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CASES REPORTED WITHOUT PUBLISHED OPINIONS

CASES REPORTED WITHOUT PUBLISHED OPINIONS

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

CAROMONT HEALTH, INC., GASTON MEMORIAL HOSPITAL, INC. AND CAROMONT AMBULATORY SERVICES, LLC D/B/A CAROMONT ENDOSCOPY CENTER, PETITIONERS
v.
NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES DIVISION OF HEALTH SERVICE REGULATION, CERTIFICATE OF NEED SECTION, RESPONDENT AND GREATER GASTON CENTER LLC, RESPONDENT-INTERVENOR

No. COA12-1044

Filed 3 December 2013

Hospitals and Other Medical Facilities—certificate of need—failure to show substantial prejudice

The North Carolina Department of Health and Human Services Certificate of Need Section ("Agency") did not err by dismissing petitioners' petition under N.C.G.S. § 1A-1, Rule 41(b). The Agency properly concluded that petitioner failed to prove that it suffered substantial prejudice from the granting of a certificate of need to respondent intervenor for development of two gastrointestinal endoscopy rooms.

Appeal by petitioners from final agency decision entered 22 March 2012 by the North Carolina Department of Health and Human Services, Division of Health Service Regulation. Heard in the Court of Appeals 13 February 2013.

Bode, Call & Stroupe, L.L.P., by S. Todd Hemphill and Matthew A. Fisher, for petitioners-appellants.

Attorney General Roy Cooper, by Special Deputy Attorney General June S. Ferrell, for respondent-appellee.

Smith Moore Leatherwood LLP, by Maureen Demarest Murray and Carrie A. Hanger, for respondent-intervenor-appellee.

GEER, Judge.

Petitioners CaroMont Health, Inc., Gaston Memorial Hospital, Inc., and CaroMont Ambulatory Services, LLC, d/b/a CaroMont Endoscopy Center (collectively "CaroMont") appeal from the final agency decision of the N.C. Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section ("the Agency"), dismissing their petition under Rule 41(b) of the Rules of Civil Procedure. We hold that the Agency properly concluded that CaroMont failed to prove that it suffered substantial prejudice from the granting of a certificate of need to Greater Gaston Center LLC ("GGC") for development of two gastrointestinal endoscopy rooms. We, therefore, affirm.

Facts

Our legislature has specifically found "[t]hat demand for gastrointestinal endoscopy services is increasing at a substantially faster rate than the general population given the procedure is recognized as a highly effective means to diagnose and prevent cancer." N.C. Gen. Stat. § 131E-175(12) (2011). For that reason, although "persons proposing to obtain a license to establish an ambulatory surgical facility for the provision of gastrointestinal endoscopy procedures" must obtain a certificate of need ("CON"), the legislature has provided that "[t]he annual State Medical Facilities Plan shall not include policies or need determinations that limit the number of gastrointestinal endoscopy rooms that may be approved." N.C. Gen. Stat. § 131E-178(a)(4) (2011).

In addition, a physician may open a gastrointestinal ("GI") endoscopy room in his or her office at any time without a CON or a license. However, only certain payors will reimburse providers for procedures performed in unlicensed GI endoscopy rooms located in physicians' offices. For example, Medicaid and, in certain circumstances, Medicare will not provide reimbursement for such procedures.

As of 2011, petitioner Gaston Memorial Hospital, an acute care hospital in Gastonia, was the only licensed provider of GI endoscopy rooms in Gaston County, North Carolina. It operated eight GI endoscopy rooms. Petitioner CaroMont Health is the parent corporation of Gaston Memorial Hospital and petitioner CaroMont Ambulatory Services, LLC, d/b/a CaroMont Endoscopy Center ("CAS"). In 2007, because petitioners perceived a need for a freestanding ambulatory surgery center, CaroMont

Health and CAS applied for a CON authorizing CaroMont to move two of the eight licensed GI endoscopy rooms from Gaston Memorial Hospital to a freestanding GI clinic to be called CaroMont Endoscopy Center. Although petitioners were granted the CON on 23 December 2008, the CaroMont Endoscopy Center was still only in development and not yet operational by 2011.

GGC was started by Physicians Endoscopy, LLC, a national endoscopy center development and management company, and five Gaston County gastroenterologists with independent practices who have practiced in Gaston County for a number of years, including Dr. Samuel Drake, Dr. Khaled Elraie, Dr. Nelson Forbes, Dr. Austin Osemeka, and Dr. William Watkins. On or about 15 October 2010, GGC filed an application for a CON to develop a freestanding ambulatory surgery center with two GI endoscopy procedure rooms in Gaston County. The Agency conditionally approved GGC's application on 30 March 2011.

CaroMont filed a petition for a contested case hearing on 29 April 2011, challenging the approval of GGC's CON application. GGC intervened by consent on 16 May 2011. Administrative Law Judge Joe L. Webster held a three-day contested case hearing. At the close of CaroMont's evidence, the Agency and GGC moved for dismissal of CaroMont's petition pursuant to Rule 41(b) of the Rules of Civil Procedure.

Judge Webster issued a recommended decision on 19 January 2012 dismissing CaroMont's petition on the basis that CaroMont had failed to demonstrate, as required by N.C. Gen. Stat. § 150B-23(a) (2011), either that its rights were "substantially prejudiced" by the Agency's decision or that the Agency committed error. CaroMont then submitted written exceptions to Judge Webster's recommended decision to the Agency. On 22 March 2012, Mr. Drexel Pratt, Director of the Department of Health and Human Services' Division of Health Service Regulation, issued the final agency decision adopting Judge Webster's decision as the final decision of the Agency. CaroMont timely appealed to this Court.

Discussion

In reviewing a CON determination:

> "[m]odification or reversal of the Agency decision is controlled by the grounds enumerated in [N.C. Gen. Stat. §] 150B–51(b); the decision, findings, or conclusions must be:
>
> (1) In violation of constitutional provisions;

> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under [N.C. Gen. Stat. §§] 150B–29(a), 150B–30, or 150B–31 in view of the entire record as submitted; or
>
> (6) Arbitrary and capricious."

Parkway Urology, P.A. v. N.C. Dep't of Health & Human Servs., 205 N.C. App. 529, 534, 696 S.E.2d 187, 192 (2010) (quoting *Total Renal Care of N.C., LLC v. N.C. Dep't of Health & Human Servs.*, 171 N.C. App. 734, 739, 615 S.E.2d 81, 84 (2005)), *disc. review denied*, 365 N.C. 78, 705 S.E.2d 739, 753 (2011).

" 'The first four grounds for reversing or modifying an agency's decision . . . are law-based inquiries' " that we review de novo. *Id.* at 535, 696 S.E.2d at 192 (quoting *N.C. Dep't of Revenue v. Bill Davis Racing*, 201 N.C. App. 35, 42, 684 S.E.2d 914, 920 (2009)). The final two grounds, however, " 'involve fact-based inquiries' " that " 'are reviewed under the whole-record test.' " *Id.* (quoting *N.C. Dep't of Revenue*, 201 N.C. App. at 42, 684 S.E.2d at 920). Under the "whole record" test, " 'the reviewing court is required to examine all competent evidence (the whole record) in order to determine whether the agency decision is supported by substantial evidence[, with s]ubstantial evidence [consisting of] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Id.* (quoting *Dialysis Care of N.C., LLC v. N.C. Dep't of Health & Human Servs.*, 137 N.C. App. 638, 646, 529 S.E.2d 257, 261, *aff'd per curiam*, 353 N.C. 258, 538 S.E.2d 566 (2000)).

The final agency decision dismissing CaroMont's contested case petition first concluded that CaroMont failed to meet its burden of proving that it was substantially prejudiced by the Agency's approval of GGC's CON application. CaroMont initially argues, however, that the Agency erred in requiring it to show that it was substantially prejudiced. It contends that it met its burden simply by showing that it was an "affected person" under N.C. Gen. Stat. § 131E-188(a) (2011).

This Court, however, specifically held in *Parkway Urology* that N.C. Gen. Stat. § 131E-188 and its requirement that a petitioner be an affected person "provides only the statutory grounds for and prerequisites to filing a petition for a contested case hearing regarding CONs."

205 N.C. App. at 536, 696 S.E.2d at 193. The Court pointed out that "in order for a petitioner to be entitled to relief," it must comply with N.C. Gen. Stat. § 150B-23(a), which requires that the petitioner allege that an agency has " 'ordered the petitioner to pay a fine or civil penalty, or *has otherwise substantially prejudiced the petitioner's rights*.' " 205 N.C. App. at 536, 696 S.E.2d at 193 (quoting N.C. Gen. Stat. § 150B-23(a) (2009)). The administrative law judge must, therefore, " 'determine *whether the petitioner has met its burden in showing that the agency substantially prejudiced petitioner's rights*,' " as well as whether " 'the agency also acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule.' " *Id.* (quoting *Britthaven, Inc. v. N.C. Dep't of Human Res.*, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459 (1995)). Consequently, the Court concluded, the appellant's "contention that it was unnecessary for it to show substantial prejudice to be entitled to relief is contrary to our case law and is without merit." *Id.* at 536-37, 696 S.E.2d at 193.

Parkway Urology is controlling. CaroMont was, therefore, required to prove that it was substantially prejudiced by the Agency's decision to grant GGC a CON. *See also Wake Radiology Servs. LLC v. N.C. Dep't of Health & Human Servs.*, 215 N.C. App. 393, 716 S.E.2d 87, 2011 WL 3891026, at *5, 2011 N.C. App. LEXIS 1924, at *14 (2011) (unpublished) ("In light of our decision in *Parkway Urology*, which we find to be controlling, we conclude that Wake's status as an 'affected person' pursuant to N.C. Gen. Stat. § 131E-188(c) in no way obviated the necessity for Wake to demonstrate that it was 'substantially prejudiced' by the Department's decision as required by N.C. Gen. Stat. § 150B-23(a)."), *disc. review denied*, 366 N.C. 229, 726 S.E.2d 838 (2012).

CaroMont next contends that it presented sufficient evidence of substantial prejudice. The question before this Court is whether the Agency's decision that CaroMont failed to prove substantial prejudice is supported by substantial evidence when considering the record as a whole or, phrased differently, whether the whole record contains relevant evidence that a reasonable mind might accept as adequate to support the Agency's conclusion that CaroMont failed to show substantial prejudice from the Agency's granting of the CON to GGC. *Parkway Urology*, 205 N.C. App. at 535, 696 S.E.2d at 192.

CaroMont argued to the Agency that it was substantially prejudiced by the approval of GGC's application for two reasons: (1) four of the five gastroenterologist members of GGC are on the medical staff of Gaston Memorial Hospital and will refer some of their patients to GGC instead

of Gaston Memorial Hospital or the CaroMont Endoscopy Center, and (2) Dr. Neville Forbes, who supported the CaroMont Endoscopy Center CON application when it was filed in October 2007, also supported and expressed his intention to perform procedures at GGC. On appeal, CaroMont argues that it was substantially prejudiced because "if the GGC Application is approved, the cases they now perform at [Gaston Memorial Hospital] and had projected to perform at [the CaroMont Endoscopy Center] *will shift* to GGC. . . . CaroMont's evidence shows that *based on the GGC Application's projections*, CaroMont will be significantly financially harmed if the Agency's approval of the GGC Application is upheld."

The Agency, however, concluded with respect to this argument:

> 30. The evidence demonstrated that CaroMont's primary concern is the normal effects of competition. CaroMont complained of the anticipated shift of GI endoscopy cases from Gaston Memorial Hospital and not yet operational CaroMont Endoscopy Center to the freestanding GI endoscopy facility proposed in the GGC Application. The allegations of harm resulting from this shift were no more than the normal effects of competition when physicians or patients may choose one facility over another.
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> . . . .
>
> 32. CaroMont's alleged loss of volume and revenue, even if considered to show other than the normal effects of competition, was speculative and not supported by a preponderance of the evidence because there was no evidence that such alleged loss of volume and revenue was reasonably certain to result from the Agency's decision to approve the GGC Application rather than other factors.
>
> 33. The fact that some physicians have chosen or may choose to perform procedures at the facility proposed by the GGC Application rather than a facility owned by CaroMont does not support or define any legal right that is substantially prejudiced by the Agency's decision to grant GGC a CON to construct a freestanding GI endoscopy center. "[Every one has the] right to enjoy the fruits and advantages of his own enterprise, industry, skill[,] and credit. He has no right to be protected against

competition." *Coleman v. Whisnant*, 225 N.C. 494, 506, 35 S.E.2d 647, 655 (1945).

34. CaroMont "is not being prevented from [benefitting from] 'the fruits and advantages of [its] own enterprise, industry, skill[,] and credit,' but [is] merely being required to compete for such benefit." *Bio-Medical Applications v. N.C. Dep't of Health and Human Servs.*, 179 N.C. App. 4[8]3, 491-92, 634 S.E.2d 572, 578 (2006) (quoting Coleman, 255 N.C. at 506, 35 S.E.2d at 665[])[.]

35. None of the CON Act's findings of fact in N.C. Gen. Stat. § 131E-175 address the importance of protecting any entity's market share, and CaroMont cannot assert protection of its market share as grounds for determining that the CON Section's decision was erroneous or improper.

36. CaroMont provided no testimony or evidence that it has a "right" to treat patients or receive revenue from patients who have yet to be scheduled for a GI endoscopy procedure or yet to be determined to be in need of GI endoscopy services, and are not currently patients of CaroMont. CaroMont witnesses admitted that physicians have the right to practice medicine where they desire and patients have the right to be treated where they wish.

37. There is nothing in the CON Act that restricts a physician's ability to practice medicine where he or she wishes. Similarly, there is nothing in the CON Act that restricts a patient from choosing where to receive health care.

38. Because CaroMont failed to prove by a preponderance of the evidence that the Agency Decision conditionally approving the GGC Application substantially prejudiced CaroMont's rights in any way, CaroMont failed to prove an essential element of its prima facie case. For that reason alone, the relief requested by CaroMont should be denied and CaroMont's case is subject to dismissal without regard to whether it proved Agency error. *See* N.C. Gen. Stat. § 150B-23; *Parkway Urology, P.A. v. N.C. Dep't of Health & Human Servs.*, *supra*;

> *Presbyterian Hosp. v. N.C. Dep't of Health & Human Servs.*, *supra*; *Bio-Medical Applications v. N.C. Dep't of Health & Human Servs.*, *supra*.

CaroMont cites no authority suggesting the Agency erred in concluding that the alleged harm CaroMont might suffer from the opening of another GI endoscopy center is simply the result of normal competition. This Court held in *Parkway Urology* that harm from normal competition does not amount to substantial prejudice:

> [The non-applicant's] argument, in essence, would have us treat any increase in competition resulting from the award of a CON as inherently and substantially prejudicial to any pre-existing competing health service provider in the same geographic area. This argument would eviscerate the substantial prejudice requirement contained in N.C. Gen. Stat. § 150B–23(a). As previously noted, [the non-applicant] qualified as an affected person because it provided similar services to individuals residing within the service area of [the applicant's] proposed [linear accelerator ("LINAC")]. Obtaining the status of an affected person does not satisfy the *prima facie* requirement of a showing of substantial prejudice. *[The non-applicant] was required to provide specific evidence of harm resulting from the award of the CON to [the applicant] that went beyond any harm that necessarily resulted from additional LINAC competition in Area 20*, and NCDHHS concluded that it failed to do so. After a review of the whole record, we determine that NCDHHS properly denied [the non-applicant] relief due to its failure to establish substantial prejudice.

205 N.C. App. at 539, 696 S.E.2d at 195 (emphasis added).

Similarly, in *Novant Health, Inc. v. N.C. Dep't. of Health & Human Servs.*, 223 N.C. App. 362, 734 S.E.2d 138, 2012 WL 5397247, at *3, *4, 2012 N.C. App. LEXIS 1239, at *9, *10 (2012) (unpublished), *disc. review denied*, 366 N.C. 577, 738 S.E.2d 376, *and disc. review denied*, 366 N.C. 577, 738 S.E.2d 398 (2013),[1] this Court considered Novant's "substantial prejudice" argument that the policy allowing North Carolina Baptist Hospital, as an academic medical center teaching hospital, to develop

1. We recognize that an unpublished decision of a prior panel of this Court cannot bind a subsequent panel, *see State v. Pritchard*, 186 N.C. App. 128, 129, 649 S.E.2d 917, 918 (2007), and that Rule 30(e)(3) of the Rules of Appellate Procedure permits the citation to unpublished opinions in a party's brief on appeal only when that party "believes . . . there

an ambulatory surgical center when a non-academic hospital would not be granted approval gave the academic institution "an unfair competitive advantage." Relying on *Parkway Urology*, the Court held that even though Novant would "suffer harm in the market due to [North Carolina Baptist Hospital's] increased ability to provide health care services," a "mere competitive advantage [was] an insufficient basis upon which to argue prejudice." *Novant*, 2012 WL 5397247, at *4, 2012 N.C. App. LEXIS 1239, at *9. Because Novant had "failed to show that its harm [arose] above that posed by mere competition, . . . it [had] failed to demonstrate substantial prejudice." *Id.*, 2012 N.C. App. LEXIS 1239, at *9-10.

Here, it is undisputed that CaroMont was the only provider of GI endoscopy rooms in Gaston County prior to the granting of the CON to GGC. CaroMont's claim of harm arises solely out of the fact that competition would be increased by virtue of the authorization of two additional GI endoscopy rooms located in Gaston County. Patients and doctors in Gaston County would now have a choice between CaroMont's facilities and another separate facility also located in Gaston County.

As the Agency found, and CaroMont does not dispute, CaroMont's CONs for Gaston Memorial Hospital and for CaroMont Endoscopy Center do not guarantee that physicians will continue to "refer patients to the facility and [are] not a guarantee of any particular market share," especially given that the CON Act specifies that no limits shall be placed on the number of GI endoscopy rooms that can be developed in a given county. The Agency further found that "CaroMont offered no evidence that the approval of the GGC Application changed, in any way, Gaston Memorial Hospital and CaroMont Endoscopy Center's ability to take efforts to attract patients to their GI endoscopy procedure rooms. CaroMont is free to recruit new physicians, undertake marketing campaigns, change its staffing, improve its operations, or change its charge structure to seek to attract more physicians and patients to its endoscopy services and to seek to generate more procedure volume and revenue." In other words, GGC's CON requires CaroMont to compete for the endoscopy business to maintain the volumes and revenues it desires.

We see no meaningful distinction between CaroMont's arguments regarding substantial prejudice and the increased competition's impact

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is no published opinion that would serve as well as the unpublished opinion." *State ex rel. Moore Cnty. Bd. of Educ. v. Pelletier*, 168 N.C. App. 218, 222, 606 S.E.2d 907, 909 (2005) (internal quotation marks omitted). As we find both *Wake Radiology* and *Novant* particularly relevant to consideration of the present case and both cases were properly submitted and discussed by the parties, we find the reasoning of those cases persuasive and adopt it here.

on pre-existing competing health service providers found insufficient in *Parkway Urology*, 205 N.C. App. at 539, 696 S.E.2d at 195, or the "unfair competitive advantage" in *Novant*, 2012 WL 5397247, at *3, 2012 N.C. App. LEXIS 1239, at *9. As the Agency concluded, CaroMont has not met the *Parkway Urology* requirement that it show "specific evidence of harm" going "beyond any harm that necessarily resulted from additional . . . competition" in Gaston County. 205 N.C. App. at 539, 696 S.E.2d at 195.

