff was contributorily negligent. The plaintiff's truck was struck by the defendant's train after the plaintiff had started to cross the tracks; the plaintiff testified that although he stopped his truck and looked to see whether a train was coming, his view of the tracks was so obstructed that he could not see an oncoming train until he was within a few feet of the tracks. Our Supreme Court, in reviewing prior cases involving collisions between vehicles and trains and motions for summary judgment claiming contributory negligence, held that

[t]he train has the right of way at a public crossing, but it is the duty of the engineer to sound the customary warnings of the train's approach. A traveler on the highway has the right to expect timely warning, but *the engineer's failure to give such warning will not justify an assumption that no train is approaching*. Before going upon the track, and at a point where lookout will be effective, 'a traveler must

FRAZIER v. CAROLINA COASTAL RY., INC.

[230 N.C. App. 504 (2013)]

look and listen in both directions for approaching trains, *if not prevented from doing so by the fault of the railroad company.*' He has the right to place some reliance upon an automatic crossing signal, especially if his view is obstructed. But the fact that an automatic warning signal is not working does not relieve the traveler of the duty to look and listen for approaching trains when, *from a safe position*, such looking and listening will suffice to warn him of danger. *'Where there are obstructions to the view and the traveler is exposed to sudden peril, without fault on his part, and must make a quick decision, contributory negligence is for the jury.'*

Id. at 670, 264 S.E.2d at 56 (citing *Johnson v. R.R.*, 255 N.C. at 388-89, 121 S.E. 2d at 581—82 (emphasis added)); *see also Ramey v. Southern Ry. Co.*, 262 N.C. 230, 136 S.E.2d 638 (1964) (holding that plaintiff was guilty of contributory negligence where the railway crossing was well known to plaintiff, the view of the tracks was unobstructed, and plaintiff failed to look for oncoming trains before crossing the tracks); *Jenkins v. Atlantic Coast Line R.R. Co.*, 258 N.C. 58, 127 S.E.2d 778 (1962) (plaintiff was contributorily negligent in relying solely on the absence of an oncoming train's whistle rather than stopping his truck and looking for oncoming trains); *Arvin v. McClintock*, 253 N.C. 679, 118 S.E.2d 129 (1961) (holding that failure of the train operator to sound a warning whistle does not alleviate a motorist's need to stop, look and listen for oncoming trains prior to crossing a railway, even though the crossing may be familiar to the motorist).

Here, plaintiff acknowledged that she had an unobstructed view of westbound approaching trains from the intersection of Railroad Street and Fayetteville Street, from the white stop line on Fayetteville Street by the crossing, and from where her vehicle sat on the crossing. An accident report prepared shortly after the collision indicated that from the white stop line on Fayetteville Street by the crossing looking towards the westbound tracks, a motorist could see without obstruction for 462 feet. Plaintiff also admitted that as she drove her car onto the crossing, she failed to stop at the white stop line clearly marked for northbound motorists, nor did she look in either direction for oncoming trains. Moreover, plaintiff testified that she stopped her vehicle on the railroad tracks for "twenty to thirty seconds" without looking in either direction for an oncoming train. Testimony from two eyewitnesses for defendant indicated that plaintiff's vehicle remained on the tracks for as long as a minute before it was struck. In addition, plaintiff admitted that

FRAZIER v. CAROLINA COASTAL RY., INC.

[230 N.C. App. 504 (2013)]

there was sufficient space for her vehicle to finish crossing the tracks to reach the intersection of Fayetteville Street and First Avenue safely. Plaintiff further stated that she had driven over the crossing “hundreds of times” and knew, from hearing train whistles at night, that trains used these tracks. As such, unlike the plaintiff in *Mansfield* who stopped and looked for approaching trains, had an obstructed view of the tracks, and when he saw an approaching train was faced with the emergency situation of attempting to drive off of the tracks after he began to cross, here, plaintiff faced none of these issues.

Plaintiff also places emphasis on the crossing being unusually dangerous as proof that the trial court erred in granting defendant’s motion for summary judgment. We find this contention to be without merit, as

[a] railroad crossing is itself a notice of danger, and all persons approaching it are bound to exercise care and prudence, and when the conditions are such that a diligent use of the senses would have avoided the injury, a failure to use them constitutes contributory negligence and will be so declared by the Court. ‘In attempting to cross, the traveler must listen for signals, notice signs put up as warnings, and look attentively up and down the track, and a failure to do so is contributory negligence which will bar recovery. A multitude of decisions of all the courts enforce this reasonable rule.’ There are, of course, exceptions to this, as well as most other rules, but *when the traveler can see and won’t see he must bear the consequences of his own folly*. His negligence under such conditions bars recovery because it is the proximate cause of his injury. He has the last opportunity to avoid injury and fails to take advantage of it.

Arvin, 253 N.C. at 683, 118 S.E.2d at 131 (emphasis added) (citing *Coleman v. R.R.*, 153 N.C. 322, 69 S.E. 251 (1910)).

Here, the trial court made detailed findings of fact regarding defendant’s motion for summary judgment as to whether plaintiff was contributorily negligent:

From the Court’s review . . . the following is apparent and undisputed:

(1) By plaintiff’s own admission, on 16 January 2009, under clear weather conditions, after making a left turn onto Fayetteville Street from Railroad Street, plaintiff drove

FRAZIER v. CAROLINA COASTAL RY., INC.

[230 N.C. App. 504 (2013)]

her 2007 Honda CRV onto the Fayetteville Street crossing where she then came to a stop on the railroad track, waiting to turn right onto First Street. Plaintiff admits that she never looked to her left or right for an oncoming train at any time after either turning onto Fayetteville Street or coming to a stop on the track in her vehicle, where she remained for some time. Plaintiff, her expert [], and a UPS driver who witnessed the accident [] all testified that there was sufficient room on the other side of the railroad track to accommodate plaintiff's vehicle without obstructing either traffic on First Street or train traffic. Plaintiff's expert . . . measured the distance from First Street to the rail closest to First Street to be 32 feet. Plaintiff testified that she was familiar with the crossing and that she had used it "hundreds" of times before this incident.

(2) On her approach from Railroad Street to the Fayetteville Street crossing, plaintiff encountered an advance warning disk, standard cross buck signage, and pavement markings, including a white painted line for northbound motorists. From the vantage point of the painted line . . . a northbound motorist has an unobstructed view of approaching westbound trains for approximately 462 feet.

Under North Carolina law, when approaching and going over a railroad crossing, a motorist must look in both directions, from a point where such looking will be effective, and listen for approaching trains. The motorist's duty to look in both directions continues until the motorist is safely clear of the crossing. A failure to discharge this duty is contributory negligence. In this case, the undisputed evidence establishes that the view of approaching trains afforded at the crossing was well within the ranges held by North Carolina appellate courts to be sufficient, as a matter of law, for a motorist to look effectively for approaching trains. The undisputed evidence shows that once on Fayetteville Street plaintiff failed to look in both directions for approaching trains during her approach to the crossing, while driving onto the crossing, and while sitting on the track in her vehicle. Accordingly, the undisputed evidence establishes plaintiff's contributory negligence as a matter of law.

FRAZIER v. CAROLINA COASTAL RY., INC.

[230 N.C. App. 504 (2013)]

. . .

Furthermore, no reasonable jury could find that the lack of active signalization (i.e., lights and gates) at the crossing constituted gross negligence. The long-standing common law in North Carolina holds that there can be no finding by a jury of negligence by a railroad for failing to install gates and lights at a railroad crossing unless the jury first finds that the crossing is “peculiarly and unusually hazardous” to the motorist using it. Under this common law, a “peculiarly and unusually hazardous” crossing is one which, in light of the physical conditions present at the crossing at the time of the accident, a reasonably prudent motorist cannot travel over safely by using his or her vision and hearing to detect the presence of a train on the track. Such a crossing must be one which presents conditions at the time of the accident which are “so treacherous” that a reasonably prudent motorist cannot use it safely without the assistance of automated warnings. According to the undisputed evidence . . . there is no genuine issue of material fact in this case as to the available sight distance at this crossing from a safe place to look for approaching trains on the day of the accident. The undisputed evidence thus establishes that there was a safe point from which plaintiff could have looked for a train and traveled over this railroad crossing safely. Thus, as a matter of law, this Court concludes that this crossing was not “peculiarly and unusually hazardous.”

We agree with the trial court’s findings, as the evidence presented by both parties showed that, despite defendant’s train’s failure to sound its whistle, there were no genuine issues of material fact as to plaintiff’s failure to exercise ordinary care in approaching and traversing the crossing, and that failure to exercise ordinary care was a proximate cause of plaintiff’s injury. *See Parchment*, 135 N.C. App. at 316—18, 520 S.E.2d at 103—04. Accordingly, as the evidence presented to the trial court showed plaintiff to be contributorily negligent as a matter of law, the trial court did not err in granting defendant’s motion for summary judgment.

Affirmed.

Judges HUNTER, Robert C., and STEELMAN concur.

IN RE G.C.

[230 N.C. App. 511 (2013)]

IN THE MATTER OF G.C.

No. COA13-152

Filed 19 November 2013

1. Appeal and Error—juvenile adjudication—right of appeal—standard of review

Under N.C.G.S. § 7B-2602, a juvenile may appeal a final district court order. Here, the juvenile argued that the trial court failed to follow a statutory mandate, which is a question of law to be reviewed *de novo*.

2. Appeal and Error—issue not timely raised—writ of certiorari

The Court of Appeals exercised its discretion to allow review of the question of whether the trial court provided a factual basis for denying a juvenile's release pending appeal. The issue was not timely raised and the juvenile would lose the ability to appeal if the writ of *certiorari* was not granted.

3. Juveniles—adjudication—release pending appeal denied—written reasons not provided

An order denying a juvenile's release pending appeal was vacated and remanded where the trial court did not provide a written statement of compelling reasons for the denial, as required by N.C.G.S. § 7B-2605.

4. Juveniles—disposition—written findings

The trial court did not err in a juvenile proceeding by making a Level III disposition without the required written findings. The trial judge's later written order provided an ample factual basis for the dispositional decision that restated the findings made after the hearings and addressed the factors laid out in N.C.G.S. § 7B-2501(c).

5. Juveniles—adjudication—responsible for offense—delineation between hearings

There was no error in adjudicating a juvenile responsible for an offense and committing him to a Youth Development Center without first holding adjudicatory and dispositional hearings. Although the trial court did not clearly state that he was moving from the transfer hearing to the adjudicatory hearing, or from the adjudicatory hearing to the dispositional hearing, the juvenile's counsel was provided with several opportunities to present evidence and took advantage of those opportunities each time they arose.

IN RE G.C.

[230 N.C. App. 511 (2013)]

Appeal by Juvenile G.C. from a disposition and commitment order entered on 17 September 2012 by Judge John W. Dickson in Cumberland County District Court. Heard in the Court of Appeals 12 September 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Gerald K. Robbins, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Jon H. Hunt, for Juvenile-Appellant

HUNTER, JR., Robert N., Judge.

Appellant G.C. (“Henry”),¹ age thirteen, was adjudicated a delinquent on 17 September 2012. Henry appealed the adjudication order on 5 October 2012. Subsequently, Henry filed a petition for a writ of *certiorari* with this Court seeking review of a later 10 April 2013 order denying Henry release pending his initial appeal. After careful review, this Court affirms the decision of the trial court adjudicating Henry delinquent. We vacate the order denying Henry release pending appeal and remand this matter to the trial court for further proceedings.

I. Facts & Procedural History

On 26 January 2012, a Cumberland County Juvenile Court Counselor filed juvenile petitions regarding Henry. The petitions alleged Henry was delinquent as a result of committing two counts of first-degree sexual offense under N.C. Gen. Stat. § 14-27.4(a)(2) (2011) and two counts of indecent liberties between children under N.C. Gen. Stat. § 14-202.2 (2011). The petitions alleged that the offenses occurred between 1 January 2009 and 7 March 2010. Henry appeared in Cumberland County District Court for his first appearance on 2 February 2012. Counsel was assigned to Henry and an order was entered to conduct a probable cause hearing on 22 March 2012. On March 22nd, 23rd, and 29th, Cumberland County District Court Judge John W. Dickson held a probable cause hearing relating to the petitions. The testimony presented tended to show the following facts.

In 2010 Henry, then 13 years old, lived in Fayetteville with his mother (“Mary”), stepfather (“John”), older sister (“Anne”), and younger brother (“Gary”). M.S. (“Linda”), then 6 years old, lived across the street from Henry. Linda testified that she often visited Henry’s home to play

1. Pseudonyms are used to conceal the identities of the juveniles and their parents involved in this case.

IN RE G.C.

[230 N.C. App. 511 (2013)]

with Anne and Gary, that she was “best friends” with Gary, and that she considered Anne to be like an older sister. Linda stated that she sometimes played videogames with Henry and Gary in an upstairs bedroom or “bonus room” shared by the brothers.

Linda stated in court that she was touched sexually by Henry “multiple times,” specifically stating that Henry touched her “private parts” and that Henry touched her vagina with his hands and placed his penis on the exterior of her vagina. Linda testified that the sexual contacts between the two of them began when she was in first grade. Linda also did not tell anyone about Henry’s actions until “when I got sick and tired of it, I told his mother and I told his father.”

John testified that on 7 March 2010, he was talking with Linda about a “Japanese garden” Linda wanted in her family’s back yard. While they were talking, John testified that Linda began scratching her privates, that he asked her to stop, and that he told Linda touching her privates was inappropriate behavior. Linda continued the conversation, and John testified that Linda then said that Henry needed to cut his fingernails, because Henry scratched her private areas. John then asked his wife Mary to speak with Linda, and John told his wife Mary immediately about Linda’s statement. Mary took Linda aside to talk with her, and then Mary brought Linda home to Linda’s mother (“Gail”). Mary told Gail about Linda’s statements, and on 8 March 2010 Gail filed a report about these events with the Fayetteville Police Department.

Detective Steve Carr (“Detective Carr”), a member of the youth services unit of the Fayetteville Police Department, responded to the report shortly thereafter. Detective Carr arranged for a doctor’s examination and a clinical interview at the Child Advocacy Center. On 11 March 2010, Janette Rogers (“Ms. Rogers”), a forensic interviewer, interviewed Linda; she did so again on 29 March 2010. During the first interview, Linda told Ms. Rogers that Henry touched her privates, that he stuck his fingernails in her privates, and that the sexual contacts occurred “about twenty or thirty times.” Ms. Rogers also testified that typically a second interview doesn’t take place unless there are new allegations raised or the need for multiple sessions due to a large volume of information. Ms. Rogers testified that Detective Carr requested the second interview because new allegations may have arisen. During the second interview with Ms. Rogers, Linda stated that Henry’s penis touched her vagina.

Later, Linda was given a comprehensive medical examination by Dr. Howard Laughlin (“Dr. Laughlin”), a pediatrician at the Southern Regional Area Health Education Center in Fayetteville, at the request of

IN RE G.C.

[230 N.C. App. 511 (2013)]

Detective Carr. Dr. Laughlin testified that when he asked Linda if there was anything she was concerned about, she discussed Henry putting his hands in her pants and noted that it had happened over twelve times. Dr. Laughlin also said Linda stated “[t]hat all of the occasions had been essentially the same, with the exception of one time she told me about, after she’d gotten back from Minnesota, that [Henry] had laid on top of her and had kissed her on the mouth.” After discussing an anatomy diagram with Linda, Dr. Laughlin testified that Linda said she felt Henry’s penis touching her privates through her clothes. Dr. Laughlin also performed a physical exam on Linda, noting no anal or vaginal injuries to Linda. Dr. Laughlin stated that he believed Linda exhibited characteristics consistent with those of a sexually abused child. Based on his observations, Dr. Laughlin recommended that Linda see a counselor to help Linda resolve her issues and to help her “feel safe.” Dr. Laughlin also recommended that Mary not allow Linda to have any further contact with Henry.

Thereafter Linda began to see Judith Rose (“Ms. Rose”), a licensed clinical social worker and psychotherapist. Ms. Rose began treating Linda for post-traumatic stress disorder and possible sexual abuse. Ms. Rose treated Linda for over a year, and during treatment sessions, Linda identified Henry as a person who sexually abused her. Specifically, Ms. Rose testified that Linda told her about how “sharp his fingernails were, and that they scraped the inside of her vagina when they went inside of her, and that she felt that he needed his fingernails cut. Beyond that, we didn’t go into very specific details of the abuse[.]” Ms. Rose stated that she did not “go into details” with Linda because she knew the case would be heard in court and did not want “to be seen as influencing testimony or leading the patient in any way, so [she] mainly just focused on symptoms specifically, and how to deal with those.”

Henry did not testify during the proceedings. The record also does not show medical evidence of penetration. After hearing the evidence, the trial court entered a 16 April 2012 Juvenile Order finding probable cause to believe Henry had committed first degree sexual offense. Judge Dickson also issued a Juvenile Adjudication Order, adjudicating Henry delinquent for violating N.C. Gen. Stat. § 14-202.2 (2011), concerning indecent liberties between children.

On 17 September 2012, a transfer hearing was conducted pursuant to N.C. Gen. Stat. § 7B-2203 (2011) to determine whether the case should be removed to superior court. The district court denied the motion and retained jurisdiction in the case. Immediately upon the conclusion of the transfer hearing, the district court stated:

IN RE G.C.

[230 N.C. App. 511 (2013)]

[The] Court previously having heard evidence, found probable cause to believe these offenses were committed, further finds beyond a reasonable doubt that they were committed and that the juvenile was guilty of the charges and is a delinquent juvenile as defined by statute.

The court then immediately began its disposition proceeding:

The juvenile, having no prior delinquency points due to the nature of the offense, Level II or III may be imposed. Both charges are to be consolidated for one judgment. The Court finds that it is in the best interest of both the juvenile and people of this state that a Level III be imposed. He is ordered placed in the custody of the Youth Development Center for a period of not less than six months, nor greater than his 21st birthday. He is to receive all treatment recommended. Ms. Cottle's report is to accompany him to YDC so that YDC may follow the recommendations that she has made.

II. Jurisdiction & Standard of Review

There are three issues on appeal. First, Henry requests the issuance of a writ of *certiorari* for the purpose of attaining a determination concerning whether the trial court erred by declining to release Henry during the appellate process. Second, Henry argues the trial court erred by imposing a Level III disposition without making the necessary findings of fact to support that disposition. Third, Henry argues the trial court erred by adjudicating Henry responsible for the charges against him and sentencing Henry to a youth development center without first holding a separate adjudicatory and dispositional hearing.

While this appeal was pending, Henry filed a petition for writ of *certiorari* asking this Court to address an issue not presented in his brief. Rule 21(a)(1) of our Rules of Appellate Procedure provides that “[a] 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.”

[1] The two issues addressed in Henry's brief are reviewed *de novo*. Under N.C. Gen. Stat. § 7B-2602 (2011), a juvenile is entitled to appeal a final order of a district court. N.C. Gen. Stat. § 7B-2604 (2011) allows Henry or his parent to bring the appeal. Henry argues that the trial court failed to follow a statutory mandate; thus, Henry's right of appeal is

IN RE G.C.

[230 N.C. App. 511 (2013)]

preserved and the failure to follow a statutory mandate is a question of law. *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985).

“Conclusions of law are reviewed *de novo* and are subject to full review.” *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011); *see also Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004) (“Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal.”). “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) (citations and quotation marks omitted).

III. Analysis

A. Writ of Certiorari and Release Pending Appeal

[2] While this appeal was pending, Henry filed a petition for the issuance of a writ of *certiorari* requesting review of whether the trial court erred in denying Henry’s request for release pending appeal without providing any factual basis for that decision. Henry argues that the trial court did not provide a factual basis for denying his release. We agree.

Henry requests the issuance of the writ because the issue is not raised in his initial appeal, and, in the absence of the issuance of a writ, he would lose the ability to appeal because notice was not timely filed. Rule 21(a)(1) provides this Court with the authority to review the merits of an appeal via writ even when the appeal is filed in an untimely manner. *Anderson v. Hollifield*, 345 N.C. 480, 482, 480 S.E.2d 661, 663 (1997). Even though this issue was not timely raised, this Court exercises its discretion to review the issue under Rules 2 and 21 of the North Carolina Rules of Appellate Procedure. N.C. R. App. P. 2, 21.

[3] N.C. Gen. Stat § 7B-2605 (2011) requires the release of a juvenile pending appeal, unless written compelling reasons are provided by the trial court. Specifically, § 7B-2605 provides:

Pending disposition of an appeal, the release of the juvenile, with or without conditions, should issue in every case unless the court orders otherwise. For compelling reasons which must be stated in writing, the court may enter a temporary order affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile or the State.

IN RE G.C.

[230 N.C. App. 511 (2013)]

Typically, trial court orders denying release pending appeal contain a number of facts stating why a juvenile should not be released. *See, e.g., In re Lineberry*, 154 N.C. App. 246, 252–53, 572 S.E.2d 229, 234 (2002), *cert. denied*, 356 N.C. 672, 577 S.E.2d 624 (2003) (noting the trial court’s finding, for example, that the juvenile was not closely supervised by his parents). Here, compelling facts were not found.

On 16 April 2012, Judge Dickson found probable cause that Henry committed the first-degree sexual offense and filed a written adjudication order the same day. During and following Henry’s adjudication and disposition hearings, there were no findings of fact or conclusions of law stating explicitly why release pending appeal should be denied. On 5 October 2012, Henry gave written notice of appeal. On 8 October 2012, Judge Dickson executed the Appellate Entries form, which found Henry to be indigent and appointed the Appellate Defender to represent him. The Appellate Entries form executed by the trial court did not provide for Henry’s release or state compelling reasons why Henry’s release was denied; instead, where these items should have been listed on the form, “N/A” was written in the space provided.

On 10 April 2013, Henry appeared to address Judge Dickson’s Appellate Entries before Judge Edward Pone. Judge Pone denied release and ruled orally that he would not to hold a hearing on the matter, noting that Judge Dickson ordered that Henry be committed to a Youth Development Center. Judge Pone issued a 10 April 2013 order that found (1) Henry was committed to a Youth Development Center; (2) release of Henry was not appropriate; (3) the matter is being appealed; and (4) “On the Appellate Entries number 2 or 3 need to be amended, it reflects N/A beside both and neither box is checked.” Judge Pone also issued a revised Appellate Entries form, in which release pending appeal was denied and on which Judge Pone wrote “[s]ee order entered April 10, 2013 and filed April 30, 2013.”

In sum, when denying Henry’s release pending appeal, the trial court made four findings of fact without conducting a separate hearing to determine whether compelling reasons existed to deny release. The order’s findings of fact stated only that Henry was committed and that release was not appropriate. This is in contrast to *Lineberry*, in which the trial court held a hearing concerning the juvenile’s release and found:

5. Three sex offender evaluations, attached and incorporated herein by reference, were received and considered;
6. The juvenile has consistently expressed entrenched denial which diminishes his amenability to treatment;

IN RE G.C.

[230 N.C. App. 511 (2013)]

7. To date the juvenile has not participated in any sex offender therapy;

....

9. The felonious Second Degree Sex Offense and misdemeanor Indecent Liberties Between Minors was committed in an aggressive, premeditated manner;

10. The juvenile is frequently in the presence of other juveniles that have not been made aware of his adjudication for a sex offense;

11. The juvenile has not been consistently closely supervised by his parents or other adults that have been made aware of the risks for re-offending; and,

12. The juvenile is currently receiving sex offender specific treatment at the Swannanoa Valley Youth Development Center Juvenile Evaluation Center.

Based on these facts, the trial court concluded that “[c]ompelling reasons exist and it is in the best interest of the juvenile and the State that the juvenile remain in the custody of the Youth Development Center pending appeal.”

154 N.C. App. At 252, 572 S.E.2d at 234 (alterations in original). Rather, the facts in the present case more closely resemble those in *In re J.J.*, where this Court remanded the case to the trial court due to insufficient findings of fact setting out compelling reasons for denying release:

“In the present case, at the close of the 14 December 2010 hearing, counsel for the juvenile asked the court to grant release of the juvenile pending his appeal. The trial court denied release of the juvenile pending appeal in open court. *In the Appellate Entries*, the trial court denoted neither that the juvenile would be released pending appeal nor that the juvenile’s release is denied. Neither box is checked on the form. In addition, in the space provided on the Appellate Entries form for listing compelling reasons why release is denied, the trial court simply denoted “NA”. Rather, the trial court entered a secure custody order for the juvenile following the 14 December 2010 hearing. However, there are no written compelling reasons stating why the juvenile should not be released pending his appeal denoted on the trial court’s order for

IN RE G.C.

[230 N.C. App. 511 (2013)]

secure custody. The trial court only checked a box finding direct contempt by the juvenile as grounds for the order. We note there is no evidence in the record to support this finding. Accordingly, the trial court failed to state any compelling reasons in writing why the juvenile should not be released pending his appeal. Therefore, under section 7B-2605, the juvenile should have been released.

___ N.C. App. ___, ___, 717 S.E.2d 59, 66 (2011) (emphasis added). Ultimately, “passage of time may have rendered the issue of the juvenile’s custody pending appeal moot;” however under similar facts, this Court found the appropriate remedy was to “vacate the order denying the juvenile’s release pending appeal and remand the matter to the trial court for findings as to the compelling reasons for denying release.” *Id.* (citing *In re J.L.B.M.*, 176 N.C. App. 613, 628, 627 S.E.2d 239, 249 (2006)) (internal quotation marks and alterations omitted); *see also Lineberry*, 154 N.C. App. At 256, 572 S.E.2d at 236.

N.C. Gen. Stat. § 7B-2605 first requires written compelling reasons be provided when a trial court denies release pending appeal. Henry was not provided with such a written statement of the compelling reasons for the denial of his release. Therefore, we must vacate the order denying Henry’s release pending appeal and remand the matter to the trial court for findings setting out any compelling reasons for denying Henry’s release.

B. Findings of Fact Made by the Trial Court

[4] Henry next argues that the trial court erred by imposing a Level III disposition without making the required written findings of fact in its initial dispositional order. We disagree.

N.C. Gen. Stat. § 7B-2512 (2011) provides that in a juvenile proceeding, “[t]he dispositional order shall be in writing and shall contain appropriate findings of fact and conclusions of law.” When deciding the proper disposition for a juvenile, trial courts must develop the final disposition by considering five different factors:

- (1) [t]he seriousness of the offense;
- (2) [t]he need to hold the juvenile accountable;
- (3) [t]he importance of protecting the public safety;
- (4) [t]he degree of culpability indicated by the circumstances of the case; and

IN RE G.C.

[230 N.C. App. 511 (2013)]

(5) [t]he rehabilitative and treatment needs of the juvenile indicated by a risk and needs assessment.

N.C. Gen. Stat. §§ 7B-2501(c)(1)–(5) (2011).

Here, the trial court entered a written dispositional order on 17 September 2012, but initially did not make the findings of fact or conclusions of law required by § 7B-2512 or consider the factors listed in § 7B-2501. However, on 27 September 2012, Chief District Court Judge Elizabeth Keever filed a disposition and adjudication order pursuant to N.C. R. Civ. P. 63 that contained these findings. *Matter of Whisnant*, 71 N.C. App. 439, 441, 322 S.E.2d 434, 435 (1984) (analyzing the use of Rule 63 in a juvenile proceeding). Chief Judge Keever's order closely tracked the oral findings of fact made by Judge Dickson, and effectively reduced Judge Dickson's findings to writing. *See Matter of Bullabough*, 89 N.C. App. 171, 180, 365 S.E.2d 642, 647 (1988) (holding that a trial judge may make a written judgment that conforms to the oral findings pronounced in open court and that the order conformed generally to the oral pronouncement).

Henry argues that this completed disposition and adjudication order is not sufficient under *In re Ferrell*, 162 N.C. App. 175, 589 S.E.2d 894 (2004). In *Ferrell*, this Court remanded a dispositional order to the trial court because the dispositional order failed to contain appropriate findings of fact. *Id.* At 177, 589 S.E.2d at 895. However, in *Ferrell*, the trial court's findings of fact were deemed to be insufficient because they did not fully address the factors laid out in § 7B-2501, nor did the findings adequately support the trial court's decision. *Id.* The custody decision adopted in *Ferrell* rested "solely on the juvenile's school absences" rather than a consideration of all of the factors required by statute. *Id.* Further, Henry notes that the trial court in *Ferrell* made significant findings of fact in a later order denying the juvenile's motion to reconsider a custody transfer. *Id.* A second order that is not dispositional is not equivalent to Chief Judge Keever's revision of Judge Dickson's order. The trial judge's revision in *Ferrell* was instead a separate order which did not cure the dispositional order's non-compliance with the statute. *Id.* Henry also relies on *In re V.M.* to argue that this case lacked adequate factual findings. 211 N.C. App. 389, 712 S.E.2d 213 (2011). However, there were no findings of fact made by the trial court in *In re V.M.* or its subsequent revision of the deficient order, making the comparison inapposite. *Id.* At 392, 712 S.E.2d at 216.

Concerning the substance of the dispositional order, Chief Judge Keever's later order provided an ample factual basis for the dispositional

IN RE G.C.

[230 N.C. App. 511 (2013)]

decision that addressed the factors laid out in § 7B-2501(c). Subsections 1 and 4 of § 7B-2501(c) require findings addressing the seriousness of the offense and the culpability of the juvenile. Chief Judge Keever's 17 September 2012 order found, beyond a reasonable doubt, that "the offenses were committed in a premeditated and willful manner [and] [t]hat the sex offense [committed] [was] an extremely serious charge." This finding sufficiently satisfied those subsections.

Subsections (2) and (5) of § 7B-2501(c) address the need to hold the juvenile accountable and the treatment needs of the juvenile. Chief Judge Keever found that the juvenile continued to deny the allegations against him, and indicated that sex offender treatment would not benefit him. Chief Judge Keever additionally determined that the juvenile had symptoms of ADHD, indicating that a controlled environment was more appropriate. Thus, the order satisfied those subsections.

Subsection 3 of § 7B-2501(c) addresses the need for public safety. Chief Judge Keever's order found that Henry's family still lives next to Linda's family and that a relationship between both families still exists. Because of this close familial relationship, and the proximity of Linda to Henry, Chief Judge Keever concluded there was too great a danger in releasing the juvenile, satisfying the last remaining subsection.

Thus, unlike *Ferrell and V.M.*, the order in this case not only contains written findings of fact, but the additional findings of fact adequately addressed all of the § 7B-2501(c) statutory factors. In light of the above findings of fact and the fact that the findings were made via a written order that restated the findings made after the disposition and adjudicatory hearings, we affirm the lower court.

C. Adjudicatory and Disposition Hearing Procedure

[5] Henry next argues the trial court erred by adjudicating him responsible for an offense and committing him to a Youth Development Center without first holding an adjudicatory hearing and a dispositional hearing. We disagree.

Henry contends that during juvenile proceedings, the trial court must hold separate adjudicatory and dispositional hearings. While a trial court is required to hold both hearings for a juvenile proceeding, there is not a requirement that each hearing be separate and distinct. See *State v. Rush*, 13 N.C. App. 539, 546, 186 S.E.2d 595, 600 (1972) (finding that a court can consider the needs of a child immediately after an adjudicatory hearing); *J.J.*, ___ N.C. App. at ___, 717 S.E.2d at 62. In *J.J.*, this Court held that so long as the juvenile's constitutional and statutory

IN RE G.C.