CaroMont, however, attempts to distinguish *Parkway Urology* on the basis that, in that case, the appellant "did not attempt to present any concrete evidence of a financial impact, but relied solely on its status as an affected person, and the fact that [the CON applicant's] second linear accelerator would compete with [the appellant's] existing ones." CaroMont contends that *Parkway Urology* establishes that "specific evidence of financial harm directly resulting from the award of a CON *is sufficient* to demonstrate substantial prejudice." CaroMont, however, does not reference any citation to *Parkway Urology* to support that contention.

Nothing in *Parkway Urology* suggests that simply quantifying the harm likely to arise out of additional competition resulting from the award of a CON is sufficient to show substantial prejudice — especially in the unique context of GI endoscopy rooms, which may not be limited in number in the State Medical Facilities Plan. Instead, *Parkway Urology* holds that the non-applicant must "provide specific evidence of harm resulting from the award of the CON . . . *that went beyond any harm that necessarily resulted from additional . . . competition*" in the relevant area. *Id.* (emphasis added). Here, although CaroMont presented evidence of specific harm, the harm resulted solely from the CON's introduction of additional competition.

Moreover, the Agency, in any event, determined both that CaroMont's evidence of harm was speculative and that CaroMont failed to show that the specific harm would be the result of the award of the CON. While CaroMont vigorously argues that the testimony of its expert witness, David Legarth, was uncontradicted and that "[n]o evidence was offered attacking the credibility or accuracy of this testimony," it has overlooked the fact that the final agency decision dismissed CaroMont's claims pursuant to Rule 41(b) of the Rules of Civil Procedure.

Rule 41(b) provides in relevant part: "After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on

the ground that upon the facts and the law the plaintiff has shown no right to relief." This Court has explained that "[a] dismissal under Rule 41(b) should be granted if the plaintiff has shown no right to relief or if the plaintiff has made out a colorable claim but the court nevertheless determines as the trier of fact that the defendant is entitled to judgment on the merits." *Hill v. Lassiter*, 135 N.C. App. 515, 517, 520 S.E.2d 797, 800 (1999).

In considering a motion under Rule 41(b), "the trial court is not to take the evidence in the light most favorable to plaintiff." *Hill*, 135 N.C. App. at 517, 520 S.E.2d at 800. Instead, " 'the judge becomes both the judge and the jury and he must consider and weigh all competent evidence before him.' " *Id.* (quoting *Dealers Specialties, Inc. v. Neighborhood Hous. Servs., Inc.*, 305 N.C. 633, 640, 291 S.E.2d 137, 141 (1982)). "The trial court must pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn from them." *Id.*

In short, even though Mr. Legarth's testimony was not contradicted, the Agency was entitled to determine the credibility of that evidence and the weight to which it was entitled, even in the absence of any opposing evidence. This Court may not overturn the Agency's credibility and weight determinations. *See, e.g.*, *Wake Radiology*, 2011 WL 3891026, at *8, 2011 N.C. App. LEXIS 1924, at *21-22 (rejecting Wake Radiology's argument that its witness' testimony standing alone sufficed to establish " 'substantial prejudice' " because it was "tantamount to a request that we overturn a factual decision that is committed to the Department rather than the appellate courts").

The Agency recognized that Mr. Legarth projected that if physicians associated with GGC performed some of their outpatient endoscopy procedures at GGC's endoscopy center, then CaroMont would lose between $463,000.00 and $925,000.00 in net income per year. The Agency found, however, that "it is not reasonable to rely on Mr. Legarth's projections of loss of endoscopy volume and revenue by CaroMont as a result of the approval of the GGC Application."

More specifically, the Agency first noted that Mr. Legarth was a CON consultant and application preparer. It then found that "Mr. Legarth's testimony does not establish that CaroMont is substantially prejudiced by the CON Section's approval of the GGC Application for any one or more" of five reasons: "(1) CaroMont does not have any legal right to a certain level of volume or revenue; (2) Gaston County patients were seeking treatment at other facilities outside Gaston County and

CaroMont's endoscopy volume and revenue were declining before the CON Section's approval of the GGC Application; (3) the GGC physicians could shift endoscopy volume from CaroMont facilities to other existing facilities or to physician office based endoscopy rooms regardless of whether or not the CON Section approved the GGC Application; (4) the CON Section made a reasonable health planning judgment in determining that GGC's projections of sufficient volume for a total of ten endoscopy rooms in Gaston County were reasonable; and (5) Mr. Legarth could not predict with any reasonable degree of certainty that the projected losses would occur or would be proximately caused in the future as a direct result of the CON Section's approval of the GGC Application."

Regarding the first reason, CaroMont does not cite any authority that would give it a legal right to particular volumes and revenues. However, Mr. Legarth's testimony regarding CaroMont's harm -- based on lost volume and revenues -- assumes that CaroMont is entitled to the volume and revenue existing prior to the issuance of a CON to GGC.

With respect to the second reason, Mr. Legarth's testimony, in projecting losses due to GGC's CON, did not take into account the fact that CaroMont's volume and revenue were already declining prior to the GGC CON because Gaston County patients were seeking treatment outside of Gaston County. In connection with this reason, the Agency found that the CON Section had evidence supporting this patient loss in the form of GGC's application, CaroMont's own application for a CON for the CaroMont Endoscopy Center, and Gaston Memorial Hospital's renewal applications. In addition, both Mr. Legarth and CaroMont's vice president of clinical services acknowledged that the volume of GI endoscopy procedures at Gaston Memorial Hospital had declined before approval of the GGC application.

In addition, the Agency found and Mr. Legarth acknowledged that one doctor had, prior to the GGC application approval, shifted his caseload from Gaston Memorial Hospital to another hospital and that this shifted case load "closely tracked the reduction in the number of endoscopy procedures performed at Gaston Memorial Hospital during the same time period." The Agency then found: "To the extent that the decline in the volume of procedures at Gaston Memorial Hospital was the result of a shift of GI endoscopy patients from Gaston Memorial to other GI endoscopy providers outside Gaston County and the movement of physicians to performing procedures at other facilities, the preponderance of the evidence shows that this occurred before GGC's application was ever filed."

In other words, CaroMont and Mr. Legarth did not show harm due to the approval of the GGC Application because any shift of patients to other providers had already started to occur prior to the approval of the GGC application. These findings are supported by substantial evidence -- indeed, they are not seriously challenged by CaroMont on appeal.

Similarly, with respect to the third reason, although Mr. Legarth admitted that physicians are free to refer patients and perform procedures wherever they choose and move their practices wherever they desire, including into their own offices, he did not take that possibility into account in calculating the purported harm due to the GGC CON. Even in the absence of the GGC CON, CaroMont could lose volume and revenues in the future because of physicians shifting their practices and procedures. On appeal, CaroMont only argues that physicians are unlikely to perform procedures in their own offices because of limitations on reimbursement. CaroMont does not address the ability of doctors to move their practices and procedures to other facilities whenever they wish even though this ability is the basis for their claim of substantial prejudice.

Turning to the fourth reason, the Agency determined that the CON Section made a reasonable health planning judgment in deciding that there was sufficient volume for a total of 10 endoscopy rooms in Gaston County. In support of this determination, the Agency relied on Mr. Legarth's admission that the methodology used by the CON Section and the GGC application's projected total numbers of Gaston County citizens needing GI endoscopy procedures were both reasonable. The Agency noted -- and CaroMont does not dispute -- that "Mr. Legarth's disagreement with the methodology was because he believed the GGC Application was premised on a higher volume of patients choosing to stay in Gaston County than he believed was reasonable."

After acknowledging CaroMont's contention that GGC's projections were not reasonable because not all of the Gaston County residents having procedures done in other counties would return to Gaston County, the Agency weighed the evidence. It found that "[t]he preponderance of the evidence shows that the projected volume of Gaston County GI endoscopy cases in the GGC Application is reasonable and could support all ten GI endoscopy procedure rooms -- both the eight operated by CaroMont and the two proposed by GGC."

In support of this finding, the Agency relied on testimony from the CON Section that the Section performed independent calculations of the volume of endoscopy procedures that would be needed based not

only on the return of Gaston County patients to Gaston County, but also on the projected patient population in the future, the aging of the Gaston County population, and the possibility of recruiting additional gastroenterologists to Gaston County. Those independent calculations demonstrated that "Gaston County did, indeed, need an additional freestanding GI endoscopy facility and that there would be enough GI endoscopy procedures by GGC's projected third year of operation in 2014 to support 10 GI endoscopy rooms." The Agency, therefore, determined that "CaroMont has also not shown harm related to the approval of the GGC Application because there is enough reasonably projected volume of GI endoscopy procedures to support all ten GI endoscopy rooms in Gaston County."

The Agency further explained why it did not find credible Mr. Legarth's opinion to the contrary that CaroMont would be underutilized as a result of GGC's CON. It first questioned his methodology:

> 101. Mr. Legarth, who is not an accountant, projected CaroMont's asserted loss of endoscopy volume and revenue during the first three years of the Greater Gaston Center's operations (identified in the application as the years 2012, 2013, and 2014 but delayed due to the appeal) by combining: (1) the volumes projected for the years 2010, 2011, and 2012 in the proformas contained in the CaroMont Endoscopy Center CON application filed in October 2007; (2) the utilization projections for 2012, 2013 and 2014 contained in the GGC Application filed in October 2011; (3) patient origin data from 2011 License Renewal Applications for the time period October 1, 2009 until September 30, 2010; and (4) CaroMont financial data provided to Mr. Legarth that he did not know how [it] was created or what information was used. *To make his projections, Mr. Legarth used historical data and projections from different years and did not rely upon audited financial statements.*

(Emphasis added.) In other words, in calculating the under-utilization of CaroMont, Mr. Legarth treated actual historical data as the same thing as projections, merged projections from different years in order to develop new projections, and used unaudited financial data.

In addition, the Agency pointed out that when projecting CaroMont's losses in the future, "Mr. Legarth's projections did not take into account the numerous changes CaroMont could make with respect to the

management, and operations of its endoscopy rooms to increase the capacity, utilization, and market share of the rooms but instead assumes that the volumes obtained by CaroMont from October 1, 2009 until September 30, 2010 will remain stagnant." Further, it noted that Mr. Legarth was unaware of the fact that CaroMont had, at the time of the Agency's approval of the GGC application, successfully recruited two additional gastroenterologists. He had not, therefore, in making his projections, taken into account CaroMont's adding additional gastroenterologists to perform endoscopy procedures.

For those reasons, the Agency determined that "it is not reasonable to rely on Mr. Legarth's projections of loss of endoscopy volume and revenue by CaroMont as a result of the approval of the GGC Application." As additional support for its findings, the Agency noted:

> 106. Furthermore, Mr. Legarth could not predict with any reasonable degree of certainty that the losses he projected would occur or would be proximately caused in the future as a direct result of the CON Section's approval of the GGC Application because the decrease in the number of GI endoscopy patients going to Gaston Memorial Hospital began before the approval of the application and CaroMont had the ability to take myriad measures to increase the utilization of its endoscopy rooms.

In sum, the Agency found the applicant's and the CON Section's evidence more credible and entitled to greater weight than CaroMont's evidence. Mr. Legarth may have attempted to quantify projected losses from approval of GGC's CON, but, even assuming these losses went beyond normal competition, the Agency found that the data relied upon by Mr. Legarth was flawed and his analysis omitted critical factors that could diminish the projected losses. Further, Mr. Legarth was unable to predict with any reasonable degree of certainty that the losses would in fact occur or would be caused in the future by the approval of GGC's application because (1) CaroMont's decrease in volume had begun before approval of the application and (2) CaroMont could take steps to increase use of its endoscopy rooms. In other words, as the Agency concluded, Mr. Legarth's projections of harm were speculative.

The Agency's findings regarding Mr. Legarth's testimony and methodology are supported by the record, and the decision of the Agency to credit the projections made by GGC rather than those made by CaroMont " 'has a rational basis in the evidence' " and, therefore, satisfies the whole record test. *Hosp. Grp. of Western N.C., Inc. v. N.C.*

Dep't of Human Res., 76 N.C. App. 265, 268, 332 S.E.2d 748, 751 (1985) (quoting *In re Rogers*, 297 N.C. 49, 65, 253 S.E.2d 912, 922 (1979)). We decline CaroMont's invitation that we ignore Rule 41's requirement that the Agency assess "the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn from them" and substitute our judgment for the Agency's. *Hill*, 135 N.C. App. at 517, 520 S.E.2d at 800.

In *Wake Radiology*, this Court affirmed the Agency's determination that Wake Radiology failed to show substantial prejudice when the Agency similarly found that the testimony of Wake Radiology's witnesses regarding declines in volumes and payor mix did not address numerous relevant factors, the data underlying the testimony was not reliable, and, because the declines had begun before approval of the CON application, Wake Radiology had "failed to establish how, or to what extent, the service that [the applicant] would be authorized to provide under the CON would result in additional harm to Wake over and above that inherent in existing market conditions." *Wake Radiology*, 2011 WL 3891026, at *9, 2011 N.C. App. LEXIS 1924, at *23-24.

This Court concluded that the Agency's findings and conclusions "provide[d] ample justification" for the Agency's determination that Wake Radiology had failed to establish that it would be substantially prejudiced by the issuance of the requested CON. *Id.*, 2011 N.C. App. LEXIS 1924, at *26. The Court noted that the Agency's "determination that [the Wake Radiology witness'] testimony was speculative, founded on flawed logic, and insufficient to require a finding in Wake's favor [had] ample record support. This determination, in turn, adequately supports the [Agency's] conclusion that Wake failed to satisfy its burden of proof with respect to the 'substantial prejudice' issue. Wake's argument to the contrary amounts to a request that we revisit the [Agency's] factual determinations and reach a different result than that found appropriate by the relevant administrative agency. We are not at liberty to take such a step under the applicable standard of review." *Id.* at *10, 2011 N.C. App. LEXIS 1924, at *27. The Court, therefore, affirmed. *Id.*, 2011 N.C. App. LEXIS 1924, at *28. *See also Parkway Urology*, 205 N.C. App. at 539, 696 S.E.2d at 194 (in affirming Agency's determination that non-applicant had failed to show substantial prejudice, noting that evidence showed that utilization of non-applicant's services had been declining for number of years before CON approval).

We find this case materially indistinguishable from *Wake Radiology*, which is persuasive authority, and *Parkway Urology*. Just as this Court concluded in *Wake Radiology*, it is not enough that the non-applicant's

witness simply attempts to quantify the projected harm. The evidence must both be persuasive and demonstrate that the harm was caused by the CON approval. Because, in this case, the Agency found, after reviewing all of the evidence, that CaroMont's projections of harm were based on flawed data, failed to take into account relevant factors, were not reasonably certain to occur, and were not shown to be caused by the CON approval as opposed to market forces, the Agency was entitled to conclude that CaroMont's evidence was insufficient to show substantial prejudice as a result of the approval of GGC's application. Consequently, we affirm.

Affirmed.

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

MARGARET HELENA HENNESSEY (formerly Duckworth), Plaintiff
v.
THOMAS MEREDITH DUCKWORTH, Defendant

No. COA13-629

Filed 3 December 2013

Attorney Fees—domestic action—separation agreement—sufficient findings of fact

The trial court did not err in a domestic case by awarding plaintiff attorneys fees under N.C.G.S. § 50-13.6. The attorney fees provision in a separation agreement between the parties did not apply since there was no determination of a breach of the agreement or order for specific performance. Furthermore, trial court's findings were supported by plaintiff's affidavits and the findings were sufficient to justify awarding plaintiff attorney fees.

Appeal by defendant from Order entered 31 December 2012 by Judge George J. Franks in District Court, Cumberland County. Heard in the Court of Appeals 22 October 2013.

Lewis, Deese, Nance, Briggs & Hardin, LLP, by Victoria Gillispie Hardin, for plaintiff-appellee.

Ferrier Law, P.L.L.C., by Kimberly M. Ferrier, for defendant-appellant.

STROUD, Judge.

Thomas Duckworth ("defendant") appeals from an order entered 31 December 2012 awarding his former wife, Margaret Hennessey ("plaintiff"), attorney's fees. For the following reasons, we affirm.

I. Background

Plaintiff and defendant were married in January 2006, separated in June 2009, and later divorced. The parties have one minor child, born December 2005.

On or about 21 August 2009, plaintiff and defendant entered into a separation agreement ("the Agreement") that addressed property distribution, custody of the parties' minor child, alimony, and the relief available in case of breach, including attorney's fees. The Agreement was not incorporated into the divorce decree or other court order.

On 16 November 2009, plaintiff filed a complaint for a custody order "preserving and protecting the status quo of the minor child," child support based upon the child support guidelines, a temporary restraining order prohibiting defendant from harassing her, specific performance of the alimony provisions in the Agreement, and attorney's fees. Defendant answered and brought counterclaims based upon Chapter 50 seeking emergency custody as well as permanent primary custody, guidelines child support, and attorney's fees based upon these claims; defendant did not bring any claim for enforcement of the Agreement against plaintiff. After years of litigation, including a number of temporary custody orders, discovery, and cross-motions on various topics, the parties executed a consent order, entered 30 November 2012, to resolve all outstanding issues between them other than attorney's fees.

Under the 2012 consent order, the parties shared legal and physical custody of their child under a detailed custodial schedule, a parenting coordinator was appointed, child support was adjusted, and defendant was required to pay plaintiff $8,072. All outstanding claims for breach of contract, contempt, and other issues not explicitly resolved by the order were dismissed. The property distribution provisions of the original separation agreement were not affected by the consent order.

On 6 December 2012, the trial court held a hearing regarding both parties' requests for an award of attorney's fees and allowed plaintiff's request for attorney's fees by order entered 31 December 2012. It also denied defendant's claim for attorney's fees. The trial court found that plaintiff was unemployed, that she stopped working while pregnant

with the parties' child and has not worked since,[1] that she does not have any income, and that her current bank statement reflected a balance of $717.07. The trial court found that defendant, by contrast, is a Lieutenant Colonel in the United States Army and "earns a gross income of approximately $10,883.06 per month." Finally, the court found that plaintiff's actions for "custody and support were filed in good faith[] [and] that [she] has insufficient means to defray the costs of her action." As an alternate ground to support its order, the trial court concluded that Rule 11 sanctions were appropriate because defendant had fired two attorneys in bad faith, unnecessarily delaying the proceedings. The court awarded plaintiff $11,282.50 in attorney's fees. Defendant filed timely notice of appeal to this Court.

II. Basis for Attorney's Fee Award

On appeal, defendant argues that the trial court erred in awarding attorney's fees to plaintiff because the Agreement should have precluded such an award and, in any event, the trial court did not make adequate findings supported by the evidence to justify a statutory award of attorney's fees. We disagree.