[230 N.C. App. 511 (2013)]

rights are protected, a trial court may conduct the transfer hearing, the adjudicatory hearing, and dispositional hearing all “in one proceeding.” ___ N.C. App. at ___, 717 S.E.2d at 62.

Here, Henry’s constitutional or statutory rights were not negatively impacted by the trial court’s actions. Although the trial judge did not at any point clearly state he was moving from the transfer hearing to the adjudicatory hearing, or from the adjudicatory hearing to the dispositional hearing, the trial judge provided defense counsel with an ample opportunity to present additional evidence. Henry cites *In re Lail*, 55 N.C. App. 238, 284 S.E.2d 731 (1981), and *In re A.W.*, 209 N.C. App. 596, 706 S.E.2d 305 (2011) to argue for separate hearings, but both cases are distinguishable. In *Lail*, this Court remanded a juvenile’s case because the juvenile was not allowed to present evidence. 55 N.C. App. at 241, 284 S.E.2d at 733. In this case, Henry’s counsel was provided several opportunities to present evidence, and Henry’s counsel took advantage of these opportunities each time that they arose.

In re A.W. is also distinguishable. *A.W.* involved a juvenile who was not allowed to present a closing argument, and this Court remanded the case for a new trial. 209 N.C. App. at 602–03, 706 S.E.2d at 309–10. Here, at the end of the dispositional hearing, Judge Dickson asked Henry’s counsel whether she wished to present “further evidence on behalf of the juvenile,” providing opportunity for a closing argument. As sufficient opportunities to present his case were provided, Henry’s constitutional or statutory rights were not adversely impacted by the trial court’s approach. Thus, we find no error.

IV. Conclusion

For the foregoing reasons, we grant Henry’s writ of certiorari and remand to the trial court for findings of fact as to why Henry was not released from custody pending appeal. We affirm the trial court’s ruling regarding the remaining issues.

AFFIRMED IN PART, REMANDED IN PART.

Judges ERVIN and DAVIS concur.

IN RE J.P.

[230 N.C. App. 523 (2013)]

IN THE MATTER OF J.P. AND P.F.

NO. COA13-35-2

Filed 19 November 2013

1. Child Abuse, Dependency, and Neglect—notice—failure to object

Although respondents argued that the trial court erred in a child neglect proceeding by adopting a temporary and then a permanent plan for the children without the statutorily required notice, the alleged error was rendered harmless by respondents' failure to object at a disposition hearing which they attended with counsel.

2. Child Abuse, Dependency, and Neglect—cessation of reunification efforts—findings and conclusion

The trial court made sufficient findings before ceasing reunification efforts in a child neglect hearing and related the findings to a conclusion of law that specifically set forth the basis for ceasing reunification efforts.

3. Child Abuse, Dependency, and Neglect—visitation plan—time, place, conditions—not sufficiently set forth

The trial court failed in a child neglect proceeding to adopt a proper visitation plan where the plan provided in the disposition order did not sufficiently set forth the time, place, or conditions of respondent-father's visitation.

Appeal by respondents from orders entered 13 June 2012 and 11 October 2012 by Judge Charlie Brown in Rowan County District Court. Heard in the Court of Appeals 8 May 2013.

Assistant Appellate Defender Joyce L. Terres for respondent-appellant mother.

Ryan McKaig for respondent-appellant father.

Rowan County Department of Social Services, by Cynthia Dry, for petitioner-appellee.

Parker Poe Adams & Bernstein LLP, by Katie M. Iams, for guardian ad litem.

IN RE J.P.

[230 N.C. App. 523 (2013)]

HUNTER, Robert C., Judge.

Respondent-mother, M.F., appeals from the trial court's order adjudicating her minor child J.P. ("Jane") to be abused and neglected. Respondent-mother and respondent-father, J.F., (collectively "respondents") appeal from the trial court's order adjudicating their minor child P.F. ("Penny") to be neglected.¹ Respondents also appeal from the disposition order which ceased reunification efforts by DSS and adopted a permanent plan as to Penny and Jane.

On 9 August 2013, respondents filed a "Motion to Withdraw Opinion and Reconsider Case Pursuant to Rule 31," which we granted. After careful review on rehearing, we affirm the adjudication order. As to the disposition order, we affirm in part and reverse in part.

Background

The Rowan County Department of Social Services ("DSS") filed a juvenile petition on 20 February 2012 alleging that Penny was a neglected juvenile and that Jane was an abused and neglected juvenile. A non-secure custody order was entered relating to both children on the same day.

On 10 May 2012, respondents and Jane's father, J.P., signed a consent order acknowledging that Penny and Jane were neglected juveniles and that Jane was an abused juvenile based on clear, cogent, and convincing evidence. On the same day, the trial court entered an adjudication order which created a concurrent plan of reunification with respondent-mother and custody/or guardianship with a family member or court-approved caretaker as a temporary permanent plan for the children. The order also provided that a dispositional hearing was to be scheduled for August 2012.

At the dispositional hearing, the trial court considered the testimony of seven witnesses and the written recommendations of DSS and the children's guardian ad litem ("GAL"). The trial court concluded that efforts to reunite the children with respondents would be futile and inconsistent with the children's safety and their need for a permanent home within a reasonable period of time. In its order entered 11 October 2012, the trial court ruled that reunification efforts should cease and established a permanent plan of custody or guardianship for Penny and Jane with a

1. "Penny" and "Jane" are pseudonyms used to protect the identity of the minor children. Respondent-mother, M.F., and respondent-father, J.F., are the parents of the minor child Penny. Respondent-mother and J.P. are the parents of the minor child Jane; however, the father, J.P., is not a party to this appeal.

IN RE J.P.

[230 N.C. App. 523 (2013)]

relative or court-approved caretaker. Custody of the children remained with DSS, and the trial court ordered that a permanency planning review be calendared for December 2012. Respondents filed notices of appeal from the trial court's orders. Acknowledging that their notices did not comply with the Rules of Appellate Procedure, respondents also filed petitions for writ of certiorari. Although we granted DSS's motions to dismiss respondents' appeals, we also granted respondents' petitions for writ of certiorari.

Discussion

[1] Respondents argue that the trial court erred by adopting a temporary permanent plan at the adjudication hearing and a permanent plan for Penny and Jane at the disposition hearing without giving respondents the statutorily required notice of its intent to create a permanent plan as required by N.C. Gen. Stat. § 7B-907(a). We disagree.

“We review a dispositional order only for abuse of discretion.” *In re B.W.*, 190 N.C. App. 328, 336, 665 S.E.2d 462, 467 (2008). “Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court.” *In re A.C.F.*, 176 N.C. App. 520, 522, 626 S.E.2d 729, 732 (2006) (citation and quotation marks omitted).

N.C. Gen. Stat. § 7B-507(c) (2011) provides, in pertinent part:

When the court determines that reunification efforts are not required or shall cease, the court shall order a plan for permanence as soon as possible, *after providing each party with a reasonable opportunity to prepare and present evidence*. If the court's determination to cease reunification efforts is made in a hearing that was *duly and timely noticed as a permanency planning hearing*, then the court may immediately proceed to consider all of the criteria contained in G.S. 7B-907(b), make findings of fact, and set forth the best plan of care to achieve a safe, permanent home within a reasonable period of time. If the court's decision to cease reunification efforts arises in any other hearing, the court shall schedule a subsequent hearing within 30 days to address the permanent plan in accordance with G.S. 7B-907.

(Emphasis added.) N.C. Gen. Stat. § 7B-907(a) further provides that when the trial court conducts a permanency plan hearing “[t]he clerk shall give 15 days’ notice of the hearing and its purpose to the parent . . . indicating the court’s impending review.”

IN RE J.P.

[230 N.C. App. 523 (2013)]

The adjudication order purports to adopt a “temporary permanent plan” of reunification of Penny and Jane with respondent-mother concurrent with custody or guardianship with a family member or other court-approved caretaker. Although respondents contend it was error for the trial court to enter the “temporary permanent plan” at adjudication without providing notice of its intent to do so, we conclude that respondents cannot demonstrate any prejudice resulting from this alleged error. *See In re H.T.*, 180 N.C. App. 611, 613-14, 637 S.E.2d 923, 925 (2006) (“[I]n general, technical errors and violations of the Juvenile Code will be found to be reversible error only upon a showing of prejudice by respondents.”). To the extent that the adjudication order did so without notice, the alleged error was rendered harmless by the trial court’s adoption of a permanent plan at disposition. As discussed below, respondents did not object to the creation of the permanent plan in the disposition order.

As to the disposition hearing, respondents contend they were provided no notice of the trial court’s intent to enter a permanent plan, which is required by section 7B-907(a). “This Court has previously held that ‘N.C. Gen. Stat. §§ 7B-507 and 907 do not permit the trial court to enter a permanent plan for a juvenile during disposition’ without the statutorily required notice for a permanency planning hearing.” *See In re S.C.R.*, __ N.C. App. __, __, 718 S.E.2d 709, 713 (2011) (quoting *In re D.C.*, 183 N.C. App. 344, 356, 644 S.E.2d 640, 646 (2007)). However, in *In re J.S.*, 165 N.C. App. 509, 514, 598 S.E.2d 658, 662 (2004), this Court held that a party waives its right to notice under section 7B-907(a) by attending the hearing in which the permanent plan is created, participating in the hearing, and failing to object to the lack of notice.² *See also In re C.W.*, __ N.C. App. __, 723 S.E.2d 582 (No. COA11-1325) (2012) (unpublished) (concluding that the respondent-mother waived her right to notice that a permanent plan would be created in a hearing scheduled only for adjudication and disposition where the mother and her counsel

2. On rehearing, respondents contend that the relevant portions of *In re J.S.* cited herein are merely dicta and thus may not be relied on in this decision. We disagree. In that case, the Court stated “[i]n light of our holding on respondents’ first two assignments of error, it is unnecessary to address respondents’ third assignment of error. *However, we do address respondents’ final assignment of error since it raises an issue as to the trial court’s jurisdiction.*” *In re J.S.*, 165 N.C. App. at 513, 598 S.E.2d at 661. As part of this final assignment of error, the Court reached the merits of the notice issue. *See id.* (“*By this same assignment of error, respondents contend they did not receive notice of the permanency planning hearing as required by N.C. Gen. Stat. § 7B-907(a)[.]*”) (emphasis added). The Court then decided the issue using the analysis we cite above. Therefore, because this analysis was determinative of the outcome of the case, it was not dicta, and we find it controlling. *Musi v. Town of Shallotte*, 200 N.C. App. 379, 383, 684 S.E.2d 892, 896 (2009) (“Under [the doctrine of stare decisis], [t]he determination of a point of law by a court will generally be followed by a court of the same or lower rank[.]”) (citation and quotation omitted).

IN RE J.P.

[230 N.C. App. 523 (2013)]

attended and participated in the hearing without objecting to the lack of notice required by N.C. Gen. Stat. § 7B-907(a)).

The transcript from the 6 September 2012 disposition hearing establishes that the trial court announced its finding that reunification would be inconsistent with Penny's and Jane's safety and announced its intent to enter a permanent plan without objection by respondents:

THE COURT: The [c]ourt . . . further bases [i]ts decision to issue a disposition with a permanent plan of custody to [sic] guardianship.

Further for the Department?

[Counsel for DSS]: No, your Honor. Thank you.

THE COURT: Further for the guardian?

[Counsel for GAL]: Thank you.

THE COURT: Further for Respondents?

[Counsel for respondents]: No, your Honor.

THE COURT: Thank you.

It is apparent that respondents and their counsel attended and participated in the disposition hearing in which the trial court announced its intention to enter a permanent plan, and they did not object to the trial court's failure to give the notice required by section 7B-907(a). In accordance with *In re J.S.*, we conclude that respondents waived any objection to the lack of notice of a hearing on a permanent plan, and their argument is overruled.

II. Findings of Fact

[2] Respondent-mother contends the trial court erred in ceasing reunification efforts without making findings that such efforts would be futile or would be inconsistent with the children's health, safety, and need for a safe, permanent home within a reasonable period of time. We disagree.

In a dispositional order, a trial court may direct

that reasonable efforts to eliminate the need for placement of the juvenile shall not be required or shall cease if the court makes written findings of fact that:

(1) Such efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and need

IN RE J.P.

[230 N.C. App. 523 (2013)]

for a safe, permanent home within a reasonable period of time[.]

N.C. Gen. Stat. § 7B-507(b)(1) (2011). “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).

Respondent-mother contends the trial court’s order does not make an ultimate finding relating to the two prongs of N.C. Gen. Stat. § 7B-507(b)(1), that: (1) attempted reunification efforts would be futile or (2) reunification would be inconsistent with the juvenile’s health, safety, and need for a safe, permanent home within a reasonable period of time. *In re I.R.C.*, __ N.C. App. __, __, 714 S.E.2d 495, 498 (2011), we reversed the trial court’s order ceasing reunification efforts because the trial court recited allegations against the respondent but did not “link” any of those allegations to the two prongs of section 7B-507(b)(1). We contrasted the order at issue in *In re I.R.C.* with orders upheld by this Court as meeting the statutory requirements upon the ground that “the trial court in those cases related the findings to a conclusion of law that specifically set forth the basis for ceasing reunification efforts under N.C. Gen. Stat. § 7B-507(b).” *Id.*

Here, the trial court’s order contains the following findings of fact:

60. . . . [Respondent-mother] continues to live with [respondent-father] even though she understands that [Jane] cannot be placed with her since [respondent-father] has a no contact order with [Jane], and [respondents] have not complied with the court’s order.

61. Based upon [respondent-father’s] guilty plea to Misdemeanor Child Abuse in district court, his violation or [sic] probation after having been serving probation only about ninety days, the changing intentions of reconciliation between [respondents], and the substantial risk to [Jane and Penny] if reunified with [respondents], a permanent plan of custody or guardianship represents the safest and most appropriate permanent plan for the juveniles.

...

65. It would be contrary to the best interests and welfare of the juveniles to be returned to the custody of

IN RE J.P.

[230 N.C. App. 523 (2013)]

[respondents] since the issue of child abuse has not yet been addressed by [respondents].

These findings are not challenged by respondents as lacking competent evidentiary support, and they are therefore binding on appeal. *In re L.A.B.*, 178 N.C. App. 295, 298, 631 S.E.2d 61, 64 (2006).³ These findings of fact support the trial court's ultimate conclusion: "Continuing a plan of reunification for the juveniles is futile *based on the findings at adjudication and those enumerated above* and is inconsistent with the juveniles' safety and their need for a permanent home within a reasonable period of time." (Emphasis added.) Thus, because the trial court "related the findings to a conclusion of law that specifically set forth the basis for ceasing reunification efforts under N.C. Gen. Stat. § 7B-507(b)[,]" *In re I.R.C.*, __ N.C. App. at __, 714 S.E.2d at 498, respondent-mother's argument is overruled.

III. Visitation Plan

[3] Respondent-father argues, and the GAL agrees, that the trial court failed to adopt a proper visitation plan in accordance with N.C. Gen. Stat. § 7B-905(c), as the plan provided in the disposition order does not sufficiently set forth the time, place, or conditions of respondent-father's visitation with Penny. We agree.

Pursuant to the Juvenile Code, "[a]ny dispositional order . . . under which the juvenile's placement is continued outside the home shall provide for appropriate visitation as may be in the best interests of the juvenile and consistent with the juvenile's health and safety." N.C. Gen. Stat. § 7B-905(c) (2009). "An appropriate visitation plan *must provide for a minimum outline of visitation, such as the time, place, and conditions under which visitation may be exercised.*" *In re E.C.*, 174 N.C. App. 517, 523, 621 S.E.2d 647, 652 (2005).

In re S.C.R., __ N.C. App. __, __, 718 S.E.2d 709, 713 (2011) (emphasis added).

In *In re T.B.*, 203 N.C. App. 497, 508-09, 692 S.E.2d 182, 189-90 (2010), we concluded that the provisions in the trial court's dispositional

3. We note that respondent-mother challenges the second finding contained in finding No. 65—that the trial court found that the Family Reunification Assessment yields a high risk of harm to the juveniles if they are returned to respondents' home. However, she does not challenge the first finding that the issue of child abuse has not been addressed by respondents.

IN RE J.P.

[230 N.C. App. 523 (2013)]

order regarding visitation were inadequate. The order provided that the mother's visitation with her children would be left to the discretion of the treatment team, that her visitation must be supervised, and that the visitations must adhere to the rules established by DSS. *Id.* We remanded the order to the trial court for the making of additional findings and conclusions regarding the time, place, and conditions under which visitation could be exercised. *Id.*; see also *In re W.V.*, 204 N.C. App. 290, 295, 693 S.E.2d 383, 387 (2010) (remanding for proceedings to clarify the respondent's visitation rights with her child where the trial court's order provided that the "respondent shall have weekly visitations supervised by [DSS]"); *In re I.S.*, 209 N.C. App. 470, 708 S.E.2d 214 (No. COA10-902) (2011) (unpublished) (concluding provisions of the trial court's order regarding visitation were inadequate where the order provided that respondent was "entitled to at least two visits per month" that were to take place at the home of the child's caregiver).

Here, the trial court's order provides that DSS "shall offer supervised visitation" for respondent-father with Penny "every-other week" and that visitation will be reduced to once a month if respondent-father "acts inappropriately during a visitation or does not attend a visit" without prior notice. Based on this Court's holdings in *In re T.B.*, *In re W.V.*, and *In re I.S.*, we reverse and remand that portion of the disposition order regarding respondent-father's visitation with Penny. We remand for the making of additional findings and conclusion as to the time, place, and conditions of an appropriate visitation plan.

Conclusion

Respondents waived their right to notice of the trial court's intent to enter a permanent plan, as required by N.C. Gen. Stat. §§ 7B-507(c) and 7B-907(a). The trial court's decision to cease reunification efforts in its 11 October 2012 disposition order is supported by sufficient findings of fact. We reverse and remand that portion of the disposition order regarding respondent-father's visitation with Penny for the making of additional findings and conclusions concerning the time, place, and conditions of an appropriate visitation plan. The remainder of the disposition order is affirmed.

The 13 June 2012 adjudication order is AFFIRMED.

The 11 October 2012 disposition order is AFFIRMED in part and REVERSED in part.

Judges STROUD and ERVIN concur.

IN RE T.J.F.

[230 N.C. App. 531 (2013)]

IN THE MATTER OF T.J.F.

No. COA13-707

Filed 19 November 2013

1. Termination of Parental Rights—specific ground—not alleged in petition—sufficient facts—respondent on notice

The trial court did not err in a termination of parental rights case by terminating respondent's parental rights on a ground not alleged in the petition. While the better practice would have been to specifically plead termination pursuant to N.C.G.S. § 7B-1111(a)(7), the petition sufficiently alleged facts to place respondent on notice that his parental rights may be terminated on the basis that he had abandoned his child.

2. Termination of Parental Rights—best interest of child—reasoned decision

The trial court did not abuse its discretion by concluding that it was in the best interest of the child that respondent's parental rights be terminated. The court's findings of fact reflected a reasoned decision.

3. Termination of Parental Rights—consideration of child's adoption—necessary benefits

The trial court did not err in a termination of parental rights case by terminating respondent's rights based in part upon the child's obtaining necessary benefits through adoption by her grandparents. The bulk of the court's findings of fact in the adjudication and disposition orders were devoted to the failure of respondent to satisfy his parental obligations to his child by withholding his presence, affection, and support. Only one mention was made concerning the possibility of the child's obtaining financial benefits by being adopted by her maternal grandparents.

Appeal by respondent-father from orders entered 21 March 2013 by Judge A. Elizabeth Keever in Cumberland County District Court. Heard in the Court of Appeals 28 October 2013.

Lane & Lane, PLLC, by Freddie Lane, Jr. and Meleisa C. Rush-Lane, for mother, petitioner-appellee.

Assistant Appellate Defender J. Lee Gilliam for father, respondent-appellant.

IN RE T.J.F.

[230 N.C. App. 531 (2013)]

HUNTER, Robert C., Judge.

Petitioner is the mother of T.J.F. (hereinafter referenced by the pseudonym “Taylor”), born in May 2003 of a relationship between petitioner and respondent-father. Petitioner and respondent-father resided together for approximately six months after Taylor’s birth and then separated. Taylor remained with petitioner. On 9 August 2012, petitioner filed a petition to terminate the parental rights of respondent-father pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) (2011) on the ground of neglect. On 21 March 2013, the court filed an order concluding grounds existed to terminate the parental rights of respondent-father pursuant to N.C. Gen. Stat. § 7B-1111(a)(7) in that respondent-father willfully abandoned Taylor for at least six consecutive months immediately preceding the filing of the petition. By separate disposition order, the court concluded that the best interest of Taylor required termination of the parental rights of respondent-father.

Discussion

[1] Respondent-father first contends the court erred by terminating his parental rights on a ground not alleged in the petition. A petition for termination of parental rights must allege “[f]acts that are sufficient to warrant a determination that one or more of the grounds for terminating parental rights [listed in N.C.G.S. § 7B-1111(a)] exist.” N.C. Gen. Stat. § 7B-1104(6) (2011). The facts alleged need not be “exhaustive or extensive” but they must be sufficient to “put a party on notice as to what acts, omission or conditions are at issue.” *In re Hardesty*, 150 N.C. App. 380, 384, 563 S.E.2d 79, 82 (2002). When the petition alleges the existence of a particular statutory ground and the court finds the existence of a ground not cited in the petition, termination of parental rights on that ground may not stand unless the petition alleges facts to place the parent on notice that parental rights could be terminated on that ground. *In re B.L.H.*, 190 N.C. App. 142, 147-48, 660 S.E.2d 255, 257-58, *aff’d per curiam*, 362 N.C. 674, 669 S.E.2d 320 (2008).

We now consider whether the petition at bar alleged sufficient facts to place respondent-father on notice that his parental rights may be terminated because he abandoned his child. “Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child.” *In re Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986). “It has been held that if a parent withholds his presence, his love, his care, the opportunity to display filial affection, and wilfully neglects to lend

IN RE T.J.F.

[230 N.C. App. 531 (2013)]

support and maintenance, such parent relinquishes all parental claims and abandons the child.” *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962).

Abandonment of a child can support termination of parental rights under two provisions of N.C. Gen. Stat. § 7B-1111(a). *See In re Humphrey*, 156 N.C. App. 533, 540-41, 577 S.E.2d 421, 427 (2003). First, parental rights may be terminated pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) if the court concludes the parent has neglected the child by abandoning the child. N.C. Gen. Stat. § 7B-1111(a)(1) (2011); *see also* N.C. Gen. Stat. § 7B-101(15) (defining a neglected juvenile as one “who does not receive proper care, supervision, or discipline from the juvenile’s parent, guardian, custodian, or caretaker; or who has been abandoned”). Second, parental rights may be terminated pursuant to N.C. Gen. Stat. § 7B-1111(a)(7) upon a finding that the parent “has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion” to terminate parental rights. N.C. Gen. Stat. § 7B-1111(a)(7) (2011).

While the better practice would have been to specifically plead termination pursuant to section 7B-1111(a)(7), we conclude the petition here sufficiently alleged facts to place respondent-father on notice that his parental rights may be terminated on the basis that he abandoned his child. The petition alleged that respondent’s “lack of involvement with or regard for the minor child constitutes neglect under N.C.G.S. 7B-1111(a)(1).” As examples of neglect, the petition cited respondent’s limited contact with the child despite consistently available opportunities for involvement; his failure to have any contact with the child within the six months preceding the petition; his failure to call or write the child within the same six-month period; and his failure to provide a reasonable amount for the cost and care of the child. The petition also alleged that as a result of the limited contact, the child has “no meaningful relationship” with respondent-father. These allegations suggest that respondent-father had foregone his parental responsibilities to the child and withheld his presence, care and parental affection by failing to maintain contact with the child.

The reliance of respondent-father upon *In re C.W.*, 182 N.C. App. 214, 228-29, 641 S.E.2d 725, 735 (2007), in which this Court invalidated termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(7), is misplaced. The petitioner in that case conceded the petition failed to allege abandonment and the respondent-parent had been given no notice by the allegations of the petition that his rights might be terminated on that basis. Here, the petition contained sufficient facts to put respondent-father on

IN RE T.J.F.

[230 N.C. App. 531 (2013)]

notice that his parental rights could be revoked on the basis of abandonment. Therefore, *In re C.W.* is inapposite.

[2] Respondent-father next contends the court abused its discretion by terminating his parental rights. He argues the court's determination of the child's best interest is flawed.

Upon determining the existence of one or more grounds for termination of parental rights, the court next decides whether terminating the parent's rights is in the juvenile's best interest. N.C. Gen. Stat. § 7B-1110(a) (2011). In deciding whether termination of parental rights is in the best interest of the juvenile,

the court shall consider the following criteria and make written findings regarding the following that are relevant:

- (1) The age of the juvenile.
- (2) The likelihood of adoption of the juvenile.
- (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
- (4) The bond between the juvenile and the parent.
- (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
- (6) Any relevant consideration.

Id. The court's decision is discretionary and reviewable only for abuse of discretion. *In re Anderson*, 151 N.C. App. 94, 98, 564 S.E.2d 599, 602 (2002). "A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

In its disposition order, the court noted the lack of contact by respondent-father with the child for more than two years. The court also found that the child has a close and loving relationship with her mother and maternal grandparents; that the maternal grandparents desire to adopt the child in order to provide her with otherwise unavailable benefits; that petitioner desires for her parents to adopt the child; and that, despite the child's desire to continue a relationship with her father, respondent-father "has not been forthcoming" in allowing the

IN RE T.J.F.

[230 N.C. App. 531 (2013)]

relationship to continue. The court concluded that it was in the child's best interest for termination to occur based upon her age, relationship with the maternal grandparents, and the lack of a relationship with respondent-father. As these findings reflect a reasoned decision, we find no abuse of discretion.

[3] Respondent-father lastly takes issue with the court's terminating his rights based in part upon the child's obtaining "necessary benefits" through adoption by her grandparents. The report of the guardian ad litem shows that if the child is adopted by her maternal grandparents, she qualifies for benefits as a child of a retired military person. The guardian ad litem wrote in her report that "the purpose of this termination and adoption basically is to manipulate the system so that [Taylor] can receive federal benefits."

Respondent-father argues that terminating parental rights so the child can obtain a financial advantage is against public policy and violates N.C. Gen. Stat. § 7B-1111(a)(2), which prohibits termination of a parent's rights for the sole reason that the parent is unable to care for the child because of the parent's poverty. He also argues it contravenes the first listed purpose of the Juvenile Code of providing "procedures for the hearing of juvenile cases that assure fairness and equity[.]" N.C. Gen. Stat. § 7B-100(1) (2011). Respondent-father submits that, since petitioner is herself abdicating parental responsibility for her child, "as a matter of equity she should not have the right to petition to terminate [respondent-father's] parental rights."

Our General Assembly has decreed that the Juvenile Code:

shall be interpreted and construed so as to implement the following purposes and policies:

- (1) To provide procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles and parents;
- (2) To develop a disposition in each juvenile case that reflects consideration of the facts, the needs and limitations of the juvenile, and the strengths and weaknesses of the family.
- (3) To provide for services for the protection of juveniles by means that respect both the right to family autonomy and the juveniles' needs for safety, continuity, and permanence; and

IN RE T.J.F.

[230 N.C. App. 531 (2013)]

(4) To provide standards for the removal, when necessary, of juveniles from their homes and for the return of juveniles to their homes consistent with preventing the unnecessary or inappropriate separation of juveniles from their parents.

(5) To provide standards, consistent with the Adoption and Safe Families Act of 1997, P.L. 105-89, for ensuring that the best interests of the juvenile are of paramount consideration by the court and that when it is not in the juvenile's best interest to be returned home, the juvenile will be placed in a safe, permanent home within a reasonable amount of time.

N.C. Gen. Stat. § 7B-100 (2011). A “common thread running throughout the Juvenile Code, [N.C. Gen. Stat. § 7B-100 *et seq.*], is that the court's primary concern must be the child's best interest.” *In re Pittman*, 149 N.C. App. 756, 761, 561 S.E.2d 560, 564, *disc. review denied*, 356 N.C. 163, 568 S.E.2d 608 (2002), *cert. denied*, *Harris-Pittman v. Nash County Dept. of Social Services*, 538 U.S. 982, 155 L. Ed. 2d 673 (2003). “[T]he child's interest in being protected from abuse and neglect is paramount.” *Id.*

The respondent-father's argument might have some merit if the only basis cited by the court for terminating his rights is so the child could obtain financial benefits. However, the court cited other bases in its determination that termination of parental rights was in Taylor's best interest. In making a determination of the disposition in the child's best interest, a court may assign more weight to one or more factors over the others. *In re C.L.C.*, 171 N.C. App. 438, 448, 615 S.E.2d 704, 709 (2005), *aff'd per curiam*, 360 N.C. 475, 628 S.E.2d 760 (2006). Here, consistent with the purpose of protecting the child from abuse or neglect, the bulk of the court's findings of fact in the adjudication and disposition orders is devoted to the failure of respondent-father to satisfy his parental obligations to his child by withholding his presence, affection, and support. Only one mention is made concerning the possibility of the child's obtaining financial benefits by being adopted by her maternal grandparents.

We affirm the adjudication and disposition orders.

AFFIRMED.

Judges CALABRIA and HUNTER, JR. concur.

JPMORGAN CHASE BANK v. BROWNING

[230 N.C. App. 537 (2013)]

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, PLAINTIFF

v.

LINDA D. BROWNING, A/K/A LINDA BROWNING AND LESLIE BROWNING
A/K/A LESLIE DEANNE BROWNING DAVIS, DEFENDANTS

No. COA13-358

Filed 19 November 2013

1. Appeal and Error—preservation of issues—failure to argue

While plaintiff sought relief at trial on four grounds, plaintiff sought review only of the trial court's treatment of its unjust enrichment claim and argued the trial court abused its discretion in denying its request for leave to amend its complaint. Plaintiff therefore abandoned the remaining three grounds raised in the trial court under N.C. R. App. P. 28(b)(6).

2. Unjust Enrichment—benefit voluntarily bestowed—no action to induce

The trial court did not err by granting summary judgment in favor of defendants on plaintiff's unjust enrichment claim. The recipient of a benefit voluntarily bestowed without solicitation or inducement is not liable for the value. The record did not contain evidence that defendants took any action to induce plaintiff's discharge of the First Deed of Trust.

3. Pleadings—denial of motion to amend complaint—no new evidence

The trial court did not abuse its discretion in an unjust enrichment case by denying plaintiff's request for leave to amend its complaint. Nothing in the record suggested that the "new evidence" supplied in the information supporting the motion to amend would show solicitation or inducement by defendants, a material issue of fact to be resolved by the jury.

Appeal by plaintiff JPMorgan Chase Bank from order entered 26 October 2012 by Judge Sharon Tracey Barrett in Cherokee County Superior Court. Heard in the Court of Appeals 12 September 2013.

Roberson Haworth & Reese, by Alan B. Powell, Christopher C. Finan, and Matthew A.L. Anderson, for plaintiff-appellant.

Cowan & Cowan, P.A., by Ronald M. Cowan, for defendant-appellees.

JPMORGAN CHASE BANK v. BROWNING

[230 N.C. App. 537 (2013)]

HUNTER, JR., Robert N., Judge.