Defendant primarily argues on appeal that the trial court erred in awarding attorney's fees under N.C. Gen. Stat. § 50-13.6 rather than under the Agreement and that the court could not award attorney's fees to plaintiff under the Agreement because the Agreement provides that "the losing party" is responsible for "all legal fees and costs." Defendant contends that plaintiff is the "losing party" here.

To decide this issue, we must first identify the basis of the attorney's fee award. "The recovery of attorney's fees is a right created by statute. [Generally,] [a] party can recover attorney's fees only if such a recovery is expressly authorized by statute." *Burr v. Burr*, 153 N.C. App. 504, 506, 570 S.E.2d 222, 224 (2002) (citations and quotation marks omitted). Attorney's fees may be awarded on a claim for child custody or support pursuant to N.C. Gen. Stat. § 50-13.6. However, attorney's fees may also be awarded under a separation agreement entered into pursuant to N.C. Gen. Stat. § 52-10.1 that provides for attorney's fees, unless the provision is otherwise contrary to public policy. *Bromhal v. Stott*, 341 N.C. 702, 705, 462 S.E.2d 219, 221 (1995); *Edwards v. Edwards*, 102 N.C. App. 706, 712-13, 403 S.E.2d 530, 533-34, *disc. rev. denied*, 329 N.C. 787, 408 S.E.2d 518 (1991).

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1. One of the provisions of the Agreement was that "Wife agrees to remain a stay-at-home parent until such time as the minor child starts school in August, 2011."

Here, plaintiff requested attorney's fees under both the Agreement and N.C. Gen. Stat. § 50-13.6; defendant requested attorney's fees in his counterclaim under N.C. Gen. Stat. § 50-13.6.[2] Thus, based upon the parties' pleadings, and depending upon the issues addressed, the trial court might have the option of awarding attorney's fees under the Agreement, under N.C. Gen. Stat. § 50-13.6, or both.

A. Separation Agreement

Although the custody and support provisions of the Agreement were superseded by the consent order regarding custody and support, the Agreement was never incorporated into a court order. Therefore, it remained "a contract, to be enforced and modified under traditional contract principles." *Walters v. Walters*, 307 N.C. 381, 386, 298 S.E.2d 338, 342 (1983).

> 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.

Lynn v. Lynn, 202 N.C. App. 423, 431, 689 S.E.2d 198, 205 (citations, quotation marks, and ellipses omitted), *disc. rev. denied*, 364 N.C. 613, 705 S.E.2d 736 (2010).

The full attorney's fees provision in the separation agreement states:

> 28. **COUNSEL FEES UPON BREACH** In the event it becomes necessary to institute legal action to enforce compliance with the terms of this Agreement or by reason of the breach by either party of this Agreement, then the parties agree that at the conclusion of such legal proceeding, the losing party shall be solely responsible for all legal fees and costs incurred by the other party, such fees and costs to be taxed the [sic] Court. The amount so awarded shall be in the sole discretion of the presiding judge and

2. Neither plaintiff nor defendant cited a particular statute in their pleadings, but the wording of the requests is clearly based upon N.C. Gen. Stat. § 50-13.6. We also note that attorney's fees may be awarded based upon N.C. Gen. Stat. § 1A-1, Rule 11, and that plaintiff also filed a motion based upon this rule. This basis was an alternative in the trial court's order, but we will discuss that separately below.

> the award shall be made without regard to the financial ability of either party to pay, but rather shall be based upon fees and expenses determined by the Court to be reasonable and incurred by the prevailing party. It is the intent of this paragraph to induce both Husband and Wife to comply fully with the terms of this Agreement to the end that no litigation as between these parties is necessary in the areas dealt with by this Agreement. In the event of litigation, it is the further intent to specifically provide that the losing party pays all reasonable fees and costs that either side may incur.

Given that this case involved several claims and was resolved by consent order, it is difficult to say who was the "losing party" and who was the "prevailing party." Plaintiff sought four types of substantive relief in her complaint: (1) a custody order preserving the status quo, (2) guideline child support, (3) a TRO, and (4) specific performance of the separation agreement's alimony provisions. In his counterclaim, Defendant sought primary physical custody of the parties' minor child and attorney's fees based upon N.C. Gen. Stat. § 50-13.6. In addition, both parties filed numerous motions which we have not listed here in detail, related to their respective claims.

Neither party was a clear winner or loser, although plaintiff prevailed on more of the issues she raised than defendant. Plaintiff did receive a "mutual" TRO by consent of the parties, based upon N.C. Gen. Stat. § 1A-1, Rule 65, restraining each party from harassing the other, but there is no attorney's fee claim under Rule 65, nor does this TRO appear to be based upon any specific provision of the Agreement.[3] Plaintiff was not able to preserve the "status quo" for custody, as defendant was ultimately awarded greater responsibility under the 2012 consent order than under the 2009 agreement. Plaintiff was not awarded specific performance of the alimony provisions in the 2009 agreement—although defendant did agree to pay her $8,072, apparently to settle that claim.

Defendant also did not prevail on his sole request in his counterclaim for primary physical custody. In addition, defendant's counterclaim for primary custody was not an action which was necessary "to enforce compliance with the terms of this Agreement or by reason of the breach by either party of this Agreement," as he was not seeking to continue the

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3. There was a general "no harassment" provision in the Agreement but it was not mentioned in Plaintiff's complaint, and since each party was ordered not to harass the other, there is no "winner" or "loser" here, even if it was based upon the Agreement.

custodial arrangement under the Agreement and he did not claim that plaintiff had breached the custodial terms of the Agreement. Instead, he was actually seeking a modification of the custody arrangement giving him custodial rights superior to those he had under the Agreement.

Further, the issues of breach and specific performance were dismissed and not addressed in the 2012 consent order. The way the action was resolved, it was not treated as one for breach of the Agreement or for specific performance. Instead, the action essentially became one for Chapter 50 child custody and child support—completely separate from whatever the 2009 agreement provided.[4] Although the Agreement expresses the general intent "that the losing party pays all reasonable fees and costs that either side may incur" in litigation, it also does not preclude an award of statutory attorney fees in this situation, in which both parties requested statutory attorney fees under N.C. Gen. Stat. § 50-16.3 and there is no breach of agreement, specific performance, or a clear winner or loser.

We hold that the attorney's fees provision in the Agreement, by its plain terms, does not apply here, since there was no determination of a "breach" of the agreement or order for specific performance. Therefore, we must next consider whether the award of attorney's fees was justified under N.C. Gen. Stat. § 50-13.6 (2011).

B. N.C. Gen. Stat. § 50-13.6

Defendant contends that the trial court erred in awarding attorney's fees under N.C. Gen. Stat. § 50-13.6 because its findings were inadequate, they did not reflect the evidence before the trial court, and because the trial court prevented him from presenting evidence about his ability to pay. Again, we disagree.

N.C. Gen. Stat. § 50-13.6 provides:

> In an action or proceeding for the custody or support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody or support, or both, the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient

4. It is well established that the custody and support provisions of a separation agreement are always subject to later modification by the court. *See Kiger v. Kiger*, 258 N.C. 126, 129, 128 S.E.2d 235, 237 (1962) (noting that separation agreements "are not final and binding as to the custody of minor children or as to the amount to be provided for the support and education of such minor children." (citation omitted)).

> means to defray the expense of the suit. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding . . . .

To award attorney's fees in an action for custody and support,

> [t]he trial court must make specific findings of fact relevant to: (1) The movant's ability to defray the cost of the suit, specifically that the movant is unable to employ counsel so that he may proceed to meet the other litigant in the suit; (2) whether the movant has initiated the action in good faith; (3) the attorney's skill; (4) the attorney's hourly rate charged; and (5) the nature and extent of the legal services performed.

Cameron v. Cameron, 94 N.C. App. 168, 172, 380 S.E.2d 121, 124 (1989) (citations omitted). Defendant only challenges the trial court's conclusion that plaintiff has insufficient means to defray the expenses of the suit.

> [T]he trial judge has the discretion to award attorney's fees once the statutory requirements of G.S. Sec. 50-13.6 (1984) have been met. While whether the statutory requirements have been met is a question of law, reviewable on appeal, the amount of attorney's fees is within the sound discretion of the trial judge and is only reviewable for an abuse of discretion.

Atwell v. Atwell, 74 N.C. App. 231, 237-38, 328 S.E.2d 47, 51 (1985) (citation omitted).

Here, the trial court found that plaintiff is currently unemployed, that she stopped working while she was pregnant with the parties' child, and that she had not been employed since. The trial court also noted that plaintiff's bank statement reflected a balance of $717.07. The trial court found that plaintiff had incurred a total of $28,260 in attorney's fees for approximately 141 hours of work and that those fees—as well as the nature and scope of the representation—were reasonable. Additionally, the trial court made findings about defendant's monthly income of approximately $10,883. Further, there was evidence that plaintiff had no assets other than a savings account with a $197 balance, a 401K worth approximately $900, and a 2006 Honda Pilot. The expense of plaintiff's attorney's fees alone far exceeded the value of all of her assets combined.

The trial court concluded that plaintiff's actions were filed in good faith and that she had insufficient means to defray the costs of her action. These conclusions were supported by adequate findings relevant to "whether plaintiff, as litigant, is able to meet defendant, as litigant, on substantially even terms with respect to representation by counsel." *Quick v. Quick*, 305 N.C. 446, 461, 290 S.E.2d 653, 663 (1982). Each one of these findings was supported by averments in plaintiff's affidavits and the record evidence.

Defendant further argues that the trial court did not review the affidavits submitted by the parties. That fact is certainly not evident from the transcript and all of the parties' relevant affidavits and evidence on their respective incomes and employment statuses are in the record. In fact, the order provides specifically "that by and through counsel, the parties consented to proceed with the hearing for attorneys' fees via affidavit and have waived the opportunity to present sworn testimony." The transcript of the hearing fully supports this statement, as defendant's counsel repeatedly referred to the affidavits. Additionally, despite defendant's argument on appeal that he was unable to introduce evidence of his expenses, there is no indication whatsoever that defendant attempted to introduce such evidence or that the trial court refused to receive anything that he did offer to present. We see no basis for determining that the affidavits were not properly before the trial court or that the trial court improperly excluded other evidence. We will not presume error where none is shown in the record. *See King v. King*, 146 N.C. App. 442, 445-46, 552 S.E.2d 262, 265 (2001).

Finally, defendant argues that the trial court's findings are invalid because the findings in the written order "do not accurately reflect" what the trial court said from the bench at the hearing. Defendant cites no law in support of the contention that a trial judge is restricted to findings he rendered at a hearing when entering a written order. This argument is meritless. *See* N.C. Gen. Stat. § 1A-1, Rule 58 (2011) ("[A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court."); *Bumgardner v. Bumgardner*, 113 N.C. App. 314, 321, 438 S.E.2d 471, 475 (1994) (holding, under the former version of Rule 58, that the trial court's oral rendition of judgment did not constitute entry of judgment because the court had simply announced his intended judgment without making the necessary findings and conclusions); *In re Hawkins*, 120 N.C. App. 585, 589, 463 S.E.2d 268, 271 (1995) (noting that "the trial court's announcement in open court was not yet final as to be suitable for appellate review[] [because] [t]he findings of fact and conclusions of law were not set forth in final form."); *Mastin v. Griffith*, 133 N.C. App. 345, 346, 515 S.E.2d 494, 494 (1999) ("Announcement of

judgment in open court merely constitutes 'rendering' of judgment, not entry of judgment." (citation and quotation marks omitted)).

We hold that the trial court's findings were supported by plaintiff's affidavits and that the findings were sufficient to justify awarding plaintiff attorney's fees. Defendant does not challenge the amount of attorney's fees as unreasonable or unjustified, nor does he contest that this action is one for custody and support.

Because we uphold the trial court's award of attorney's fees we need not address the court's alternate ground of Rule 11 sanctions. Yet, we do feel compelled to note that Rule 11 would not seem to apply to defendant's decisions to change counsel during the course of litigation. Although the trial court made other findings which would be proper considerations under Rule 11, one of the trial court's primary findings in support of Rule 11 sanctions was that

> Defendant's present counsel, Kimberly M. Ferrier, is his third attorney; and that the Defendant caused unnecessary delays and expenses in the litigation due, in part, to his changing attorneys; and that Defendant's actions were in bad faith.

A litigant may wish to change counsel for many reasons, some perfectly valid and some foolish or even in "bad faith," and although the record before us does offer hints of the personal animosity between various counsel for the parties, it does not give any indication of the reasons for defendant's changes in counsel, only that they occurred.[5]

III. Conclusion

We hold that the trial court properly awarded attorney's fees to plaintiff under N.C. Gen. Stat. § 50-13.6. Therefore, we affirm the trial court's order.

AFFIRMED.

Judges McGEE and BRYANT concur.

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5. We further note that, in his appellate brief, defendant's counsel repeatedly used the phrase "upon information and belief" before making various factual assertions and made other statements of fact that were apparently from personal recollection or at the very least are not based upon the record. Such arguments are wholly inappropriate. *See Sood v. Sood*, ___ N.C. App. ___, ___ n.4, 732 S.E.2d 603, 608 n.4 (admonishing counsel for including "his personal recollection of events at trial or after as part of his argument in an appellate brief."), *cert. denied, disc. rev. denied, and app. dismissed*, 366 N.C. 417, 735 S.E.2d 336 (2012); N.C.R. App. P 9(a). Appellate counsel should make arguments based on the facts in the record, not "upon information and belief."

JUDITH TEEL HERRING, PLAINTIFF
v.
JAMES DALLAS HERRING, DEFENDANT

No. COA13-544

Filed 3 December 2013

Divorce—separation agreement—motion to set aside—mutual mistake—mistake of law

The trial court did not err by denying defendant ex-husband's motions to set aside a separation agreement entered into by the parties and equitably distribute plaintiff's TSERS pension based on alleged mutual mistake. The mutual mistake, if any, was a "bare mistake of law" regarding the valuation of defined benefit plans for purposes of equitable distribution.

Appeal by defendant from order entered on 29 November 2012 by Judge Donna H. Johnson in Cabarrus County District Court. Heard in the Court of Appeals 23 October 2013.

Ferguson, Scarbrough, Hayes, Hawkins & DeMay, P.A., by James R. DeMay, for plaintiff-appellee.

Christy E. Wilhelm for defendant-appellant.

DAVIS, Judge.

James Dallas Herring ("Defendant") appeals from the trial court's order denying his motion to set aside a separation agreement entered into by him and his former wife. The issue before us is whether the separation agreement should be rescinded based on the ground of mutual mistake. After careful review, we affirm the trial court's order.

Factual Background

Judith Teel Herring ("Plaintiff") and Defendant were married on 27 April 1985 and separated on 21 June 1998. On 11 May 2007, the parties executed a separation agreement ("Separation Agreement") to "confirm their separation and make arrangements in connection therewith; including settlement of their property rights, and other rights and obligations growing out of the marriage relationship." The Separation Agreement distributed the parties' real and personal property, including the parties' marital home, vehicles, bank accounts, and retirement accounts.

Specifically, the Separation Agreement stated that Plaintiff would "retain all bank checking, savings, mutual fund, money market, stocks, 401K, 456B retirement and governmental employees retirement accounts which are presently titled in her name only as her separate property." The Separation Agreement also provided that Defendant would likewise "retain all bank checking, savings, mutual fund, money market, stocks and 401K retirement accounts which are presently titled in his name only as his separate property." The Separation Agreement contained a provision specifying that "[t]his agreement contains the entire undertaking of the parties, and there are no representations, warranties, covenants or undertakings other than those expressed and set forth herein." Finally, the Agreement provided that Defendant would pay Plaintiff a distributional award of $31,500 and that Plaintiff would execute a quitclaim deed conveying her interest in the marital home to Defendant.

On 21 February 2012, Plaintiff filed a complaint for absolute divorce and alleged that the parties had "agreed upon and completed a division of all property subject to equitable distribution considerations as defined by the North Carolina General Statutes, and there remains no division of property to be further considered by the Court." On 5 April 2012, Defendant filed an answer and counterclaim seeking equitable distribution and to set aside the Separation Agreement on grounds of mistake, misrepresentation, or fraud. Specifically, Defendant contended that "[t]he parties were mistaken as to the actual marital value of Plaintiff's Governmental Employees Retirement. The actual value was far greater than the $27,499 value divided by the parties."

The matter was heard on 10 October and 20 November 2012, and on 29 November 2012, the trial court entered an order denying Defendant's motion to set aside the Separation Agreement and likewise denying his claim for equitable distribution. Defendant appealed to this Court.

Analysis

On appeal, Defendant argues that the trial court erred by failing to rescind or reform the parties' Separation Agreement based on a mutual mistake of fact.[1] We disagree.

"A marital separation agreement is subject to the same rules pertaining to enforcement as any other contract." *Gilmore v. Garner*,

1. Defendant makes no argument in his brief regarding the trial court's rejection of his fraud and misrepresentation theories. These issues are thereby deemed abandoned. *See* N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

157 N.C. App. 664, 669, 580 S.E.2d 15, 19 (2003). Thus, like any other contract, a separation agreement may be set aside or reformed based on grounds such as fraud, mutual mistake of fact, or unilateral mistake of fact procured by fraud. *See Searcy v. Searcy*, ___ N.C. App. ___, ___, 715 S.E.2d 853, 857 (2011) ("Separation and property settlement agreements are contracts and as such are subject to rescission on the grounds of (1) lack of mental capacity, (2) mistake, (3) fraud, (4) duress, or (5) undue influence.") (citation, quotation marks, and alteration omitted).

"A mutual mistake of fact is a mistake common to both parties and by reason of it each has done what neither intended." *Lancaster v. Lancaster*, 138 N.C. App. 459, 465, 530 S.E.2d 82, 86 (2000) (citation and quotation marks omitted). To support the rescission or reformation of an otherwise valid and binding contract, the mutual mistake

> must be of an existing or past fact which is material; it must be as to a fact which enters into and forms the basis of the contract, or in other words it must be of the essence of the agreement, . . . the efficient cause of the agreement, and must be such that it animates and controls the conduct of the parties.

MacKay v. McIntosh, 270 N.C. 69, 73, 153 S.E.2d 800, 804 (1967). Thus, neither unilateral mistakes of fact nor mutual mistakes of law are, standing alone, sufficient to set aside or reform a contract. *See Stevenson v. Stevenson*, 100 N.C. App. 750, 752, 398 S.E.2d 334, 336 (1990) ("A unilateral mistake, unaccompanied by fraud, imposition, or like circumstances, is not sufficient to avoid a contract."); *Durham v. Creech*, 32 N.C. App. 55, 60, 231 S.Ed.2d 163, 167 (1977) ("A bare mistake of law generally affords no grounds for reformation.").