JPMorgan Chase Bank (“Plaintiff”) appeals from a 26 October 2012 order granting summary judgment in favor of Linda Browning and Leslie Browning (collectively “Defendants”). Upon review, we affirm the trial court’s order granting summary judgment and denying Plaintiff’s motion to amend.

I. Facts & Procedural History

Plaintiff filed a civil summons, notice of *lis pendens*, and its complaint on 2 December 2011 in Cherokee County Superior Court. Defendants filed an answer and counterclaims on 23 February 2012. Plaintiff replied to the counterclaims on 14 June 2012. Defendants filed a motion for summary judgment on 20 August 2012. Plaintiff filed a motion for leave to amend its complaint on 1 October 2012.

The summary judgment motion and motion to amend the pleadings were heard simultaneously by the Honorable Sharon T. Barrett on 26 October 2012. Judge Barrett granted Defendants’ motion for summary judgment and denied Plaintiff’s motion for leave to amend. The trial court served Plaintiff with this order on 19 November 2012, and notice of appeal was timely filed on 29 November 2012. The record and exhibits presented on appeal tended to show the following facts.

This action concerns title to real property located at 179 Peachtree Street in Murphy, North Carolina (“Peachtree”). A brief history of the chain of title shows Defendants’ grandparents Evan Alonzo Browning (“Evan”) and Fleta Browning (“Fleta”) previously owned Peachtree. Fleta passed away, leaving Evan as the sole owner as a surviving tenant by the entirety. Evan then conveyed Peachtree to Defendants on 26 August 1986 by a properly recorded deed, reserving a life estate for himself. Evan passed away on 27 October 1989. Defendants later conveyed a one-third interest to their father William Evan Browning (“Father”) by general warranty deed on 31 March 1989. Father deeded his one-third interest in Peachtree to himself and his wife Mildred Browning on 13 January 1992, creating a tenancy by the entirety. Mildred Browning predeceased her husband in 1999.

On 24 April 2001, Father individually executed a promissory note payable to First-Citizens Bank and Trust Company in the amount of \$162,000 (“First Note”). On the same date, to secure the First Note, Defendants and Father executed a deed of trust (“First Deed of Trust”) to secure repayment of the First Note. The uniform settlement

JPMORGAN CHASE BANK v. BROWNING

[230 N.C. App. 537 (2013)]

statement shows a title examination fee of \$275.00 paid to Hyde, Hoover, & Lindsay, a Murphy, North Carolina law firm. As part of the closing, Attorney Charles W. McHan, Jr. notified Defendants that they needed to sign the First Deed of Trust in order for Father to complete the transaction. Defendants signed the First Deed of Trust, but not the First Note.

On or near 16 August 2005, Father executed a second promissory note in the amount of \$236,300.00, payable to Gordon Lending Corporation, Plaintiff's predecessor in interest ("Second Note"). Father simultaneously executed a deed of trust ("Second Deed of Trust"), which was later recorded on 29 August 2005 in the Cherokee County Registry. Advantage Equity Services of Pittsburgh, Pennsylvania completed a "Title Commitment" for Father and his then-deceased wife, Mildred Browning. On the "Title Commitment," Schedule B, Item 3 required as a condition of closing that a "loan termination authorization must be signed by the borrowers for each mortgage appearing on the title." In the mortgages section of this document, the First Deed of Trust is listed, along with mortgagees "William E. Browning, Unmarried, Linda D. Browning, Unmarried, and Leslie D. Browning Davis, Unmarried." There is also a title insurance fee of \$405.50 and a title exam fee of \$185.00 listed on the "Title Commitment" document.

Defendants did not execute either the Second Note or the Second Deed of Trust. The 29 August 2005 Second Deed of Trust listed the borrowers as Father and his then-deceased wife, Mildred Browning, but not Defendants. Despite the title commitment requirement, then-deceased Mildred Browning did not sign the Second Deed of Trust. The record does not show Defendants signed a "loan termination authorization."

At closing, Gordon Lending Corporation disbursed \$153,711.09 from the proceeds of the Second Note to satisfy the First Note and First Deed of Trust. The Second Deed of Trust was drafted by Gordon Lending Corporation. Additionally, the closing statement from Gordon Lending Corporation did not include any charges for checking the chain of title or for attorney's fees, although a \$475 fee was paid to Advantage Equity Services. The record lacks any indication of involvement by a licensed North Carolina attorney in the second transaction.

Father died intestate on 13 September 2006 with Defendants being his only heirs. By letter dated 15 December 2006, the administrator of Father's estate notified the then-holder of the Second Deed of Trust, Plaintiff's predecessor in interest, Washington Mutual Bank, that (i) Father never owned more than a one-third interest in Peachtree; (ii) each of Defendants owned a one-third interest; and (iii) the Second Deed of

JPMORGAN CHASE BANK v. BROWNING

[230 N.C. App. 537 (2013)]

Trust constituted a lien on only a one-third tenancy in common interest in Peachtree. The administrator also notified Washington Mutual that “it does not appear that a local attorney did any title examination and [does appear] that the whole transaction was handled by an out-of-state closing company, which may violate North Carolina statutes dealing with the authorized practice of law.” The administrator also forwarded copies of the closing documents to the North Carolina State Bar for any appropriate action. Washington Mutual acknowledged receipt of this letter by its own letter dated 25 January 2007. Washington Mutual replied that it had “initiated an investigation of the allegations you raise and will advise you of our determination when concluded.”

On 25 September 2008, the Federal Deposit Insurance Company labeled Washington Mutual Bank a “Failed Bank.” Plaintiff, JPMorgan Chase, assumed the liabilities and purchased the assets of Washington Mutual Bank. Plaintiff is now the holder in due course of the Second Note and the beneficiary of the Second Deed of Trust.

[1] Plaintiff filed a complaint in Cherokee County Superior Court requesting: (i) that the Second Deed of Trust be declared a valid lien; (ii) to establish a trust in the property or to reform the Second Deed of Trust; (iii) to quiet title; or (iv) in the alternative, to find for Plaintiff that Defendants were unjustly enriched. While Plaintiff sought relief at trial on all four grounds, Plaintiff seeks review only of the trial court’s treatment of its unjust enrichment claim and argues the trial court abused its discretion in denying Plaintiff’s request for leave to amend its complaint. Plaintiff therefore has abandoned the remaining three grounds raised in the trial court. *See* N.C. R. App. P. 28(b)(6) (2011) (“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. Jurisdiction & Standard of Review

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A–27(b) (2011), as Plaintiff appeals from a final order of the superior court as a matter of right.

The first issue on appeal is whether the trial court properly granted summary judgment with respect to Plaintiff’s unjust enrichment claim; this issue is reviewed *de novo*. *In Re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). The standard of review relating to the granting or denial of a summary judgment motion is whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. *Oliver v. Roberts*, 49 N.C. App. 311, 314, 271 S.E.2d 399, 401 (1980), *cert. denied*, 276 S.E.2d 283 (1981). “In ruling on the

JPMORGAN CHASE BANK v. BROWNING

[230 N.C. App. 537 (2013)]

motion, the court must consider the evidence in the light most favorable to the nonmovant, who is entitled to the benefit of all favorable inferences which may reasonably be drawn from the facts proffered.” *Averitt v. Rozier*, 119 N.C. App. 216, 218, 458 S.E.2d 26, 28 (1995). Summary judgment may be properly shown by “‘proving that an essential element of the plaintiff’s case is non-existent.’” *Kinesis Adver., Inc. v. Hill*, 187 N.C. App. 1, 10, 652 S.E.2d 284, 292 (2007) (quoting *Draughon v. Harnett Cnty. Bd. of Educ.*, 158 N.C. App. 705, 708, 582 S.E.2d 343, 345 (2003)).

The second issue on appeal is whether the court improperly denied a request for leave to amend Plaintiff’s complaint and is reviewed under an abuse of discretion standard. “Leave to amend should be granted when ‘justice so requires,’ or by written consent of the adverse party . . . The granting or denial of a motion to amend is within the sound discretion of the trial judge, whose decision is reviewed under an abuse of discretion standard.” *House Healers Restorations, Inc. v. Ball*, 112 N.C. App. 783, 785–86, 437 S.E.2d 383, 385 (1993) (internal citation omitted). “If the trial court articulates a clear reason for denying the motion to amend, then our review ends. Acceptable reasons for which a motion to amend may be denied are ‘undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice and futility of the amendment.’” *NationsBank of N.C., N.A. v. Baines*, 116 N.C. App. 263, 268, 447 S.E.2d 812, 815 (1994) (quoting *Coffey v. Coffey*, 94 N.C. App. 717, 722, 381 S.E.2d 467, 471 (1989)). “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.”).

III. Analysis

A. Unjust Enrichment

[2] Plaintiff first argues that the trial court erred in granting summary judgment in favor of Defendants on its unjust enrichment claim. We disagree.

A prima facie claim for unjust enrichment has five elements. First, one party must confer a benefit upon the other party. *D.W.H. Painting Co., Inc. v. D.W. Ward Const. Co., Inc.*, 174 N.C. App. 327, 334, 620 S.E.2d 887, 893 (2005). Second, the benefit “must not have been conferred

JPMORGAN CHASE BANK v. BROWNING

[230 N.C. App. 537 (2013)]

officially, that is it *must not be conferred by an interference in the affairs of the other party* in a manner that is not justified in the circumstances.” *Id.* (emphasis added) (quoting *Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 556 (1988)) (quotation marks omitted). Third, the benefit must not be gratuitous. *Id.* Fourth, the benefit must be measurable. *Id.* Last, “the defendant must have consciously accepted the benefit.” *Id.* For purposes of this appeal, we hold that the Plaintiff could show at trial three of these elements: (i) that the discharge of the First Deed of Trust was a benefit; (ii) that the benefit was non-gratuitous; and (iii) that the benefit was measurable. However, because the Plaintiff did not forecast evidence showing that the benefit was not officiously conferred, we affirm the trial court’s granting of summary judgment.

“The doctrine of unjust enrichment was devised by equity to exact the return of, or payment for, benefits received under circumstances where it would be unfair for the recipient to retain them without the contributor being repaid or compensated. More must be shown than that one party voluntarily benefited another or his property.” *Collins v. Davis*, 68 N.C. App. 588, 591, 315 S.E.2d 759, 761 (1984). “In order to properly set out a claim for unjust enrichment, a plaintiff must allege that property or benefits were conferred on a defendant under circumstances which give rise to a legal or equitable obligation on the part of the defendant to account for the benefits received.” *Norman v. Nash Johnson & Sons’ Farms, Inc.*, 140 N.C. App. 390, 417, 537 S.E.2d 248, 266 (2000). “Not every enrichment of one by the voluntary act of another is unjust. ‘Where a person has officiously conferred a benefit upon another, the other is enriched but is not considered to be unjustly enriched. *The recipient of a benefit voluntarily bestowed without solicitation or inducement is not liable for their value.*’ ” *Wright v. Wright*, 305 N.C. 345, 350, 289 S.E.2d 347, 351 (1982) (emphasis added) (quoting *Rhyme v. Sheppard*, 224 N.C. 734, 737, 32 S.E.2d 316, 318 (1944)).

For example, in *Homeq v. Watkins*, 154 N.C. App. 731, 572 S.E.2d 871 (2002), this Court held the unsolicited payment of a deed of trust does not, by itself, support an unjust enrichment claim. 154 N.C. App. at 733–34, 572 S.E.2d at 873. In *Homeq*, the plaintiff was the “final bidder” at a foreclosure sale. *Id.* at 732, 572 S.E.2d at 872–73. During the ten-day upset bid period, the plaintiff in *Homeq* satisfied an existing deed of trust, but an upset bidder properly placed a higher bid during the ten-day period. *Id.* at 732–33, 572 S.E.2d at 873.

This Court found that there was “no legal or equitable obligation” for defendant to pay plaintiff for satisfying the first deed of trust. *Id.* at 733, 572 S.E.2d at 873. Particularly, this Court noted that the defendant

JPMORGAN CHASE BANK v. BROWNING

[230 N.C. App. 537 (2013)]

“*did not solicit or induce plaintiff’s discharge of the first deed of trust,*” and that plaintiff even had an opportunity to place its own upset bid within the ten-day period. *Id.* (emphasis added). This Court ultimately found that “[w]here defendant did not induce plaintiff’s action, he is not responsible for plaintiff’s error. Though defendant is enriched, ‘[t]he mere fact that one party was enriched, even at the expense of the other, does not bring the doctrine of unjust enrichment into play.’” *Id.* (quoting *Williams v. Williams*, 72 N.C. App. 184, 187, 323 S.E.2d 463, 465 (1984)).

The present case is similar to *Homeq*. Here, Plaintiff’s predecessor in interest received a promissory note under which Father would pay \$236,300. The Second Deed of Trust secured the promissory note and stated an *intention* to encumber the entire Peachtree property. However, Gordon Lending Corporation failed to secure the signatures of the other property owners on the Second Deed of Trust, and thus did not encumber the entire property. We note that Plaintiff’s predecessor in interest, Gordon Lending Corporation, prepared the Second Deed of Trust and the closing statement’s lack of a title examination fee tends to indicate that no title search was performed. Gordon Lending Corporation also utilized the services of a Pittsburgh, Pennsylvania company, Advantage Equity Services. In its 11 August 2005 “Title Commitment” document, this firm discovered the First Deed of Trust, listing as mortgagors Father and Defendants. Plaintiff was clearly on notice of the potential multiple ownership of Peachtree. However, Gordon Lending Corporation did not require or obtain the signatures of Defendants on the Second Deed of Trust before it disbursed the funds. Gordon Lending Corporation satisfied the First Deed of Trust in the amount of \$153,711.09, doing so officiously.

We note this chain of events stands in contrast to Father’s execution of the First Deed of Trust, where attorneys from Murphy, North Carolina required the signatures of Defendants on the First Deed of Trust before funds were distributed by First-Citizens Bank and Trust Company. This error or omission by the bank and the title company is self-inflicted.

The trial court further found that Defendants never knew of or agreed to encumber their individual one-third interests in exchange for Father’s 2005 transaction. Without any knowledge of Father’s action, Defendants could not induce action by Gordon Lending Corporation to fully satisfy the First Deed of Trust. *See Rhyne*, 224 N.C. at 737, 32 S.E.2d at 318 (noting the requirement of solicitation or inducement in unjust enrichment actions). Defendants may have gained financially by the actions of Plaintiff’s predecessor, but under *Wright*, they were not *unjustly enriched*. “The recipient of a benefit voluntarily bestowed

JPMORGAN CHASE BANK v. BROWNING

[230 N.C. App. 537 (2013)]

without solicitation or inducement is not liable for [its] value.” *Wright*, 305 N.C. at 350, 289 S.E.2d at 351 (citation and quotation marks omitted). Defendants are not responsible for the mistakes of Plaintiff’s predecessor because they took no affirmative steps to induce action of which they were unaware.

This deficiency in the forecast of evidence relating to solicitation or inducement is sufficient to grant summary judgment for Defendants. Summary judgment is proper when “an essential element of the opposing party’s claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense.” *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (citation omitted). Because the record does not contain evidence that Defendants took any action to induce the Plaintiff’s discharge of the First Deed of Trust, an essential element of an unjust enrichment claim is not met, summary judgment is appropriate, and we affirm the trial court.

B. Leave to Amend Pleadings

[3] Plaintiff argues that the trial court’s denial of its motion to amend the Complaint was a manifest abuse of discretion. We disagree and affirm the trial court.

Motions to amend are governed by North Carolina Civil Procedure Rule 15(a), which provides that “a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.” N.C. R. Civ. P. 15(a). A ruling on a motion for leave to amend is left to the sound discretion of the trial judge and the denial of such a motion is not reviewable except for a clear showing of abuse of discretion. *Martin v. Hare*, 78 N.C. App. 358, 360–61, 337 S.E.2d 632, 634 (1985).

A trial court abuses its discretion only where no reason for the ruling is apparent from the record. *Ledford v. Ledford*, 49 N.C. App. 226, 233–34, 271 S.E.2d 393, 398–99 (1980). “A motion to amend may be denied for ‘(a) undue delay, (b) bad faith, (c) undue prejudice, (d) futility of amendment, and (e) repeated failure to cure defects by previous amendments.’” *Strickland v. Lawrence*, 176 N.C. App. 656, 666–67, 627 S.E.2d 301, 308 (2006) (quoting *Carter v. Rockingham Cnty. Bd. of Educ.*, 158 N.C. App. 687, 690, 582 S.E.2d 69, 72 (2003)).

Here, the record indicates that the trial court denied Plaintiff’s motion to amend based on undue delay and the futility of an amendment. If either ground exists, then the trial court did not abuse its discretion. Nothing in the record suggests that the “new evidence” supplied in the

JPMORGAN CHASE BANK v. BROWNING

[230 N.C. App. 537 (2013)]

information supporting the motion to amend would show solicitation or inducement by Defendants, a material issue of fact to be resolved by the jury. Put differently, there is no forecast of evidence that Defendants participated in any way in procuring the second transaction. In the absence of such evidence, which is necessary to supply the missing proof needed to withstand the summary judgment motion, any further amendment would be futile.

Plaintiff correctly notes that new evidence may give rise to new equitable remedies. *Commercial Farmers Bank v. Scotland Neck Bank*, 158 N.C. 238, 244, 73 S.E. 157, 160 (1911). However, as noted above, Defendants' affidavit admitting their prior signatures on the First Deed of Trust was not new evidence. While Defendants provided affidavits that were perhaps "new documents" stating that they had signed the First Deed of Trust, several pre-existing documents made this fact self-evident. First, the First Deed of Trust contained both Defendants' notarized signatures and could be accessed at the Register of Deeds office. Second, Defendants' answer, filed and served on 23 February 2012, noted both Defendants' signatures on the First Deed of Trust. While Defendants reaffirmed that they signed the First Deed of Trust via affidavit on 15 August 2012, this does not constitute "new evidence" that would give rise to additional claims for equitable subrogation or equitable assignment, nor does it show an abuse of discretion by the court. For these reasons, we affirm the trial court's denial of the motion based on futility.

For the reasons stated above, the decision of the trial court is

AFFIRMED.

Judges ERVIN and DAVIS concur.

MILLS v. TRIANGLE YELLOW TRANSIT

[230 N.C. App. 546 (2013)]

J.D. MILLS, EMPLOYEE, PLAINTIFF

v.

TRIANGLE YELLOW TRANSIT AND HAROLD DOVER, EMPLOYER, NONINSURED,
AND HAROLD DOVER, INDIVIDUALLY, DEFENDANTS

No. COA13-617

Filed 19 November 2013

1. Workers' Compensation—taxi driver—employee—not independent contractor

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff taxi driver was an employee instead of an independent contractor. While the pertinent ordinance regulated part of plaintiff's relationship with defendants, defendants controlled other manners and methods of plaintiff's work to a degree sufficient to establish an employer-employee relationship.

2. Workers' Compensation—employer subject to Act—requisite number of employees

The Industrial Commission did not err in a workers' compensation case by concluding that defendant employer had the requisite number of employees to be subject to the Workers' Compensation Act under N.C.G.S. § 97-2(1).

3. Workers' Compensation—penalties—employer failure to have insurance

The Industrial Commission did not err in a workers' compensation case by assessing penalties against defendants pursuant to N.C.G.S. §§ 97-93, 97-94(b), and 97-94(d) for failure to have workers' compensation insurance.

Appeal by defendants from Opinion and Award entered 14 January 2013 and order entered 8 February 2013 by the North Carolina Industrial Commission. Heard in the Court of Appeals 23 October 2013.

Younce & Vtipil, P.A., by Robert C. Younce, Jr., for plaintiff.

Hedrick Gardner Kincheloe & Garofalo, L.L.P., by Vachelle D. Willis and M. Duane Jones, for defendants.

Elmore, Judge.

MILLS v. TRIANGLE YELLOW TRANSIT

[230 N.C. App. 546 (2013)]

Triangle Yellow Transit, Inc., and its owner, Harold Dover, (collectively defendants) filed timely notice of appeal to this Court on 8 March 2013 from the 14 January 2013 Opinion and Award of the Full Commission (the Commission) and the 8 February 2013 order denying defendants' motion to reconsider. After careful review, the Opinion and Award by the Commission and its order denying defendants' motion to reconsider are affirmed.

I. Background

In December 2009, defendants hired John D. Mills (plaintiff) as a taxi driver in addition to at least six other drivers who already worked for defendants. Defendants owned, maintained, and insured all of the taxis. Each driver worked according to a schedule set by defendants, and almost none of the drivers were allowed to take the taxis home once their shift ended. Actions by the drivers that fell outside of company policy resulted in reprimands by defendants. Defendants created a pay structure with each driver individually, whereby collected fares were divided equally with defendants. Drivers received their share of payment by check on Fridays.

In addition to their own requirements, defendants also had to comply with the Taxicab Control Ordinance of the City of Raleigh (the Ordinance). In part, the Ordinance mandated that 1.) taxi drivers comply with customer requests "as to the speed of travel, and . . . the route to be taken[.]" 2.) taxi drivers not refuse service to any "orderly person[.]" and 3.) taxi companies maintain insurance on the vehicles.

After plaintiff dropped off his last customer on 23 May 2011, he was injured in a motor vehicle collision while traveling through a green light on Morgan Street in Raleigh. Plaintiff's injuries included a fractured clavicle, minor head injury, and lumbosacral strain. As a result of said injuries, plaintiff had surgery and follow-up treatment, which included physical therapy.

Plaintiff filed a "Notice of Accident to Employer and Claim of Employee" on 8 June 2011, alleging that he sustained injuries in a motor vehicle accident on 23 May 2011. Plaintiff also filed a "Request that Claim be Assigned for Hearing" alleging that defendants were uninsured. Defendants replied with a "Response to Request That Claim be Assigned for Hearing[.]" contending that plaintiff was not an employee. Thereafter, Deputy Commissioner Adrian Phillips conducted a hearing and filed an Opinion and Award on 28 June 2012, concluding that 1.) plaintiff was an employee of defendants; 2.) plaintiff suffered a compensable injury;

MILLS v. TRIANGLE YELLOW TRANSIT

[230 N.C. App. 546 (2013)]

and 3.) penalties be assessed to defendants for failing to carry workers' compensation insurance in violation of N.C. Gen. Stat § 97-93.

On 2 July 2012, defendants gave notice of appeal to the Commission. The Commission heard the matter and filed an Opinion and Award on 14 January 2013, affirming with modifications the Opinion and Award of Deputy Commissioner Phillips. Defendants then filed a motion for reconsideration, which was denied by the Commission in an order entered 8 February 2013.

II. Analysis

a.) Plaintiff was an employee

[1] Defendants first argue that the Commission erred in its legal conclusion that plaintiff was their employee instead of an independent contractor. Specifically, defendants aver that the Commission erred in "attributing controlling conduct to [defendants] rather than the Ordinance." We disagree.

Review of an Opinion and Award of the Commission "is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law. This 'court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.' " *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). "The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson*, 265 N.C. at 433-34, 144 S.E.2d at 274. However, jurisdictional facts, even if supported by competent evidence, are "not conclusive on appeal[.]" *Cain v. Guyton*, 79 N.C. App. 696, 698, 340 S.E.2d 501, 503 *aff'd*, 318 N.C. 410, 348 S.E.2d 595 (1986).

"[T]he Commission has no jurisdiction to apply [the Workers' Compensation Act] to a party who is not subject to its provisions." *Williams v. ARL, Inc.*, 133 N.C. App. 625, 628, 516 S.E.2d 187, 190 (1999) (citation omitted). A determination as to whether a relationship between parties is one of an employer-employee is a jurisdictional question. *Hughart v. Dasco Transp., Inc.*, 167 N.C. App. 685, 689, 606 S.E.2d 379, 382 (2005) (citation omitted). Furthermore, "[w]hether an employer had the required number of employees to be subject to the Workers' Compensation Act is a question of jurisdiction[.]" *Grouse v. DRB Baseball Mgmt., Inc.*, 121 N.C. App. 376, 378, 465 S.E.2d 568, 570

MILLS v. TRIANGLE YELLOW TRANSIT

[230 N.C. App. 546 (2013)]

(1996) (citation omitted). Thus, we must “review the evidence and make an independent determination” of the jurisdictional facts. *Id.*

“[W]hether a relationship is one of employer-employee or independent contractor turns upon the extent to which the party for whom the work is being done has the right to control the manner and method in which the work is performed.” *Williams*, 133 N.C. App. at 630, 516 S.E.2d at 191 (citation and quotation omitted). Factors relevant in analyzing “the degree of control exercised by the hiring party” are whether the employed

(a) is engaged in an independent business, calling or occupation; (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work; (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he may think proper; (g) has full control over such assistants; and (h) selects his own time.

Id. (citation and quotation omitted). None of these factors are determinative by itself, but each must be considered in the totality of the circumstances to determine whether “the claimant possessed the degree of independence necessary for classification as an independent contractor.” *McCown v. Hines*, 353 N.C. 683, 687, 549 S.E.2d 175, 178 (2001).

In support of their argument, defendants rely heavily on *Alford v. Victory Cab Co.*, in which we ruled that a taxicab driver was an independent contractor because “the right of control did not rest in Victory[,]” the defendant cab company. *Alford v. Victory Cab Co.*, 30 N.C. App. 657, 661, 228 S.E.2d 43, 46 (1976). Defendants aver that the *Alford* decision turned on Victory’s lack of control due to “the City of Charlotte Municipal Code [the Charlotte Code] . . . which regulated the licensing of taxicab companies and the conduct of taxicab drivers.” Similarly, defendants contend that the Ordinance controlled their relationship with plaintiff.

Defendants’ reliance on *Alford* is misplaced. While “[m]uch of the relationship between Alford and Victory was controlled by [the Charlotte Code],” this Court also relied on facts outside the constraints of the Charlotte Code in deciding that the cab driver was an independent contractor: 1.) Victory “had no supervision or control over the manner

MILLS v. TRIANGLE YELLOW TRANSIT

[230 N.C. App. 546 (2013)]

or method claimant chose to operate that cab[;]” 2.) the cab driver completely controlled his work schedule and he “could disregard the radio dispatcher, use the cab for his own purposes during the time it was rented, and he kept all the fares and tips he earned.” *Id.* at 658-661, 228 S.E.2d at 44-46.

Here, unlike in *Alford*, plaintiff did not rent a taxi from defendants. Defendants maintained and owned the taxis driven by plaintiff. Plaintiff could not set his own wages and was required to give defendants fifty percent of all his earned fares at the end of each week. Defendants set the work schedule and required plaintiff to start work at 6:00 P.M. for six days each week. During plaintiff’s tenure with defendants, he did not have another job. Defendants mandated that plaintiff provide advance notice to them if he wanted a vacation and would reprimand plaintiff for acting in contravention of their policies. Plaintiff was not allowed to use the taxi for his own personal purposes and picked it up from defendants’ office each day and returned it to the same location at the end of his shift. Finally, when plaintiff drove the taxi, he was required to follow service routes and pick up customers based on the commands of defendants’ dispatcher. Thus, while it is true that the Ordinance regulated part of plaintiff’s relationship with defendants, we hold that defendants controlled other manners and methods of plaintiff’s work to a degree sufficient to establish an employer-employee relationship. *See State, ex rel. Employment Sec. Comm’n v. Faulk*, 88 N.C. App. 369, 375, 363 S.E.2d 225, 228 (1988) (holding that an employer-employee relationship existed where cab drivers had no personal equity in the business, drove similarly designed company taxis, did not have a separate business listing on company cards, were restricted by geography on service routes, and lacked overall “flexibility” in work environment); *See also Capps v. Se. Cable*, ___ N.C. App. ___, ___, 715 S.E.2d 227, 238-39 (2011) (finding that claimant was an employee where he did not have a separate business, had no control over work schedule, could not take time off without permission from employer, and reported to employer’s office each day). Thus, the Commission did not err in concluding that plaintiff was defendants’ employee.

b.) The Other Drivers Were Also Employees

[2] Defendant next argues that the Commission erred in concluding that it had the requisite number of employees to be subject to the Workers’ Compensation Act (the Act). We disagree.

Under N.C. Gen Stat. § 97-2(1), “an employer is subject to the provisions of the Act if it regularly employs three or more employees.”

MILLS v. TRIANGLE YELLOW TRANSIT

[230 N.C. App. 546 (2013)]

Woodliff v. Fitzpatrick, 205 N.C. App. 192, 194, 695 S.E.2d 503, 505 (2010). The burden is on the plaintiff to establish that the defendant regularly employed at least three employees throughout plaintiff's employ. *Id.* at 194-95, 695 S.E.2d at 505 (citation omitted). Evidence from the record must "affirmatively appear to[] sustain the jurisdiction" of the Commission. *Chadwick v. N. Carolina Dep't of Conservation & Dev.*, 219 N.C. 766, 767, 14 S.E.2d 842, 843 (1941) (citations omitted). Regular employment "connotes employment of the same number of persons throughout the period with some constancy." *Walker v. Town of Stoneville*, 211 N.C. App. 24, 38, 712 S.E.2d 239, 249 (2011) (citation and quotation omitted) *review withdrawn*, 717 S.E.2d 388 (2011) and *review withdrawn*, 731 S.E.2d 834 (2011).

Our analysis of the record shows that in addition to plaintiff, the other drivers constituted three or more employees necessary to subject defendants to the Act. Testimony relating to the other drivers' employment status was similar to the evidence elicited about plaintiff's employment with defendants. Plaintiff testified that during the course of his employment, defendants had between six and eight drivers working for them. When describing how the drivers were paid, plaintiff testified that "on Thursday we'd turn in our sheets with the trips. And on Friday we would pick up – pick up our check. The pay was split fifty fifty." Plaintiff also described how the drivers were subject to twelve-hour shifts by defendants. Defendant Dover reaffirmed plaintiff's testimony by stating that the fare system consists of a fifty-fifty split and that "we have schedules" for all of the drivers. Defendant Dover also admitted that he had an expectation for all drivers to arrive and leave the job pursuant to their dictated schedules. Furthermore, if any driver received complaints from customers, defendant Dover testified that he would reprimand that driver. He also told the Commission that none of the drivers pay for rent, insurance, or maintenance on the taxis because defendants own the vehicles and handle those responsibilities. As for personal use of the taxis, defendant Dover testified that he only allowed three drivers to take cars home after they "show[ed] some sign of responsibility." In sum, this evidence indicates that defendants controlled the manner and method of the other drivers' work in that defendants owned and maintained the taxicabs, established the drivers' pay system, dictated their work schedule, punished them for poor work performance, and rarely allowed the drivers to utilize the taxis for personal use. Thus, the Commission did not err in concluding that defendant regularly employed at least three or more employees during the relevant time period. *See Woodliff*, 205 N.C. App. at 199, 695 S.E.2d at 508 (ruling that sufficient evidence must show that 1.) the "[d]efendant

MILLS v. TRIANGLE YELLOW TRANSIT

[230 N.C. App. 546 (2013)]

regularly employed three or more employees with some constancy throughout the period” and 2.) other individuals “were similarly situated to [the plaintiff], or that they worked pursuant to [d]efendant’s control based on other facts” in order for defendant to be subject to the Act).

c.) Penalties for Failing to Maintain Workers’ Compensation Insurance

[3] In their last argument on appeal, defendants argue that the Commission erred in assessing penalties against them pursuant to N.C. Gen. Stat §§ 97-93, 97-94(b), and 97-94(d) because they were not required to have workers’ compensation insurance. We disagree.

Defendants’ argument is based solely on the assumptions that plaintiff was not their employee, and defendants did not employ three or more employees as required by the Act. Because we have already ruled that plaintiff and the other drivers constitute at least three employees subjecting defendant to the Act, defendants’ argument necessarily fails.

III. Conclusion

In sum, the Commission did not err in concluding that 1.) plaintiff was an employee of defendants; 2.) defendants had the requisite number of employees to be subject to the Act; and 3.) penalties must be assessed to defendants for their failure to carry workers’ compensation insurance. Thus, we affirm the Commission’s Opinion and Award and its order denying defendants’ motion to reconsider.

Affirmed.

Judges McCULLOUGH and DAVIS concur.

STATE v. CHUKWU

[230 N.C. App. 553 (2013)]

STATE OF NORTH CAROLINA

v.

SUNNY JOHN CHUKWU

No. COA13-315

Filed 19 November 2013

1. Constitutional Law—due process—second competency hearing—failure to conduct sua sponte

The trial court did not violate defendant's due process rights in a heroin prosecution when it allowed his case to go to trial without *sua sponte* instituting a second competency hearing. The evidence presented did not raise a bona fide doubt about defendant's competency during trial and his competency was not temporal in nature.

2. Criminal Law—competency to stand trial—divergent behavior

The trial court did not err in a heroin prosecution by finding that defendant displayed a history of being lucid when at Central Regional Hospital yet delusional when he returned to Mecklenburg County. Given the reports of defendant's rational behavior while in the custody of Central Hospital and the divergent behavior displayed at trial, competent evidence supported the trial court's finding.

3. Criminal Law—competency to stand trial—cooperation with attorneys—findings

The trial court did not err in a heroin prosecution by finding that defendant refused to cooperate with his attorneys where those attorneys withdrew or moved to withdraw due to their inability to communicate with defendant, a psychologist's report indicated that defendant had a history of refusing to cooperate with his attorneys, and defendant noted at several points that he did not need or want an attorney.

4. Constitutional Law—competent representation—evidence sufficient

There was competent evidence in a heroin prosecution to support the trial court's finding that defendant's attorneys were competent to represent him. The record contained no evidence suggesting that defendant's attorneys were incompetent and contained evidence of competent representation when defendant allowed his attorneys to represent him. Although defendant argued that the record should have contained evidence supporting a volunteered statement by the judge about the attorney's competence, the finding

STATE v. CHUKWU

[230 N.C. App. 553 (2013)]

of competent representation would be supported by the record even without the volunteered statement.

5. Criminal Law—judge’s statements—findings rather than conclusions—evidence sufficient

The trial court in a heroin prosecution correctly characterized its statements that defendant was malingering and attempting to delay and manipulate the system as findings rather than conclusions. Those findings were supported by competent evidence, although there was evidence to the contrary.

Appeal by Defendant from judgment entered 11 September 2012 by Judge Linwood O. Foust in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 September 2013.

Attorney General Roy Cooper, by Assistant Attorney General Matthew Tulchin, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Charlesena Elliot Walker for defendant-appellant.

HUNTER Jr. Robert N., Judge.

Sunny John Chukwu (“Defendant”) appeals from a judgment entered on 11 September 2012 in Mecklenburg County Superior Court. Defendant argues that the trial court violated due process by failing *sua sponte* to conduct a hearing concerning whether Defendant lacked the capacity to continue to trial. Defendant also argues that competent evidence did not support the trial court’s findings of fact supporting the court’s conclusion of law that Defendant was competent to cooperate with his attorneys and assist in his defense. After careful review, we find no error.

I. Facts & Procedural History

Defendant was tried beginning on 10 September 2012 before a jury. Judge Linwood O. Foust presided in Mecklenburg County Superior Court. Defendant did not put on evidence at his trial. On 11 September 2012, the jury found Defendant guilty of two counts of trafficking in heroin and one count of possession of heroin with the intent to sell or deliver. The trial court sentenced Defendant to a term of 225 to 279 months in prison. Defendant gave oral notice of appeal. The State’s evidence tended to show the following facts.

STATE v. CHUKWU

[230 N.C. App. 553 (2013)]

On 2 February 2009 Defendant arrived at Charlotte Douglas International Airport in Mecklenburg County after a three-day round trip to Costa Rica. Upon reentering the United States, Defendant presented himself to customs officials at the airport and was referred to a secondary processing area by United States Customs and Border Protection agents. Referrals to the secondary processing area are “generally [made] from the primary inspection area by a primary inspection officer who normally doesn’t have enough time to make a determination whether or not to admit somebody into the United States or whether they need to have their baggage examined.” In the secondary processing area, Defendant’s luggage was inspected by Agent Thomas Weeks Jr. (“Agent Weeks”), a customs and border protection enforcement officer experienced and trained in identifying “high risk” travelers.

During the baggage inspection, Agent Weeks noticed that Defendant sweated “excessively,” despite the fact that he was in an air-conditioned room in February. Agent Weeks described the room as so cold it was “not uncommon for officers even in the middle of August to be wearing heavy winter coats.” Agent Weeks noticed Defendant “appeared to be uncomfortable walking,” and Defendant walked with his toes pointed out to the sides rather than in front of him. Agent Weeks also stated that Defendant leaned forward on the bag belt and put all of his body weight on his hands when he watched Agent Weeks examine his bags. Further, Defendant told Agent Weeks he had purchased round trip tickets for his trip to Costa Rica only three days prior to departing and was abroad for only three days.

Based on his observations of Defendant, Agent Weeks requested and received permission from his supervisor to perform a “pat down” of Defendant. Agent Weeks testified that during the pat down, “I felt a hard bulge in his groin area when I went up the inside of his leg” and that it felt like “there was some kind of foreign object in his groin area.” Agent Weeks pointed the bulge out to his supervisor who was in the room monitoring the pat down procedure.

Agent Weeks then requested and obtained permission from his supervisor to perform a partial body search. Agent Weeks removed Defendant’s pants, thereafter finding that Defendant was wearing a pair of thermal underwear over an adult diaper. After Agent Weeks asked Defendant to remove the diaper, he discovered a clear plastic bag containing 30 white pellets.

Agent Weeks performed a narcotics field test on the pellets which showed the presence of heroin (a forensic lab test later confirmed the

STATE v. CHUKWU

[230 N.C. App. 553 (2013)]

pellets consisted of 295.45 grams of heroin). Agent Weeks also found “some cash in an envelope” among Defendant’s belongings. After discovering the white pellets, Agent Weeks notified airport police, who arrested Defendant and transferred him to the Charlotte Mecklenburg Police Department for violating N.C. Gen. Stat. § 90-95(h)(4) (2011) by transporting a controlled substance.

After his arrest, the district court appointed Mr. John Ross (“Mr. Ross”) as Defendant’s counsel on 12 February 2009. On 16 February 2009, a grand jury indicted Defendant for two counts of trafficking in heroin and one count of possession of a controlled substance with the intent to sell or deliver. Mr. Ross made a motion questioning Defendant’s capacity to proceed on 23 July 2009. Mr. Ross indicated that Defendant made statements that appeared to have no basis in fact or reality when he consulted with Defendant. Mr. Ross further noted that Defendant had refused to communicate with Mr. Ross.

Subsequently, North Carolina Certified Forensic Screener Jennifer Kuehn (“Ms. Kuehn”) attempted to evaluate Defendant on 3 August 2009. Ms. Kuehn opined that Defendant required further evaluation to determine if he had the capacity to proceed. Ms. Kuehn made her recommendation because Defendant failed to cooperate with her evaluation, rendering it impossible for her to form an opinion concerning Defendant’s capacity to stand trial. Ms. Kuehn concluded her report by recommending that Defendant undergo further evaluation at Dorothea Dix Hospital.

Ms. Chiege Okwara (“Ms. Okwara”) was appointed Defendant’s new counsel on 13 August 2009. Ms. Okwara used Ms. Kuehn’s report to support a 15 September 2009 motion requesting that Defendant be committed to Dorothea Dix Hospital to determine whether Defendant was competent to stand trial. Mecklenburg County Superior Court Judge Eric Levinson granted Ms. Okwara’s motion via a 15 September 2009 order. The scope of the examination order provided that Defendant should be examined to determine whether

by reason of mental illness or defect the defendant is unable to understand the nature and object of the proceedings against the defendant, to comprehend his/her own situation in reference to the proceedings, and to assist in his/her defense in a rational or reasonable manner.

Dorothea Dix Senior Psychologist Dr. David Hattem (“Dr. Hattem”) examined Defendant on 15 October 2009. During the examination and afterward, Defendant claimed he was a Nigerian diplomat who was

STATE v. CHUKWU

[230 N.C. App. 553 (2013)]

arrested in New York for a probation violation. Defendant also stated that he was a “Ph.D. in school psychology with an emphasis on problem solving,” and that he worked as a consultant to the “Federal Ministry of Foreign Affairs” in Abuja, Nigeria. Dr. Hattem opined that Defendant displayed confusion about his charges and delusional ideas about his attorneys, which impaired his ability to assist his defense in a rational or reasonable manner. Dr. Hattem rendered his opinion in a report dated 4 November 2009, concluding that Defendant lacked the mental capacity to proceed:

In my opinion Mr. Chukwu lacks capacity to proceed at this time. He displayed confusion about his charges that impaired his rational understanding of his position. His confusion about his charges, and delusional ideas about his attorneys, impaired his ability to assist his defense in a rational or reasonable manner.

On 29 January 2010, the trial court found Defendant was incapable to proceed and committed Defendant to Broughton Hospital. After further examination, Defendant’s psychiatrist at Broughton concluded that Defendant was fabricating stories inconsistent with the facts. Defendant’s psychiatrist also found Defendant was not delusional. The psychiatrist at Broughton noted two items in particular: Defendant did not require psychiatric medication and Defendant declined offers to help resolve his legal situation by contacting the Nigerian embassy. Defendant’s final diagnosis at Broughton was “malingering psychosis,” and Defendant was discharged on 11 February 2010 and returned to jail.

Defendant was reexamined by Dr. Hattem on 7 October 2010 and 8 December 2010. Dr. Hattem received the preceding records and evaluations from Broughton Hospital as well as documents from the Mecklenburg County District Attorney’s office, which were not available to him previously. These included a Nigerian Passport, a Texas ID card, a Resident Alien Card, and a Social Security card found on Defendant when arrested. When Dr. Hattem showed Defendant these documents during his examination, Dr. Hattem noted Defendant’s reaction as follows:

[Defendant] inspected [the documents] carefully, then responded, “this is not me.” He noted the name “Sunny John Chukwu” was on all of the documents. He asserted that his name was “Sunny Chukwu” and not “Sunny John Chukwu.” He signed the name “Sunny Chukwu” under the copy of the passport. . . . He was told that a color photo

STATE v. CHUKWU

[230 N.C. App. 553 (2013)]

of the passport showed it to be green; he responded that this passport was “not a diplomatic passport” and reiterated “mine is red.” He pointed out the date of birth on the passport and Texas ID card was different from his professed date of birth. He asserted these identification documents belonged to someone else, and were not the documents taken from him on arrest.

Dr. Hattem opined in his 4 February 2011 report that Defendant did not suffer from a mental disease or defect that rendered him incapable of proceeding and that Defendant did not suffer from delusions. Dr. Hattem noted that Defendant understood he was facing “drug charges.” Dr. Hattem also noted that “[p]ersons who hold delusional beliefs will typically react to a credible challenge with escalating suspiciousness, escalating hostility, increasingly far fetched assertions, and disorganized thinking. Mr. Chukwu showed none of these responses. Instead, his responses were consistently rational, well organized and plausible.” As a result of his observations, Dr. Hattem opined that Defendant was not delusional about his identity, that Defendant “demonstrated more than adequate factual understanding of the nature and object of the proceedings,” that Defendant understood the charges that had been lodged against him, that Defendant could work rationally and reasonably in his defense, and ultimately that Defendant had the capacity to proceed to trial.

On 1 April 2011, Superior Court Judge Hugh B. Lewis of Mecklenburg County conducted a competency hearing. At this hearing, the court concluded that Defendant was “faking his disabilities to avoid facing the consequences of the court system.” The court concluded that Defendant was competent to stand trial. This 1 April 2011 competency hearing was approximately seventeen months before Defendant’s 9 September 2012 trial.

On 27 May 2011, Defendant appeared before Judge Lewis again in connection with his second attorney’s motion to withdraw as counsel. At this hearing, Ms. Okwara indicated that a plea offer was on the table which included a sentence of 58 to 79 months and the dismissal of two counts of Level 3 trafficking. Ms. Okwara testified that she advised Defendant if he rejected the plea, he faced a sentence of 225 months to 279 months on each count of trafficking, plus a \$500,000 fine, and could risk receiving multiple consecutive sentences. Ms. Okwara averred that she could not communicate with Defendant, and that the only response she received from Defendant was that “God is in control” or that “glory be to God.” During this hearing, the following colloquy occurred:

STATE v. CHUKWU

[230 N.C. App. 553 (2013)]

The Court: Okay. Mr. Chukwu, do you wish to be heard in any way? Do you wish to be heard?

[Defendant]: Sir?

The Court: Do you wish to make any statements or be heard?

[Defendant]: Sir, I — I (inaudible). I still maintain that I don't need an attorney.

The Court: You do not need an attorney?

[Defendant]: For probation violation.

The Court: And do you wish to waive your rights for an attorney and represent yourself?

....

[Defendant]: Well, the lady (inaudible).

The Court: I'm sorry?

[Defendant]: Whatever the court decides.

The Court: No, sir. You have to make your own decision of your own personal waiver. Do you wish to waive the right to an attorney because it's your constitutional right? Do you wish to waive that right and represent yourself?

[Defendant]: Yes, sir.

The Court: Please have the gentleman sign the waiver.

[Defendant]: I do not agree with this statement, sir.

The Court: So therefore you do not wish to waive your right to an attorney and represent yourself?

[Defendant]: Yes, sir.

The court then made findings of fact that (1) Defendant displayed a history of being lucid when he was at Central Regional Hospital, yet delusional when he returned to court in Mecklenburg County; (2) Defendant refused to cooperate with his attorneys; (3) both of Defendant's attorneys were experienced and able to represent Defendant; and (4) Defendant's actions were an "attempt to delay and mire the Court down to avoid going forward with his case." The court found Defendant was "malingering and attempting to manipulate the system." The trial court then

STATE v. CHUKWU

[230 N.C. App. 553 (2013)]

appointed Ms. Okwara as Defendant's standby counsel. Ms. Okwara later filed a second motion to withdraw as counsel, which the trial court granted on 27 October 2011.

On 20 December 2011, Mr. Christopher Sanders ("Mr. Sanders") was appointed to represent Defendant. On 24 August 2012, Mr. Sanders made a motion to withdraw as counsel and in support thereof he stated that the only meaningful communication he had had with Defendant were statements by Defendant that "God is in control" and "Glory be to God." Mr. Sanders represented that Defendant "refuse[d] or [chose] not to communicate" with him concerning the case. The court denied the motion to withdraw, so Mr. Sanders represented Defendant at trial.

Both the State and Defendant's counsel remarked that the trial itself was brief. Defendant did not testify nor did Defendant present evidence. The State called three witnesses: Agent Weeks, airport police officer Robert Spencer, and Charlotte Mecklenburg Police Department crime lab analyst Ann Charlesworth. After hearing all of the evidence, the jury returned unanimous verdicts finding Defendant guilty of two counts of trafficking in heroin by transportation and possession with intent to sell or deliver heroin. The trial court sentenced Defendant to a term of 225 to 279 months in prison. Defendant was given credit for 1,317 days spent in confinement prior to the entry of judgment.

II. Jurisdiction & Standard of Review

As Defendant appeals from the final judgment of a superior court, an appeal lies of right to this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2011).

Defendant raises two issues on appeal. The first issue is whether the court improperly failed to institute, *sua sponte*, a second competency hearing during the trial when Defendant exhibited irrational conduct. This issue is a question of law, and is reviewed de novo. "Conclusions of law are reviewed de novo and are subject to full review." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011); *see also Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004) ("Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal.").

Defendant's second issue on appeal is whether the findings of fact supporting the trial court's order to allow Defendant's case to proceed to trial were supported by competent evidence. If the trial court's findings of fact regarding a defendant's competency are supported by competent evidence, they are deemed conclusive on appeal. *State v. Heptinstall*,

STATE v. CHUKWU

[230 N.C. App. 553 (2013)]

309 N.C. 231, 234, 306 S.E.2d 109, 111 (1983). “Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding.” *Eley v. Mid/East Acceptance Corp. of N.C., Inc.*, 171 N.C. App. 368, 369, 614 S.E.2d 555, 558 (2005) (citation and quotation marks omitted).

Defendant argues that competent evidence does not support the trial court’s findings that: (i) Defendant displayed a history of being lucid while at Central Regional Hospital and delusional when he returned to Mecklenburg County; (ii) Defendant refused to cooperate with his attorneys; (iii) both of Defendant’s attorneys were competent and had the ability to represent him; and (iv) Defendant’s actions constituted malingering, an attempt to delay and mire down the court, and an attempt to manipulate the system.

III. Analysis

A. *Sua Sponte* Competency Hearing

[1] Defendant first argues that the trial court violated his due process rights when it allowed his case to proceed to trial without *sua sponte* instituting a second competency hearing. We disagree.

“[A] trial court has a constitutional duty to institute, *sua sponte*, a competency hearing *if there is substantial evidence before the court* indicating that the accused may be mentally incompetent.” *State v. McRae*, 139 N.C. App. 387, 390, 533 S.E.2d 557, 559 (2000) (internal quotation marks and citation omitted). “The conviction of an accused person while he is legally incompetent violates due process.” *State v. Coley*, 193 N.C. App. 458, 461, 668 S.E.2d 46, 49 (2008), *aff’d*, 363 N.C. 622, 683 S.E.2d 208 (2009) (quoting *State v. Taylor*, 298 N.C. 405, 410, 259 S.E.2d 502, 505 (1979)). In addition to constitutional guarantees, North Carolina’s General Statutes also provide that only competent defendants may stand trial:

No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is *unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner.*

N.C. Gen. Stat. § 15A-1001(a) (2011) (emphasis added). The State, a defendant, a defense counsel, or the trial court may move for a competency determination. N.C. Gen. Stat. § 15A-1002(a) (2011). If raised by

STATE v. CHUKWU

[230 N.C. App. 553 (2013)]

any party, the trial court has a statutory duty to hold a hearing to resolve questions of competency. N.C. Gen. Stat. § 15A-1002(b).

Trial courts have a “ ‘constitutional duty to institute, *sua sponte*, a competency hearing *if there is substantial evidence before the court* indicating that the accused may be mentally incompetent.’ ” *Coley*, 193 N.C. App. at 464, 668 S.E.2d at 51 (quoting *State v. Young*, 291 N.C. 562, 568, 231 S.E.2d 577, 581 (1977)). On review, this Court “must carefully evaluate the facts in each case in determining whether to reverse a trial judge for failure to conduct *sua sponte* a competency hearing where the discretion of the trial judge, as to the conduct of the hearing and as to the ultimate ruling on the issue, is manifest.” *State v. Staten*, 172 N.C. App. 673, 682, 616 S.E.2d 650, 657 (2005). Further:

Evidence of a defendant’s irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant to a *bona fide doubt inquiry*. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated.

Id. at 678–79, 616 S.E.2d at 655 (internal quotation marks and citations omitted) (emphasis added). While the trial court’s finding of competency receives deference, other “findings and expressions of concern about the temporal nature of [a] defendant’s competency” may raise a *bona fide doubt* as to a defendant’s competency. *McRae*, 139 N.C. App. at 391, 533 S.E.2d at 560. We thus review the record to determine (i) whether there is a *bona fide doubt* as to Defendant’s competency and (ii) whether Defendant’s competency was temporal in nature.

The appropriate test for evaluating defendant’s competency to stand trial is “whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings against him.” *State v. Badgett*, 361 N.C. 234, 259, 644 S.E.2d 206, 221 (2007) (internal quotation marks and citations omitted). A defendant need not “be at the highest stage of mental alertness to be competent to be tried.” *State v. Shytle*, 323 N.C. 684, 689, 374 S.E.2d 573, 575 (1989). “So long as a defendant can confer with his or her attorney so that the attorney may interpose any available defenses for him or her, the defendant is able to assist his or her defense in a rational manner.” *Id.*

STATE v. CHUKWU

[230 N.C. App. 553 (2013)]

Coley provides an example of this Court applying the test under similar facts. In *Coley*, the defendant argued that regardless of his competence at a prior hearing, his testimony at trial demonstrated that he did not possess the capacity to proceed to trial. 193 N.C. App. at 464, 668 S.E.2d at 51. At trial, the defendant “appeared to ramble in response to questions imposed by counsel.” *Id.* However, such behavior was “not a new occurrence, and had been present during defendant’s examinations prior to the preliminary hearing.” *Id.* This Court, finding no error, held “[t]he fact, by itself, that defendant continued this behavior at trial, did not amount to substantial evidence that defendant was mentally incompetent at trial.” *Id.*

Here the record demonstrates Defendant’s competency to stand trial and an unwillingness to cooperate with his attorneys and attending psychiatrists. Defendant’s first attorney, Mr. Ross, requested a forensic examination in July 2009, primarily due to Defendant’s refusal to communicate with Mr. Ross. Defendant thereafter refused to cooperate with the forensic examiner. Dr. Hattem evaluated Defendant in October 2009, finding Defendant incompetent to proceed due to confusion about his charges and delusions regarding his attorneys. Defendant was then committed to Broughton Hospital for two weeks, where he was treated solely for medical conditions before being released after his psychiatrist found Defendant was malingering by fashioning stories to avoid legal consequences. Defendant stated that he understood the nature of the “drug charges” against him while at Broughton and when examined by Dr. Hattem.

Defendant indicated distrust for his attorney, Ms. Okwara, at his October 2010 evaluation, stating that she was pursuing a “hidden agenda.” Defendant also claimed that he was charged with a “probation violation” and made statements that he was a Nigerian diplomat. Despite Defendant’s statements, Dr. Hattem concluded that Defendant did not suffer from a mental disease or defect that could cause him to be incapable of proceeding and that Defendant did not suffer from delusions. Dr. Hattem concluded that Defendant was capable of working rationally and reasonably with his counsel, but was inventing stories to avoid prosecution. In his 4 February 2011 report, Dr. Hattem stated that “[a]lthough he continues to express distrust of his attorney, he no longer asserted that he does not need an attorney, and he clearly demonstrated an understanding of the importance of adequate representation.” Dr. Hattem also found that Defendant “demonstrated that he is capable of working rationally and reasonably in his own defense.” In light of this evidence, we agree with the trial court’s finding that Defendant “possessed the

STATE v. CHUKWU

[230 N.C. App. 553 (2013)]

capacity to (1) comprehend his position, (2) understand the nature of the proceedings against him, (3) conduct his defense in a rational manner, and (4) cooperate with his counsel.” *Id.* at 464, 668 S.E.2d at 50–51. Thus, the record and testimony presented do not indicate a need for a *sua sponte* second competency hearing.

The record also shows no cause for concern regarding the “temporal nature” of Defendant’s mental condition. In *McRae*, this Court found the temporal nature of a competency finding to be relevant, as there were “*numerous psychiatric evaluations*” of the defendant’s competency “that were *conducted before trial with various findings and expressions of concern about the temporal nature of defendant’s competency*” which raised a bona fide doubt as to the defendant’s competency. 139 N.C. App. at 391, 533 S.E.2d at 560 (emphasis added) (discussing six different findings by psychiatrists finding defendant competent at times and incompetent at others); *see also Meeks v. Smith*, 512 F. Supp. 335, 338 (W.D.N.C. 1981) (finding a bona fide doubt existed regarding a defendant’s competency because defendant was diagnosed as schizophrenic and underwent seven psychiatric evaluations that yielded different conclusions as to his competency to stand trial).

Here, based on his initial observations of Defendant’s confusion about the charges against him and his distrust of his attorneys, Dr. Hattem concluded that Defendant was not capable of proceeding. However, Dr. Hattem adjusted his diagnosis after gathering additional evidence, concluding Defendant was competent to proceed and did not suffer from delusions as originally thought. Dr. Hattem also stated that during his initial evaluation of Defendant in November 2009, Defendant did not exhibit any symptoms of mental illness, that Defendant had no symptoms prior to arrest, and that the origin of the recent onset of symptoms was unclear.

Here there were minimal competency concerns and no findings by any of the examining psychiatrists that Defendant’s competency was temporary. *Cf. McRae*, 139 N.C. App. at 389–91, 533 S.E.2d at 559–60 (discussing the temporary nature of the defendant’s competency and his dependence on medication to attain competency). Defendant displayed consistent behavior in asserting that he was a Nigerian diplomat, that he was being charged for a “probation violation,” and that he did not wish to have counsel. The singular item of concern regarding competency was the initial evaluation by Dr. Hattem, which he later changed. In *McRae*, on the other hand, the court’s findings of fact showed the existence of a variety of opinions concerning the defendant’s competency

STATE v. CHUKWU

[230 N.C. App. 553 (2013)]

and its temporal relation to medication taken by the defendant. *See id.* Thus, Defendant's competency was not temporal.

Because (i) the evidence presented does not raise a bona fide doubt about Defendant's competency during the trial and (ii) Defendant's competency was not temporal in nature, we hold that the trial court did not err when it did not commence a second competency hearing *sua sponte*.

B. Findings of Fact

Defendant challenges four of the trial court's findings of fact, arguing that they are not supported by competent evidence. After careful review, we find no error.

i. Lucid Intervals

[2] Defendant argues the trial court erred by finding Defendant displayed a history of being lucid when at Central Regional Hospital, yet delusional when he returned to Mecklenburg County. We disagree.

A defendant can appear completely lucid and competent at some intervals, yet not at others. *See State v. Whitted*, 209 N.C. App. 522, 528–29, 705 S.E.2d 787, 791–92 (2011). Prior to the 27 May 2011 hearing before Judge Hugh Lewis, Defendant was committed to Broughton Hospital on 29 January 2010. At Broughton, Defendant did not exhibit signs of mental illness and was not prescribed medications for mental illness. The State's psychiatrist concluded that Defendant was manufacturing a story which was not consistent with the facts and was "not actually delusional." The psychiatrist also reported that Defendant "understood he was later charged with 'stolen passport, armed robbery, and recently drug charges.'" Likewise, when Dr. Hattem examined Defendant at Central Regional Hospital on 7 October 2010, there were no signs of mental illness or delusions.

At the 1 April 2011 hearing, Judge Lewis asked whether Defendant understood the charges against him and Defendant replied that he did not understand the charges and believed he was "arrested for probation violation." Defendant also continued to insist that he was a "diplomatic consultant" employed by the Nigerian government, similar to statements Defendant had previously made to the forensic examiner. Judge Lewis, after engaging in discussion about Defendant's diplomatic activities, provided an explanation of the competency requirement in layman's terms for Defendant:

The Court: Okay. Well, competency to stand trial means that you understand what's going on, okay? And you're

STATE v. CHUKWU

[230 N.C. App. 553 (2013)]

able to help your attorney with your defense, all right? I determine that you are not able to understand what's going on here, and you cannot help your attorney, then I deem that you are incompetent to stand trial. That means that you do not have the capacity to stand before me either before me and enter a plea or go to trial for a jury to find whether or not you're innocent or guilty. And if I find that you're incompetent, what I will do is send you back to the hospital where you will stay there under the treatment of physicians and with medication until you become competent so that you understand what's going on. Does that explain it to you?

[Defendant]: Yes, Your Honor.

The Court: Okay. And do you understand that?

[Defendant]: I don't fully understand, Your Honor. Because I recall on January 29th, 2010 I was sent down to Broughton Hospital in Morganton.

The Court: Um-hum.

[Defendant]: And I was there for 13 days precisely.

THE COURT: Um-hum.

The Court: And I was there for treatment. And they were not giving me any treatment except the words I'm receiving right at the Mecklenburg County jail. Except there was in windows and (inaudible) that trying to get me to sign a plea to what I do not know. That continued on till they decided do like this -- they have to send me to a special counsel. I said, I don't need any counsel. I've told you that before. I told them I don't need a counsel. My medications — I listed all my medications to them, and they were giving me the same medication that I was receiving right at Mecklenburg County Jail. They decided on their own to send me back on the 11th of February, 2010.

The Court: But you were clear enough to know that you didn't wish to enter a plea; is that correct? You were clear enough to understand you didn't want to enter a plea; is that correct?

[Defendant]: What -- what —

STATE v. CHUKWU

[230 N.C. App. 553 (2013)]

The Court: You just told me that the attorneys were trying to trick you into signing a paper that would indicate that you were pleading, and you knew that you did not want to do that; is that correct?

[Defendant]: Yes, Your Honor.

The court then found Defendant was competent to proceed based on the conversations with Defendant and the reports of Defendant's psychiatrists. Ms. Okwara then requested and received a continuance of Defendant's trial date so she could advise Defendant of his options for a plea arrangement. Defendant responded to Ms. Okwara by stating "Glory be to God." At Defendant's 27 May 2011 trial date, Defendant continued to insist that he did not want an attorney for his "probation violation." After the court asked Defendant to sign a waiver of his right to counsel, Defendant stated he did not agree with the waiver. The court then made its finding that Defendant was lucid while at Central Hospital, yet delusional when he returned to Mecklenburg County to stand trial.

The preceding evidence provides ample support for Judge Lewis's decision. Defendant was found competent via two separate examinations by psychiatrists. Defendant stated that he understood the charges against him, then denied that he understood. Defendant requested a waiver of counsel, then refused to sign a form verifying his waiver. Defendant testified that a plea was offered, but he chose not to accept it. Given the reports of Defendant's rational behavior while in the custody of Central Hospital and the divergent behavior displayed at trial, we conclude competent evidence supported the trial court's finding of fact.

ii. Cooperation with Attorneys

[3] Defendant next argues that competent evidence did not support the trial court's finding of fact that Defendant refused to cooperate with his two attorneys. We disagree.

Defendant's first attorney was Mr. Ross. Mr. Ross was allowed to withdraw from the case because he was not able to communicate effectively with Defendant. At the 27 May 2011 hearing, Ms. Okwara made a motion to withdraw, noting that Defendant's most meaningful communications with her were his statements that "God is in control" or "Glory be to God." Ms. Okwara testified that she made several attempts to discuss possible pleas Defendant could enter to receive a reduced sentence. After sending several letters and reaching out to Defendant to advise him of how he could receive a reduced sentence,

STATE v. CHUKWU

[230 N.C. App. 553 (2013)]

Defendant's response continued to be that "God is in control" or "Glory be to God." Ms. Okwara stated:

I can't continue to represent a client I cannot communicate with. He's looking at a substantial amount of time, and I just – I cannot proceed further on this case.

We've never had any meaningful discussions, and my conscience will not allow me to continue to represent him. I've been in this case now almost 20 months – 21 months, and we're no further along than we were when I got the case in August, 2009.