The party seeking to reform or rescind the contract bears the burden of proving the existence of a mutual mistake by clear, cogent, and convincing evidence. *Smith v. First Choice Servs.*, 158 N.C. App. 244, 249, 580 S.E.2d 743, 748, *disc. review denied*, 357 N.C. 461, 586 S.E.2d 99 (2003). Here, Defendant contends that the parties shared a mutual misunderstanding as to the proper value of Plaintiff's Teachers' and State Employees' Retirement System ("TSERS") retirement benefits. Specifically, Defendant argues that the parties' mutual mistake was basing their calculation of the TSERS pension solely upon Plaintiff's contributions to the account rather than upon the expected future value of the pension if Plaintiff continued working for the State. We conclude that Defendant failed to adequately establish that the TSERS pension value used by the parties in calculating the distributional award to Plaintiff set

forth in the Separation Agreement constituted a mistake of fact common to both parties sufficient to compel the setting aside of the Agreement.

Defendant argues that Plaintiff's testimony at the hearing on his motion to set aside the Separation Agreement was "an acknowledgement of the mutual mistake" because she testified that "[a]s far as I knew, 27,000 was what was in there at that point 'cause that's all I would have gotten. That's how we looked at it at the time we did this." However, this statement does not establish that Plaintiff misunderstood the nature of her pension or was unaware of the potential future benefits she would receive if she continued her service with the State for the prescribed period of time. Indeed, Plaintiff's earlier testimony that if she "had retired on that date, that would have been the amount of money that [she] would have gotten" indicates that her intent had been to value the pension as if she had terminated her service and withdrawn the pension funds on the date of separation.

We are not persuaded that these statements demonstrate by clear, cogent, and convincing evidence that Plaintiff was wholly ignorant of the fact that, as a defined benefit plan,[2] her TSERS pension would eventually be worth more than just her contributions and the accumulated interest. Defendant's unilateral assertions that (1) the parties intended to use the actual value of the TSERS account in calculating a distributional award; and (2) they were unaware that the pension was worth more than Plaintiff's contributions are insufficient to establish the existence of a mutual mistake of material fact. *See Lancaster*, 138 N.C. App. at 465-66, 530 S.E.2d at 86 ("Although [the defendant] argues that the separation agreement contains 'mutual mistakes,' [the plaintiff] offers no such argument, thereby negating the contention that the alleged mistakes were 'mutual.' ").

Moreover, we believe that the mistake alleged by Defendant would more accurately be characterized as a mistake of law, which does not afford a basis for rescinding or reforming a separation agreement. Defendant is essentially asserting that the parties misunderstood the value of the TSERS pension because they did not treat the pension as

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2. "In a defined benefit plan the employee's pension is determined without reference to contributions [by the employee] and is based on factors such as years of service and compensation received." *Cochran v. Cochran*, 198 N.C. App. 224, 227, 679 S.E.2d 469, 472 (2009) (citation and quotation marks omitted), *disc. review denied*, 363 N.C. 801, 690 S.E.2d 533 (2010). In equitable distribution actions, defined benefit plans are valued by our courts using the five-step method outlined in *Bishop v. Bishop*, 113 N.C. App. 725, 731, 440 S.E.2d 591, 595-96 (1994).

a defined benefit plan and calculate its worth accordingly. Thus, if the parties were mutually mistaken about anything, the mistake would have concerned how the TSERS pension would have been valued and distributed under North Carolina's equitable distribution law.

In *Dalton v. Dalton*, 164 N.C. App. 584, 586, 596 S.E.2d 331, 333 (2004), the defendant argued that the trial court should have set aside the parties' separation agreement on several grounds, including the parties' mutual mistake as to how retirement accounts were distributed under North Carolina's equitable distribution system. The defendant asserted that the parties' belief that "the law in North Carolina required each of them to retain their respective retirement savings account as their separate property" was a mutual mistake requiring rescission. *Id.* at 586, 596 S.E.2d at 332. Our Court concluded that the alleged mistake did not support rescission of the contract, stating that

> in the instant case, the separation agreement succeeded in accomplishing the intention of the parties. Specifically, the parties intended to distribute their retirement benefits pursuant to an erroneous understanding of North Carolina law. That the parties' distribution scheme, in actuality, differed from that established by North Carolina law constitutes merely a "bare mistake of law."

Id. at 588, 596 S.E.2d at 334. Likewise, we believe that the mutual mistake here, if any, is a "bare mistake of law" regarding the valuation of defined benefit plans for purposes of equitable distribution. As such, it fails as a basis for rescission.

Finally, in a related argument, Defendant asserts that the trial court's refusal to value the TSERS account using the defined benefit plan valuation method outlined in *Bishop v. Bishop*, 113 N.C. App. 725, 731, 440 S.E.2d 591, 595-96 (1994), led to its erroneous conclusion that there was no mutual mistake of fact. This argument is without merit.

While Defendant is correct that a trial court is required to utilize the *Bishop* method when distributing a defined benefit plan in an equitable distribution action, it is well established that parties "may agree in a separation agreement to distribute their property in any fashion they desire without resorting to litigation for equitable distribution." *Lee v. Lee*, 93 N.C. App. 584, 586, 378 S.E.2d 554, 555 (1989). Indeed, "[b]y executing a written separation agreement, married parties forego their statutory rights to equitable distribution and decide between themselves how to divide their marital estate following divorce." *Brenenstuhl v. Brenenstuhl*, 169 N.C. App. 433, 435, 610 S.E.2d 301, 303 (2005).

Here, the Separation Agreement addresses and distributes the TSERS account in the provision stating "[t]he Wife shall hereinafter retain . . . governmental employees retirement accounts which are presently titled in her name only as her separate property." As Defendant has failed to meet his burden of proving a mutual mistake requiring reformation or rescission of the Separation Agreement, the trial court was neither obligated nor permitted to disregard the parties' contractual agreement and instead conduct its own valuation and distribution of the TSERS pension using the *Bishop* method. *See Lee*, 93 N.C. App. at 586, 378 S.E.2d at 555 ("A validly drawn separation agreement which distributes all of the parties' property . . . bars an equitable distribution claim.").

Conclusion

For the reasons stated above, we affirm the trial court's order denying Defendant's motion to (1) set aside the Separation Agreement; and (2) equitably distribute Plaintiff's TSERS pension.

AFFIRMED.

Judges ELMORE and McCULLOUGH concur.

HIGH POINT BANK AND TRUST COMPANY, Plaintiff-Appellant
v.
HIGHMARK PROPERTIES, LLC; MITCHELL BLEVINS, CYNTHIA BLEVINS, CHARLES WILLIAMS and JANICE WILLIAMS, Defendants-Appellees

No. COA13-331

Filed 3 December 2013

1. Parties—foreclosure and deficiency—borrower—voluntary dismissal and joinder

In an action involving the purchase of real estate for development, with guaranty agreements, default, foreclosure, and a dispute over the amount of the deficiency, the trial court did not abuse its discretion by joining the borrower (defendant Highmark Properties, Inc.), which plaintiff had earlier dismissed voluntarily.

2. Guaranty—real estate deficiency—offset

In an action arising from the foreclosure of real estate purchased for development, with guaranty agreements and a deficiency after a foreclosure sale, the guarantors were only responsible for

the borrower's indebtedness. While plaintiff argued that the defense and offset provided in N.C.G.S. § 45-21.36 was personal to the borrower and not available to the guarantors, in this case the borrower was allowed the offset defense, not the guarantors, and the guarantors' liability was established once the jury and the trial court determined the borrower's indebtedness.

Judge DILLON concurs in part and concurs in result only in part.

Appeal by Plaintiff from orders entered 19 September 2011 and 4 October 2011 by Judge Ronald E. Spivey and judgment entered 11 July 2012 by Judge Stuart Albright in Superior Court, Guilford County. Heard in the Court of Appeals 24 September 2013.

Roberson Haworth & Reese, P.L.L.C., by Alan B. Powell, Christopher C. Finan, and Matthew A.L. Anderson, for Plaintiff-Appellant.

Wells Jenkins Lucas and Jenkins PLLC, by Ellis B. Drew, III and Ann G. Sugg, for Defendants-Appellees.

Brooks Pierce McLendon Humphrey & Leonard LLP, by Robert A. Singer, S. Leigh Rodenbough IV, Kathleen A. Gleason, and Joseph A. Ponzi, for the North Carolina Bankers Association, amicus curiae.

McGEE, Judge.

At all times relevant to this appeal, Highmark Properties, LLC ("Borrower") was a company involved in real estate development. Mitchell Blevins, Cynthia Blevins, Charles Williams, and Janice Williams ("Guarantors" and, together with Borrower, "Defendants"), were Borrower's members. High Point Bank and Trust Company ("Plaintiff") was a financial institution, with its principal place of business in Guilford County, North Carolina. Borrower obtained loans totaling $6,450,000.00 from Plaintiff, through two promissory notes: one executed on 18 January 2007 for $4,700,000.00 ("first note"), and one executed on 2 May 2007 for $1,750,000.00 ("second note"), for the purposes of developing real estate. The two notes were secured by deeds of trust to two parcels of real property ("the property") owned by Borrower. The first note was secured by the first parcel of real property, and the second note was secured by the second parcel of real property. Contemporaneously with the promissory notes, Plaintiff and Guarantors executed guaranty agreements whereby

Guarantors "guarantee[d] full and punctual payment and satisfaction of the indebtedness of Borrower to Lender [Plaintiff], and the performance and discharge of all Borrower's obligations under the Note[s][.]"

Borrower defaulted with an indebtedness of $3,541,356.00 remaining on the first note, and $1,336,556.00 remaining on the second note. Plaintiff filed a complaint on 19 October 2010 initiating an action against Defendants on the two notes, seeking to recover this outstanding indebtedness.

Plaintiff sold both parcels of the property at foreclosure sales on 8 February 2011. Plaintiff was the sole bidder, and purchased the first parcel for $2,578,070.00 and the second parcel for $720,000.00. Plaintiff filed a motion for summary judgment on 28 July 2011. Plaintiff then voluntarily dismissed Borrower from Plaintiff's action on 18 August 2011. Guarantors filed a motion on 2 September 2011 to rejoin Borrower as a defendant in the action, and simultaneously filed a motion for leave to file a third-party complaint against Borrower. Plaintiff filed a motion *in limine*, requesting that the trial court issue an "order excluding all evidence involving or relating . . . to the value of the properties foreclosed on[.]" Plaintiff's motion was in response to its belief that Guarantors intended

> to present certain evidence in support of two separate defenses. In particular, the Guarantors are offering evidence relating to . . . the value of the properties foreclosed on in support of the defense under N.C. Gen. Stat. § 45-21.36 that the bid amount at the foreclosure sale was substantially less than the true market value of the property[.]

In its motion, Plaintiff argued that the defense under N.C. Gen. Stat. § 45-21.36, allowing an offset on the amount owed on the notes based on the value of the property, was not available to Guarantors.

The trial court, by order entered 19 September 2011, ruled that joinder of Borrower to the action was "appropriate under N.C.G.S. § 26-12[,]" and that, pursuant to the North Carolina Rules of Civil Procedure, Borrower was a necessary party pursuant to Rule 19, or a permissive party pursuant to Rule 20, "and should be joined." The trial court further found "that [Borrower] is a going concern; is not in bankruptcy; is not dissolved; and is subject to the jurisdiction of this Court. In fact, [] Plaintiff sued [Borrower], and [Borrower] was a party until August 18, 2011, when Plaintiff filed a Dismissal without prejudice as

to [Borrower]." The trial court also denied Guarantors' motion to file a third-party complaint against Borrower.

By order entered 4 October 2011, the trial court entered summary judgment against Guarantors on the issue of liability, and further ruled that "[t]he value of the property securing payment of the Notes and its effect, if any, on the deficiency owed are the sole unresolved issues remaining for trial." Defendants, now including both Borrower and Guarantors, filed a motion to amend their answer so they could "assert N.C.G.S. § 45-21.36 specifically as a defense." Plaintiff consented to Defendants' motion to amend, and leave for Defendants to file an amended answer was granted by consent order entered 18 April 2012. Defendants' amended answer was filed that same date.

Plaintiff and Defendants stipulated to the following relevant facts by pretrial order entered 18 April 2012: (1) "all parties have been correctly designated, and there is no question as to misjoinder[,]" (2) "[t]he total deficiency on the First Note following the foreclosure sale . . . was . . . $963,286[,]" (3) "[t]he total deficiency on the Second Note following the foreclosure sale . . . was . . . $616,556[,]" (4) "that the single remaining issue for trial is . . . Defendants' affirmative defense under N.C. Gen. Stat. § 45-21.36[,]" and (5) this issue included whether the amount paid by Plaintiff at the foreclosure sales for the two parcels of the property "was substantially less than [the] true value."

Following a trial in which Plaintiff and Defendants submitted evidence related to the fair market value of the real property, the jury decided on 20 April 2012, that the amounts paid by Plaintiff for the parcels of real property at foreclosure were substantially less than the fair market value of the parcels. The jury determined the fair market value of parcel one was $3,723,000.00, and the fair market value of parcel two was $1,034,000.00. Judgment was entered 11 July 2012, in which the trial court ruled that Borrower's indebtedness on the first note was $0.00, because the jury had determined that the fair market value of the first parcel of the property was greater than Borrower's remaining debt of $3,541,356.00. The trial court ruled that Borrower's indebtedness on the second note was reduced to $302,556.00, because the jury had determined the fair market value of parcel two was $1,034,000.00, and Borrower's remaining debt was $1,336,556.00. The trial court then ruled that Borrower and Guarantors were jointly and severally liable, and ordered Defendants to pay Plaintiff $302,556.00 for the remaining uncollected debt, as well as granting Plaintiff attorney's fees and interest. Plaintiff appeals.

I.

The issues on appeal are whether: (1) reducing the liability of Guarantors based upon N.C. Gen. Stat. § 45-21.36 was improper, (2) N.C. Gen. Stat. § 26-12 "enlarge[d] the scope of available defenses," and (3) joinder of Borrower as a party-defendant was improper.

II.

[1] "[A] guarantor stands in the shoes of the debtor with respect to liability[.]" *Gregory Poole Equipment Co. v. Murray*, 105 N.C. App. 642, 646, 414 S.E.2d 563, 566 (1992). Therefore, upon Borrower's default, Guarantors were responsible to Plaintiff for Borrower's remaining liability on the first and second notes. Stated otherwise, and to use language from the guaranty agreements drafted by Plaintiff, Guarantors were liable for any remaining "indebtedness of Borrower to Lender [Plaintiff]."

After Plaintiff voluntarily dismissed Borrower from this action, Guarantors moved to re-join Borrower pursuant to, *inter alia*, N.C. Gen. Stat. § 26-12, which states in relevant part:

> When any [guarantor] is sued by the holder of the obligation, the court, on motion of the [guarantor] may join the principal as an additional party defendant, provided the principal is found to be or can be made subject to the jurisdiction of the court. Upon such joinder the [guarantor] shall have all rights, defenses, counterclaims, and setoffs which would have been available to him if the principal and [guarantor] had been originally sued together.

N.C. Gen. Stat. § 26-12(b) (2011). So long as Plaintiff was subject to the jurisdiction of the trial court, and that is not disputed in this case, the trial court's joinder of Plaintiff upon Guarantors' request was discretionary. "[T]he use of [the word] 'may' generally connotes permissive or discretionary action and does not mandate or compel a particular act. [A] discretionary order of the trial court is conclusive on appeal absent a showing of abuse of discretion." *Brock and Scott Holdings, Inc. v. Stone*, 203 N.C. App. 135, 137, 691 S.E.2d 37, 38-39 (2010) (quotation marks and citations omitted).

Plaintiff makes no argument that the trial court abused its discretion in joining Borrower to Plaintiff's suit seeking recovery for Borrower's default, and we find none. Plaintiff seemed to concede joinder was proper at oral argument, but argues in its brief that joinder pursuant to N.C.G.S. § 26-12(b) was improper as a matter of law because

Guarantors were thereby able to benefit from Borrower's offset defense. The only authority relied upon by Plaintiff in support of this argument is *Poughkeepsie Sav. Bank, FSB v. Harris*, 833 F. Supp. 551 (W.D.N.C. 1993). This opinion is not binding on this Court. More importantly, the trial court in *Poughkeepsie*, assuming *arguendo*, that N.C.G.S. § 26-12(b) "binds a federal court sitting in diversity," recognized that joinder pursuant to N.C.G.S. § 26-12(b) is discretionary, and decided, in its discretion, against joinder. *Id.* at 554. We hold the trial court did not abuse its discretion in joining Borrower pursuant to N.C.G.S. § 26-12(b).

Once joined, Borrower was entitled to assert the defense of offset pursuant to N.C. Gen. Stat. § 45-21.36 (2011) in order to determine Borrower's indebtedness to Plaintiff. N.C.G.S. § 45-21.36 states in relevant part:

> When any sale of real estate has been made by a mortgagee, trustee, or other person authorized to make the same, at which the mortgagee, payee or other holder of the obligation thereby secured becomes the purchaser and takes title either directly or indirectly, and thereafter such mortgagee, payee or other holder of the secured obligation, as aforesaid, shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustor or other maker of any such obligation whose property has been so purchased, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and offset, but not by way of counterclaim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value, and, upon such showing, to defeat or offset any deficiency judgment against him, either in whole or in part[.]

N.C.G.S. § 45-21.36. This Court has stated:

> N.C. Gen. Stat. § 45-21.36 applies well-settled principles of equity to provide protection for debtors whose property has been sold and purchased by their creditors for a sum less than its fair value. *Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co.*, 210 N.C. 29, 185 S.E. 482 (1936), *aff'd*, 300 U.S. 124, 81 L.Ed. 552 (1937).

NCNB v. O'Neill, 102 N.C. App. 313, 316, 401 S.E.2d 858, 859 (1991). N.C.G.S. § 45-21.36 is a statute based in equity enacted to prevent "abuse

leading to a windfall," *Id.* at 316, 401 S.E.2d at 859, it "does not relieve the [borrower] of its debt[,] . . . [i]t simply limits the plaintiff to what it bargained for – repayment in full plus interest." *Id.* at 317, 401 S.E.2d at 860 (citations omitted).

After the jury in the present case determined the fair market value of the property, the trial court determined that "[Borrower's] indebtedness on the First Note was reduced to $0.00[,]" and that "[Borrower's] indebtedness on the Second Note was reduced to $302,556.00." The trial court then ruled that Guarantors were jointly and severally liable with Borrower for $302,556.00.

Pursuant to established principles of surety law, *Gregory Poole*, 105 N.C. App. at 646, 414 S.E.2d at 566, and the guaranty agreements drafted by Plaintiff, Guarantors were liable to Plaintiff for "the Indebtedness of Borrower to [Plaintiff.]"[1] The guaranty agreements state: "The word 'Indebtedness' means Borrower's indebtedness to [Plaintiff] as more particularly described in this Guaranty[,]" and further state:

> The word "Indebtedness" as used in this Guaranty means all of the principal amount outstanding from time to time and at any one or more times, accrued unpaid interest thereon and all collection costs and legal expenses related thereto permitted by law, attorneys' fees arising from any and all debts, liabilities and obligations that Borrower individually or collectively or interchangeably with others, owes or will owe Lender under the Note[.]