Dr. Hattem's 4 February 2011 report also indicates that Defendant had a history of refusing to cooperate with his attorneys and medical staff. Defendant noted at several points that he did not need or want counsel. Defendant also stated in these examinations that Ms. Okwara had a "hidden agenda" and that he distrusted his attorneys. In light of this testimony and conduct we hold competent evidence existed showing Defendant refused to cooperate with his attorneys.

iii. Attorney Competency

[4] Defendant argues that there was not competent evidence supporting the trial court's finding that Defendant's attorneys were competent to represent him. We disagree.

"Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." N.C. Admin. Code tit. 27, r. 1.01 (August 2013). The record contains no evidence to suggest Defendant's attorneys were incompetent, and instead contains evidence showing competent representation by Defendant's attorneys when Defendant allowed them to interact with him. For example, during the 27 May 2011 hearing, the trial court considered evidence that Defendant's attorney at the time, Ms. Okwara, had obtained a plea offer from the State and advised her client to accept the offer. Ms. Okwara had obtained a plea offer that she testified would have reduced Defendant's sentence to "58 months to 79 months" and resulted in the dismissal of two charges of Level 3 trafficking. Defendant was notified by Ms. Okwara that "he faces a sentence of 225 months to 279 months on each count of trafficking, plus a \$500,000 fine and could also receive a consecutive sentence on the plea." Ms. Okwara's communication with her client concerning strategies to reduce the length of his sentence provide an example of competent advice that would meet the standard required of counsel.

STATE v. CHUKWU

[230 N.C. App. 553 (2013)]

Lastly, Judge Lewis, in making his finding stated “[t]his Court has had the opportunity to observe in the practice of law over the last 15 years as a jurist and deems both of them to be competent and have the ability to represent the defendant.” Judge Lewis’s statements regarding his experience represent a volunteered statement that preceded his ultimate finding of fact: that Defendant received competent legal advice during the proceedings. Even without the statement by Judge Lewis, the finding of fact would still be supported by the record and would stand by itself. We therefore find Defendant’s argument that the record should contain evidence concerning Judge Lewis’s experience to be without merit. Accordingly, we find competent evidence exists to support the trial court’s finding of fact that Defendant’s counsel was competent.

iv. Delay and Malingering

[5] Defendant last argues that the trial court’s findings of fact that Defendant’s actions were “simply an act of attempt to delay and mire the Court down to avoid going forward with his case” and that he was “malingering and attempting to manipulate the system” were actually conclusions of law. We disagree.

In distinguishing between findings of fact and conclusions of law, generally, “any determination requiring the exercise of judgment or the application of legal principles is more properly classified as a conclusion of law.” *State v. Sparks*, 362 N.C. 181, 185, 657 S.E.2d 655, 658 (2008) (internal quotation marks and citations omitted).

A trial court’s findings that a defendant is attempting to delay a case and mire down the court, and that a defendant is malingering and manipulating the system are properly considered findings of fact. *See, e.g., State v. Tucker*, 347 N.C. 235, 241–42, 490 S.E.2d 559, 562 (1997) (trial court’s finding of competency supported by testimony that defendant was malingering); *Cannizzaro v. Food Lion*, 198 N.C. App. 660, 664, 680 S.E.2d 265, 268 (2009) (upholding a finding of fact made by the Industrial Commission that plaintiff was not malingering); *State v. Mahatha*, 157 N.C. App. 183, 199, 578 S.E.2d 617, 627 (2003) (upholding a finding of fact that defendant was malingering). The trial court was correct in characterizing these statements as findings of fact, making the appropriate inquiry whether there was competent evidence before the trial court to support these findings of fact. *Heptinstall*, 309 N.C. at 234, 306 S.E.2d at 111.

Tucker is instructive in determining whether competent evidence existed to support Judge Lewis’s findings. In *Tucker*, the defendant argued that the trial court erred by finding him capable of proceeding to trial. 347 N.C. at 241, 490 S.E.2d at 562. The defendant was examined

STATE v. CHUKWU

[230 N.C. App. 553 (2013)]

by three physicians multiple times. *Id.* Eventually the defendant's attending physician at Dorothea Dix Hospital diagnosed him with antisocial personality disorder and suspected that he was malingering. *Id.* A staff psychologist at Dorothea Dix also found the defendant to not appear psychotic, but to be malingering to avoid prosecution. *Id.* During his final evaluation, a third physician found the defendant not competent to stand trial, but stated that it was "possible that he was malingering." *Id.* Defendant's examining physician testified, based on an eight-day examination at Dorothea Dix Hospital, review of jail records, review of a hearing record, and other psychological testing results that the defendant was competent and malingering. *Id.* at 243, 490 S.E.2d at 562. Thus, there was conflicting evidence over whether the defendant in *Tucker* was malingering. This Court found the preceding facts provided competent evidence to support a finding that the defendant was competent to stand trial. *Id.*

As in *Tucker*, conflicting opinions exist here concerning whether Defendant was malingering. Notably, on 11 February 2010, Defendant received a diagnosis of "malingering psychosis" and was discharged from Broughton Hospital. However, Dr. Hattem, in his 4 February 2011 report, opined that Defendant did not suffer from "malingering psychosis" because "manufacturing a story" about his identity to evade prosecution "is not malingering because it is not an attempt to portray symptoms of mental illness."

"When the trial court, without a jury, determines a defendant's capacity to proceed to trial, it is the court's duty to resolve conflicts in the evidence; the court's findings of fact are conclusive on appeal if there is competent evidence to support them, even if there is also evidence to the contrary." *Heptinstall*, 309 N.C. at 234, 306 S.E.2d at 111. As in *Tucker*, the trial court here found Defendant was malingering and thus competent to stand trial based on the available evidence, despite evidentiary conflicts. We agree that competent evidence supports a finding of fact that Defendant was "malingering and attempting to manipulate the system" and find no error.

IV. Conclusion

Based on the foregoing discussion, we find the trial court did not err in determining Defendant competent to proceed, nor in making its underlying findings of fact used to arrive at that result.

NO ERROR.

Judges ERVIN and DAVIS concur.

STATE v. MARTIN

[230 N.C. App. 571 (2013)]

STATE OF NORTH CAROLINA

v.

JAMAR ANTONIO MARTIN

No. COA13-374

Filed 19 November 2013

1. Appeal and Error—record—documents not included—not considered

The trial court did not erroneously assign prior record points where defendant argued that two prior convictions had occurred on the same day, but the convictions appeared to have been separated by three months. The documents relied upon by defendant (copies of a plea transcript and judgment) were attached to his brief but could not be considered because they were not part of the record on appeal.

2. Sentencing—erroneous prior record point—not prejudicial

The trial court's erroneous assignment of one prior record point was not prejudicial because it did not change defendant's offender level.

Appeal by defendant from judgments entered 10 January 2013 by Judge Timothy S. Kincaid in Catawba County Superior Court. Heard in the Court of Appeals 23 October 2013.

Attorney General Roy Cooper, by Assistant Attorney General Daphne D. Edwards, for the State.

Attorney Winifred H. Dillon for defendant.

Elmore, Judge.

On 10 January 2013, a jury found Jamar Martin (defendant) guilty of possession of a firearm by a felon, assault with a deadly weapon inflicting serious injury, robbery with a dangerous weapon, and discharging a weapon into occupied property inflicting serious injury. The trial court sentenced defendant as a prior record level five offender (level V offender) in the presumptive range with consecutive terms of 127 to 165 months, 111 to 146 months, 44 to 65 months, and 22 to 36 months imprisonment. Defendant now appeals and raises as error the trial court's determination that he was a level V offender. After careful consideration, we conclude that the trial court did not commit prejudicial error.

STATE v. MARTIN

[230 N.C. App. 571 (2013)]

I. Facts

At sentencing, the trial court determined that defendant was a level V offender with 15 prior record points. Defendant was assigned: four points for possession of a firearm by a convicted felon (Class G felony); six points for two convictions of possession with intent to sell and deliver cocaine (PWISD) and one conviction of possession of a stolen motor vehicle (three Class H felonies); four points for convictions of breaking and entering, weapons on educational property, assault on a female, and possession of drug paraphernalia (four Class A1 or 1 misdemeanors); and one point for committing the offenses while on probation.

The sentencing worksheet indicated that defendant's convictions for breaking and entering (No. 08 CRS 1497) and possession of a stolen vehicle (No. 08 CRS 21497) both occurred on 3 February 2009, the possession of a firearm by a felon (No. 11 CRS 3619) on 4 January 2012, and PWISD Cocaine (No. 11 CRS 3620) on 4 April 2012. Defendant signed the sentencing worksheet and stipulated to these convictions.

II. Analysis**a.) Felony PWISD Cocaine**

[1] Defendant first argues that the trial court erroneously assigned two points for PWISD cocaine (No. 11 CRS 3620) because this conviction actually occurred on 4 January 2012, the same day as his conviction for possession of a firearm by a felon (No. 11 CRS 3619). We disagree.

"Conclusions of law are reviewed *de novo* and are subject to full review." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011); see also *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004) ("Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal."). "The determination of an offender's prior record level is a conclusion of law that is subject to *de novo* review on appeal." *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009) (citation omitted). Furthermore, "[a]lthough defendant's stipulation as to prior record level is sufficient evidence for sentencing at [the trial court] (per N.C. Gen. Stat. § 15A-1340.14(d)(1)), the trial court's designation of a defendant's record level is a conclusion of law, which we shall review *de novo*." *State v. Fraley*, 182 N.C. App. 683, 691, 643 S.E.2d 39, 44 (2007). A defendant properly preserves the issue of a sentencing error on appeal despite his failure to object during the sentencing hearing. *State v. Morgan*, 164 N.C. App. 298, 304, 595 S.E.2d 804, 809 (2004). Erroneous calculation of a defendant's point total is harmless error when, despite the error, the

STATE v. MARTIN

[230 N.C. App. 571 (2013)]

defendant remains in the same record level. *State v. Smith*, 139 N.C. App. 209, 220, 533 S.E.2d 518, 524 (2000).

The prior record level for a felony offender during sentencing is determined by “the sum of the points assigned to each of the offender’s prior convictions[.]” N.C. Gen. Stat. § 15A-1340.14 (2011). A level IV offender has between 10-13 points, whereas a level V offender has a minimum of 14 and no more than 17 points. *Id.* However, “if an offender is convicted of more than one offense in a single superior court during one calendar week, only the conviction for the offense with the highest point total is used.” *Id.*

Here, the record on appeal contains the prior record level worksheet that was completed by the trial court and stipulated to by defendant. Under the section titled “PRIOR CONVICTION[.]” the form shows a conviction for 1.) possession of a firearm by a felon (No. 11 CRS 3619) on 4 January 2012 and 2.) PWISD Cocaine (No. 11 CRS 3620) on 4 April 2012. Based on the information presented to the trial court, the convictions appeared to have been separated by three months. Nothing in the record indicates that the trial court erroneously added two 4 January 2012 convictions in calculating defendant’s record level. Thus, the trial court properly assigned two points for the PWISD cocaine conviction and four points for the possession of a firearm by a felon conviction.

More importantly, the only documents that defendant provides in support of his argument that the two convictions occurred on different weeks are copies of a plea transcript and judgment, which are attached to his brief. However, we cannot consider these documents because they are not part of the record on appeal. *See* N.C.R. App. P. Rule 9(a) (Review of “appeals from the trial division of the General Court of Justice . . . is solely upon the record on appeal[.]”); *See also Ronald G. Hinson Elec., Inc. v. Union Cnty. Bd. of Educ.*, 125 N.C. App. 373, 375, 481 S.E.2d 326, 328 (1997) (ruling that the briefs of the parties are not part of the record, and a party’s failure to “include certain exhibits presented to the trial court in the record on appeal” precluded appellate review of those exhibits).

Defendant’s issue on appeal exclusively relies on documents outside the record. Accordingly, defendant has not shown that the trial court erred in allocating two points for defendant’s PWISD cocaine conviction. *See Hicks v. Alford*, 156 N.C. App. 384, 390, 576 S.E.2d 410, 414 (2003) (“An appellate court is not required to, and should not, assume error by the trial judge when none appears on the record before the appellate court.”).

STATE v. MARTIN

[230 N.C. App. 571 (2013)]

b.) Misdemeanor Breaking and Entering

[2] Defendant also argues that the trial court erroneously assigned one point for misdemeanor breaking and entering. We agree that the trial court erred. However, its error was harmless.

Based on defendant's prior record level worksheet, defendant was given one point for misdemeanor breaking and entering (08 CRS 1497), which had a conviction date of 3 February 2009. Defendant was also assigned two points for a felony possession of a stolen vehicle (08 CRS 1497) conviction that occurred on the same date. Thus, the conviction for breaking and entering should not have been used in calculating defendant's prior record level because both convictions occurred on the same day, and the felony possession of a stolen vehicle conviction had the higher point total. Accordingly, the inclusion of defendant's conviction for misdemeanor breaking and entering erroneously added one point to his prior record level. *See* N.C. Gen. Stat. § 15A-1340.14(d) (2011). However, this error was harmless because once the erroneous additional point is taken away, defendant still remains a level V offender with 14 points. *See Smith, supra*. Therefore, we hold that the trial court did not commit prejudicial error in determining defendant's prior record level by including defendant's breaking and entering conviction in its calculation.

III. Conclusion

In sum, the trial court did not err in assigning two points for defendant's prior conviction for PWISD cocaine (11 CRS 3620) because nothing in the record shows that the conviction date was on 4 January 2012. The trial court erroneously assigned one point for defendant's breaking and entering conviction, but this error was harmless because once the conviction is omitted from defendant's record level calculation, he is still a level V offender with 14 points.

No prejudicial error.

Judges McCULLOUGH and DAVIS concur.

STATE v. NORTHINGTON

[230 N.C. App. 575 (2013)]

STATE OF NORTH CAROLINA

v.

VINCENT EDWARD NORTHINGTON

No. COA13-475

Filed 19 November 2013

1. Possession of Stolen Property—breaking and entering—jury instructions—sufficient evidence—lesser-included offenses—instructions not required

The trial court did not err in a felonious possession of stolen property and felonious breaking and entering case by denying defendant's request for instructions on lesser-included offenses. There was positive evidence as to each and every element of felonious possession of stolen property and felonious breaking and entering.

2. Sentencing—prior record level—out-of-state conviction—failure to present evidence—substantially similar—not prejudicial

The trial court did not err in a felonious possession of stolen property and felonious breaking and entering case by sentencing defendant as a prior felony record level IV offender. Although the State failed to present evidence that defendant's conviction in Tennessee for "theft over \$1,000" was substantially similar to a Class H offense in North Carolina, and the trial court erroneously accepted defendant's stipulation of the substantial similarity of the Tennessee conviction, this error did not affect the computation of defendant's prior felony record level. Both Class H and Class I felonies carried two sentencing points for the computation of defendant's prior felony record level.

3. Firearms and Other Weapons—possession by felon—habitual felon status—sufficient predicate felonies

The trial court had jurisdiction to try, convict, and sentence defendant for possession of a firearm by a felon, and sentence him as an habitual felon, where possession of marijuana with the intent to sell and deliver and possession of a firearm by a felon are felonies under North Carolina law.

Appeal by defendant from judgments entered 8 November 2012 by Judge Charles H. Henry in Onslow County Superior Court. Heard in the Court of Appeals 9 October 2013.

STATE v. NORTHINGTON

[230 N.C. App. 575 (2013)]

Attorney General Roy Cooper, by Special Deputy Attorney General Hilda Burnett-Baker, for the State.

Bowen and Berry, PLLC, by Sue Genrich Berry for defendant-appellant.

STEELMAN, Judge.

Where there was positive evidence as to each and every element of felonious possession of stolen property and felonious breaking and entering, the trial court did not err by denying defendant's request for instructions on lesser included offenses. Where both Class H and Class I felonies carry two sentencing points for the computation of defendant's prior felony record level, the trial court's designation of an out-of-state conviction as a Class H felony was not prejudicial. Where possession of marijuana with the intent to sell and deliver and possession of a firearm by a felon are felonies under North Carolina law, the trial court had jurisdiction to try, convict, and sentence defendant for possession of a firearm by a felon, and sentence defendant as an habitual felon.

I. Factual and Procedural Background

On 24 September 2010, Tricia Brady (Brady) called 911 to report a breaking and entering of her residence in Jacksonville, North Carolina. Brady had returned to her home that afternoon and found glass everywhere, her dogs locked inside her bedroom, and blood on the door to the master bedroom. Officer Kimberly Carnes (Carnes) responded, processed the crime scene with photographs, and collected blood evidence from the doorframe. Brady told Carnes that her father's shotgun was missing from the closet in her bedroom. She also stated that a couple pieces of jewelry, \$100.00, and prescription medication were missing. Detective Barbara Evanson (Evanson) was assigned to the case on 27 September 2010 and confirmed with Brady the items that were missing, including the single barrel bolt-action shotgun. Brady told Evanson that she believed her son, Anthony Asay (Asay), and his friend Tyler Boutwell (Boutwell) were involved in the break-in.

On 3 October 2010, Jacksonville Police Officer Brian Pacilli (Pacilli) conducted a traffic stop of Bryan Goldman's (Goldman) vehicle. Goldman gave Pacilli consent to search the vehicle, and Pacilli found various items including a 12-gauge bolt-action shotgun, an orange prescription bottle belonging to Boutwell, drugs, and the North Carolina Identification card of Vincent E. Northington (defendant). Brady later

STATE v. NORTHINGTON

[230 N.C. App. 575 (2013)]

identified the shotgun as being the shotgun that was taken from her home. She also identified a gun cloth case that was retrieved from the book bag found in Goldman's vehicle. Evanson obtained DNA samples from Asay and Boutwell and sent the samples to the North Carolina State Bureau of Investigations Lab for comparison to the DNA sample taken from Brady's residence. They did not match the DNA blood evidence taken at Brady's residence. About a year later, Evanson was notified of a match to the DNA sample taken from the 24 September 2010 break-in to defendant in the Combined DNA Index System. Defendant's DNA was then taken, sent to the lab where it was tested, and the test confirmed it was a match with the blood evidence.

On 11 September 2012, defendant was indicted for possession of stolen goods and conspiracy to break and enter to commit larceny. On the same date, defendant was also indicted for felony breaking and entering, and larceny. Finally, defendant was indicted for possession of a firearm by a convicted felon. Defendant was also indicted for having attained habitual felon status.

The matter came on for trial at the 5 November 2012 session of Superior Court for Onslow County. Prior to jury selection, the State decided not to prosecute the conspiracy charge. At trial, Goldman testified that he was friends with defendant and that they had shot the shotgun together a number of times. Goldman testified that he didn't know who the owner of the gun was, but that he believed the gun belonged to defendant. At the conclusion of evidence, the State indicated that it would rely on the shotgun and the fabric gun case as items of stolen property. The State also elected not to proceed in the charge of larceny after breaking and entering.

The jury found defendant guilty of possession of stolen property, breaking and entering, and possession of a firearm by a felon. Defendant entered a plea of no contest to having achieved habitual felon status for all three offenses. The trial court sentenced defendant as a Level IV offender to two consecutive active terms of imprisonment of 108 to 139 months.

Defendant appeals.

II. Jury Instructions

[1] In his first argument, defendant contends that the trial court erred by denying his request that the jury be instructed on the lesser included offenses of non-felonious possession of stolen goods and non-felonious breaking and entering. We disagree.

STATE v. NORTHINGTON

[230 N.C. App. 575 (2013)]

A. Standard of Review

“[Arguments] challenging the trial court’s decisions regarding jury instructions are reviewed *de novo* by this Court.” *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009).

B. Analysis

“An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater.” *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002). “[W]hen the State’s evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element of the charged crime,” an instruction on lesser included offenses is not required. *State v. Harvey*, 281 N.C. 1, 13-14, 187 S.E.2d 706, 714 (1972).

1. Possession of Stolen Goods

The essential elements of felonious possession of stolen property are: (1) possession of personal property, (2) which was stolen pursuant to a breaking or entering, (3) the possessor knowing or having reasonable grounds to believe the property to have been stolen pursuant to a breaking or entering, and (4) the possessor acting with a dishonest purpose.

State v. McQueen, 165 N.C. App. 454, 459, 598 S.E.2d 672, 676 (2004). Misdemeanor possession of stolen goods is “the receiving or possession of stolen goods knowing or having reasonable grounds to believe them to be stolen, where the value of the property or goods is not more than one thousand dollars.” N.C. Gen. Stat. § 14-72(a) (2011). Defendant contends that there was no direct evidence that the property was stolen pursuant to a breaking or entering and therefore, the instruction on misdemeanor possession of stolen goods should have been given.

In the instant case, the State presented positive evidence as to each element of the offense of felonious possession of stolen goods. Brady testified that on 24 September 2010, her residence was broken into and that items were stolen, including a shotgun that was taken from her closet. She further testified that she found blood on the doorframe of the bedroom when she returned home. The blood was determined to match defendant’s DNA profile. Defendant’s friend, Goldman, testified that he first saw the shotgun about a week before 3 October 2010, that he and defendant occasionally shot the gun together, and that he believed the shotgun belonged to defendant. Upon our review of the record, there

STATE v. NORTHINGTON

[230 N.C. App. 575 (2013)]

is no conflicting evidence as to the element of whether the shotgun was taken pursuant to the breaking and entering. We hold that defendant was not entitled to jury instructions on the lesser included offense of misdemeanor possession of stolen goods because all evidence at trial tended to show that there was a breaking and entering at Brady's residence; that the shotgun was taken as a result of that breaking and entering; that defendant's DNA profile matched a sample of blood found on the doorframe in Brady's residence; and defendant's friend stated he believed the gun belonged to defendant.

This argument is without merit.

2. Breaking and Entering

N.C. Gen. Stat. § 14-54 provides that "[a]ny person who breaks or enters any building with intent to commit any felony or larceny therein shall be punished as a Class H felon" and "[a]ny person who wrongfully breaks or enters any building is guilty of a Class 1 misdemeanor." N.C. Gen. Stat. § 14-54 (2011). Defendant argues that there was no evidence of his intent at the time of the entering of Brady's residence and therefore, he was entitled to the instruction on the lesser included offense of non-felonious breaking and entering.

Evidence of missing items after a breaking or entering can be sufficient to prove intent to commit a larceny and dispose of the necessity to instruct on misdemeanor breaking and entering. *See State v. Hamilton*, 132 N.C. App. 316, 322, 512 S.E.2d 80, 85 (1999) (stating that when defendant offered no alternative reason for entering and "items were missing from the subject premises after defendant broke or entered," there was "no need to instruct the jury on the lesser included offenses of misdemeanor breaking or entering").

In the instant case, defendant argues that the evidence did not include testimony from Brady about "when, in relation to the break-in, she had last seen the shotgun and its case in her bedroom closet." Brady testified that when she left her residence on 24 September 2010, the shotgun was in the fabric gun case in her closet, and that the shotgun was taken from her residence on 24 September 2010. Carnes testified that Brady reported to her that the shotgun was missing after the break-in, and Evanson testified that Brady confirmed to her that the shotgun had been stolen from her residence as a result of the breaking and entering. This testimony was more than sufficient to establish that items were missing after the breaking and entering. There was no evidence presented that supported any alternate theory as to why the items were missing or that gave another explanation for the unauthorized entry.

STATE v. NORTHINGTON

[230 N.C. App. 575 (2013)]

Ingenuity of counsel on appeal does not constitute evidence supporting an instruction on misdemeanor breaking or entering. Under our holding in *Hamilton*, the trial court was not required to submit the lesser charge of misdemeanor breaking and entering to the jury.

This argument is without merit.

III. Prior Record Level

[2] In his second argument, defendant contends that the trial court erred in sentencing him as a prior felony record level IV offender. We disagree.

A. Standard of Review

“The determination of an offender’s prior record level is a conclusion of law that is subject to *de novo* review on appeal.” *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009).

B. Analysis

By default, a prior conviction for a crime that another jurisdiction classifies as a felony will count as a Class I felony for determining defendant’s prior record level. N.C. Gen. Stat. § 15A-1340.14(e) (2011). The State or defendant may seek a departure from this default classification by presenting evidence that the offense is substantially similar to an offense in North Carolina that has a different offense classification. *Id.*

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

Bohler, 198 N.C. App. at 637-38, 681 S.E.2d at 806.

In the instant case, the prior record level worksheet included Tennessee convictions for “aggravated assault-felony,” designated as a Class I felony, and “theft over \$1,000,” designated as a Class H felony. Defendant stipulated to these prior convictions. On appeal, defendant contends the State did not prove by a preponderance of the evidence that defendant’s out-of-state conviction of “theft over \$1,000” was substantially similar to a Class H offense under North Carolina law.

Defendant was permitted to stipulate to his conviction of “theft over \$1,000” and that such conviction was a felony under the laws of

STATE v. NORTHINGTON

[230 N.C. App. 575 (2013)]

Tennessee; however, he was not permitted to stipulate that this conviction was substantially similar to a Class H offense under North Carolina law. *Id.* The State relied on defendant's stipulation and did not submit any additional evidence during sentencing establishing defendant's prior record level. The State had previously submitted certified copies of defendant's out-of-state convictions to the trial court as evidence of defendant's habitual felon status; however, at no time did the State present evidence that the "theft over \$1,000" was substantially similar to a Class H offense in North Carolina.

While it was error to accept defendant's stipulation of the substantial similarity of the Tennessee conviction for "theft over \$1,000" to a Class H felony, this error did not affect the computation of defendant's prior felony record level. *See id.* at 638, 681 S.E.2d at 806-807 (holding that the trial court's error in classifying out-of-state convictions as Class H felonies, rather than Class I felonies, was not prejudicial because both are assigned two points under N.C. Gen. Stat. § 15A-1340.14(b)(4)). Because a Class H felony and a Class I felony are both assigned two points under N.C. Gen. Stat. § 15A-1340.14(b)(4), any possible error did not affect defendant's prior record level, and we hold there was no prejudicial error in sentencing defendant.

This argument is without merit.

IV. Prior Felony Conviction

[3] In his fourth and fifth arguments, defendant contends that the trial court was without jurisdiction (1) to try, convict, and sentence defendant for possession of a firearm by a felon, and (2) to sentence defendant as an habitual felon, because the State failed to allege proper qualifying prior felony convictions. We disagree.

Defendant's 2006 conviction for possession of a firearm by a felon in 04 CRS 54531 was alleged as the predicate felony for the charge of possession of a firearm by a felon. It was also one of the three prior convictions alleged as supporting the habitual felon indictment.¹

Defendant's argument on appeal is that the 04 CRS 54531 conviction inappropriately relied upon defendant's North Carolina conviction

1. Although not argued on appeal, we note that it was proper to use the previous conviction of possession of a firearm by a felon to support defendant's current charge of possession of a firearm by a felon and also to support a habitual felon indictment. *See State v. Crump*, 178 N.C. App. 717, 720, 632 S.E.2d 233, 235 (2006) (holding that it was proper to "utiliz[e] [the defendant's] 1998 conviction for possession of a firearm by a felon as both (1) the underlying felony for his current possession of a firearm prosecution and (2) one of the underlying felonies for his habitual felon indictment").

STATE v. NORTINGTON

[230 N.C. App. 575 (2013)]

in 2003 for possession with intent to sell and deliver marijuana as the predicate felony element of that crime. Defendant argues that because he “could not have received a sentence of greater than one year for the underlying prior conviction for possession with intent to sell and deliver marijuana . . . that prior conviction is not a qualifying predicate prior.” In support of this contention, defendant relies on two federal cases, *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 177 L. Ed. 2d 68 (2010) and *United States v. Simmons*, 649 F.3d. 237 (4th Cir.2011), which clarify the definition of “aggravated felony” for the purposes of cancellation of removal pursuant to the Immigration and Nationality Act, 8 U.S.C. § 1229b, and the definition of “felony drug offense” for the purposes of sentencing pursuant to the Controlled Substances Act, 21 U.S.C. § 841.

The determination of whether a prior conviction constitutes a felony under the possession of a firearm by a felon offense, N.C. Gen. Stat. § 14-415.1, and the habitual felon statute, N.C. Gen. Stat. § 14-7.1, is a question of North Carolina state law, not federal law. *See* N.C. Gen. Stat. § 14-415.1 (2011) (“Prior convictions . . . under this section shall only include: (1) Felony convictions in North Carolina that occur before, on, or after December 1, 1995. . . .); N.C. Gen. Stat. § 14-7.1 (2011) (“[A] felony offense is defined as an offense which is a felony under the laws of the State. . . .”). Both the 2003 conviction of possession of marijuana with intent to sell and deliver, and the conviction in 04 CRS 54531 of possession of a firearm by a felon are felonies under the laws of North Carolina. *See* N.C. Gen. Stat. § 90-95(b) (2011) (noting that a controlled substance classified in Schedule III, IV, V, or VI shall be punished as a Class I felon); *see also* N.C. Gen. Stat. § 90-94 (2011) (classifying marijuana as a Schedule IV substance); N.C. Gen. Stat. § 14-415.1 (“Every person violating the provisions of this section shall be punished as a Class G felon.”).

Because possession of marijuana with intent to sell and deliver is a felony under North Carolina state law, it was appropriately relied upon in defendant’s conviction in 04 CRS 54531. Therefore, it follows that the trial court properly relied on the 04 CRS 54531 conviction as one of defendant’s three prior convictions qualifying defendant for habitual felon status and to satisfy the predicate felony element in the prosecution of possession of a firearm by a felon. The trial court had jurisdiction to try, convict, and sentence defendant for possession of a firearm by a felon and the trial court had jurisdiction to sentence defendant as a habitual felon.

We note that while we have addressed defendant’s challenge to his conviction in case 04 CRS 54531, it is not properly before us. The

STATE v. SHANNON

[230 N.C. App. 583 (2013)]

judgment in 04 CRS 54531 was entered 8 August 2006. Any alleged error with this conviction should have been raised by an appeal of that judgment. *See* N.C. Gen. Stat. § 15A-1444 (2011) (describing when a defendant may appeal); N.C.R. App. P. 4(a) (denoting the time and manner of a criminal appeal).

This argument is without merit.

NO PREJUDICIAL ERROR.

Judges HUNTER, ROBERT C., and BRYANT concur.

STATE OF NORTH CAROLINA
v.
MICHAEL ANTHONY SHANNON

No. COA13-214

Filed 19 November 2013

Witnesses—intimidation—status as witness

The trial court correctly denied defendant's motion to dismiss the charge of intimidating a witness where defendant argued that the witness had not been subpoenaed, but the State's evidence, taken in the light most favorable to the State, was sufficient to establish that the witness's involvement in defendant's custody case was substantial enough to qualify her as a prospective witness.

Judge ELMORE dissents.

Appeal by defendant from judgment entered 19 October 2012 by Judge Zoro Guice in Swain County Superior Court. Heard in the Court of Appeals 11 September 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General June S. Ferrell, for the State.

J. Edward Yeager, Jr., for defendant-appellant.

CALABRIA, Judge.

STATE v. SHANNON

[230 N.C. App. 583 (2013)]

Michael Anthony Shannon (“defendant”) appeals from a judgment entered upon a jury verdict finding him guilty of intimidating a witness. We find no error.

In August 2010, the Swain County Department of Social Services (“DSS”) filed a juvenile petition against defendant and obtained custody of defendant’s minor daughter. As part of that case, defendant was referred to Appalachian Community Services (“ACS”) for counseling.

On 13 September 2011, defendant went to the ACS facility and loudly demanded information from the support staff in the lobby. Kelly Phelps (“Phelps”), who was both the director of the facility and defendant’s therapist, passed defendant while she was assisting another client. When she passed, defendant grabbed Phelps’s left forearm with enough force to stop her and stated, in a loud and aggravated tone, that he needed to speak with her. Defendant told Phelps that he wanted to talk about his inability to see his daughter as well as the content of a letter that Phelps had written to DSS regarding defendant’s treatment.

Phelps was able to convince defendant to follow her into a separate room away from the other individuals in the lobby. They subsequently began to discuss the letter. Defendant wanted Phelps to write a new letter stating that he did not require a certain treatment that was recommended. When Phelps informed defendant that she could not write a new letter, defendant became very loud. However, he calmed down when she subsequently offered to give him a copy of the letter she had sent to DSS. Phelps provided defendant with a copy of her DSS letter and made an appointment with defendant to further discuss his case. Defendant exited the ACS facility, and Phelps contacted law enforcement the next day to report the incident.

On 24 October 2011, defendant was indicted for intimidating a witness and breaking and/or entering. Beginning 18 October 2012, defendant was tried by a jury in Swain County Superior Court. At the close of the State’s evidence and at the close of all the evidence, defense counsel made a motion to dismiss the charge of witness intimidation. Both motions were denied. On 19 October 2012, the jury returned verdicts finding defendant guilty of intimidating a witness and not guilty of breaking and/or entering. The trial court sentenced defendant to a minimum of 6 months to a maximum of 8 months in the North Carolina Division of Adult Correction. That sentence was suspended, and defendant was placed on supervised probation for 36 months. Defendant appeals.

Defendant’s sole argument is that the trial court erred by denying his motion to dismiss. We disagree.

STATE v. SHANNON

[230 N.C. App. 583 (2013)]

“ ‘Upon defendant’s motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant’s being the perpetrator of such offense. If so, the motion is properly denied.’ ” *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000)(quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). “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). “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).

If any person shall by threats, menaces or in any other manner intimidate or attempt to intimidate any person who is summoned or acting as a witness in any of the courts of this State, or prevent or deter, or attempt to prevent or deter any person summoned or acting as such witness from attendance upon such court, he shall be guilty of a Class H felony.

N.C. Gen. Stat. § 14-226(a) (2009).¹

On appeal, defendant contends that his motion to dismiss should have been granted because (1) the State presented insufficient evidence that Phelps was “summoned or acting as a witness;” and (2) the State presented insufficient evidence that defendant attempted to prevent Phelps from attending court. However, at trial, defense counsel only raised the first argument, and consequently, this is the only argument properly before this Court. *See State v. Euceda-Valle*, 182 N.C. App. 268, 272, 641 S.E.2d 858, 862 (2007)(If, on appeal, a “defendant presents a different theory to support his motion to dismiss than that he presented at trial,” the argument is waived.). Since defendant has waived the second argument, the only issue to determine is whether the State presented substantial evidence that Phelps was acting as a witness pursuant to the statute.

1. Effective 1 December 2011, N.C. Gen. Stat. § 14-226(a) was amended to make this offense a Class G felony. *See* 2011 N.C. Sess. Law 190. Defendant’s offense occurred prior to the effective date of this amendment, and so we use the previous version of the statute.

STATE v. SHANNON

[230 N.C. App. 583 (2013)]

Defendant argues that the State failed to prove that Phelps was acting as a witness because she had not been subpoenaed to testify in any hearing regarding defendant and there was no evidence presented that Phelps was actually going to be a witness against defendant. However, this Court has previously explained that it is unnecessary to demonstrate that an individual will definitely testify in an upcoming matter in order to qualify for protection as a witness under N.C. Gen. Stat. § 14-226(a).

In *State v. Neely*, a witness testified against the defendant during the defendant's initial trial in the City Recorder's Court of the City of Charlotte. 4 N.C. App. 475, 475, 166 S.E.2d 878, 878 (1969). After the defendant was convicted in that court and had appealed to the superior court for a trial *de novo*, the defendant threatened the witness. *Id.* Defendant was subsequently convicted of intimidating a witness and appealed to this Court. *Id.* at 476, 166 S.E.2d at 878. On appeal, the defendant argued that his conviction should have been dismissed because, when the threat was made, the witness had already completed his testimony in the first trial and was not under a subpoena to testify in the superior court trial. *Id.* This Court rejected the defendant's argument, noting that the witness "was in the position of being a prospective witness" because, at the time of the threat, the defendant had already appealed for a trial *de novo* and the defendant was trying to prevent the witness from testifying in the superior court trial. *Id.* at 476, 166 S.E.2d at 879. The Court further explained that because "[t]he gist" of the offense of intimidating a witness is the obstruction of justice, "[i]t is immaterial . . . that the person procured to absent himself was not regularly summoned or legally bound to attend as a witness." *Id.* at 476-77, 166 S.E.2d at 879 (quoting 39 Am. Jur. Obstructing Justice § 6).

In the instant case, defendant was referred to Phelps for therapy because DSS required counseling for him as a condition in his child custody case. The letter which provoked defendant's actions on 13 September 2011 was provided to DSS by Phelps in order to assist DSS in resolving that case. As defendant himself acknowledged, the reason he went to ACS that day was because "[t]hat's where I got all my counseling from that DSS wanted me to go through counseling for. . . ."

Furthermore, Phelps testified that she had been called as a witness at least three or four times during her four years treating DSS clients as a therapist. She further testified that every time she wrote a letter to DSS, she was "opening [her]self up to have to testify" in court. In addition, Justin Greene ("Greene"), the attorney representing DSS in its case with defendant, testified that he had previously called Phelps as a

STATE v. SHANNON

[230 N.C. App. 583 (2013)]

witness in prior cases and that he had discussed with Phelps the possibility that she could be called as a witness in defendant's case in early 2011. Taking this testimony in the light most favorable to the State, there was substantial evidence that Phelps was a prospective witness against defendant in his case with DSS.

The dissent contends that our interpretation of this Court's language in *Neely* "erroneously expand[s] the scope of N.C. Gen. Stat. § 14-226 to encompass the facts of this case." The dissent distinguishes this case from *Neely* by noting that there was arguably stronger evidence in that case that the prospective witness would be testifying against the defendant. However, nothing in *Neely* or the cases which have relied upon it suggests that the *Neely* Court was establishing a minimum standard to qualify as a "prospective witness." Instead, *Neely* was simply establishing that "prospective witness" was the standard by which to determine whether an individual qualifies as being a "person summoned or acting as such witness" under N.C. Gen. Stat. § 14-226(a). Thus, while we agree with the dissent that, under the statute, there must be some likelihood that the threatened individual will act as a witness, the evidence to satisfy this requirement need not be, as the dissent suggests, the same or greater than the evidence presented in *Neely*. In this context, the differences between this case and *Neely* which are highlighted by the dissent relate only to the weight of the evidence presented by the State, rather than its legal sufficiency.

Ultimately, when considered in the context of the plain language of *Neely*, the State presented sufficient evidence, when taken in the light most favorable to it, to establish that Phelps's involvement in defendant's custody case was substantial enough to qualify her as a "prospective witness" in that case. Defendant was only involved in therapy with Phelps as a result of his custody case, he confronted her regarding a letter which he knew she provided to DSS as part of that case, and the letter created a likelihood that she would have to testify regarding defendant. A reasonable juror could "accept [this evidence] as adequate to support [the] conclusion" that Phelps was a prospective witness. *Smith*, 300 N.C. at 78-79, 265 S.E.2d at 169. Accordingly, the trial court properly denied defendant's motion to dismiss. This argument is overruled.

Defendant received a fair trial, free from error.

No error.

Judge STEPHENS concurs.

STATE v. SHANNON

[230 N.C. App. 583 (2013)]

ELMORE, Judge, dissenting.

I respectfully disagree with the majority's decision to find that the State presented substantial evidence that Phelps was "summoned or acting as a witness" to withstand defendant's motion to dismiss. As a result, I would reverse the decision of the trial court and dismiss the charge.

The majority relies on *State v. Neely*, where we interpreted N.C. Gen. Stat. § 14-226 broadly to include threats made to the witness (Daniels) because he was "in the position of being a prospective witness[.]" 4 N.C. App. 475, 476, 166 S.E.2d 878, 879 (1969). However, our holding in *Neely* cannot be extended to the facts of this case because Phelps was not in the position of being a prospective witness in the same way Daniels was in *Neely*. The majority has erroneously expanded the scope of N.C. Gen. Stat § 14-226 to encompass the facts of this case.

In support, the majority notes "the gist of this offense is the obstruction of justice." While I agree with this contention, the gist of an offense should not sweep over the offense itself; instead, it should merely guide our interpretation of the offense and the development of the related law.

The North Carolina Legislature codified numerous offenses in Article 30, entitled "Obstruction of Justice," which is "a common law offense in North Carolina [with broad reach.]" *Blackburn v. Carbone*, 208 N.C. App. 519, 526 703 S.E.2d 788, 794 (2010). "It is an offense to do any act which prevents, obstructs, impedes or hinders public or legal justice." *Id.* (citation and quotation omitted). The offense of "threatening or intimidating a witness" in the instant case is codified in N.C. Gen. Stat § 14-226(b). Our Supreme Court has held that "[t]here is no indication that the legislature intended Article 30 to encompass all aspects of obstruction of justice." *In re Kivett*, 309 N.C. 635, 670, 309 S.E.2d 442, 462 (1983) (finding that "bribery of jurors, surely an obstruction of justice offense, [is] in Article 29, *Bribery*"). Extending this logic, I believe the purpose of N.C. Gen. Stat § 14-226(a) is to address a specific and narrow aspect of the obstruction of justice offense.

Furthermore, the majority opinion fails to account for several distinguishing factors between our decision in *Neely* and the case at hand. First, Daniels had been subpoenaed to testify against the defendant at his first trial. Here, Phelps was never subpoenaed to testify against defendant. Second, Daniels did in fact testify against the defendant at his first trial. Here, Phelps never testified against defendant during his custody dispute. While Phelps was told that she may be called as a witness, her actual participation was limited to the report she submitted. Third,

STATE v. SHANNON

[230 N.C. App. 583 (2013)]

and most notably, the defendant in *Neely* knew Daniels would likely be called as a witness at the superior court trial, and his intent was to intimidate and threaten Daniels to prevent him from testifying. *Neely*, at 476, 166 S.E.2d at 879. Here, the State provided no evidence that defendant knew Phelps was a potential witness in his custody dispute. In fact, it would have been impossible for defendant to have known Phelps was a potential witness because she had not been asked to testify in court. Thus, while “the gist” of the offense of intimidating a witness is “the obstruction of justice,” defendant cannot have threatened Phelps in an effort to “obstruct justice” if he was unaware of her potential involvement in the matter.¹ *See id.*

Overall, the likelihood that Phelps would testify at defendant’s trial was remote – much more remote than the likelihood that Daniels would be called to testify at defendant’s second trial. The fact that Phelps 1) was called as a witness approximately once per year over a period of four years, 2) testified that she “open[ed] [her]self up to have to testify” in court every time she wrote a letter to DSS, and 3) was informed in early 2011 that she may be called as a witness does not serve as substantial evidence to classify her as a potential witness. The State failed to prove beyond a reasonable doubt that Phelps was summoned or acting as a witness.

By continuing to expand the scope of N.C. Gen. Stat. § 14-226, the statute will soon engulf all aspects of the common law obstruction of justice offense -- eventually persons with distant or marginal ties to a case will be afforded protection. I do not find that our legislature codified this statute for that purpose. Accordingly, I respectfully dissent from the majority’s opinion. The decision of the trial court should be reversed and the charge dismissed.

1. Based on my reasoning above, our recent unpublished decision in *State v. Hairston*, 2013 WL 1905152 (2013) supports my position. The witness in *Hairston* had a greater prospect of being called as a witness than Phelps in the case *sub judice*.

STATE v. WILLIAMS

[230 N.C. App. 590 (2013)]

STATE OF NORTH CAROLINA

v.

JONATHAN RAY WILLIAMS

No. COA13-246

Filed 19 November 2013

1. Appeal and Error—writ of certiorari—probation revocation—review of all judgments

Defense counsel's petition for writ of *certiorari* seeking review of 10 CRS 1409 in addition to the other ten judgments was granted in the interest of reviewing all of the judgments revoking probation entered by the trial court on 22 August 2011.

2. Appeal and Error—reply brief—timeliness—motion to strike

The State's motion to strike appellant defendant's reply brief in a probation revocation case was denied. Appellant's reply brief was timely under the version of N.C. R. App. P. 28(h) that was in effect for appellant's appeal.

3. Appeal and Error—record—motion to amend—probation revocation—inclusion of criminal judgment

Defendant's motion to amend the record in a probation revocation case to include a certified summary of the criminal judgment in 05 CRS 7502 was granted.

4. Probation and Parole—filing of violation report—lack of subject matter jurisdiction

The trial court erred by revoking defendant's probation in 10 CRS 1409 because the State failed to present evidence that the violation report prepared by defendant's probation officer was filed before the natural termination of his probation. As a result, the State failed to meet its burden of demonstrating that the revoking court possessed subject matter jurisdiction.

5. Appeal and Error—preservation of issues—failure to request review in writ of certiorari—failure to object—untimely request

The Court of Appeals declined to address defendant's argument in a probation revocation case that the trial court that sentenced him in Alamance County was required to make findings of fact before it placed him on probation for a period greater than thirty months when neither of the petitions for writ of *certiorari* requested review

STATE v. WILLIAMS

[230 N.C. App. 590 (2013)]

of the Alamance County judgments, defendant failed to object to those judgments prior to his arguments to the Court of Appeals, and those judgments were made final nearly four and a half years ago.

6. Probation and Parole—revocation—sufficiency of evidence

The trial court did not abuse its discretion when it revoked defendant's probation in all eleven judgments. There was sufficient evidence presented to find that defendant had violated the terms of his probation.

On writ of certiorari to review judgments entered 22 August 2011 by Judge Milton F. Fitch, Jr. in Wilson County Superior Court. Heard in the Court of Appeals 26 August 2013.

Attorney General Roy Cooper, by Assistant Attorney General Kathryn H. Shields, for the State.

Richard Croutharmel for defendant.

HUNTER, JR., Robert N., Judge.

We have granted Jonathan Ray Williams' ("Defendant's") petition for writ of certiorari to review judgments revoking his probation and activating his sentences in Wilson County case numbers 10 CRS 1399–1409. For the following reasons, we vacate the judgment in 10 CRS 1409, but leave the judgments in 10 CRS 1399–1408 undisturbed.

I. Factual & Procedural History

On 12 March 2007, Defendant pled guilty to one count of obtaining property by false pretenses ("false pretenses") in Wake County Superior Court. Defendant was sentenced to an intermediate punishment of 6-8 months imprisonment, suspended for 18 months of supervised probation. Defendant's probation was to begin at the expiration of his probation in a previous Wake County case, 05 CRS 7502. Defendant's probation was transferred to Wilson County, where Defendant resided, and given file number 10 CRS 1409.

On 5 January 2009, Defendant pled guilty to 14 counts of false pretenses in Alamance County Superior Court. The court consolidated the 14 counts into ten separate judgments and imposed a community punishment in each judgment, sentencing Defendant to 8-10 months imprisonment for each of the ten judgments with the sentences in each judgment running consecutively. The court suspended the sentences

STATE v. WILLIAMS

[230 N.C. App. 590 (2013)]

and placed Defendant on 36 months of supervised probation in each judgment, with the probationary periods running concurrently.

Defendant's probation in those cases was transferred to Wilson County and given case numbers 10 CRS 1399–1408. On 23 March 2010, Defendant's probation officer filed violation reports in the Wake County case and in the ten Alamance County cases, alleging that Defendant willfully violated his probation. Among the allegations were that Defendant violated the condition of probation that he "commit no criminal offense in any jurisdiction." On 10 May 2010, in Wilson County Superior Court, the Honorable Milton F. Fitch, Jr. found Defendant to be in violation of his probation in all eleven cases and modified Defendant's probation by ordering him to serve nine months of electronic house arrest.

On 8 July 2010, Defendant's probation officer filed violation reports alleging that Defendant failed to comply with the terms of the electronic house arrest. On 19 July 2010, Judge Fitch again found Defendant to be in violation of probation and modified his probation by ordering him not to be away from his residence during curfew hours.

Defendant's probation officer filed violation reports on 13 August 2010, alleging that Defendant failed again to comply with the terms of his house arrest. On 31 August 2010, Judge Fitch found Defendant to be in willful violation of probation for a third time and again modified Defendant's probation, this time by ordering him to serve a 30-day period of confinement in the county jail.

On or about 27 July 2011, Defendant's probation officer prepared and signed probation violation reports in each case alleging that Defendant was in violation of his probation by possessing a firearm.¹ On 17 August 2011, the probation officer filed additional violation reports in each case except 10 CRS 1409 (the case originated in Wake County). These reports alleged that Defendant was in violation of his probation by failing to adhere to restrictions placed on his employment. Judge Fitch conducted a probation violation hearing on 22 August 2011. Defendant contested the violations. The evidence presented at the hearing was as follows.

Defendant's probation officer, Ms. Cameron, testified that during a warrantless search of Defendant's residence on 27 July 2011, a loaded .40 caliber pistol was found in a cabinet housing the motor of a whirlpool tub. Defendant was arrested and charged with being a felon in possession of a firearm in Nash County the day the gun was found.

1. The report in the record contains no file stamp.

STATE v. WILLIAMS

[230 N.C. App. 590 (2013)]

Ms. Cameron testified regarding Defendant's alleged non-compliance with his probationary employment restrictions. Defendant was permitted to do only *commercial* construction work while on probation and was barred from performing *residential* home improvement work pursuant to an injunction from the Attorney General's Office. This injunction included a prohibition on Defendant giving estimates to potential customers for such work. While on house arrest in July 2011, Defendant's GPS device indicated that he was at two separate residences in Raleigh. Ms. Cameron later discovered a residential home improvement contract with Defendant's signature on it. The residence listed on this contract was the address of one of the two residences Defendant went to, according to his GPS device. Ms. Cameron acknowledged that she did not know if Defendant prepared the contract and stated that Defendant merely being present at a residence would not constitute a violation under his conditions of probation.

In his defense, Defendant testified that the gun found in his home was not his and denied knowing that it was there. He testified that he had lived at that address for about a month and a half with his girlfriend and that other people had lived there before him. Defendant claimed that someone broke into his house and stole his motorcycle a couple of days before the search. He believed his girlfriend was involved in this break-in, because whoever broke in had a key. Defendant believed that the gun belonged to his girlfriend's stepfather and that someone had planted the gun.

Regarding the injunction violation, Defendant admitted that he was in Raleigh on the days in question. He said his house arrest conditions allowed him to work without consulting with his probation officer. Defendant testified that his employer directed him to go to the residences in Raleigh to see if the customers wanted his employer to proceed on work and to get a contract signed if they did. Defendant stated that he had signed the contract as an agent of his employer, but that he did not write it or perform the estimate. Defendant said that he knew he was prohibited from doing residential work and that he did not perform any work on the homes. Defendant testified that the Attorney General's Office had not notified him that he was in violation of the injunction.

At the conclusion of the hearing, Judge Fitch found Defendant in willful violation of his probation on the basis of the allegations contained in both sets of reports. Judge Fitch revoked Defendant's probation in

STATE v. WILLIAMS

[230 N.C. App. 590 (2013)]

all eleven judgments and ordered him to serve his underlying active prison sentences.

[1] On 18 April 2012, Defendant filed a hand-written *pro se* Petition for Writ of Certiorari with this Court. Defendant's petition only listed case numbers 10 CRS 1399–1408, but stated that Defendant sought review of “his sentence [sic] hearing.” On 9 May 2012 we granted certiorari “for the purpose of reviewing the judgments entered upon revocation of probation on 22 August 2011,” but did not specify any file numbers. On 15 October 2012, the trial court found Defendant to be indigent and appointed the Appellate Defender's Office to represent Defendant on appeal, who in turn appointed private counsel for Defendant. On 25 March 2013, Defendant's counsel filed a Petition for Writ of Certiorari, seeking review of 10 CRS 1409 in addition to the other ten judgments. We grant this petition in the interest of reviewing all of the judgments revoking probation entered by the trial court on 22 August 2011.

[2] Defendant filed a reply brief in this case on 13 August 2013. Under new Rule 28(h) of our Rules of Appellate Procedure, effective for cases where the notice of appeal was filed on or after 15 April 2013, reply briefs may only be filed within 14 days of service of the Appellee's brief. However, as Appellant's petition for writ of certiorari was granted on 9 May 2012, this case is still governed by the previous Rule 28(h), which allowed reply briefs filed with 14 days of notice to the parties that there would be no oral argument. Notice was sent to the parties on 8 August 2013 that there would not be oral arguments in this case. Appellant's reply brief was filed on 13 August 2013. We therefore consider Appellant's reply brief as timely under the Rule 28(h) in effect for Appellant's appeal. On 16 August 2013, the State filed a Motion to Strike Appellant-Defendant's Reply Brief, which it now recognizes should not be granted. We therefore deny the State's Motion to Strike Appellant-Defendant's Reply Brief.

[3] Also on 13 August 2013, Defendant filed a Motion to Amend Record on Appeal to Include a Criminal Judgment Pertaining to the Case. Defendant's sentence in 10 CRS 1409 was to begin at the expiration of his sentence in Wake County file number 05 CRS 7502. The State's brief pointed out that the record was silent as to when Defendant's sentence expired in 05 CRS 7502. Defendant's motion to amend the record was to include a certified summary of the criminal judgment in 05 CRS 7502. We grant Defendant's motion to amend the record to include this judgment.

II. Analysis

Defendant raises three arguments in his brief, which we address in turn.

STATE v. WILLIAMS

[230 N.C. App. 590 (2013)]

A. Lack of Subject Matter Jurisdiction to Revoke in 10 CRS 1409

[4] Defendant first argues that the trial court erred in revoking his probation in 10 CRS 1409 because the State failed to present evidence that the violation report prepared by Defendant's probation officer was filed before the natural termination of Defendant's probation. As a result, Defendant asserts that the State failed to meet its burden of demonstrating that the revoking court possessed subject matter jurisdiction. We agree.

The State bears the burden in criminal matters of demonstrating beyond a reasonable doubt that a trial court has subject matter jurisdiction. *State v. Petersilie*, 334 N.C. 169, 175, 432 S.E.2d 832, 835 (1993). Furthermore, a defendant may properly raise the issue of subject matter jurisdiction at any time, even for the first time on appeal. *State v. Reinhardt*, 183 N.C. App. 291, 292, 644 S.E.2d 26, 27 (2007). "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. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981). A trial court may only revoke a Defendant's probation if "[b]efore the expiration of the period of probation the State has filed a written violation report with the clerk indicating its intent to conduct a hearing on one or more violations of one or more conditions of probation." N.C. Gen. Stat. § 15A-1344(f)(1) (2011).

We have previously held that in order for a trial court to retain jurisdiction over a probationer after his period of probation has expired, there must be some record evidence that the State complied with the language of N.C. Gen. Stat. § 15A-1344(f)(1). *State v. Moore*, 148 N.C. App. 568, 570-71, 559 S.E.2d 565, 566 (2002). "The burden of perfecting the trial court's jurisdiction for a probation revocation hearing after defendant's period of probation has expired lies squarely with the State." *Id.* at 570-71, 559 S.E.2d at 566-67.

Defendant's probation in 10 CRS 1409 was 18 months long, to be served at the expiration of his sentence in Wake County number 05 CRS 7502. According to the summary provided in Defendant's amendment to the record, Defendant's final discharge in 05 CRS 7502 was on 12 September 2008. Defendant's probation in 10 CRS 1409, therefore, would have run for 18 months following that date, ending 12 March 2010. The first violation report was filed 23 March 2010. Therefore, every violation report for 10 CRS 1409 was filed after Defendant's period of probation had ended and the trial court had no subject matter jurisdiction over Defendant. We therefore vacate the trial court's 22 August 2011 judgment revoking Defendant's probation in 10 CRS 1409.

STATE v. WILLIAMS

[230 N.C. App. 590 (2013)]

B. Lack of Subject Matter Jurisdiction to Revoke in 10 CRS 1399–1408

[5] Defendant next argues that the trial court lacked subject matter jurisdiction to revoke his probation in 10 CRS 1399-1408. Specifically, Defendant argues that the trial court that sentenced him in Alamance County was required to make findings of fact before it placed him on probation for a period greater than 30 months. Defendant argues that absent these findings, he could not have been placed on probation for more than 30 months. As a result, Defendant argues that the Wilson County Superior Court lacked jurisdiction when it revoked his probation in what was the 31st month of his probationary sentence.

However, evaluating Defendant’s argument would necessarily require us to consider the propriety of the Alamance County trial court’s original judgments placing Defendant on probation 5 January 2009. The record is silent as to whether Defendant appealed these judgments at the time they were entered. In any event, a request to review these judgments was not contained in either of Defendant’s petitions for writ of certiorari.

Defendant argues that a probationer does not have to object to a condition of probation at the time probation is imposed, but may object “at a later time.” *State v. Cooper*, 304 N.C. 180, 182, 282 S.E.2d 436, 438 (1981). However, the court in *Cooper* made it clear that “defendant cannot relitigate the legality of a condition of probation unless he raises the issue no later than the hearing at which his probation is revoked.” *Id.* at 183–84, 282 S.E.2d at 439. (“The words ‘at a later time’ refer to the revocation hearing. It does not mean that a probationer has a perpetual right to challenge a condition of probation and may exercise such right for the first time at the appellate level.”).

Accordingly, we decline to address Defendant’s second argument when neither of the petitions for writ of certiorari requested review of the Alamance County judgments, Defendant failed to object to those judgments prior to his arguments to this Court, and those judgments were made final nearly four and a half years ago.

C. Abuse of Discretion in Revoking Probation in All Eleven Cases

[6] Defendant lastly contends that the trial court abused its discretion when it revoked his probation in all eleven judgments, because there was insufficient evidence presented to find that Defendant had violated the terms of his probation. We disagree.

STATE v. WILLIAMS

[230 N.C. App. 590 (2013)]

A proceeding to revoke probation [is] often regarded as informal or summary, and the court is not bound by strict rules of evidence. An alleged violation by a defendant of a condition upon which his sentence is suspended need not be proven beyond a reasonable doubt. All that is required is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has violated a valid condition upon which the sentence was suspended. The findings of the judge, if supported by competent evidence, and his judgment based thereon are not reviewable on appeal, unless there is a manifest abuse of discretion.

State v. Tennant, 141 N.C. App. 524, 526, 540 S.E.2d 807, 808 (2000) (citations and quotation marks omitted) (alteration in original). An abuse of discretion occurs only when a court's decision "is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Campbell*, 359 N.C. 644, 673, 617 S.E.2d 1, 19 (2005).

Defendant's arguments fail under this standard. Regardless of whether it would meet the standard of proof beyond a reasonable doubt, some evidence of Defendant's possession was presented. A firearm was found during a search of Defendant's home. Although Defendant testified that he didn't know about the gun, the judge stated, "I don't believe what he said on the stand." Since there was evidence of Defendant's possession of a firearm and the judge made the determination that Defendant was not telling the truth while testifying, we find no abuse of discretion in the trial court's revocations.

As "[t]he breach of any single valid condition upon which the sentence was suspended will support an order activating the sentence," we need not address Defendant's argument regarding the violation based on his having allegedly provided residential construction services. *State v. Braswell*, 283 N.C. 332, 337, 196 S.E.2d 185, 188 (1973) (citation omitted).

III. Conclusion

For the foregoing reasons, we vacate the judgment activating Defendant's sentence in 10 CRS 1409. We affirm the trial court's judgments in 10 CRS 1399–1408.

VACATED IN PART; AFFIRMED IN PART.