That indebtedness was established at trial, and Plaintiff does not argue on appeal that there was any error at trial concerning the jury's determination of the fair market value of the property, or concerning the trial court's determination of the remaining indebtedness in light of the jury's determination. Plaintiff argues that it should be allowed to recover from Borrower, through purchase and sale of the two parcels of real property, then recover again from Guarantors, based upon Guarantors' agreement to guarantee Borrower's indebtedness to Plaintiff. However, according to the guaranty agreements: "This Guaranty . . . will continue in full force until all the Indebtedness shall have been fully and finally paid and satisfied and all of Guarantor's other obligations under this Guaranty shall

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1. The guaranty agreements all begin with the following language: "For good and valuable consideration, Guarantor absolutely and unconditionally guarantees full and punctual payment and satisfaction of the Indebtedness of Borrower to [Plaintiff], and the performance and discharge of all Borrower's obligations under the Note and the related Documents."

have been performed in full." That indebtedness was partially satisfied through the Plaintiff's actions at the foreclosure sales. The trial was conducted to determine the remainder of the indebtedness.

Plaintiff argues that the defense and offset provided for in N.C.G.S. § 45-21.36 is personal to Borrower, and not available to Guarantors simply because Borrower had availed itself of the offset defense, and Borrower was re-joined in the action pursuant to N.C.G.S. § 26-12(b). We agree that the plain language of N.C.G.S. § 26-12(b) does not, upon re-joinder of Borrower, expand the defenses available to Guarantors beyond those that were available to Guarantors when Plaintiff originally brought action against both Borrower and Guarantors together. However, in the present case Guarantors were *not* allowed an offset defense, Borrower was. The fact that Guarantors "benefitted," because the amount of Borrower's indebtedness was determined at trial to be less than what Plaintiff claimed, does not alter this fact. Plaintiff directs us to no controlling nor persuasive law in support of its position in this matter.

The issue in the case before us is *not* whether a guarantor can *personally* assert an offset defense pursuant to N.C.G.S. § 45–21.36. We have not held that Guarantors had the right to avail *themselves* of the offset defense in N.C.G.S. § 45-21.36. We quite assiduously avoided making that determination. We hold that Guarantors were only responsible for Borrower's indebtedness. This holding is in accord with precedent and the language of the guaranty agreements drafted by Plaintiff. Once the jury and the trial court determined Borrower's indebtedness to Plaintiff, Guarantors' liability to Plaintiff was thereby established.

Plaintiff does raise legitimate questions concerning a guarantor's rights, if any, with respect to N.C.G.S. § 45–21.36. The earliest opinion addressing this issue appears to be *Trust Co. v. Dunlop*, 214 N.C. 196, 198 S.E.2d 645 (1937). Our Supreme Court in *Dunlop* held that the guarantor, though not a "mortgagee, or trustee, or holder of the notes secured by the mortgage," *id.* at 196, 198 S.E. at 646, had a right to "present the facts" concerning the statutory offset defense at trial. *Id.* Our Supreme Court further stated: "It is not, of course, for us to say whether the defendants can make good the allegations of their [offset] defense: We only say that at this stage of the case we do not deny their right to make it." *Id. Dunlop* seems to allow a guarantor to step into the borrower's shoes and assert the offset defense because

> [i]t would not be an unreasonable interpretation of the statute to hold that it proceeds upon the equitable assumption that the debtor has received payment in full when, by

> his own choice, he takes the land, and that the purpose of the law is, under such circumstances, to discharge the debt.

Id. Opinions of this Court have acknowledged this reading of *Dunlop*. *Chem. Bank v. Belk*, 41 N.C. App. 356, 368-69, 255 S.E.2d 421, 429 (1979) ("even a guarantor could likely assert [N.C.G.S. § 45-21.38 as a] defense. *See Trust Co. v. Dunlop*, 214 N.C. 196, 198 S.E. 645 (1938)."); *Smith v. Childs*, 112 N.C. App. 672, 684, 437 S.E.2d 500, 508 (1993) ("While personal guaranties are not explicitly covered by G.S. 45-21.38, the statute does preclude 'a deficiency judgment on account of' a purchase money deed of trust. This Court has previously commented even a guarantor arguably could assert G.S. § 45-21.38 as a defense. *Chemical Bank v. Belk*, 41 N.C. App. 356, 368-69, 255 S.E.2d 421, 429, *disc. review denied*, 298 N.C. 293, 259 S.E.2d 911 (1979). Moreover, our Supreme Court has ruled the guarantor of a purchase money deed of trust is entitled to plead the anti-deficiency statute as a defense in an action brought on his personal guaranty. *Virginia Trust Co. v. Dunlop*, 214 N.C. 196, 198-99, 198 S.E. 645, 646 (1938). While the anti-deficiency statute at issue in [*Dunlop*] was not identical to present G.S. § 45-21.38, both statutes are similar in that guarantors are not expressly covered.").

To the extent *Dunlop* stands for the proposition that guarantors can claim the offset defense in N.C.G.S. § 45-21.38 under appropriate circumstances, opinions of this Court holding otherwise are not controlling. *Andrews ex rel. Andrews v. Haygood*, 188 N.C. App. 244, 248, 655 S.E.2d 440, 443 (2008) ("this Court has no authority to overrule decisions of our Supreme Court and we have the responsibility to follow those decisions 'until otherwise ordered by . . . [our] Supreme Court' ") (citation omitted). However, our holding in this matter does not require us to resolve this issue, and we do not presume to do so.

We hold that once Borrower successfully obtained an offset pursuant to N.C.G.S. § 45–21.36, reducing Borrower's indebtedness thereby, Guarantors could only be held responsible for Borrower's indebtedness. Plaintiff's arguments are without merit.

No error.

Judge McCULLOUGH concurs.

DILLON, Judge, concurring in part and concurring in the result only in part.

I concur with the majority's conclusion that the trial court did not abuse its discretion in joining Highmark Properties, LLC, ("Borrower") to this action. However, regarding the majority's holding that the trial court did not err by reducing the liability of the individual defendants ("Guarantors") based upon N.C. Gen. Stat. § 45-21.36 (2011), I concur in result only for the reasons set forth below.

I believe that holdings from our Court, discussed *infra*, would compel us to conclude that the trial court erred in reducing the liability of the Guarantors based on the jury's determination of the collateral's fair market value rendered in connection with the Borrower's assertion of the defense provided in G.S. § 45-21.36. However, I reach the same holding as the majority because I believe this case is controlled by our Supreme Court's holding in *Trust Co. v. Dunlop*, 214 N.C. 196, 198 S.E. 645 (1937), where the Court, essentially, held that a guarantor could assert the defense provided by G.S. § 45-21.36 in a case even where the mortgagor-borrower was not a party.

Normally, following a foreclosure sale, the amount of the underlying indebtedness securing a mortgage is deemed reduced by the amount of the net proceeds realized from the sale. N.C. Gen. Stat. § 45-21.31(a)(4) (2011). This general rule is abrogated in situations where the creditor, who commenced the foreclosure, is the high bidder at the foreclosure sale. I believe the key question here is whether the Legislature, by enacting G.S. § 45-21.36, intended for the actual value of the collateral at the time of the foreclosure – as opposed to the net proceeds realized from the sale – to serve as a measure by which the indebtedness is reduced or as a measure by which the *mortgagor-borrower's personal liability* to pay the indebtedness is reduced. If the former is true, then I believe a guarantor should be able to assert G.S. § 45-21.36, even if the borrower whose property served as the collateral for the debt is not a party to the action since the guarantor is only liable for the actual amount of the underlying indebtedness. However, if the latter is true — and the defense provided by G.S. § 45-21.36 is intended to provide a defense that is personal to the mortgagor-borrower — then I believe a guarantor cannot benefit from the defense.[1]

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1. Examples of defenses that are *personal* to the primary borrower, which we have stated cannot generally be asserted by a guarantor or surety, are found in *Exxon v. Kennedy*, 59 N.C. App. 90, 295 S.E.2d 770 (1982) (holding that a discharge of a debtor through bankruptcy does not discharge the obligation of a guarantor under a guaranty agreement); and in *Town v. Smith*, 10 N.C. App. 70, 74, 178 S.E.2d 18, 21 (1970), *cert. denied*, 277 N.C. 727, 178 S.E.2d 831 (1971), where we stated that "[a] surety for an idiot or an infant, or a surety for a corporation or governmental entity acting *ultra vires*, may be

Our Court has held that the guarantor of a mortgagor's debt may not avail himself of the defense provided by G.S. § 45-21.36. For instance, in *Wells Fargo Bank, N.A. v. Arlington Hills of Mint Hill, LLC*, which involved a deficiency suit by a creditor against a mortgagor-borrower and the guarantors, our Court affirmed the trial court's summary judgment order against the guarantors, stating that "[t]he fact that Bank also named Borrower, the mortgagor, as a defendant in the deficiency action does not expand the availability of the offset defense under N.C. Gen. Stat. § 45-21.36 to non-mortgagor [guarantors]." __ N.C. App. __, __, 742 S.E.2d 201, 204 (2013).

In *Borg-Warner v. Johnston*, which involved a deficiency suit against only the guarantors of a loan, our Court held that the guarantor-defendants could not invoke G.S. § 45-21.36 as a means to determine the amount of the indebtedness that they owed, but that the defense was only available to the mortgagor-borrower. 97 N.C. App. 575, 579, 389 S.E.2d 429, 433 (1990).

We have also held that, in a situation where a loan is extended to multiple co-borrowers but where only one of the co-borrowers actually owned the collateral securing the debt, only the borrower who had the ownership in the collateral could assert G.S. § 45-21.36. Specifically, in *Raleigh Federal v. Godwin*, the Court stated:

> The General Assembly's intention to limit the protection of the statute to those who hold a property interest in the mortgage property is clear; the protection of G.S. § 45-21.36 is not applicable to other parties who may be liable on the underlying debt. Defendants, as other parties liable on the underlying debt, but who hold no property interest in the mortgaged property, cannot assert the defense of G.S. § 45-21.36.

99 N.C. App. 761, 763, 394 S.E.2d 294, 295 (1990); *see also First Citizens v. Martin*, 44 N.C. App. 261, 261 S.E.2d 145 (1979) (stating that the General Assembly intended that, in a case involving multiple borrowers, only the borrower with an interest in the collateral could avail itself of G.S. § 45-21.36), *disc. rev. denied*, 299 N.C. 741, 267 S.E.2d 661 (1980). Taken together, these holdings from our Court discussed above suggest that the defense provided by G.S. § 45-21.36 is *personal* to the mortgagor-borrower.

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liable, although the principal is liable neither to the obligee nor to the surety." *Id.* (citing *Davis v. Commissioners*, 72 N.C. 441 (1876); *Poindexter v. Davis*, 67 N.C. 112 (1872)).

Notwithstanding the holdings in these cases of our Court, I believe our Supreme Court's opinion in *Trust Co. v. Dunlop*, 214 N.C. 196, 198 S.E. 645 (1937) — a case which is not referenced in any of the decisions of this Court cited above — is controlling.

In *Dunlop*, a creditor made a loan to a borrower secured by borrower's real estate collateral and guaranteed by a guarantor.[2] *Id.* at 196, 198 S.E. at 645. The borrower defaulted. *Id.* at 197, 198 S.E. at 645. The creditor foreclosed on the collateral. *Id.* The successful bidder at foreclosure was not the creditor, but rather a subsidiary of the creditor. *Id.* The net proceeds, however, did not cover the amount owed on the underlying debt. *Id.* Accordingly, the creditor sued the executors of guarantor's estate for the deficiency under the guaranty; however, the borrower was not sued. *Id.*

In their answer, the executors of guarantor's estate pled, as a defense, the language in G.S. § 45-21.36, referred to in the opinion as "chapter 275 of the Public Laws of 1933[,]"[3] as a defense, alleging that the collateral "was reasonably and fairly worth the amount of the debt . . . and that its market value was in excess of such indebtedness; and that under [G.S. § 45-21.36] the debt of the plaintiff is fully satisfied and paid, and the estate of [the guarantor] was thereby fully released and discharged." *Id.* at 197, 198 S.E. at 645.

The creditor moved to strike the executors' defense, arguing that the pleading was irrelevant to the case because the defense under G.S. § 45-21.36 was only available to debtors " 'whose property has been so purchased (at foreclosure)' and that such special defense is unavailable to a guarantor of the debt." *Id.* at 198, 198 S.E. at 645.

The trial court denied the creditor's motion to strike the defense pled by the guarantor's executors. The creditor's immediately appealed.

Regarding motions to strike, our Supreme Court held that "an aggrieved party may have [an] irrelevant or redundant matter stricken from his opponent's pleading, especially when such matter is prejudicial to him[,]" stating that a motion to strike, timely made, was "a matter of

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2. The guaranty agreement appears to be a "guaranty of payment," stating that "[t]he undersigned [guarantor] hereby guarantees the prompt payment of the within obligation, both principal and interest, as and when same becomes due according to its terms. . . . The undersigned further agrees to remain bound notwithstanding any extension of time which may be granted to the maker of the within obligation." *Dunlop*, 214 N.C. at 196, 198 S.E. at 645.

3. The language in the statute has been amended since it was originally enacted in 1933. However, the portions of the statute that are relevant to *Dunlop* and to the present case are substantially similar to the current text of G.S. § 45-21.36.

right and not addressed to the discretion of the court." *Patterson v. R.R.*, 214 N.C. 38, 42-43, 198 S.E. 364, 367 (1937); *see also Development Co. v. Bearden*, 227 N.C. 124, 127, 41 S.E.2d 85, 87 (1946) (holding that "[i]f the matter sought to be deleted is found to be [irrelevant], the court has no alternative but to strike it out").

In addressing the issue of the relevancy of the pleadings, the *Dunlop* Court, citing *Patterson*, stated that "[o]n a motion to strike out, the test of relevancy of a pleading is the right of the pleader to present the facts to which the allegation relates in the evidence upon the trial." *Dunlop*, 214 N.C. at 198, 198 S.E. at 646. That is, only those allegations "which, if established, will constitute a cause of action or a defense[,]" are relevant and will be sustained. *Williams v. Thompson*, 227 N.C. 166, 167, 41 S.E.2d 359, 360 (1947). In *Dunlop*, the allegations sought by the creditor to be struck – for example, allegations that the purchaser at the foreclosure was essentially the alter ego of the mortgagee and that the actual value of the real estate exceeded the amount of the debt – were only relevant to the case if the guarantor's defense based on G.S. § 45-21.36 could validly be pled as a defense by a guarantor in a deficiency suit, even where the mortgagor-borrower had not been sued. By affirming the trial court's ruling not to strike the defense, our Supreme Court concluded that the allegations were, indeed, relevant, based "upon the merits." *Dunlop*, 214 N.C. at 199, 198 S.E. at 646. In other words, the only basis by which the Supreme Court could have affirmed the trial court's ruling in this case was that the defense provided by G.S. § 45-21.36 raised by the guarantor's estate was relevant, and therefore valid:

> It is not, of course, for us to say whether [the executors of guarantor's estate] can make good the allegations of their further defense: We only say that at this stage of the case we do not deny their right to make it.

Id. at 199, 198 S.E. 646. If the defense was not available to a guarantor under the statute, the allegations would have been irrelevant to the resolution of the creditor's action against the guarantor; and I believe the Supreme Court would have been compelled to reverse the trial court's ruling, which would have prevented the parties from wasting time and resources at trial presenting evidence to prove irrelevant issues.

Our Supreme Court has not abrogated or overruled its 1937 holding in *Dunlop*. Accordingly, notwithstanding the prior holdings of our Court discussed above, I believe we are bound to follow that holding "until otherwise ordered by [our] Supreme Court[,]" *Andrews v. Haygood*, 188 N.C. App. 244, 248, 655 S.E.2d 440, 443 (2008).

CAROLYN G. HOLMES, Widow and Administrator of the Estate of WASHINGTON D. HOLMES, Deceased Employee, Plaintiff
v.
SOLON AUTOMATED SERVICES, Employer, SPECIALITY RISK SERVICES, INC., Carrier, Defendants

No. COA13-325

Filed 3 December 2013

1. Workers' Compensation—cost of annuity—condition precedent—failure to survive

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff wife was not entitled to receive from defendants $93,994.39 for the cost of an annuity. As plaintiff husband did not survive a single year, he failed to meet an explicit condition precedent in the mediated settlement contract.

2. Workers' Compensation—mediated settlement agreement—seed money

The Industrial Commission erred in a workers' compensation case by failing to require defendants to pay plaintiff wife $19,582.37 that would have been used as seed money for the mediated settlement agreement. It would have been inequitable for defendants to keep the $19,582.37, despite the purpose of the agreement being frustrated, since the agreement did not condition payment of this sum upon Mr. Holmes' continued survival.

Appeal by plaintiff from Opinion and Award entered 21 November 2012 by the North Carolina Industrial Commission. Heard in the Court of Appeals 29 August 2013.

Lennon, Camak & Bertics, PLLC, by George W. Lennon and Michael W. Bertics, for plaintiff-appellant.

Lewis & Roberts, P.L.L.C., by Winston L. Page, Jr., for defendant-appellee.

STROUD, Judge.

Plaintiff appeals an opinion and award of the North Carolina Industrial Commission denying "Plaintiff's request that the Commission enforce the provisions of the Mediated Settlement Agreement which

relate to the funding by Defendants of a Medicare Set-Aside Account[.]" For the following reasons, we affirm in part and reverse in part.

I. Background

On 21 November 2012, the North Carolina Industrial Commission issued an opinion and award in this matter. The basic facts of the situation are uncontested. Washington D. Holmes was an employee of defendant Solon Automated Services who sustained a compensable injury on 16 May 1990, for which he received workers' compensation benefits. On 26 August 2010, Mr. Holmes and defendants engaged in a voluntary mediation, and they "entered into an agreement to settle" Mr. Holmes' claim. This "agreement was memorialized in an Industrial Commission Form MSC8 Mediated Settlement Agreement ("Agreement") which was signed by all parties."

In the Agreement, in consideration of the payments to be made by defendants, Mr. Holmes "waived the right to any further benefits under the Act" arising from his 16 May 1990 injury. Defendants agreed to pay the following:

a. $250,000.00;

b. Mediator's fees;

c. "[A]ll authorized medical expenses to the date of the mediation[;]"

d. Funding of "a Medicare Set-Aside Allocation ('MSA') in the amount of $186,032.51, with '$19,582.37 seed money for the Medicare Set Aside for the benefit of Washington Holmes' and payments of '9,247.23 annually beginning on September 15, 2011, payable 18 years only if Washington Holmes is living.' "

The defendants were to purchase an annuity to make the annual payments. "The portion of the Mediated Settlement Agreement relating to the Medicare Set Aside further provides, 'Non-surgical medical bills will be paid to date of CMS approval.' " The Agreement also provided that " 'The Employee understands and agrees that the monies in the Medicare Set-Aside Account will be used for the sole purpose of paying future medical expenses related to his injury which would otherwise be paid for by Medicare.' " The seed money and annual payments "with which Defendants were to fund the Medicare Set-Aside Account [were] derived from a Medicare Set-Aside Summary prepared by Gould & Lamb" and "the factors used in the calculation of the Medicare Set-Aside include[d

Mr. Holmes'] life expectancy, which Gould & Lamb calculated to be 19 years, and his anticipated medical care, physical therapy and medication costs."

After the mediation, counsel for the parties "began drafting a settlement agreement[,]" but Mr. Holmes "died unexpectedly of pneumonia on October 24, 2010[,]" before the settlement agreement was completed.[1] Plaintiff, Mr. Holmes' widow, was substituted as plaintiff in this action. On 15 December 2010, defendants paid the $250,000.00 required by the Agreement to plaintiff "pursuant to an Administrative Order entered by Executive Secretary Tracey H. Weaver[.]" But defendants refused to pay any sums under the Agreement regarding the Medicare Set-Aside Account, stating:

> On December 30, 2010, Plaintiff filed an Industrial Commission Form 33 Request for hearing seeking payment of the Medicare Set-Aside funds set forth in the Mediated Settlement Agreement. Defendants contend they are not obligated to pay the seed money or the annual payments to a Medicare Set-Aside Account as set forth in the Mediated Settlement Agreement.

The Commission denied "Plaintiff's request that the Commission enforce the provisions of the Mediated Settlement Agreement which relate to the funding by Defendants of a Medicare Set-Aside Account[.]" The Commission based its determination upon the following rationale:

> 9. Pursuant to the Medicare Secondary Payer Act, the burden of future medical expenses arising from a workers' compensation case may not be shifted to Medicare. For this reason, the Act requires that Medicare's interest be considered in workers' compensation settlements which take into account future medical expenses.
>
> 10. As in the instant case, protecting Medicare's interest may be accomplished through the establishment of a Medicare Set-Aside Account. Medicare will not pay for any expenses related to the workers' compensation injury until the monies contained in the Medicare Set-Aside Account are exhausted. To this end, the Settlement

1. Plaintiff has not brought any claim for death benefits under North Carolina General Statute § 97-38. Plaintiff's claim is based solely upon the Agreement.

Agreement drafted by the parties in this case provides, "The Employee understands and agrees that the monies in the Medicare Set-Aside Account will be used for the sole purpose of paying future medical expenses related to his injury which would otherwise be paid for by Medicare."

. . . .

12. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that the parties' purpose in agreeing to establish a Medicare Set-Aside Account was to comply with the mandate of the Medicare Secondary Payer Act to protect Medicare from bearing the burden of future medical expenses arising from this workers' compensation case. This purpose was to be accomplished through the funding by Defendants of the Medicare Set-Aside Account with monies which were to be used by Deceased-Employee for "the sole purpose of paying future medical expenses related to his injury which would otherwise be paid for by Medicare."

13. The Full Commission further finds that an implied condition in the agreement to establish a Medicare Set-Aside Account was that Deceased-Employee be living, and, in effect, capable of incurring future medical expenses, at the time the Medicare Set-Aside Account was established through the deposit of the seed money. As medical bills could be incurred during Decedent-Employee's lifetime, his death prior to the establishment of the Medicare Set-Aside Account frustrated the parties' purpose in agreeing to establish the Account, namely, to protect Medicare from bearing the burden of future medical expenses arising from this workers' compensation case.

14. Specifically with regard to the annual payments to be made by Defendants to the Medicare Set-Aside Account set forth in the Settlement Proposal, the Full Commission finds, that, not only was the purpose of these payments frustrated by Decedent-Employee's death as set forth above, but also, the contingency of Decedent-Employee being alive as of the due date of the annual payment has not been satisfied as Decedent-Employee died on October 24, 2010, before the first annual payment came due.

15. For the foregoing reasons, the Full Commission finds that Defendants are not required to pay the seed funds or the annual payments to a Medicare Set-Aside as detailed in the Mediated Settlement Agreement.

The Commission concluded,

1. Compromise settlement agreements, including mediated settlement agreements [in Workers' Compensation cases], are governed by general principles of contract law.[] *Roberts v. Century Contractors, Inc.*, 162 N.C. App. 688, 592 S.E.2d 215 (2004) (quoting *Lemly v. Colvald Oil Co.*, 157 N.C. App. 99, 577 S.E.2d 712 (2003)).

2. Addressing the doctrine of frustration of purpose in *Brenner v. Little Red School House, Ltd*, the North Carolina Supreme Court quoted 17 Am.Jur.2d Contracts § 401 (1964) as follows:

> Changed conditions supervening during the term of a contract sometimes operate as a defense excusing further performance on the ground that there was an implied condition in the contract that such a subsequent development should excuse performance or be a defense, and this kind of defense has prevailed in some instances even though the subsequent condition that developed was not one rendering performance impossible. . . . In such instances, . . . the defense doctrine applied has been variously designated as that of "frustration" of purpose or object of the contract or "commercial frustration."
>
> Although the doctrines of frustration and impossibility are akin, frustration is not a form of impossibility of performance. It more properly relates to the consideration of performance. Under it performance remains possible, but is excused whenever a fortuitous event supervenes to cause a failure of the consideration or a practically total destruction of the expected value of the performance.

302 N.C. 207, 211, 274 S.E.2d 206, 209 (1981). The doctrine of frustration of purpose is not applicable where the frustrating event is reasonably foreseeable. *Id.*

3. In the instant case, it was an implied condition of the portion of the Mediated Settlement Agreement concerning the Medicare Set-Aside that Decedent-Employee be living at the time the Medicare Set-Aside Account was established. *Id.* Decedent-Employee's supervening, unexpected death prior to the establishment of the Medicare Set-Aside Account through the depositing of the seed money, destroyed the expected value of the performance, namely, protecting Medicare from bearing the burden of future medical expenses incurred by Decedent-Employee arising from this workers' compensation case. *Id.*

4. Defendants could not have reasonably foreseen Plaintiff's unexpected death from pneumonia prior to the establishment of the Medicare Set-Aside Account. *Id.*

5. Based upon the foregoing, the Full Commission concludes that Decedent-Employee's death operates as a defense excusing Defendants from performance of that portion of the Mediated Settlement Agreement which concerns the Medicare Set-Aside Account. *Id.*

6. Neither party prosecuted or defended this claim without reasonable grounds. Therefore, neither party is not [sic] entitled to an award of attorney's fees under N.C. Gen. Stat. § 97-88.1.

Ultimately, the Commission ordered:

1. Plaintiff's request that the Commission enforce the provisions of the Mediated Settlement Agreement which relate to the funding by Defendants of a Medicare Set-Aside Account is hereby DENIED.

2. The parties shall bear their own costs.

Plaintiff appeals.

II. Standard of Review

The standard of review in workers' compensation cases has been firmly established by the General Assembly and by numerous decisions of this Court. Under the Workers' Compensation Act, the Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony. Therefore, on appeal from an

> award of the Industrial Commission, review 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 [C]ourt'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) (citations, quotation marks, and brackets omitted).

III. The Medicare Set-Aside Account

The essential facts of this case are not in contention. Furthermore, most of the terms of the Agreement have either been performed or are not contested before this Court: Defendants paid the $250,000.00, and none of the parties make any arguments regarding the "mediator's fees" or the "authorized medical expenses to the date of the mediation." Accordingly, all that is left for this Court to consider regarding the performance of the contract is the funding of "a Medicare Set-Aside Allocation ('MSA') in the amount of $186,032.51, with '$19,582.37 seed money for the Medicare Set Aside for the benefit of Washington Holmes' and payments of '9,247.23 annually beginning on September 15, 2011, payable 18 years only if Washington Holmes is living.' " As to the MSA, the Commission concluded that the doctrine of frustration of purpose applied to discharge defendant's performance of the Agreement. Neither plaintiff nor defendant assert that the Commission was incorrect in applying the doctrine of frustration of purposes; rather, plaintiff essentially contends that even when a defense of frustration of purpose applies, she is still entitled to restitution.

We can find no case law in North Carolina which directly supports an award of restitution following discharge of a contract based upon frustration of purpose. Yet there is case law supporting the proposition that restitution is an appropriate remedy in a case where performance of the contract is rendered impossible. *See Shelton v. Tuttle Motor Co.*, 223 N.C. 63, 68, 25 S.E.2d 451, 454 (1943) ("One who has paid for goods he never gets is entitled to recover the payment, even though the reason why performance was not made by the seller is excusable impossibility. The Act of God may properly lift from his shoulders the burden of performance, but has not yet extended so as to enable him to keep the other man's property for nothing." (citations and quotation marks omitted)). Furthermore, the Restatement (Second) of Contracts provides that restitution is an appropriate remedy following discharge of a

contract by either the defenses of frustration of purpose or impossibility. *See* Restatement (Second) of Contracts § 377 (1981) ("A party whose duty of performance does not arise or is discharged as a result of impracticability of performance, frustration of purpose, non-occurrence of a condition or disclaimer by a beneficiary is entitled to restitution for any benefit that he has conferred on the other party by way of part performance or reliance.") Lastly, defendants have not made any arguments that restitution is an inappropriate remedy where the purpose of a contract has been frustrated.

In the circumstances presented by this case, whether impossibility or frustration of purpose is the correct defense, it seems that the remedy is the same, so we believe that any attempt we might make to distinguish the two as to this case would simply be frustrating for the reader, and perhaps impossible to understand. We can find no legal distinction between considering restitution as a remedy for a contract that has been not fully performed either due to frustration of purpose or impossibility, so we conclude that restitution may be a proper remedy for plaintiff in light of the Commission's uncontested determination that the purpose of the parties' contract was frustrated. *See generally Shelton*, 223 N.C. at 68, 25 S.E.2d at 454; see also Restatement (Second) of Contracts § 377.

Plaintiff argues that she is entitled to restitution under the Agreement, in the amount of $113,576.76, which includes the $19,582.37 seed money as well as the sum of $93,994.39, which was the cost of the annuity which defendants were to purchase to pay for Mr. Holmes' ongoing medical expenses for 18 years, so long as he was living; plaintiff argues that allowing defendants to retain these funds would unjustly enrich them at her expense.

> Unjust enrichment has been defined as a legal term characterizing the result or effect of a failure to make restitution of, or for, property or benefits received under such circumstances as to give rise to a legal or equitable obligation to account therefor. A claim of this type is described as a claim in quasi contract or a contract implied in law.

Rev O, Inc. v. Woo, ___ N.C. App. ___, ___, 725 S.E.2d 45, 49 (2012) (citation, quotation marks, and ellipses omitted).

> The restitution claim . . . is not aimed at compensating the plaintiff, but at forcing the defendant to disgorge benefits that it would be unjust for him to keep. A plaintiff may receive a windfall in some cases, but this is acceptable in order to avoid any unjust enrichment on the defendant's

> part. The principle of restitution is to deprive the defendant of benefits that in equity and good conscience he ought not to keep even though plaintiff may have suffered no demonstrable losses.

WMS, Inc. v. Weaver, 166 N.C. App. 352, 360-61, 602 S.E.2d 706, 711-12 (citation, quotation marks, and ellipses omitted), *disc. review denied*, 359 N.C. 197, 608 S.E.2d 330 (2004).

A. Cost of the Annuity

[1] As to the cost of the annuity, plaintiff contends that defendants received a windfall as they have not paid the $93,994.39 for the purchase of the annuity to fund the MSA. However, the Agreement specifically provided that plaintiff should only benefit from the annuity for each year he remained alive. The Agreement stated, "$9,247.23 annually beginning on September 15, 2011, payable 18 years only if Washington Holmes is living[.]" The cost of the annuity to defendant was $93,994.39, but plaintiff received no guaranteed benefit from the annuity. Plaintiff could receive a maximum of $166,450.14, but only if he survived 18 years.

As plaintiff did not survive a single year, we conclude that plaintiff failed to meet an explicit condition precedent in the contract, survival. *See Handy Sanitary Dist. v. Badin Shores Resort*, ___ N.C. App. ___, ___, 737 S.E.2d 795, 800 (2013) ("A condition precedent is an event which must occur before a contractual right arises, such as the right to immediate performance. Breach or non-occurrence of a condition prevents the promisee from acquiring a right, or deprives him of one, but subjects him to no liability." (citation omitted)). As such, defendants did not receive a windfall, since the parties explicitly bargained that in order for Mr. Holmes to receive the benefit of the annual payments of the annuity Mr. Holmes must survive; he did not, and thus defendants have not breached the Agreement. We do not believe that the unfortunate timing of Mr. Holmes' death changes this analysis for purposes of restitution. Indeed, restitution is an inapplicable remedy as the explicit terms bargained for in the Agreement simply were not met, and thus neither Mr. Holmes nor plaintiff who stands in his stead "acquir[ed] a right[.]" *Id.* Accordingly, the Commission did not err in concluding that plaintiff was not entitled to the $93,994.39, the cost of the annuity.

B. Seed Money

[2] The analysis as to the seed money is a bit different. As to the seed money, defendants argue that they are not required to pay it due to the plain language of the Agreement. Essentially, defendants contend that

the purpose of the Agreement was frustrated. While this may be true, and indeed is for this case pursuant to the uncontested determination of the Commission, that does not mean that plaintiff is not entitled to restitution. Defendant makes no argument for why restitution would not be applicable. Unlike the annual payments, the seed money to fund the MSA does have a guaranteed benefit in a specific sum, $19,582.37. Furthermore, it does not have any specific language requiring Mr. Holmes to survive. While the seed money provision does note that it is for Mr. Holmes' benefit, and while according to the unchallenged determination of the Commission, this purpose was frustrated, plaintiff may still be able to recover restitution if defendant was unjustly enriched. *See generally Shelton*, 223 N.C. at 68, 25 S.E.2d at 454; *see also* Restatement (Second) of Contracts § 377. Plaintiff contends that "[i]f an injured worker dies and funds remain in the MSA account, the money passes to the injured workers' estate." Defendants do not contest this fact. As such, we conclude that defendants would be unjustly enriched if they were allowed to keep the seed money; like with the annual payments, defendants could have specifically bargained that the payment of the seed money was conditioned on Mr. Holmes survival, but they did not do so. We realize that this may have simply been inartful wording of the Agreement, but the parties agreed that the seed money would be for Mr. Holmes' benefit, and certainly a benefit to Mr. Holmes' estate is still a benefit to him.

As to the remedy of restitution, the fact that the purpose was frustrated because the money will not be used for Mr. Holmes' future medical expenses does not mean defendant "may receive a windfall[.]" *WMS, Inc.*, 166 N.C. App. at 360, 602 S.E.2d at 712. As noted above, "[t]he principle of restitution is to deprive the defendant of benefits that in equity and good conscience he ought not to keep even though plaintiff may have suffered no demonstrable losses." *Id.* at 361, 602 S.E.2d at 712. Plaintiff gave up his legal rights to receive ongoing workers' compensation benefits in exchange for those benefits not contested before this Court and funding of an inheritable MSA with $19,582.37 non-contingent seed money and additional annual payments each year, totaling $166,450.14, contingent upon his survival of 18 more years. We thus conclude that it would be inequitable for defendants to keep the $19,582.37, despite the purpose of the Agreement being frustrated, as the Agreement did not condition payment of this sum upon Mr. Holmes' continued survival. Accordingly, defendants must pay plaintiff the $19,582.37 that would have been used as seed money for the MSA.

IV. Conclusion

For the foregoing reasons, we affirm the Commission's denial of plaintiff's request for the cost of the annuity, but we reverse as to the $19,582.37 in seed money.

AFFIRMED in part; REVERSED in part.

Judges CALABRIA and DAVIS concur.

IN RE A.D.N., A MINOR CHILD

No. COA13-709

Filed 3 December 2013

1. Termination of Parental Rights—subject matter jurisdiction—standing

The trial court did not err by concluding that it had subject matter jurisdiction in a termination of parental rights (TPR) case. The evidence supported the trial court's ultimate finding that the minor child resided continuously with petitioner paternal grandmother for the two-year period immediately preceding the filing of the petition. Consequently, petitioner had standing to file the TPR petition under N.C.G.S. § 7B-1103(a)(5).

2. Appeal and Error—preservation of issues—failure to object—failure to appoint guardian ad litem for minor

Although respondent mother urged the Court of Appeals to reverse a termination of parental rights order based on the trial court's failure to appoint the minor child a guardian *ad litem*, respondent did not preserve this issue for appeal based on her failure to object at trial. Under the facts of this case, suspension of the appellate rules was not required to prevent manifest injustice to respondent or the minor child.

Appeal by respondent from order entered 1 April 2013 by Judge Peter Mack in Carteret County District Court. Heard in the Court of Appeals 28 October 2013.

Lauren Vaughan for petitioner-appellee.

Richard Croutharmel for respondent-appellant.

GEER, Judge.

Respondent mother appeals from the trial court's order terminating her parental rights to A.D.N. ("Andy").[1] On appeal, respondent mother argues that the trial court lacked subject matter jurisdiction over the termination of parental rights ("TPR") proceeding because petitioner, Andy's paternal grandmother, lacked standing to file the TPR petition. We hold that the trial court properly concluded that Andy resided with petitioner for a continuous period of two years prior to the filing of the petition, such that petitioner had standing under N.C. Gen. Stat. § 7B-1103(a)(5) (2011). Although respondent mother additionally urges this Court to reverse the TPR order based on the trial court's failure to appoint Andy a guardian ad litem, respondent mother has not preserved her argument on that issue for appeal. We, therefore, affirm the trial court's order.

Facts

Petitioner first met respondent mother in February 2010 when petitioner's son, respondent father, brought respondent mother to petitioner's home in Beaufort, North Carolina in order to introduce respondent mother to petitioner. Petitioner had a strained relationship with respondent father because of his drug use and legal troubles. Two weeks later, respondent mother and father returned to petitioner's home and told her that respondent mother was pregnant.

Respondent mother submitted to a pre-natal examination drug test on 1 September 2010, roughly two and a half months before Andy's birth, and she tested positive for "BZO, oxycodone, and THC." Respondent mother gave birth to Andy on 18 November 2010. At the time of his birth, Andy was diagnosed with neonatal withdrawal syndrome. Respondent mother admitted she used Xanax while pregnant with Andy, although she claimed she had been prescribed Xanax. In the days following Andy's birth, respondent mother requested and was prescribed pain medication for pain from her C-section surgery. She then returned to the emergency room to obtain additional pain medications, telling petitioner that respondent father was "eating her prescriptions like candy."

Andy was released from the hospital on 24 November 2010, and petitioner drove Andy and respondent mother and father to respondent mother's stepfather's house in Carteret County, North Carolina, where respondent mother and father were living. The next day, petitioner

1. The pseudonym "Andy" is used throughout this opinion to protect the child's privacy and for ease of reading.

brought Andy and respondent mother and father to petitioner's home for Thanksgiving dinner, and two days later, on 27 November 2010, Andy spent the night at petitioner's home at respondent mother and father's request. Petitioner returned Andy to respondent mother and father the next day.

Beginning at the time of Andy's birth, petitioner kept a daily calendar on which she noted information about Andy, including every time that Andy spent the night in her home. She did so because she worried about her son's drug use and believed it was important to document information about Andy.