Chief Judge MARTIN and Judge ELMORE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 19 NOVEMBER 2013)

DEPT OF TRANSP. v. ASHCROFT COMMONS, LLC No. 13-140	Rockingham (10CVS1678)	Affirmed
GENTRY v. MILLER No. 13-581	Durham (11CVS4437)	No Error
HISTORICAL PRES. ACTION COMM., INC. v. CITY OF REIDSVILLE No. 12-1386	Rockingham (12CVS518)	Affirmed
IN RE A.D. No. 13-641	Mecklenburg (12JB439)	Affirmed
IN RE A.N.V. No. 13-572	Wake (12JT31-32)	Affirmed
IN RE D.M.R. No. 13-789	Dare (11JT51)	Affirmed
IN RE E.L.F. No. 13-604	Wilkes (12JB109)	Affirmed
IN RE J.B.W. No. 13-445	Guilford (10JT143-144)	Reversed and Remanded
IN RE K.C. No. 13-738	Durham (10J295-296)	Affirmed
IN RE M.F. No. 13-432	Mecklenburg (12JB148)	Affirmed
IN RE M.R. No. 13-737	Granville (10JT68-69)	Affirmed
IN RE R.C. No. 13-683	Wake (11JT322-24)	Affirmed
IN RE T.F. No. 13-731	Warren (07JA43-44)	Affirmed
IN RE T.R.C. No. 13-508	Guilford (10JT628)	Affirmed
McRAVION v. N.C. DEPT OF CORR. No. 13-467	N.C. Industrial Commission (TA-21976)	Affirmed

STATE v. BROWN No. 13-501	Greene (09CRS50159) (12CRS284)	No Error
STATE v. CHURCH No. 13-557	Wilkes (10CRS052678) (11CRS42)	Reversed and Remanded
STATE v. GOODWIN No. 13-569	Johnston (11CRS55516)	Affirmed in part, no error in part; remanded for correction of clerical errors in judgments.
STATE v. HARRIS No. 13-479	Wayne (10CRS55729-30) (11CRS5726)	Vacated; new trial; no error; no prejudicial error; all in part
STATE v. HART No. 13-558	Mecklenburg (09CRS250733)	No Error
STATE v. JOHNSON No. 13-368	Harnett (11CRS50593) (11CRS51033)	No error; no plain error
STATE v. LAWSON No. 13-529	Cumberland (10CRS51009) (97CRS2927)	Reversed and Remanded
STATE v. NEWSON No. 13-131	Cumberland (12CRS4256-58)	Affirmed in part; vacated in part.
STATE v. NICHOLAS No. 13-613	Onslow (12CRS50214)	No Error
STATE v. NUNN No. 13-528	Guilford (11CRS75413)	No Error
STATE v. ROSSI No. 13-361	Craven (12CRS837-838)	Vacated and Remanded
STATE v. SALTER No. 13-386	Carteret (12CRS50158-60)	Affirmed
STATE v. SAMOLINSKI No. 13-485	Surry (10CRS54325)	Dismissed
STATE v. STREATER No. 13-338	Forsyth (12CRS54266) (12CRS6413)	No Error

STATE v. WIGFALL No. 13-523	Caswell (12CRS50284)	No Error
STATE v. WILSON No. 13-110	Mecklenburg (09CRS258861)	No Error
THORNTON v. CITY OF RALEIGH No. 13-533	N.C. Industrial Commission (216738)	Affirmed

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

ADMINISTRATIVE LAW
APPEAL AND ERROR
ARBITRATION AND MEDIATION

CHILD ABUSE, DEPENDENCY,
AND NEGLECT
CHILD CUSTODY AND SUPPORT
CIVIL PROCEDURE
COLLATERAL ESTOPPEL AND
RES JUDICATA
CONSTITUTIONAL LAW
CONTEMPT
CONTRACTS
CORPORATIONS
COURTS
CRIMES, OTHER
CRIMINAL LAW

DIVORCE
DRUGS

EMINENT DOMAIN
EMPLOYER AND EMPLOYEE
ENVIRONMENTAL LAW
ESTOPPEL
EVIDENCE

FIREARMS AND OTHER WEAPONS
FRAUD

HIGHWAYS AND STREETS
HOMICIDE

IMMUNITY
INTEREST

JURISDICTION
JURY
JUVENILES

MALICIOUS PROSECUTION

NATIVE AMERICANS
NEGLIGENCE
NEGOTIABLE INSTRUMENTS

PLEADINGS
POSSESSION OF STOLEN PROPERTY
PROBATION AND PAROLE
PROCESS AND SERVICE
PUBLIC ASSISTANCE

SEARCH AND SEIZURE
SENTENCING
SEXUAL OFFENDERS
STATUTES OF LIMITATION
AND REPOSE

TERMINATION OF PARENTAL RIGHTS
TORT CLAIMS ACT
TRIALS

UNJUST ENRICHMENT
UTILITIES

WILLS
WITNESSES
WORKERS' COMPENSATION

ZONING

ADMINISTRATIVE LAW

Findings for sanctions not imposed—not required—In an action arising from the suspension of a police officer's law enforcement certification, respondent was required to make adequate findings to support its decision, but petitioner cited no case, statute, or regulation requiring an agency to make findings about sanctions it elected not to impose. **Kreuger v. N.C. Criminal Justice Educ. & Training Standards Comm'n, 293.**

North Carolina Coastal Resources Commission—review of administrative law judge's decision—changes to legal conclusions—The North Carolina Coastal Resources Commission (Commission) did not err in its review of an administrative law judge's (ALJ) decision by adopting certain new findings of fact and striking other findings of fact instead of remanding the matter back to the ALJ, as required by N.C.G.S. § 150B-36(d). The Commission made changes to legal conclusions and not factual findings. **Busik v. N.C. Coastal Res. Comm'n, 148.**

Petitioner's proposed additional findings—no requirement that agency adopt—There was no basis in law for a contention that an agency should have adopted petitioner's proposed additional findings in an action involving a police officer's suspended law enforcement certification. **Kreuger v. N.C. Criminal Justice Educ. & Training Standards Comm'n, 293.**

APPEAL AND ERROR

Appellate jurisdiction—appeal from district court dismissal—An appeal by the State was not authorized by statute, and the Court of Appeals had no jurisdiction over the appeal, where defendant made a pretrial motion to dismiss a driving while impaired charge in district court; after a remand for further findings, the superior court affirmed the district court's preliminary order and remanded it to the district court for dismissal; and the State again appealed to the superior court. Since this appeal to superior court was from a final order of the district court, N.C.G.S. § 15A-1432 was the controlling statute and the State could then appeal only by following the procedures stated in N.C.G.S. § 15A-1432(e) and including a certificate that the appeal was not for purposes of delay. While the State sought to file a belated certificate by petitioning for a writ of certiorari, the Court of Appeals saw no reason to nullify the requirements of N.C.G.S. § 15A-1432(e) by allowing the petition. **State v. Bryan, 324.**

Argument moot—Petitioner's argument the North Carolina Coastal Resources Commission's (Commission) interpretation of 15A NCAC 7H. 0306 was not entitled to deference as a matter of law "because it [was] erroneous" was moot where the Court of Appeals determined that the Commission's application of the regulations was consistent with the plain meaning of the text. **Busik v. N.C. Coastal Res. Comm'n, 148.**

Certiorari granted—different theory on appeal—The Court of Appeals granted defendant's petition for certiorari, invoking its authority under N.C.R. App. P. 2, to review the merits of defendant's appeal where defendant acknowledged that his argument in Court of Appeals presented a different theory for dismissal than that argued in the trial court. **State v. Martinez, 361.**

Findings—not made by trial court—evidence in the record—An order in a child neglect case involving the Indian Child Welfare Act that ceased reunification efforts was reversed and remanded for proper findings. While there may be evidence in the record to support a determination that further efforts would be futile, it was

APPEAL AND ERROR—Continued

up to the trial court to make proper factual findings based on the record evidence. **In re E.G.M., 196.**

Interlocutory orders and appeals—Section 108 hearing—vital preliminary issue—immediate appeal—An order from a trial court's judgment in an N.C.G.S. § 136-108 hearing concerning title to property and area taken is a vital preliminary issue and is subject to immediate review on appeal. **Dep't of Transp. v. Webster, 468.**

Interlocutory orders and appeals—child custody—changed from mother to DSS—immediately appealable—A permanency planning order that changed legal custody of a child from respondent mother to DSS was immediately appealable. **In re E.G.M., 196.**

Interlocutory orders and appeals—default judgment for monetary sum—substantial right affected—Defendant's appeal from the trial court's interlocutory order denying his motion to set aside a default judgment against him for a monetary sum affected a substantial right and the Court of Appeals addressed the merits of the appeal. **Brown v. Caviti Sci., Inc., 460.**

Interlocutory orders and appeals—denial of motions to dismiss—substantial right—Workers' Compensation Act exclusivity provision—The denial of a motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(1) and the exclusivity provision of the Workers' Compensation Act in a negligence case affected a substantial right and were immediately appealable. Further, the denial of defendants' N.C.G.S. § 1A-1, Rule 12(b)(6) motions to dismiss were immediately appealable as affecting a substantial right to the extent that they involved the trial court's jurisdiction over this matter. **Estate of Vaughn v. Pike Elec., LLC, 485.**

Interlocutory orders and appeals—eminent domain—substantial right affected—An order in an eminent domain action finding facts and concluding that the easement was for a public purpose was interlocutory because the issue of just compensation was not resolved. However, orders under N.C.G.S. § 40A-47 are immediately appealable as affecting a substantial right. **City of Asheville v. Resurgence Dev. Co., 80.**

Interlocutory orders and appeals—preliminary injunction—substantial right—Plaintiffs' motion to dismiss defendant North Carolina Bail Agents Association's appeal from the trial court's order granting plaintiffs a preliminary injunction was denied. Although the appeal was interlocutory, the preliminary injunction required defendant to "give up" the right to do business as the exclusive provider of creditable bail bondsmen training and to receive remuneration for providing such education and thus affected a substantial right. **Rockford-Cohen Grp., LLC v. N.C. Dep't of Ins., 317.**

Interlocutory orders and appeals—preventing fragmentary appeals—Although the orders from which plaintiffs and defendant Baker appealed were interlocutory, Baker's appeal was found to be proper in order to prevent fragmentary appeals. Additionally, the appeals from the trial court's orders denying plaintiffs' motion to amend the summons against the City and denying defendants' motion to dismiss for failure of the summons to "contain the title of the cause" were also properly before the Court pursuant to N.C.G.S. § 1-278 since plaintiffs properly appealed from a final judgment, and the orders involved the merits and necessarily affected that judgment. **Washington v. Cline, 396.**

APPEAL AND ERROR—Continued

Interlocutory orders and appeals—sovereign immunity—substantial right—The Court of Appeals had jurisdiction to hear defendants' interlocutory appeal from the trial court's denial of their motion to dismiss for lack of personal jurisdiction. Defendants' claim of sovereign immunity was immediately appealable as affecting a substantial right. **Atl. Coast Conf. v. Univ. of Md.**, 429.

Interlocutory orders and appeals—summary judgment—public official immunity—substantial right—Orders denying summary judgment based on public official immunity affect a substantial right and are immediately appealable. **Allmond v. Goodnight**, 413.

Issue not timely raised—writ of certiorari—The Court of Appeals exercised its discretion to allow review of the question of whether the trial court provided a factual basis for denying a juvenile's release pending appeal. The issue was not timely raised and the juvenile would lose the ability to appeal if the writ of *certiorari* was not granted. **In re G.C.**, 511.

Juvenile adjudication—right of appeal—standard of review—Under N.C.G.S. § 7B-2602, a juvenile may appeal a final district court order. Here, the juvenile argued that the trial court failed to follow a statutory mandate, which is a question of law to be reviewed *de novo*. **In re G.C.**, 511.

Motion for appropriate relief—no substantial evidence—The trial court did not err in a robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon case by denying defendant's motion for appropriate relief (MAR). Even assuming *arguendo* that the challenged finding of fact was unsupported, defendant failed to show that the trial court erred in its ultimate conclusion to deny the MAR. There was not substantial evidence requiring the trial court to conduct a hearing into defendant's competency. **State v. Holland**, 337.

Preservation of issues—constitutional issue—not raised at trial—A constitutional issue raised at oral argument but not at trial was not preserved for appeal. **In re Cline**, 11.

Preservation of issues—failure to argue—While plaintiff sought relief at trial on four grounds, plaintiff sought review only of the trial court's treatment of its unjust enrichment claim and argued the trial court abused its discretion in denying its request for leave to amend its complaint. Plaintiff therefore abandoned the remaining three grounds raised in the trial court under N.C. R. App. P. 28(b)(6). **JPMorgan Chase Bank v. Browning**, 537.

Preservation of issues—failure to cite authority—Although defendant Baker contended the trial court erred by denying his motion to dismiss the action for failure of the summonses to contain all of the necessary information required by N.C.G.S. § 1A-1, Rule 4(b), namely the "title of the cause," this argument was deemed abandoned based on a failure to cite authority. **Washington v. Cline**, 396.

Preservation of issues—failure to request review in writ of certiorari—failure to object—untimely request—The Court of Appeals declined to address defendant's argument in a probation revocation case that the trial court that sentenced him in Alamance County was required to make findings of fact before it placed him on probation for a period greater than thirty months when neither of the petitions for writ of *certiorari* requested review of the Alamance County judgments, defendant failed to object to those judgments prior to his arguments to the Court

APPEAL AND ERROR—Continued

of Appeals, and those judgments were made final nearly four and a half years ago. **State v. Williams, 590.**

Preservation of issues—no authority cited—A contention in an equitable distribution appeal for which plaintiff cited no authority was deemed abandoned. **Ross v. Ross, 28.**

Record—documents not included—not considered—The trial court did not erroneously assign prior record points where defendant argued that two prior convictions had occurred on the same day, but the convictions appeared to have been separated by three months. The documents relied upon by defendant (copies of a plea transcript and judgment) were attached to his brief but could not be considered because they were not part of the record on appeal. **State v. Martin, 571.**

Record—motion to amend—probation revocation—inclusion of criminal judgment—Defendant's motion to amend the record in a probation revocation case to include a certified summary of the criminal judgment in 05 CRS 7502 was granted. **State v. Williams, 590.**

Reply brief—timeliness—motion to strike—The State's motion to strike appellant defendant's reply brief in a probation revocation case was denied. Appellant's reply brief was timely under the version of N.C. R. App. P. 28(h) that was in effect for appellant's appeal. **State v. Williams, 590.**

Standard of review—comity—question of law—de novo—The question of whether a North Carolina court should extend comity to a sister state's sovereign immunity request is a question of law reviewable *de novo*. **Atl. Coast Conf. v. Univ. of Md., 429.**

Writ of certiorari—probation revocation—review of all judgments—Defense counsel's petition for writ of *certiorari* seeking review of 10 CRS 1409 in addition to the other ten judgments was granted in the interest of reviewing all of the judgments revoking probation entered by the trial court on 22 August 2011. **State v. Williams, 590.**

ARBITRATION AND MEDIATION

Novation to note—earlier agreements superseded—no agreement to arbitrate—There was no agreement to arbitrate where a 2010 novation to a 2004 note did not contain an agreement to arbitrate, the novation was between the same parties, and the novation superseded any agreement the parties may have made in the 2004 note or the original agreement (the BAI Series 7 Agreement). **Bank of Am., N.A. v. Rice, 450.**

Novations to notes—original agreement superseded—In an action to compel arbitration, an agreement between plaintiff's affiliate and defendant (the BAI Series 7 Agreement) had no effect because subsequent novations to notes unambiguously stated that they superseded all previous commitments and understandings. **Bank of Am., N.A. v. Rice, 450.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Cessation of reunification efforts—findings and conclusion—The trial court made sufficient findings before ceasing reunification efforts in a child neglect hearing

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

and related the findings to a conclusion of law that specifically set forth the basis for ceasing reunification efforts. **In re J.P., 523.**

Neglect—erroneous award of guardianship to non-relatives—cessation of review—The trial court erred in a child neglect case by awarding guardianship to non-relatives and ceasing further review in the matter. On remand, the trial court should ensure that respondent father's right to appear at hearings in the matter and his right to effective assistance of counsel are protected. **In re C.M., 193.**

Notice—failure to object—Although respondents argued that the trial court erred in a child neglect proceeding by adopting a temporary and then a permanent plan for the children without the statutorily required notice, the alleged error was rendered harmless by respondents' failure to object at a disposition hearing which they attended with counsel. **In re J.P., 523.**

Permanency planning order—child not returned home—inadequate findings of fact—The trial court erred in a permanency planning order by failing to make adequate findings of fact under N.C.G.S. § 7B-907(b) to support its conclusion that the child could not be returned home. The order was reversed and remanded for entry of an order with sufficient findings to support the trial court's judgment. **In re M.M., 225.**

Permanency planning order—no detailed visitation plan—The trial court erred in a permanency planning order by failing to set forth a detailed visitation plan for respondent mother and, instead, inappropriately leaving visits within the discretion of the child's guardians. The order was reversed and the matter was remanded to the trial court. **In re M.M., 225.**

Permanency planning order—transfer of jurisdiction—insufficient findings of fact—failure to stay proceeding—The trial court erred in a permanency planning order by transferring jurisdiction of the case to Michigan where the trial court's findings of fact failed to demonstrate that the trial court properly considered the relevant factors under N.C.G.S. § 50A-207(b). Moreover, the trial court failed to stay the present juvenile case upon condition that a child custody proceeding be promptly commenced in Michigan, as required by N.C.G.S. § 50A-207(c). The order was reversed and the matter was remanded to the trial court. **In re M.M., 225.**

Permanency planning order—waiver of future hearings—inadequate findings of fact—The trial court erred in a permanency planning order by failing to make sufficient findings of fact under N.C.G.S. § 7B-906(b) to support its decision to waive further review hearings. The order was reversed and the matter was remanded to the trial court for further proceedings. **In re M.M., 225.**

Visitation plan—time, place, conditions—not sufficiently set forth—The trial court failed in a child neglect proceeding to adopt a proper visitation plan where the plan provided in the disposition order did not sufficiently set forth the time, place, or conditions of respondent-father's visitation. **In re J.P., 523.**

CHILD CUSTODY AND SUPPORT

Child support arrearages—periodic payments—no valid basis to set aside provision—The trial court erred in a child support case by granting defendant's motion pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure and setting aside a provision in a prior judgment for child support requiring defendant to

CHILD CUSTODY AND SUPPORT—Continued

make periodic payments towards his child support. There was no valid basis under Rule 60(b) that would permit the trial court's modification of the prior judgment. **Duplin Cnty. Dep't of Soc. Servs. ex rel. Pulley v. Frazier, 480.**

CIVIL PROCEDURE

Rule 12(b)(6) dismissal—with prejudice—no abuse of discretion—The trial court did not abuse its discretion when it granted a Rule 12(b)(6) dismissal with prejudice rather than allowing leave to amend. The record was devoid of any motion by plaintiff to amend its complaint and nothing indicated that plaintiff moved that the dismissal be without prejudice. Plaintiff cannot now claim that the trial court abused its discretion by not offering, *sua sponte*, an opportunity to amend the complaint. **First Federal Bank v. Aldridge, 187.**

COLLATERAL ESTOPPEL AND RES JUDICATA

Change in circumstances—res judicata doctrine not applicable—The trial court did not err in a case involving the lease of a used car lot by denying defendant's motion for a new trial. Plaintiff's third complaint was not barred by the doctrine of *res judicata* where a change in circumstance after the first complaint eliminated plaintiff's waiver of defendant's lease breaches that previously prevented it from ejecting defendant. **Auto. Grp., LLC v. A-1 Auto Charlotte, LLC, 443.**

Traffic accident—state trooper—sued in individual and official capacities—The trial court did not err by refusing to hold that plaintiffs were judicially estopped from asserting their claims against defendant state trooper in his individual capacity where defendant was involved in a traffic accident and was sued in both his individual and official capacities. **Allmond v. Goodnight, 413.**

CONSTITUTIONAL LAW

Agency authority to decide punishment—not unfettered—The fact that respondent, which issued law enforcement certifications, had the authority to exercise some discretion in deciding whether to punish petitioner with a suspension or something less severe did not render the regulations unconstitutional. The regulations at issue did not give respondent unfettered discretion. **Kreuger v. N.C. Criminal Justice Educ. & Training Standards Comm'n, 293.**

Competency to stand trial—hearing not required—The trial court did not err in a robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon case by failing to inquire, *sua sponte*, into defendant's competency after he was involuntarily committed to a psychiatric unit before the second day of his trial. The trial court had no record or information during trial that defendant was involuntarily committed. Further, defendant's distrust of counsel, decision to proceed to trial, mistaken understanding of criminal procedure, and refusal to attend his trial did not constitute substantial evidence requiring the trial court to conduct a hearing. **State v. Holland, 337.**

Competent representation—evidence sufficient—There was competent evidence in a heroin prosecution to support the trial court's finding that defendant's attorneys were competent to represent him. The record contained no evidence suggesting that defendant's attorneys were incompetent and contained evidence of competent representation when defendant allowed his attorneys to represent him.

CONSTITUTIONAL LAW—Continued

Although defendant argued that the record should have contained evidence supporting a volunteered statement by the judge about the attorney's competence, the finding of competent representation would be supported by the record even without the volunteered statement. **State v. Chukwu, 553.**

District attorney—actual malice—not protected speech—Speech by a district attorney that involved actual malice was not constitutionally protected and the district attorney did not receive the protection given to government employees for constitutionally protected speech. **In re Cline, 11.**

Double jeopardy—separate charges based on same substance—stare decisis—Bound by the decisions in *State v. Pipkins*, 337 N.C. 431, and *State v. Perry*, 316 N.C. 87, the Court of Appeals held that the trial court did not deprive defendant of his right against double jeopardy by sentencing him for three trafficking in methamphetamine charges, manufacturing methamphetamine, and possession of methamphetamine based on the same illegal substance. **State v. Simpson, 119.**

Due process—competency to stand trial—substantial evidence of incompetence—new trial—Where there was substantial evidence before the trial court indicating that defendant might be incompetent to stand trial both at the time of his initial trial for assault on a person employed at a state detention facility and having attained habitual felon status, and at his habitual felon retrial, the trial court erred and violated defendant's due process rights by not ordering a competency hearing *sua sponte*. Defendant's convictions were reversed and a new trial was ordered. **State v. Ashe, 38.**

Due process—equal protection—law enforcement certification—findings—In an action involving a police officer's suspended law enforcement certification, respondent's findings were sufficient to address petitioner's due process and equal protection arguments. Respondent made findings about other officers who were suspended or received a lesser sanction and found that those officers who had committed similar offenses were treated similarly. **Kreuger v. N.C. Criminal Justice Educ. & Training Standards Comm'n, 293.**

Due process—second competency hearing—failure to conduct sua sponte—The trial court did not violate defendant's due process rights in a heroin prosecution when it allowed his case to go to trial without *sua sponte* instituting a second competency hearing. The evidence presented did not raise a bona fide doubt about defendant's competency during trial and his competency was not temporal in nature. **State v. Chukwu, 553.**

Due process—zoning violation—notice of hearing—Petitioner's due process right was not violated by a board of adjustment decision concerning a fence where petitioner had a property interest in his fence and was given notice and an opportunity to be heard. Petitioner was sent and received written notice of his ordinance violation, met with the town's code administrator and the town attorney before the hearing to clarify the scope of the hearing, was present for the hearing and was allowed to ask the code administrator questions, and was allowed to testify. **Lipinski v. Town of Summerfield, 305.**

Effective assistance of counsel—failure to show prejudice—Defendant did not receive ineffective assistance of counsel and could not show prejudice when there was no reasonable probability that, in the absence of the counsel's alleged errors, the result of the proceeding would have been different. Further, the obstruction of

CONSTITUTIONAL LAW—Continued

justice and attempted obstruction of justice charges were dismissed at the close of the State's evidence and defendant was acquitted of all but one of the sexual misconduct charges. **State v. Smith, 387.**

Equal protection—suspension of law enforcement certification—A police officer was not deprived of his equal protection rights when respondent suspended his law enforcement certification. Respondent's interest in preserving the credibility of law enforcement officer certifications is substantial and there was a rational relation between respondent's decision to distinguish between petitioner and other officers who had received lesser sanctions. **Kreuger v. N.C. Criminal Justice Educ. & Training Standards Comm'n, 293.**

Free speech—removal of district attorney—The procedure for removing a district attorney from office did not violate her right to free speech under the First Amendment of the United States Constitution. Statements made with actual malice are not protected by the First Amendment. **In re Cline, 11.**

North Carolina—prohibition against monopolies—preliminary injunction—The trial court did not err by granting plaintiffs' motion for preliminary injunction declaring that 2012 N.C. Sess. Law, ch. 183, "An Act to Provide for the Pre-Licensing and Continuing Education of Bail Bondsmen and Runners[.]" violated Article I, Section 34 of the North Carolina Constitution. By assigning creditable bail bondsmen training solely to one group (defendant), where previously anyone could apply to the Commissioner of Insurance to provide such training, the law violated the prohibition against impermissible monopolies. **Rockford-Cohen Grp., LLC v. N.C. Dep't of Ins., 317.**

Procedural due process—removal of district attorney—The trial court did not err by denying a district attorney's motion to dismiss a removal proceeding against her for violations of procedural due process. The underlying issues were resolved against her elsewhere in the opinion. **In re Cline, 11.**

Removal of district attorneys—language not unconstitutionally vague—The language in N.C.G.S. § 7A-66(6) providing for the removal of district attorneys is not unconstitutionally vague. **In re Cline, 11.**

Right to cross-examine witnesses—non-testimonial evidence—no violation—The trial court did not err in a larceny case by denying defendant's motion for a mistrial. Defendant's argument that two pieces of evidence admitted at trial violated his Sixth Amendment right to cross-examine witnesses was without merit because the contested evidence was non-testimonial. **State v. Call, 45.**

Substantive due process—suspension of agency certification—A law enforcement officer whose certification was suspended by respondent was not deprived of substantive due process where respondent did not offer him a consent agreement. Respondent's actions were not arbitrary because preserving the credibility of law enforcement certifications is a valid state objective and suspending the certification for officers who undermine that credibility is rationally related to that objective. **Kreuger v. N.C. Criminal Justice Educ. & Training Standards Comm'n, 293.**

CONTEMPT

Criminal—standard of proof—deficient—A criminal contempt order against an attorney for trying to obtain a signed order through subterfuge was reversed where

CONTEMPT—Continued

the trial court made numerous findings about defendant's inexcusable and unacceptable behavior, but did not indicate that it had used "beyond a reasonable doubt" as the standard of proof. **State v. Phillips, 382.**

CONTRACTS

Breach of contract—specific performance—motion to dismiss—sufficiency of evidence—void for indefiniteness—The trial court did not err by dismissing plaintiffs' claims for breach of contract and specific performance even though plaintiffs contended that the amended complaint alleged a valid contract between the parties, based on a 21 November letter, and that the contract was breached by defendant County. The 21 November letter's silence on several key terms rendered it void for indefiniteness. **Charlotte Motor Speedway, LLC v. Cnty. of Cabarrus, 1.**

Breach of contract—unfair and deceptive trade practices—default judgment—no excessive relief granted—sufficient allegations—The trial court did not err in a breach of contract and unfair and deceptive trade practices case by denying defendant Connell's motion to set aside a default judgment against him made pursuant to North Carolina Rule of Civil Procedure 60(b). The relief granted did not exceed the relief sought by plaintiff based upon the allegations set forth in the complaint and the allegations in the complaint were sufficient to state claims for relief against Connell with respect to each of the nine asserted claims. **Brown v. Cavit Sci., Inc., 460.**

Breach—failure to make deposit—not a condition precedent—summary judgment—The trial court did not err in a breach of contract case by granting summary judgment in plaintiffs' favor even though they failed to make a \$2,500 deposit. Nothing in the language of the Infrastructure Agreement in any way tended to suggest that plaintiffs had to make the required \$2,500 payment before defendant became obligated to obtain the installation of the required facilities. **Davis v. Woodlake Partners, LLC, 88.**

CORPORATIONS

Department of Motor Vehicles hearing—representation by counsel—The trial court did not err by reversing the final decision of the Department of Motor Vehicles (DMV), which assessed a civil penalty of \$1,500 against Twin County Motorsports, Inc. (Twin County) and suspended its safety inspection license for a period of 1,080 days, and remanding the matter to the DMV hearing officer for a new hearing with Twin County represented by proper counsel. Twin County was not represented by counsel at the DMV hearing and corporations cannot appear pro se in DMV hearings. **In re Twin Cnty. Motorsports, Inc., 259.**

Piercing corporate veil—fraud—genuine issues of material fact—Where defendants Gordon and Bieber failed to cite to the Court of Appeals facts that supported a conclusion that the corporate veil should be pierced as to two corporations, there was no repayment of an antecedent debt to constitute reasonably equivalent value when Moorehead transferred the monies to Gordon and Bieber. There existed genuine issues of material fact under N.C.G.S. §§ 39-23.5, 39-23.4, and 39-23.8 as to plaintiffs' claims against Gordon and Bieber, and the Court of Appeals reversed the trial court's order granting summary judgment in their favor and remanded the case for further evidentiary proceedings. **Estate of Hurst v. Jones, 162.**

COURTS

Removal of district attorney—burden of persuasion—In a proceeding to remove a district attorney, the trial court did not err by failing to clearly delineate which party bore the burden of persuasion. It was clear from the trial court's formulation of the standard of proof required, and of the manner in which the hearing was conducted, that the burden of proof rested squarely upon the parties who instituted these proceedings. **In re Cline, 11.**

Removal of district attorney—continuance denied—The trial court did not abuse its discretion by denying a second motion for a continuance by a district attorney in a proceeding to remove her from office. The statutory time frame for this type of proceeding is tight and the trial judge made accommodations for the district attorney. **In re Cline, 11.**

Removal of district attorney—discovery—A district attorney did not have a right to discovery in a proceeding to remove her from office in the absence of statutory or rule-based provisions. Moreover, the district attorney could not show prejudice because the trial court explicitly limited the evidence and the district attorney knew precisely what evidence could be brought against her. **In re Cline, 11.**

Removal of district attorney—lay opinion testimony—The trial judge did not err in a district attorney's removal proceeding by allowing lay witnesses to give opinion testimony on the subject of whether the district attorney's conduct brought her office into disrepute. The proceedings were conducted without a jury and the presumption was that the trial court based its judgment solely on the admissible evidence. **In re Cline, 11.**

CRIMES, OTHER

Altering court documents—insufficient evidence—The trial court erred by denying defendant's motion to dismiss the charge of altering court documents. While the evidence suggested that defendant forged signatures on a document before it was filed in the clerk of court's office, the evidence did not show that defendant materially altered or changed any process, pleading, or other official case record. **State v. Martinez, 361.**

CRIMINAL LAW

Competency to stand trial—cooperation with attorneys—findings—The trial court did not err in a heroin prosecution by finding that defendant refused to cooperate with his attorneys where those attorneys withdrew or moved to withdraw due to their inability to communicate with defendant, a psychologist's report indicated that defendant had a history of refusing to cooperate with his attorneys, and defendant noted at several points that he did not need or want an attorney. **State v. Chukwu, 553.**

Competency to stand trial—divergent behavior—The trial court did not err in a heroin prosecution by finding that defendant displayed a history of being lucid when at Central Regional Hospital yet delusional when he returned to Mecklenburg County. Given the reports of defendant's rational behavior while in the custody of Central Hospital and the divergent behavior displayed at trial, competent evidence supported the trial court's finding. **State v. Chukwu, 553.**

Judge's statements—findings rather than conclusions—evidence sufficient—The trial court in a heroin prosecution correctly characterized its statements

CRIMINAL LAW—Continued

that defendant was malingering and attempting to delay and manipulate the system as findings rather than conclusions. Those findings were supported by competent evidence, although there was evidence to the contrary. **State v. Chukwu, 553.**

Prosecutor's argument—feelings of sympathy for defendant—The trial court did not err in a robbery with a dangerous weapon and possession of stolen goods case by overruling defendant's objection to the prosecutor's closing argument. The prosecutor's challenged statement merely implored the jury not to allow feelings of sympathy to overshadow the application of the law to the evidence presented. **State v. Monroe, 70.**

DIVORCE

Equitable distribution—note—marital property—evidence—The trial court did not err in an equitable distribution action by determining that a promissory note from plaintiff's brother was marital property valued at \$45,000. The parties' pretrial stipulations and the testimony of the parties as to the amount of the debt were sufficient to support the trial court's findings, which supported its conclusions and its ultimate award. **Johnson v. Johnson, 280.**

Equitable distribution—pension—value—evidence—The trial court did not abuse its discretion in an equitable distribution action by not assigning a value to defendant's military pension or distributing the pension where plaintiff failed to produce credible evidence of the value of defendant's pension at the time of separation. **Johnson v. Johnson, 280.**

Equitable distribution—post-separation loan payments—An equitable distribution final judgment was reversed and remanded with instructions that the amount of defendant's post-separation payments characterized as divisible property be reduced by the amount of a loan received by defendant rather than going to pay off a marital debt. **Ross v. Ross, 28.**

Equitable distribution—post-separation loan payments—appreciation of property—An equitable distribution final judgment was remanded where the trial court erred in its treatment of defendant's post-separation payments on a real property debt, which allowed her to increase her ownership interest in the property itself after the date of separation. In determining the amount of passive appreciation in the marital portion of the property, the trial court should have valued the marital and separate portions of the property as of the date of separation. **Ross v. Ross, 28.**

Equitable distribution—valuation of house and lot—The trial court did not err in an equitable distribution action by using the source of funds theory to value a lot and house as a single asset rather than determining separate appreciation. Plaintiff did not cite in his brief to any part of the record where he offered evidence regarding the separate values of the lot and the house. **Ross v. Ross, 28.**

Equitable distribution—valuation of marital residence—The trial court did not err in an equitable distribution action in its valuation of a marital residence. Although plaintiff contended that she was entitled to credit for payments made on the indebtedness on the marital residence after separation, once the residence was distributed to plaintiff in the interim distribution order, any payments she made were for her residence and to her benefit rather than for the marital estate. **Johnson v. Johnson, 280.**

DIVORCE—Continued

Equitable loan—repayment of loan—marital—The trial court erred in an equitable distribution action by classifying the repayment of a loan as part marital and part separate where plaintiff's purchase of a lot prior to the marriage was partially financed by a loan which was satisfied during the marriage. When the undisputed evidence showed that the loan was paid off during the marriage, the burden shifted to plaintiff to present evidence establishing the portion of the loan reduction that was his separate property because it was paid before the marriage. This he did not do. **Ross v. Ross, 28.**

DRUGS

Maintaining a vehicle for keeping or selling methamphetamine—insufficient evidence—The trial court erred in denying defendant's motion to dismiss the charge of maintaining a vehicle for keeping or selling methamphetamine. The evidence was insufficient to show that defendant allowed others to resort to his vehicle to use controlled substances. **State v. Simpson, 119.**

Manufacturing methamphetamine—trafficking in methamphetamine by manufacture charges—jury instructions—element of intent—no plain error—The trial court did not commit plain error in a drugs case by failing to instruct the jury on the intent element of manufacturing methamphetamine and trafficking in methamphetamine by manufacture charges. Even assuming arguendo that the trial court's omission of an instruction on intent to distribute was erroneous, the omission did not rise to the level of plain error as defendant failed to show prejudice. **State v. Simpson, 119.**

EMINENT DOMAIN

Extension of sewer service—affordable housing—public use or benefit—An expansion of sewer service constituted an action for the public use or benefit under N.C.G.S. § 40A-3 and plaintiff could validly exercise its power of eminent domain to condemn a sewer easement over defendant's land. An extension of sewer lines to allow the development of the land owned by the City of Asheville facilitated the construction of affordable housing, which was to the benefit of the public. **City of Asheville v. Resurgence Dev. Co., 80.**

EMPLOYER AND EMPLOYEE

Wrongful termination—correct evidentiary standard—genuine issue of material fact—summary judgment erroneous—The trial court erred in a wrongful termination case by granting summary judgment in favor of defendant employer. Although the trial court did not use the wrong evidentiary standard as set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, plaintiff's evidence created a genuine issue of material fact as to whether plaintiff's age was the reason for his termination. **Johnson v. Crossroads Ford, Inc., 103.**

ENVIRONMENTAL LAW

Coastal Area Management Act—oceanfront construction setbacks—regulatory interpretation—The trial court did not err in a case involving the interpretation and application of certain rules governing oceanfront construction setbacks contained in 15A NCAC 7H. 0306 by concluding, as a matter of law, that there was no

ENVIRONMENTAL LAW—Continued

error in applying a 60-foot setback from the ocean's vegetation line. This interpretation comported with the plain meaning of the regulations. **Busik v. N.C. Coastal Res. Comm'n**, 148.

ESTOPPEL

Judicial—fraud—intent—good faith—Where plaintiffs in prior litigation asserted that business entities were one and the same, they were judicially estopped from asserting any inconsistent factual allegations in the present case and could not show that defendant Moorehead's transfer of money to defendant Jones was fraudulent under N.C.G.S. § 39-23.4(a)(2) or 39-23.5. The trial court's entry of summary judgment in favor of plaintiffs was reversed and the matter was remanded for entry of summary judgment in Jones' favor as to these issues. Where there were issues of material fact as to whether Moorehead transferred the money to Jones with fraudulent intent and as to whether Jones took it in good faith, the Court of Appeals reversed the trial court's entry of summary judgment in favor of plaintiffs as to Jones under N.C.G.S. § 39-23.4(a)(1) and remanded the case for a jury trial on these issues. **Estate of Hurst v. Jones**, 162.

EVIDENCE

Affidavit—summary judgment—erroneously excluded—abuse of discretion—The trial court abused its discretion in a wrongful termination case by excluding an affidavit presented by plaintiff prior to a summary judgment hearing. The affidavit from the individual hired to replace plaintiff was timely served upon defendant, the substance of the affidavit did not contradict any previous sworn testimony of the affiant, and the contents of the affidavit were not contradictory to plaintiff's complaint. **Johnson v. Crossroads Ford, Inc.**, 103.

Exclusion—increased traffic—compensation—The trial court did not err in a case seeking damages for increased traffic flow on a private road taken for public use by ordering that the evidence and arguments pertaining to increased traffic on Rescue Lane be excluded from the trial on compensation purportedly owed defendants due to plaintiff Department of Transportation's expansion of Brawley School Road. **Dep't of Transp. v. Webster**, 468.

Prior crimes or bad acts—criminal record—drug use—The trial court did not err in a robbery with a dangerous weapon and possession of stolen goods case by denying defendant's motion to redact the videotaped interrogation referencing his prior criminal record and drug use. The pertinent statement was relevant under Rule 402 and its probative value was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. **State v. Monroe**, 70.

Prior crimes or bad acts—driving while impaired—malice—no prejudicial error—The trial court did not commit prejudicial error in a driving while impaired case by admitting evidence of defendant's drinking habits and of prior incidents in which defendant drank alcohol while driving. Challenged testimony regarding an incident two months earlier was properly admitted as evidence of malice and the trial court did not abuse its discretion in admitting the evidence under Rule 403. Further, any error in admitting the remaining challenged testimony was not prejudicial, given the State's evidence. **State v. Grooms**, 56.

EVIDENCE—Continued

Prior crimes or bad acts—first-degree statutory rape—temporal proximity—sufficiently similar—Although the appeal was decided on other grounds, there was no plain error in a prosecution for first-degree statutory rape in admitting evidence of other incidents where the alleged conduct and the charged conduct were not too remote in time and were sufficiently similar. **State v. May, 366.**

Statutory rape—testimony of doctor and nurse—Although the appeal was decided on other grounds, the trial court did not commit plain error in a prosecution for first-degree statutory rape by allowing the expert testimony of a doctor and nurse where defendant contended that their testimony included impermissible opinion evidence that the victim had been sexually abused. Neither witness stated that the victim was sexually abused or attempted to draw conclusions or make a diagnosis; instead, they testified to their experience and knowledge, examination procedures and treatment, and the victim's symptoms and characteristics. **State v. May, 366.**

FIREARMS AND OTHER WEAPONS

Possession by felon—habitual felon status—sufficient predicate felonies—The trial court had jurisdiction to try, convict, and sentence defendant for possession of a firearm by a felon, and sentence him as an habitual felon, where possession of marijuana with the intent to sell and deliver and possession of a firearm by a felon are felonies under North Carolina law. **State v. Northington, 575.**

FRAUD

Motion to dismiss—sufficiency of evidence—The trial court did not err by dismissing plaintiffs' fraud claim. There was no definite and specific representation that would be sufficient on these facts to support a claim for fraud. **Charlotte Motor Speedway, LLC v. Cnty. of Cabarrus, 1.**

Negligence misrepresentation—motion to dismiss—sufficiency of evidence—The trial court did not err by dismissing plaintiffs' negligent misrepresentation claim. Even assuming *arguendo* that defendant County owed plaintiffs a duty of care, there was no specific representation made by the County sufficient to form the basis for a negligent misrepresentation claim. **Charlotte Motor Speedway, LLC v. Cnty. of Cabarrus, 1.**

HIGHWAYS AND STREETS

Increased traffic flow—private road—public use—police power—damage to property—The trial court did not err in a case seeking damages for increased traffic flow on a private road taken for public use by failing to dismiss plaintiff Department of Transportation's (DOT) motion for an N.C.G.S. § 136-108 hearing. Where DOT argues that it acted within the authority of its police power and that damage to defendants' property as a result is not compensable, the trial court has authority to rule on this issue pursuant to section 108. **Dep't of Transp. v. Webster, 468.**

HOMICIDE

Second-degree murder—malice—sufficient evidence—The trial court did not err in a driving while impaired case by denying defendant's motion to dismiss a second-degree murder charge where there was sufficient evidence of each element of the offense, including malice. **State v. Grooms, 56.**

IMMUNITY

Comity—obligations in contract—The trial court did not err by denying defendant's motion to dismiss on the grounds of sovereign immunity. Because public policy does not allow the State of North Carolina to avoid its obligations in contract, the extension of comity in this case would have violated public policy. Based on this conclusion, the Court of Appeals declined to consider whether defendants would have been entitled to sovereign immunity as a matter of Maryland law. **Atl. Coast Conf. v. Univ. of Md.**, 429.

District attorney—civil defamation immunity—not applicable—Civil defamation immunity did not apply to a district attorney in a removal proceeding. While statements made in a judicial proceeding will not support a civil defamation action, there is no authority for applying civil defamation immunity to disciplinary proceedings. Furthermore, the trial court examined all of the district attorney's statements submitted as evidence of misconduct through the lens of qualified immunity and properly distinguished between statements which were not made with actual malice and those made with actual malice. **In re Cline**, 11.

Public official—traffic accident—state trooper—Plaintiffs' evidence in a traffic accident case involving a state trooper was sufficient to overcome the state trooper's motion for summary judgment. The trooper relied upon public official immunity and its presumption of good faith and lawful conduct. **Allmond v. Goodnight**, 413.

State trooper—auto accident—public official immunity—summary judgment—The trial court did not err by denying summary judgment for defendant, a state trooper, in a traffic accident case where defendant drove 120 mph in a 55 mph zone and struck an automobile making a legal left turn, cutting it in half and killing two people. Defendant maintained that he was pursuing a speeder and claimed public official immunity, but some witnesses saw the speeder and some did not. Plaintiff was required to allege one of the "piercing" exceptions to the public official immunity; although plaintiffs did not specifically state that defendant was acting outside the scope of his official duties, the relevant language in plaintiffs' complaint could not be read any other way. **Allmond v. Goodnight**, 413.

INTEREST

Right to collect—higher than legal rate—waiver—The trial court did not err in a breach of contract case arising out of the nonpayment of legal services by denying plaintiff attorney's request for the assessment of interest at a rate of one and one-half percent per month (or eighteen percent per annum) pursuant to N.C.G.S. § 24-11(a) rather than at the legal rate. A creditor's right to collect interest at a rate higher than the legal rate pursuant to N.C.G.S. § 24-11(a) should be asserted in a regular and consistent manner and may be waived by the creditor's subsequent failure to assert her rights in such a manner. **Farlow v. Brookbank**, 179.

JURISDICTION

Subject matter—Native American child—neglect—agreement with tribe—record insufficient—The question of the district court's jurisdiction under the Indian Child Welfare Act (ICWA) in a child neglect proceeding could not be resolved on the record presented and the matter was remanded for a determination of subject matter jurisdiction. While the State may exercise subject matter jurisdiction pursuant to an agreement with the Eastern Band of the Cherokee Indian Tribe, and a Memorandum of Agreement between the Tribe and the State was tendered, the

JURISDICTION—Continued

document was not authenticated and the trial record contained no reference to it. **In re E.G.M., 196.**

JURY

Batson challenge—prima facie showing of discrimination—moot—no purposeful discrimination—The trial court's findings of fact supporting the dismissal of a *Batson* objection were not clearly erroneous, and the trial court's judgment was left undisturbed. The trial court erroneously found that defendant had failed to make out a *prima facie* showing of discrimination because the trial court heard the State's reasons for striking the jurors prior to making a ruling on defendant's *Batson* objection, rendering the issue of whether defendant made a *prima facie* showing moot. Nonetheless, the trial court conducted a full *Batson* inquiry based on defendant's *Batson* objection and determined there was no showing of purposeful discrimination. **State v. James, 346.**

Deadlocked—instruction—The trial court's third charge to a deadlocked jury in a prosecution for first-degree statutory rape violated N.C.G.S. § 15A-1235 in several respects, including a reference to the time and expense of the trial and a reference to only a portion of the four-part instruction contained in the statute. **State v. May, 366.**

Deadlocked—instruction—harmless error—The State did not carry its burden of showing that an error in an instruction to a deadlocked jury was harmless beyond a reasonable doubt. Moreover, the evidence against defendant was not overwhelming, unlike many cases in which error was found to be harmless. **State v. May, 366.**

Deadlocked—instruction—standard of review—Errors in the third charge to a deadlocked jury in a prosecution for first-degree statutory rape were reviewed for harmless error beyond a reasonable doubt. The North Carolina Supreme Court has not clarified whether it intended for its rationale in *State v. Wilson*, 363 N.C. 478, to apply to all situations involving alleged N.C. Const. art. I, § 24 violations or whether it intended *Wilson* to apply only to N.C. Const. art. I, § 24 challenges involving a trial court speaking to fewer than all the members of the jury. However, the Court of Appeals has held on at least two occasions that the rationale in *Wilson* does extend to situations involving a coercive charge to a fully empaneled jury. **State v. May, 366.**

Use of peremptory challenge after trial began—examination reopened—no questions by defense—The trial court erred in a prosecution for first-degree murder and other charges by not allowing a juror to be removed with a peremptory challenge after the trial had begun. The trial reopened examination of the juror when it allowed defendant and the State to re-question the juror, and defendant was not required to ask any questions to preserve his right to use a remaining peremptory challenge. **State v. Thomas, 127.**

JUVENILES

Adjudication—release pending appeal denied—written reasons not provided—An order denying a juvenile's release pending appeal was vacated and remanded where the trial court did not provide a written statement of compelling reasons for the denial, as required by N.C.G.S. § 7B-2605. **In re G.C., 511.**

Adjudication—responsible for offense—delineation between hearings—There was no error in adjudicating a juvenile responsible for an offense and committing him to a Youth Development Center without first holding adjudicatory and

JUVENILES—Continued

dispositional hearings. Although the trial court did not clearly state that he was moving from the transfer hearing to the adjudicatory hearing, or from the adjudicatory hearing to the dispositional hearing, the juvenile's counsel was provided with several opportunities to present evidence and took advantage of those opportunities each time they arose. **In re G.C., 511.**

Disposition—written findings—The trial court did not err in a juvenile proceeding by making a Level III disposition without the required written findings. The trial judge's later written order provided an ample factual basis for the dispositional decision that restated the findings made after the hearings and addressed the factors laid out in N.C.G.S. § 7B-2501(c). **In re G.C., 511.**

Release from commitment—notice—The trial court erred by denying the juvenile's motion for release from commitment where the Division of Juvenile Justice failed to comply with the notice requirements set out in N.C.G.S. § 7B-2515(a) at the time that it extended the duration of the juvenile's commitment period. **In re J.L.H., 214.**

MALICIOUS PROSECUTION

Institution of criminal proceedings—summary judgment—The trial court did not err in a malicious prosecution action that arose from a criminal investigation into missing funds by granting summary judgment for defendants on the issue of institution of criminal proceedings. While defendant Young made a written statement, there was no evidence that either she or the United Way defendants instituted or participated in the criminal proceeding. **Mathis v. Dowling, 311.**

Malice—summary judgment—In a malicious prosecution action arising from missing funds, the trial court correctly found that there was no genuine issue of material fact as to whether defendants pursued the criminal matter due to ill-will, spite, or a desire for revenge, and summary judgment was correctly granted for defendants. **Mathis v. Dowling, 311.**

Probable cause—summary judgment—The trial court did not err in finding no genuine issue of material fact as to the element of probable cause in a malicious prosecution action that arose from an investigation into missing funds. There were reasonable grounds for suspicion in unpaid invoices and alleged 401(k) violations. **Mathis v. Dowling, 311.**

NATIVE AMERICANS

Child neglect proceeding—Indian Child Welfare Act—The Indian Child Welfare Act (ICWA) was applicable to a child neglect proceeding where the district court transferred legal custody of the child to the Department of Social Services. The ICWA applies to all state court child custody proceedings involving Indian children. This proceeding qualified as a “foster care placement” and thus a “child custody proceeding” under the ICWA. **In re E.G.M., 196.**

Child neglect—foster case—cessation of reunification efforts—findings—The authority of North Carolina's district courts to cease family reunification efforts under N.C.G.S. § 7B-507(b)(1) does not conflict with “minimum Federal standards” for Indian child welfare cases established by the Indian Child Welfare Act. The Act merely requires a finding, both before ordering a foster care placement and before terminating parental rights, that “active efforts” to prevent the disruption of the

NATIVE AMERICANS—Continued

Indian family “proved unsuccessful.” The policy concerns that animate the ICWA do not oblige our social service agencies to undertake actions inconsistent with the welfare of Indian children. **In re E.G.M., 196.**

Neglected child—foster care—supporting testimony—not sufficient—The removal to foster care of an allegedly neglected child who was a member of the Eastern Band of the Cherokee Indian tribe was not supported by the expert testimony where the court relied upon the testimony of a case manager for Cherokee Family Support Services from a prior hearing. The pediatric psychologist who testified as an expert at the foster care hearing offered no opinion regarding the likelihood of serious physical or emotional damage to the child in respondent mother’s custody and did not profess any expertise in matters of Cherokee tribal culture or childrearing practices. **In re E.G.M., 196.**

Placement of child in foster care—supporting testimony—prior hearing—The trial court’s placement of a child in foster care under the Indian Child Welfare Act must be supported by evidence, including expert testimony, introduced at the proceeding that results in the foster care placement. **In re E.G.M., 196.**

NEGLIGENCE

Contributory negligence—vehicle collision with train—summary judgment appropriate—The trial court did not err by granting defendant’s motion for summary judgment in a negligence case resulting from a collision between plaintiff’s vehicle and a train. The undisputed evidence established that plaintiff was contributorily negligent as a matter of law in driving across a railroad crossing. **Frazier v. Carolina Coastal Ry. Inc., 504.**

NEGOTIABLE INSTRUMENTS

Novations—parties not the same—arbitration not compelled—Defendant could not compel arbitration under 2010 novations to 2005 and 2006 notes because the parties were not the same and there was no evidence that the missing party (BAI) agreed, acquiesced, ratified, or in any other way accepted the 2010 novations. **Bank of Am., N.A. v. Rice, 450.**

Promissory notes—collection by third party—right to enforce—not sufficiently alleged—The trial court properly granted defendant’s motion to dismiss pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) in an action to enforce promissory notes executed by defendant with a third party bank. Plaintiff’s complaint lacked allegations sufficiently particular to indicate plaintiff’s right to enforce the instrument. **First Federal Bank v. Aldridge, 187.**

PLEADINGS

Denial of motion to amend complaint—no new evidence—The trial court did not abuse its discretion in an unjust enrichment case by denying plaintiff’s request for leave to amend its complaint. Nothing in the record suggested that the “new evidence” supplied in the information supporting the motion to amend would show solicitation or inducement by defendants, a material issue of fact to be resolved by the jury. **JPMorgan Chase Bank v. Browning, 537.**

Denial of motion to amend summons—name of person currently holding office—The trial court did not abuse its discretion by denying plaintiffs’ motion to

PLEADINGS—Continued

amend the summons against the City to correct the name of the person currently holding the office of city manager because it would confer jurisdiction over the City without proper service of process. **Washington v. Cline, 396.**

Sanctions—Rule 11—insufficient findings—The trial court erred in a case involving the lease of a used car lot by concluding that defendant's motion for a new trial violated Rule 11 of the North Carolina Rules of Civil Procedure and was filed in bad faith. Each of the trial court's findings related only to defendant's repeated attempts to re-argue the issue of *res judicata* and were, thus, insufficient to support its conclusion that a Rule 11 violation occurred. **Auto. Grp., LLC v. A-1 Auto Charlotte, LLC, 443.**

POSSESSION OF STOLEN PROPERTY

Breaking and entering—jury instructions—sufficient evidence—lesser-included offenses—instructions not required—The trial court did not err in a felonious possession of stolen property and felonious breaking and entering case by denying defendant's request for instructions on lesser-included offenses. There was positive evidence as to each and every element of felonious possession of stolen property and felonious breaking and entering. **State v. Northington, 575.**

Failure to instruct on lesser-included offense—non-felonious possession—The trial court did not err in a robbery with a dangerous weapon and possession of stolen goods case by denying defendant's request for a jury instruction on the lesser-included offense of non-felonious possession of stolen goods. There was no evidence presented that either of two stolen vans could be valued at \$1,000.00 or less. **State v. Monroe, 70.**

PROBATION AND PAROLE

Filing of violation report—lack of subject matter jurisdiction—The trial court erred by revoking defendant's probation in 10 CRS 1409 because the State failed to present evidence that the violation report prepared by defendant's probation officer was filed before the natural termination of his probation. As a result, the State failed to meet its burden of demonstrating that the revoking court possessed subject matter jurisdiction. **State v. Williams, 590.**

Lack of jurisdiction—judgment arrested—order vacated—The trial court lacked jurisdiction to extend defendant's period of probation. Judgment was arrested and the order modifying probation and imposing sentence was vacated. **State v. High, 330.**

Revocation—sufficiency of evidence—The trial court did not abuse its discretion when it revoked defendant's probation in all eleven judgments. There was sufficient evidence presented to find that defendant had violated the terms of his probation. **State v. Williams, 590.**

PROCESS AND SERVICE

Sufficiency—failure to contain title of cause—The trial court did not err in a violations of federal and state constitutional provisions, malicious prosecution, negligence, negligent and intentional infliction of emotional distress, conspiracy, and supervisory liability case by granting the City's motion to dismiss for insufficient service of process, denying defendant Baker's motion to dismiss for insufficient service

PROCESS AND SERVICE—Continued

of process, denying plaintiffs' motion to amend the summons, and denying Baker's motion to dismiss for failure of the summons to contain the "title of the cause." However, the trial court's order granting all other defendant appellees' motions to dismiss for insufficient service of process was reversed. **Washington v. Cline, 396.**

PUBLIC ASSISTANCE

Food stamp fraud—jury instruction—acting in concert—no plain error—The trial court did not commit plain error in a food stamp fraud case by its jury instruction on acting in concert. The State was not required to use the theory of acting in concert in order to prove that defendant violated N.C.G.S. § 108A-53, and therefore, defendant could not establish prejudice. **State v. Davis, 50.**

Food stamp fraud—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of food stamp fraud. Viewing the evidence in the light most favorable to the State, the evidence created a reasonable inference that defendant knowingly submitted a fraudulent wage verification form to obtain food benefits to which he was not entitled. Further, there was sufficient evidence to indicate that defendant obtained or aided or abetted another person to obtain food benefits to which he was not entitled. **State v. Davis, 50.**

SEARCH AND SEIZURE

Probable cause—vehicle passenger—no particularized suspicion—The trial court erred in a possession of cocaine case by concluding the police had probable cause to conduct the warrantless search of defendant's person. Although the officers had probable cause to search the vehicle in which defendant was a passenger when they detected the odor of marijuana on the driver's side of the vehicle, there was insufficient evidence to support the trial court's conclusion that the search of defendant was supported by probable cause particularized with respect to defendant. **State v. Malunda, 355.**

Warrantless investigatory stop—anonymous tip—insufficient indicia of reliability—no corroboration—The trial court erred in a driving while impaired case by denying defendant's motion to suppress evidence. The officers did not have reasonable suspicion to conduct a warrantless investigatory stop since the anonymous tip did not possess sufficient indicia of reliability and the officers did not corroborate the tip. **State v. Blankenship, 113.**

SENTENCING

Erroneous prior record point—not prejudicial—The trial court's erroneous assignment of one prior record point was not prejudicial because it did not change defendant's offender level. **State v. Martin, 571.**

Prior record level—out-of-state conviction—failure to present evidence—substantially similar—not prejudicial—The trial court did not err in a felonious possession of stolen property and felonious breaking and entering case by sentencing defendant as a prior felony record level IV offender. Although the State failed to present evidence that defendant's conviction in Tennessee for "theft over \$1,000" was substantially similar to a Class H offense in North Carolina, and the trial court erroneously accepted defendant's stipulation of the substantial similarity of the Tennessee conviction, this error did not affect the computation of defendant's prior

SENTENCING—Continued

felony record level. Both Class H and Class I felonies carried two sentencing points for the computation of defendant's prior felony record level. **State v. Northington, 575.**

SEXUAL OFFENDERS

Registration during appeals process—public safety outweighs stigma—The trial court did not err by requiring defendant to register as a sex offender even though defendant contended that his conviction was not yet "final" insofar as his right to direct appeal under N.C. R. App. P. 4(a)(2) had not yet expired. Protecting public safety and facilitating law enforcement by requiring registration during the appeals process outweighs the stigma the accused may suffer from his registration during the appeals process. **State v. Smith, 387.**

STATUTES OF LIMITATION AND REPOSE

Single agreement executed under seal—contracts—summary judgment—The trial court did not err in a breach of contract action by granting summary judgment in favor of plaintiffs even though defendant contended the pertinent statute of limitations had expired. The contractual documents executed by the parties constituted a single agreement executed under seal, and thus, were subject to the ten-year statute of limitations set out in N.C.G.S. § 1-47(2). **Davis v. Woodlake Partners, LLC, 88.**

TERMINATION OF PARENTAL RIGHTS

Best interest of child—reasoned decision—The trial court did not abuse its discretion by concluding that it was in the best interest of the child that respondent's parental rights be terminated. The court's findings of fact reflected a reasoned decision. **In re T.J.F., 531.**

Consideration of child's adoption—necessary benefits—The trial court did not err in a termination of parental rights case by terminating respondent's rights based in part upon the child's obtaining necessary benefits through adoption by her grandparents. The bulk of the court's findings of fact in the adjudication and disposition orders were devoted to the failure of respondent to satisfy his parental obligations to his child by withholding his presence, affection, and support. Only one mention was made concerning the possibility of the child's obtaining financial benefits by being adopted by her maternal grandparents. **In re T.J.F., 531.**

Specific ground—not alleged in petition—sufficient facts—respondent on notice—The trial court did not err in a termination of parental rights case by terminating respondent's parental rights on a ground not alleged in the petition. While the better practice would have been to specifically plead termination pursuant to N.C.G.S. § 7B-1111(a)(7), the petition sufficiently alleged facts to place respondent on notice that his parental rights may be terminated on the basis that he had abandoned his child. **In re T.J.F., 531.**

TORT CLAIMS ACT

Jurisdiction—school activity bus accident—The Industrial Commission erred by ruling that it lacked jurisdiction over a Tort Claims Act case arising from an accident involving a school activity bus, and by granting defendant's motion for summary

TORT CLAIMS ACT—Continued

judgment. N.C.G.S. § 143-300.1 granted sole jurisdiction to the Commission to hear plaintiff's claim. To the extent that policies of defendant or the State Board conflicted with the General Statutes and appellate opinions of North Carolina interpreting these statutes, the Court of Appeals was bound by the statutory enactments and prior case law. **Irving v. Charlotte-Mecklenburg Bd. of Educ.**, 265.

TRIALS

Judicial notice—immaterial for Rule 12(b)(6) motion—Defendant's motion in a breach of contract case for the Court of Appeals to take judicial notice of several facts was denied. Generally, matters outside the complaint are not germane to a Rule 12(b)(6) motion. **Charlotte Motor Speedway, LLC v. Cnty. of Cabarrus**, 1.

UNJUST ENRICHMENT

Benefit voluntarily bestowed—no action to induce—The trial court did not err by granting summary judgment in favor of defendants on plaintiff's unjust enrichment claim. The recipient of a benefit voluntarily bestowed without solicitation or inducement is not liable for the value. The record did not contain evidence that defendants took any action to induce plaintiff's discharge of the First Deed of Trust. **JPMorgan Chase Bank v. Browning**, 537.

UTILITIES

Agreement—allocation of rights—not authorized by statute—The Utilities Commission did not err by denying approval of an agreement between the Town of Smithfield and Carolina Power & Light Company, d/b/a Progress Energy Carolinas, Inc. ("Progress") that allocated rights to serve certain areas within the town. N.C.G.S. § 160A-331.2(a) only authorizes those agreements wherein the parties exchange rights to serve premises that each would not have the right to serve but for the agreement. Because both parties had rights to serve the premises they purported to exchange, the agreement was not authorized by statute. **In re Town of Smithfield**, 252.

WILLS

Caveat—undue influence—testamentary capacity—duress—insufficient evidence—The trial court did not err in a will case by granting summary judgment in favor of the propounders of a will. There were no genuine issues of fact concerning undue influence or testamentary capacity and propounders were thus entitled to summary judgment as a matter of law. The Court of Appeals did not address caveators' argument that there were genuine issues of material fact concerning duress because the allegations underlying the challenges to undue influence and duress were identical. **In re McNeil**, 241.

WITNESSES

Intimidation—status as witness—The trial court correctly denied defendant's motion to dismiss the charge of intimidating a witness where defendant argued that the witness had not been subpoenaed, but the State's evidence, taken in the light most favorable to the State, was sufficient to establish that the witness's involvement in defendant's custody case was substantial enough to qualify her as a prospective witness. **State v. Shannon**, 583.

WORKERS' COMPENSATION

Employer subject to Act—requisite number of employees—The Industrial Commission did not err in a workers' compensation case by concluding that defendant employer had the requisite number of employees to be subject to the Workers' Compensation Act under N.C.G.S. § 97-2(1). **Mills v. Triangle Yellow Transit, 546.**

Expired policy—non-renewal procedures—not applicable—The Industrial Commission correctly determined in a workers' compensation case that Auto-Owners Insurance Company (Auto Owners) was not providing plaintiff with workers' compensation insurance on the date of his accident and thus was not responsible for plaintiff's compensation. Since the employer never attempted to renew the policy, Auto-Owners necessarily could not have indicated its unwillingness to renew it and the procedures governing a refusal to renew in the policy and N.C.G.S. § 58-36-110(a) were inapplicable. **Zaldana v. Smith, 134.**

Medical expenses—injury—no causal relationship—The Industrial Commission erred in a workers' compensation case by ordering defendants to compensate plaintiff for medical expenses related to the treatment of plaintiff's right shoulder and neck. No competent evidence supported the trial court's finding of a causal relationship between plaintiff's 7 October 2010 fall and her right shoulder and neck injury. **Chaffins v. Tar Heel Capital Corp., 156.**

Penalties—employer failure to have insurance—The Industrial Commission did not err in a workers' compensation case by assessing penalties against defendants pursuant to N.C.G.S. §§ 97-93, 97-94(b), and 97-94(d) for failure to have workers' compensation insurance. **Mills v. Triangle Yellow Transit, 546.**

Pleasant co-employee exception—willful, wanton, and reckless negligence—The trial court's order denying defendant Penland's motions to dismiss under N.C.G.S. § 1A-1, Rules 12(b)(1) and 12(b)(6) in a negligence case was affirmed. An employee may exhibit willful, wanton, and reckless negligence either when he intentionally injures a coworker or when he does so with manifest disregard to the consequences of his actions. Defendant Penland's alleged direction to send decedent up a utility pole despite decedent's severe lack of training and expertise was sufficient to create an inference that Penland was manifestly indifferent to the consequences of his actions under either Rule 12(b)(1) or Rule 12(b)(6). **Estate of Vaughn v. Pike Elec., LLC, 485.**

Taxi driver—employee—not independent contractor—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff taxi driver was an employee instead of an independent contractor. While the pertinent ordinance regulated part of plaintiff's relationship with defendants, defendants controlled other manners and methods of plaintiff's work to a degree sufficient to establish an employer-employee relationship. **Mills v. Triangle Yellow Transit, 546.**

Woodson employer exception—failure to allege intentional misconduct—The trial court's order denying defendant Pike Electric's motions to dismiss under N.C.G.S. § 1A-1, Rules 12(b)(1) and 12(b)(6) in a negligence case was reversed. Plaintiff offered no basis to believe that Pike Electric was aware of, intended, or was substantially certain that defendant Penland's actions on that day would result in decedent's death. Plaintiff failed to allege uncontroverted evidence of defendant Pike Electric's intentional misconduct. **Estate of Vaughn v. Pike Elec., LLC, 485.**

ZONING

Fences—attachment of tarps—structural composition—A zoning board of adjustment erred in its interpretation of a fence ordinance where petitioner attached tarps to a chain link fence. The board's interpretation of the ordinance superimposed a limitation that was not found in the ordinance: that attaching things to a fence changes its structural composition. The tarps that petitioner attached were a non-structural feature and petitioner's fence, with tarps attached to it, was constructed of a permitted material, chain-link, and complied with the ordinance. **Lipinski v. Town of Summerfield, 305.**