Petitioner's calendar showed that from 1 December 2010 onward, Andy spent significantly more nights with petitioner than with respondent mother and father. In December 2010, Andy spent 21 nights in petitioner's home. During January 2011, Andy stayed overnight at petitioner's house for 25 nights. Andy spent 24 nights in petitioner's home in February 2011, and another 26 nights at her home in March 2011. In April 2011, Andy stayed overnight at petitioner's home for 26 nights.

In February 2011, respondent father was incarcerated for breaking and entering. Also in February, while respondent father was in prison, respondent mother moved into her own trailer home. Petitioner provided respondent mother with some furnishings for the trailer. When petitioner picked up Andy from respondent mother's trailer, Andy always smelled strongly of cigarettes. On one occasion, when petitioner picked up Andy from respondent mother, Andy "reeked of stench" and was wearing ill-fitting clothes, requiring petitioner to immediately bathe him and properly dress him.

During this time, a member of respondent mother's family called the Carteret County Department of Social Services ("DSS") and reported an incident in which respondent mother excessively shook Andy because he would not stop crying. DSS then became involved and ordered respondent mother and father to enroll in drug rehabilitation programs and submit to random drug testing. As of 19 May 2011, neither respondent had enrolled in a program, and both had failed numerous random drug tests.

On 19 May 2011, petitioner obtained an ex parte custody order for Andy, pursuant to Chapter 50 of the North Carolina General Statutes, that granted petitioner temporary sole custody of Andy and restricted respondent mother and father from visiting or contacting the child in any way. The order provided that it was in Andy's best interests to be in the sole care of petitioner and that there was probable cause to

believe that the ex parte order was necessary to protect Andy's health, welfare, and safety. A 24 May 2011 modification to the order allowed for supervised visitation by respondent mother and father.

In a 3 November 2011 order, the trial court again granted temporary custody to petitioner, although, this time, it was with the consent of respondent mother and father. Pursuant to the November 2011 order, respondent mother and father were each granted two hours supervised visitation twice a week. Respondent mother and father were both ordered to enroll in a drug treatment and counseling program, submit to random drug tests, and enroll in the Family Adjustment Services program offered by DSS.

Respondent mother visited occasionally, but missed many scheduled visitation periods and rarely stayed for the entire two hour period. Respondent mother was prescribed Suboxin and methadone during this period of supervised visitation to assist in her opiate withdrawal. Respondent mother enrolled in a drug treatment program along with respondent father, but respondent father was dismissed from the program after he and respondent mother attempted to sell respondent mother's Suboxin at a counseling session. Although DSS had required respondents to stop living together and to refrain from drug abuse, they continued to live together and each failed random drug tests during the period of supervised visitation.

On 26 May 2012, after just completing a drug treatment program, respondent mother took three Xanax that she got from a family member and drove to Harlowe, North Carolina to buy cocaine. The day after the Harlow incident, 27 May 2012, respondent mother returned to her trailer and got into a fight with respondent father because he refused to give her money to return to Harlowe and buy more cocaine. Respondent mother hit respondent father, causing respondent father to seek emergency treatment for a severe foot wound. Petitioner visited respondents' trailer the day after the fight and saw lots of blood and bloody rags on the floor, as well as a drug pipe and marijuana on the kitchen counter. In addition, the home was "nasty and dirty."

The trial court entered an order on 8 August 2012 terminating respondents' visitation with Andy. The court found that respondent mother "continues to use and abuse cocaine and other opiates." The August 2012 order further found that respondent mother was evicted from her trailer for failing to pay rent for three months; that the trailer was condemned for health and safety reasons, including the roof partially falling in; and that respondent mother had made "numerous"

threats to petitioner, including a 17 July 2012 threat that she would " 'see [petitioner] in hell for what [petitioner had] done.' "

At a 31 July 2012 hearing, respondent mother advised the trial court that she was going to Arizona to stay with a friend and enroll in a 12-month drug rehabilitation program. Prior to that time, respondent mother had called her friend in Arizona and told the friend that respondent mother was going to kill petitioner, Andy, and herself because "if she couldn't have [Andy], nobody else was going to have [Andy] either." In part because of this call, the friend agreed for respondent mother to stay with her in Arizona and to pay for respondent mother's ticket to Arizona.

Respondent mother left for Arizona on 19 August 2012 and, although she was accepted for an inpatient drug treatment program, she enrolled in an out-patient program. Respondent mother missed classes for the program and did not attend alcoholics anonymous/narcotics anonymous meetings or get a job as required by the program. After two months, respondent mother's friend told respondent mother that she either needed to enroll in an inpatient program in Arizona or return to Carteret County. Respondent mother returned to Carteret County the next day.

After returning to Carteret County, respondent mother did not contact petitioner about Andy, even on Andy's 18 November 2012 birthday. In early December, petitioner received a letter from respondent mother stating that respondent mother was in the process of getting a job and would start sending petitioner $200.00 a month to care for Andy. However, other than a $50.00 check from respondent mother's grandmother and a $30.00 money order from respondent mother, petitioner received no money from respondent mother.

During this time, respondent mother began a romantic relationship with a convicted felon whom she believed, in her own words, to be the "biggest heroin runner in Beaufort." Respondent mother used the man's address, went out of town with him, and kept her belongings at his residence until a 20 February 2013 incident in which the man pointed a gun at respondent mother. On 7 March 2013, respondent mother started living with respondent father at respondent mother's grandmother's home.

On 2 January 2013, petitioner filed a petition to terminate respondent mother's parental rights. At the TPR hearing, respondent mother admitted that she had issues with addiction and that, at the time of the hearing, she was incapable of caring for Andy.

On 1 April 2013, the trial court entered an order finding that it had jurisdiction over the TPR proceeding pursuant to N.C. Gen. Stat.

§ 7B-1103(a)(5) since Andy had resided continuously with petitioner for the two years preceding the filing of the petition. The court further found that grounds existed to terminate respondents' parental rights because (1) respondents left Andy in placement outside their home for more than 12 months without showing reasonable progress in correcting the conditions that led to his removal, (2) Andy was neglected, and (3) Andy was a dependent juvenile and there was no indication that either respondent would be able to care for him within a reasonable period of time. The court then found that termination of both respondents' parental rights was in Andy's best interests and would facilitate Andy's adoption by petitioner and, accordingly, ordered respondents' rights terminated. Respondent mother timely appealed to this Court.[2]

I

[1] Respondent mother first argues that the trial court lacked subject matter jurisdiction over the TPR proceeding because petitioner lacked standing to file the TPR petition. This Court has recognized that "standing is 'jurisdictional in nature and consequently, standing is a threshold issue that must be addressed, and found to exist, before the merits of [the] case are judicially resolved.' " *In re E.T.S.*, 175 N.C. App. 32, 35, 623 S.E.2d 300, 302 (2005) (quoting *In re Miller*, 162 N.C. App. 355, 357, 590 S.E.2d 864, 865 (2004)). Whether petitioner had standing is a legal issue that this Court reviews de novo. *Lee Ray Bergman Real Estate Rentals v. N.C. Fair Hous. Ctr.*, 153 N.C. App. 176, 179, 568 S.E.2d 883, 885 (2002).

Our General Assembly has prescribed by statute who has standing to file a TPR petition. N.C. Gen. Stat. § 7B-1103(a) provides:

> (a) A petition or motion to terminate the parental rights of either or both parents to his, her, or their minor juvenile may only be filed by one or more of the following:
>
> (1) Either parent seeking termination of the right of the other parent.
>
> (2) Any person who has been judicially appointed as the guardian of the person of the juvenile.
>
> (3) Any county department of social services, consolidated county human services agency,

2. Although the order also terminated the rights of respondent father, he is not a party to this appeal.

> or licensed child-placing agency to whom custody of the juvenile has been given by a court of competent jurisdiction.
>
> (4) Any county department of social services, consolidated county human services agency, or licensed child-placing agency to which the juvenile has been surrendered for adoption by one of the parents or by the guardian of the person of the juvenile, pursuant to G.S. 48-3-701.
>
> (5) *Any person with whom the juvenile has resided for a continuous period of two years or more next preceding the filing of the petition or motion.*
>
> (6) Any guardian ad litem appointed to represent the minor juvenile pursuant to G.S. 7B-601 who has not been relieved of this responsibility.
>
> (7) Any person who has filed a petition for adoption pursuant to Chapter 48 of the General Statutes.

(Emphasis added.)

The only applicable basis for petitioner to have standing in this case was the ground the trial court concluded existed: N.C. Gen. Stat. § 7B-1103(a)(5). The trial court found that "[t]he minor child has resided continuously with the Petitioner since November 27, 2010." Based on that finding, the court concluded that "[p]ursuant to G.S. 7B-1103(a)(5), the Petitioner has standing to bring the Petition for termination of parental rights, in that the minor child has resided continuously with Petitioner for a period exceeding two (2) years prior to filing the Petition." Respondent mother challenges both this finding and the conclusion based on it.

Since petitioner filed the TPR petition on 2 January 2013, the relevant period -- two years preceding the filing of the petition -- ran from 2 January 2011 until 1 January 2013. Although respondent mother does not dispute that Andy resided with petitioner continuously after the trial court entered the 19 May 2011 ex parte temporary custody order giving petitioner sole custody of Andy, respondent mother contends that the court erred in finding that Andy continuously resided with petitioner

prior to 19 May 2011. Consequently, we must determine whether the trial court properly determined that Andy continuously resided with petitioner from 2 January 2011 to 19 May 2011.

Initially, we note that while the trial court made the ultimate finding of fact necessary to establish that petitioner had standing, the trial court did not make detailed supporting findings because respondent mother did not raise the issue at trial. The record, however, contains competent evidence supporting the ultimate finding of fact that Andy resided continuously with petitioner for the two-year period prior to the filing of the TPR petition.

Respondent mother first argues that the trial court's conclusion was erroneous because, prior to 19 May 2011, respondent mother had legal custody of Andy and could, therefore, remove Andy from petitioner's home at any point. In applying N.C. Gen. Stat. § 7B-1103(a)(5), this Court has, however, previously held that "[t]he person or persons with whom legal custody lies during [the two-year] time period is irrelevant." *In re E.T.S.*, 175 N.C. App. at 38, 623 S.E.2d at 303. *See also id.* (explaining that "statute confers standing on petitioners based on their two year relationship with the child, which is in no manner related to the respondent or her relationship with the child during that two year period"); *In re B.O.*, 199 N.C. App. 600, 603, 681 S.E.2d 854, 857 (2009) (analyzing whether petitioners, who had temporary custody of child, had standing under N.C. Gen. Stat. § 7B-1103(a)(5) by reviewing time during which child "lived with" petitioners). We are bound by this Court's holding in *In re E.T.S.*

The plain language of N.C. Gen. Stat. § 7B-1103(a)(5) requires (1) that a child have "resided" with the petitioner and (2) that he did so "continuous[ly]" for two years. It is not entirely clear whether respondent mother challenges the trial court's conclusion that Andy "resided" with petitioner from 2 January 2011 to 19 May 2012. Respondent mother's principle brief appears to equate "residing" with overnight stays, thereby implicitly conceding that Andy resided with petitioner between 2 January 2011 and 19 May 2011 on the nights he spent at petitioner's house. Respondent mother then proceeds to argue that because Andy sometimes did not stay with petitioner, Andy did not reside continuously with petitioner. However, respondent mother's reply brief asserts that prior to 19 May 2011, Andy resided with respondent mother but "often spent the night with Petitioner."

Assuming without deciding that respondent mother has argued that Andy did not reside with petitioner, this Court, in analyzing the

requirement that a child reside with a petitioner for the statutory period, has looked to the period of time in which a child "lived with" the petitioner. *See In re B.O.*, 199 N.C. App. at 603, 681 S.E.2d at 857; *In re Ore*, 160 N.C. App. 586, 588, 586 S.E.2d 486, 487 (2003) ("Since the minor child lived with petitioner for the two years next preceding filing the motion, she was a proper person to file the petition."). To determine what the General Assembly intended when requiring that the child "reside" — or, as this Court has held, live with – the petitioner, we look to the analogous context of child support payments.

The General Assembly has directed the Conference of Chief District Judges to create the North Carolina Child Support Guidelines to be used in calculation of child support payments in North Carolina. *See* N.C. Gen. Stat. § 50-13.4(c1) (2011) ("Effective July 1, 1990, the Conference of Chief District Judges shall prescribe uniform statewide presumptive guidelines for the computation of child support obligations of each parent . . . ."). The Child Support Guidelines provide that "[a] parent's presumptive child support obligation . . . must be determined using one of the attached child support worksheets." Form AOC-A-162, Rev. 1/11. With respect to the worksheets, the guidelines provide:

> Use Worksheet A when one parent (or a third party) has primary physical custody of all of the children for whom support is being determined. A parent (or third party) has primary physical custody of a child if the child *lives with* that parent (or custodian) for *at least 243 nights* during the year. Primary physical custody is *determined without regard to whether a parent has primary, shared, or joint legal custody of a child*. . . .
>
> Use Worksheet B when (a) the parents share custody of all of the children for whom support is being determined, or (b) when one parent has primary physical custody of one or more of the children and the parents share custody of another child. Parents share custody of a child if the child *lives with* each parent for *at least 123 nights* during the year and each parent assumes financial responsibility for the child's expenses during the time the child *lives* with that parent. A parent does not have shared custody of a child when that parent has visitation rights that allow the child to spend *less than 123 nights* per year with the parent and the other parent has primary physical custody of the child. Shared custody is *determined without*

> *regard to whether a parent has primary, shared, or joint legal custody of a child. . . .*

Id. (emphasis added).

Thus, under the guidelines promulgated pursuant to N.C. Gen. Stat. § 50-13.4(c1), a child is determined to "live[] with" a parent or third party based upon the number of nights a child spends with that person per year (without regard to whether the parent or third party has primary, shared, or joint legal custody of a child). *Id.*

It is reasonable to conclude similarly for purposes of N.C. Gen. Stat. § 7B-1103(a)(5) that whether a child resides with or lives with a particular person depends on the number of nights that the child spends with that person. Accordingly, we hold that the person with whom a child "resided" as used in N.C. Gen. Stat. § 7B-1103(a)(5) refers to the person with whom a child spent his or her nights.

In this case, respondent mother does not challenge on appeal petitioner's evidence that in 2011, Andy stayed with petitioner overnight for 25 nights in January, 24 nights in February, 26 nights in March, 26 nights in April, and for 16 of the 18 nights from 1 May 2011 to 19 May 2011. In other words, Andy spent an average of 85% of his nights with petitioner. Respondent mother cannot, therefore, reasonably contend that Andy did not reside with petitioner during the period from January 2011 through May 2011. Although respondent mother argues on appeal that Andy was merely visiting petitioner on the nights he stayed with her, the trial court reasonably concluded that Andy was living or residing with petitioner and only visiting respondent mother.

The question remains whether Andy resided with petitioner "continuously" from 2 January 2011 to 19 May 2011. Respondent mother first contends that N.C. Gen. Stat. § 7B-1103(a)(5) requires that Andy must have had "uninterrupted" overnight stays with petitioner for the relevant period in order to have standing.

We believe that resolution of this issue is guided by this Court's analysis when deciding a child's home state for purposes of the Uniform Child-Custody Jurisdiction and Enforcement Act ("UCCJEA"). Under the UCCJEA, " '[h]ome state' " is defined as "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding." N.C. Gen. Stat. § 50A-102(7) (2011). "A period of temporary absence of any of the mentioned persons is part of the period." *Id.*

In *Chick v. Chick*, 164 N.C. App. 444, 451-52, 596 S.E.2d 303, 309 (2004), this Court adopted a totality of the circumstances test for the determination whether a period of absence was temporary under the UCCJEA home state statute and held that when the children had lived in Vermont for 11 months preceding the filing of the action, barring a six-week period during which they lived in North Carolina, Vermont was the children's home state. Similarly, in *Hammond v. Hammond*, 209 N.C. App. 616, 633-34, 708 S.E.2d 74, 85-86 (2011), this Court held that the children's home state was North Carolina, despite the fact that the children had lived in Japan for nearly the entire six months immediately preceding the action, since the children lived in North Carolina for nearly two years prior to leaving for Japan and since the father believed, in moving to Japan, that the family would return to North Carolina.

Similarly, here, we do not believe that the General Assembly's requirement under N.C. Gen. Stat. § 7B-1103(a)(5) that a child reside with a person "for a continuous period of two years" requires that the child spend every single night with the person for that period. Just as a child can live with a parent in a state for "six consecutive months" despite extended absences from the state under the UCCJEA, N.C. Gen. Stat. § 50A-102(7), a child can reside continuously with a person for the purposes of N.C. Gen. Stat. § 7B-1103(a)(5) despite spending a limited number of nights away from that person's home.

The evidence in this case showed that in 2011, Andy was away from petitioner for only six nights in January, four nights in February, five nights in March, four nights in April, and two of the 18 nights from 1 May 2011 to 19 May 2011. In other words, Andy spent the night elsewhere on a very limited number of occasions. Based on this evidence, the trial court could properly determine that Andy resided with petitioner "for a continuous period of two years or more next preceding the filing of the petition or motion." *Id.*

Respondent mother nonetheless argues that this Court should adopt a test that looks only to the intention of the parties -- specifically to respondent mother's intention -- in determining whether Andy resided with petitioner continuously during the relevant period. Respondent mother cites *Grindstaff v. Byer*s, 152 N.C. App. 288, 567 S.E.2d 429 (2002), and *Patterson v. Taylor*, 140 N.C. App. 91, 535 S.E.2d 374 (2000), in support of her argument. However, both of those cases refer to the intent of the parties when construing the terms of voluntarily-executed custody agreements, or contracts, between the parties. *See Grindstaff*, 152 N.C. App. at 296, 567 S.E.2d at 434; *Patterson*, 140 N.C. App. at 96-97, 535 S.E.2d at 378. Although it is true that " '[w]henever a court is

called upon to interpret a contract its primary purpose is to ascertain the intention of the parties at the moment of its execution[,]' " *Gilmore v. Garner*, 157 N.C. App. 664, 666, 580 S.E.2d 15, 18 (2003) (quoting *Lane v. Scarborough*, 284 N.C. 407, 409–10, 200 S.E.2d 622, 624 (1973)), respondent mother has pointed to no equivalent principle in this non-contract context. In any event, given the evidence in this case, the trial court could properly conclude that the fact respondent mother allowed Andy to spend the overwhelming majority of his nights with petitioner indicated that respondent mother intended for Andy to reside with petitioner and visit respondent mother.

In sum, we hold that the evidence supported the trial court's ultimate finding that Andy resided continuously with petitioner for the two-year period immediately preceding the filing of the petition. Consequently, petitioner had standing to file the TPR petition under N.C. Gen. Stat. § 7B-1103(a)(5), and the trial court did not err in concluding that it had subject matter jurisdiction over the action.

II

[2] Respondent mother next argues that the trial court erred by failing to appoint Andy a guardian ad litem ("GAL") for the TPR proceeding. N.C. Gen. Stat. § 7B-1108(b) (2011) provides that when a parent files a response to a TPR petition or motion that "denies any material allegation of the petition or motion, the court shall appoint a guardian ad litem for the juvenile to represent the best interests of the juvenile, unless the petition or motion was filed by the guardian ad litem pursuant to G.S. 7B-1103, or a guardian ad litem has already been appointed pursuant to G.S. 7B-601 [providing for appointment of GALs for juveniles in abuse, neglect, and dependency proceedings]."

Here, respondent mother filed a response to the petition denying many of the material allegations of the petition and denying that grounds existed to terminate her parental rights. The petition was not filed by a GAL, and no GAL had previously been appointed for Andy in an abuse, neglect, and dependency proceeding. The trial court was, therefore, required to appoint Andy a GAL under N.C. Gen. Stat. § 7B-1108(b).

However, respondent mother failed to object at trial to the failure of the trial court to appoint the child a GAL. This Court has previously held that in order to preserve for appeal the argument that the trial court erred by failing to appoint the child a GAL, a respondent must object to the asserted error below. *See In re Fuller*, 144 N.C. App. 620, 623, 548 S.E.2d 569, 571 (2001) (discussing "respondent's noncompliance with our rules" by failing to object to lack of GAL at trial level); *In re Barnes*,

97 N.C. App. 325, 326, 388 S.E.2d 237, 238 (1990) (holding "respondent failed to comply with our Rules of Appellate Procedure" because "there was no objection or exception made at trial to the court's failure to appoint a guardian ad litem" for child). We are bound by these holdings, and respondent mother has, therefore, failed to preserve this issue for appeal. N.C.R. App. P. 10(a)(1).

We are aware that in both *Fuller* and *Barnes*, this Court invoked Rule 2 of the Rules of Appellate Procedure in order to reach the issue whether the trial court erred by failing to appoint a GAL for the child and, in both cases, found prejudicial error in the failure to appoint a GAL. *In re Fuller*, 144 N.C. App. at 623, 548 S.E.2d at 571; *In re Barnes*, 97 N.C. App. at 326-27, 388 S.E.2d at 238-39. However, there is no indication in those cases, as there is here, that the appealing respondent had repeatedly chosen substance abuse over the child's welfare throughout the child's life and had almost entirely abdicated responsibility for the child to the petitioner. *See In re Fuller*, 144 N.C. App. at 620, 548 S.E.2d at 569; *In re Barnes*, 97 N.C. App. at 326-27, 388 S.E.2d at 238-39.

Rule 2 of the Rules of Appellate Procedure provides that "[t]o prevent manifest injustice to a party . . . 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 . . . ." We do not believe, under the facts of this case, that suspension of rules is required to prevent manifest injustice to respondent mother or Andy. We, therefore, affirm the order of the trial court.

Affirmed.

Chief Judge MARTIN and Judge STROUD concur.

IN RE FORECLOSURE OF WEBB

[231 N.C. App. 67 (2013)]

IN THE MATTER OF THE FORECLOSURE OF A DEED OF TRUST EXECUTED BY BURL WEBB, JR. AND LEIGH B. WEBB DATED JANUARY 6, 2006 AND RECORDED IN BOOK 19879 AT PAGE 177 IN THE MECKLENBURG COUNTY PUBLIC REGISTRY, NORTH CAROLINA

No. COA 13-324

Filed 3 December 2013

Parties—foreclosure action—trustee—holder of the note—appeal to superior court

The superior court erred in a foreclosure proceeding by an appeal from an assistant clerk's order on the basis that U.S. Bank was not a party to the proceeding. Where the trustee of a note institutes a foreclosure proceeding and the clerk enters an order in favor of the borrower, the holder of the note who did not appear at the hearing before the clerk has standing to pursue the appeal of the clerk's order in superior court. As U.S. Bank qualified as a real party in interest, U.S. Bank should have been allowed to prosecute the appeal of the assistant clerk's order in superior court.

Appeal by Petitioner from order entered 11 January 2013 by Judge Timothy S. Kincaid in Mecklenburg County Superior Court. Heard in the Court of Appeals 28 August 2013.

The Law Office of John T. Benjamin, Jr., P.A., by John T. Benjamin, Jr., and Taylor T. Haywood, for Petitioner.

The Law Office of James W. Surane, PLLC, by James W. Surane, for Respondents.

Shapiro and Ingle, LLP, by Jeffrey A. Bunda, for the Substitute Trustee.

DILLON, Judge.

Because the trial court erroneously found that U.S. Bank ("Petitioner") was not a party to the action and improperly ordered the case dismissed without prejudice, we reverse the order and remand the case to the trial court, holding that U.S. Bank is a real party in interest to this action.

I: Facts and Procedural History

On 6 January 2006, Burl Webb, Jr., ("Borrower") executed a promissory note ("the Note") in the amount of $400,000, payable originally to Wells Fargo Bank, N.A., in order to finance the purchase of a home ("the subject property"). The Note was secured by a Dead of Trust executed by Borrower and Leigh B. Webb (together, "Respondents"). Wells Fargo endorsed the Note "in blank" and then gave physical possession of the Note to U.S. Bank. Subsequently, Borrower defaulted on the Note, and the Note was accelerated.

On 28 June 2011, the Substitute Trustee under the Deed of Trust filed a Notice of Hearing of Foreclosure of Deed of Trust (the "Notice of Hearing") with the Mecklenburg County Clerk of Court, which listed U.S. Bank as the "present holder of the debt evidenced in the Deed of Trust."[1] On 15 March 2012, an Assistant Clerk of Superior Court of Mecklenburg County conducted a hearing on the matter, pursuant to N.C. Gen. Stat. § 45-21.16 (2011). Counsel for Respondents and the Substitute Trustee were present at the hearing; however, no counsel appeared on behalf of U.S. Bank. At the hearing, the Assistant Clerk dismissed the action with prejudice because the "[Substitute Trustee] failed to show valid debt by lack of showing holder of note." On 21 March 2012, U.S. Bank timely appealed to superior court pursuant to N.C. Gen. Stat. § 45-21.16(d1). On 29 November 2012, a hearing was conducted in Mecklenburg County Superior Court, at which counsel for U.S. Bank and Respondents were present, but counsel for the Substitute Trustee was not. At the close of U.S. Bank's evidence, Respondents moved for "a directed verdict of sorts[,]" arguing that "U.S. Bank is not a party to this action" and that the "trustee didn't even appear today to present evidence." The trial court, thereafter, granted a motion to dismiss without prejudice, finding that "the appeal was brought from the substitute trustee's action[,]" "that the substitute trustee is not here represented[,]" and that "the holder [of the Note] can't go forward because the holder hasn't intervened or become a party" to the proceeding.

The trial court entered an order of dismissal without prejudice on 11 January 2013. The order found that "[t]he notice of appeal was filed by the Substitute Trustee." Further, the order concluded that U.S. Bank was not the petitioner in the special proceeding and that the Substitute Trustee, being a party to the special proceeding, was required

1. Petitioner had maintained continuous possession of the Note from the time it received it from Wells Fargo in 2006 through 29 November 2012, when Petitioner presented the Note to the trial court.

to introduce evidence to prove its case. The trial court concluded that "[h]aving failed to appear at the November 29, 2012 appeal hearing, the Substitute Trustee did not establish its right to foreclose upon the Deed of Trust pursuant to N.C. Gen Stat. § 45-21.16" and, thereafter, dismissed the case without prejudice. From this order, Petitioner appeals.

U.S. Bank's primary issue on appeal is whether the trial court erred in dismissing the foreclosure proceeding on the basis that U.S. Bank was not a party to the proceeding. It is well established that "only the real party in interest can prosecute a claim." *Crowell v. Chapman*, 306 N.C. 540, 544, 293 S.E.2d 767, 770 (1982). Since "[s]tanding concerns the trial court's subject matter jurisdiction and is therefore properly challenged by a Rule 12(b)(1) motion to dismiss[,]" "[o]ur review of an order granting a Rule 12(b)(1) motion to dismiss is *de novo*[.]" *Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001) (citations omitted).

The specific question before this Court is - where the trustee of a note institutes a foreclosure proceeding and the Clerk enters an order in favor of the borrower — does a holder of the note who did not appear at the hearing before the Clerk have standing to pursue the appeal of the Clerk's order in Superior Court. We addressed this issue in *In Re Foreclosure of a Deed of Trust by Thomas*, 2009 N.C. App. LEXIS 20, 09 WL 26702, 2 (2009) (COA08-287). Because *Thomas* is an unpublished opinion, we are not bound by its holding; however, because we find the rationale persuasive, we adopt its rationale and holding in this case. In *Thomas*, the borrower argued that "only a trustee may appeal a clerk's adverse ruling to superior court," specifically contending that an appeal by the holder of the note should be dismissed for lack of "standing and subject matter jurisdiction." *Id.* Citing a number of cases from our Supreme Court, *e.g.*, *Energy Investors Fund, L.P. v. Metric Contractors, Inc.*, 351 N.C. 331, 525 S.E.2d 441 (2000), and *Parnell v. Nationwide*, 263 N.C. 445, 139 S.E.2d 723 (1965), this Court concluded in *Thomas* that the holder of the note was the real party in interest, and, therefore, could prosecute the appeal of the clerk's adverse ruling in superior court. *Id.* We noted in *Thomas* that "in one of this jurisdiction's leading foreclosure cases" from our Supreme Court, the "appeal was taken from the clerk of superior court to a superior court judge by the beneficiary of a deed of trust, not the trustee." *Id.* (citing *In re Foreclosure of Deed of Trust of Michael Weinman Assocs.*, 333 N.C. 221, 424 S.E.2d 385 (1993)).

In the case *sub judice*, U.S. Bank is the holder of the Note and the party to which repayment of the balance is owed. The disbursed funds

were secured by the Deed of Trust on the subject property; and, upon default, repayment of the funds was accelerated in accordance with the Note. U.S. Bank was injured by the judgment in this case since they were not able to proceed with the foreclosure as a remedy to recover the balance of the disbursed funds. Therefore, we find that the trial court erred in dismissing the proceeding because U.S. Bank qualifies as a real party in interest. U.S. Bank should be allowed to prosecute the appeal of the Assistant Clerk's order in superior court.

As to U.S. Bank's further arguments regarding the sufficiency of the evidence to allow the foreclosure to proceed, we remand to the trial court for that determination.

REVERSED and REMANDED.

Judge BRYANT and Judge STEPHENS concur.

DONALD R. PODREBARAC, Plaintiff
v.
HORACK, TALLEY, PHARR, & LOWNDES, P.A. and GENA G. MORRIS, Defendants

No. COA13-534

Filed 3 December 2013

Statutes of Limitation and Repose—legal malpractice—discovery of defect

The trial court erred by granting defendant's motion to dismiss plaintiff's complaint for legal malpractice under Rule 1A-1,Rule 12(b)(6) based on the statute of limitations. The alleged malpractice included failing to have the signatures on a mediation agreement notarized; liberally construing the complaint and applying the discovery rule to determine the earliest that plaintiff could reasonably have been expected to discover the defect, the complaint was filed within the time allowed.

Appeal by plaintiff from Order entered on or about 29 November 2012 by Judge Timothy S. Kincaid in Superior Court, Mecklenburg County. Heard in the Court of Appeals 23 September 2013.

Jackson Law Group, by Gary W. Jackson, for plaintiff-appellant.

Poyner Spruill LLP, by Cynthia L. Van Horne, for defendants-appellees.

STROUD, Judge.

Donald Podrebarac ("plaintiff") appeals from an order entered 29 November 2012 dismissing his malpractice complaint against Horack, Talley, Pharr, & Lowndes, P.A. and Gena Morris ("defendants") as barred by the statute of limitations. For the following reasons, we reverse.

I. Background

Plaintiff and Buntin Podrebarac were married in October 1987 and separated in December 2007. Plaintiff retained defendants and Perry, Bundy, Plyler, Long, & Cox, LLP ("Perry Bundy") to represent him in an action seeking equitable distribution of marital property. Plaintiff, Ms. Podrebarac, and their respective attorneys participated in a mediation session on 14 January 2009. The parties failed to reach an agreement at the first session, but agreed to a second mediation session on 29 April 2009. The second mediation session resulted in a three-page document entitled "Mediation Stipulations," which was signed by the parties and the attorneys but not notarized; the stipulations were contained in a document with the case caption, signed by the trial court, and filed with the Clerk of Court. As alleged by Plaintiff:

> 17. The Mediation Stipulation, at paragraph 12, provided that the property settlement and alimony provisions, as agreed upon at the mediated settlement conference, would be formalized in an Alimony and Property Settlement Agreement, which the parties agreed would be prepared by Ms. Podrebarac's counsel and submitted to Plaintiff and Defendants for review.
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> 18. On May 1, 2009, the Honorable Christopher W. Bragg entered the Mediation Stipulations, which were to have resolved all issues between the parties.

As agreed in the stipulations, counsel for Ms. Podrebarac drafted an Alimony and Property Settlement Agreement ("Draft Settlement Agreement") based upon the stipulations, but then Ms. Podrebarac refused to sign it. Nevertheless, prior to January of 2010, the parties

began complying with the property division outlined in the "Mediation Stipulations" and continued to act in accordance with the stipulations until at least April 2012.[1]

In early 2012, defendants withdrew as counsel for plaintiff. Counsel for Ms. Podrebarac withdrew in early 2011. In May 2011, Ms. Podrebarac retained new counsel, who asserted that the mediation stipulations were not enforceable. Plaintiff also retained new counsel and moved to enforce the stipulations as a "mediated settlement agreement." Plaintiff's complaint alleges the following:

> 28. On September 26, 2011, Plaintiff's new counsel, Dorian Gunter, moved for enforcement of the Mediated Settlement Agreement.
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> 29. On April 13, 2012, Mr. Brooks and Ms. Woodruff filed a Motion to Dismiss Plaintiff's Motion to Enforce Mediated Settlement Agreement. The basis for the Motion was stated as follows:
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> > The Motion to Enforce Mediated Settlement Agreement fails on its face and should be summarily dismissed because the Mediated Stipulations filed May 1, 2009, totally fail to meet the requirement of N.C.G.S. § 50-20(d) for a stipulation settling equitable distribution. To settle equitable distribution with a stipulation, the stipulation must absolutely be notarized. N.C.G.S. § 50-20(d).... The other option would have been to have had the parties sworn in open court under *McIntosh* (*McIntosh v. Mcintosh*, 74 N.C. App. 554, 328 S.E.2d 600). The procedure under *McIntosh* was not followed either.
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> These motions were heard before District Court Judge Hunt Gwyn on April 29, 2012.
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> 30. On April 29, 2012, Judge Hunt Gwynn granted Ms. Podrebarac's Motion to Dismiss on the basis that the parties' signatures on the Mediation Stipulations had

1. The stipulations also included provisions regarding alimony and child support, which are not at issue in this appeal, but the parties apparently acted in compliance with these provisions as well.

evidently not been notarized pursuant to N.C.G.S. §50-l0 or 50-20(d).[2]

Plaintiff then filed the present action against defendants, as well as Perry Bundy, and Richard Long, Jr. in Mecklenburg County on 14 June 2012, alleging professional negligence in the preparation of the mediation stipulations. Plaintiff alleged that defendants breached their duty to plaintiff by, *inter alia*, failing to have the signatures on the stipulations notarized, failing to advise him that the stipulations were not enforceable without such notarization, failing to take the necessary steps to have the stipulations notarized between the day that the stipulations were signed and the date they withdrew as counsel, and omitting the biggest asset in the marital estate, a business called Happy Times Discount Beverage, Inc., from the stipulations. Plaintiff attached a copy of the Mediation Stipulations, the Draft Settlement Agreement, and invoices for attorney services rendered to Ms. Podrebarac between December 2008 and June 2009 as exhibits to the complaint. Liberally construing the complaint, plaintiff has alleged that the "mediation stipulations" were intended to be a complete and final settlement agreement, but that defendants failed to ensure that the "Mediation Stipulations" were enforceable as a settlement agreement.

All defendants moved to dismiss the complaint under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2011). The trial court granted defendants' motion by order entered 29 November 2012 on the basis that plaintiff's claims are barred by the applicable statute of limitations. Plaintiff filed notice of appeal on 27 December 2012, but also filed a voluntary dismissal of his claims against Richard Long, Jr. and Perry Bundy on 4 April 2013.

II. Motion to Dismiss

Plaintiff argues that the trial court erred in concluding that his complaint was barred by the applicable statute of limitations. We agree.

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2. The record in the case does not include Judge Gwynn's actual order, so for purposes of this opinion and because we are reviewing an order allowing a motion to dismiss, we must treat plaintiff's characterization of Judge Gwynn's ruling on the motion as alleged in the complaint as correct and true. We take judicial notice that plaintiff did appeal the trial court's ruling on his motion to enforce the "mediated settlement agreement," currently docketed in this Court as *Podrebarac v. Podrebarac* (COA13-779). That case, however, is separate from the one before us. We will consider the alleged ruling as the actual and complete ruling of the District Court for purposes of this opinion, but we caution that this opinion should not be construed as having any legal effect upon the pending appeal from the District Court's order.

A. Standard of Review

> The standard of review of an order granting a 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true. On a motion to dismiss, the complaint's material factual allegations are taken as true. Dismissal is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim. On appeal of a 12(b)(6) motion to dismiss, this Court conducts 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.

Burgin v. Owen, 181 N.C. App. 511, 512, 640 S.E.2d 427, 428-29 (citations and quotation marks omitted), *disc. rev. denied and app. dismissed*, 361 N.C. 425, 647 S.E.2d 98, *cert. denied*, 361 N.C. 690, 652 S.E.2d 257 (2007).

"A legal malpractice action is subject to a three-year statute of limitations. N.C.G.S. § 1-15(c) (2001). The action 'accrue[s] at the time of . . . the last act of the defendant giving rise to the cause of action.' N.C.G.S. § 1-15(c)." *Bolton v. Cron*e, 162 N.C. App. 171, 173, 589 S.E.2d 915, 916 (2004) (citation omitted). "Continuing representation of a client by an attorney following the last act of negligence does not extend the statute of limitations." *Chase Development Group v. Fisher*, *Clinard & Cornwell*, *PLLC*, 211 N.C. App. 295, 304, 710 S.E.2d 218, 225 (2011) (citation omitted).

> However, if the claimant's loss is "not readily apparent to the claimant at the time of its origin, and . . . is discovered or should reasonably be discovered by the claimant two or more years after . . . the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made."

Bolton, 162 N.C. App. at 173, 589 S.E.2d at 916 (quoting N.C. Gen. Stat. §1-15(c)).

Plaintiff argues that even assuming his cause of action accrued on the date that the stipulations were signed, 29 April 2009, his loss was not apparent on that date. Liberally construing the complaint and taking all of the allegations in the complaint as true, we agree.

Plaintiff has alleged that he was unaware that the signatures on a mediated settlement agreement had to be notarized to be enforceable. Plaintiff claims that he did not discover that the agreement was unenforceable as a settlement agreement until 29 April 2012, when the District Court so held.[3]

Although defendants correctly point out that generally a person is expected to read and understand the documents he signs, *see Isley v. Brown*, 253 N.C. 791, 793, 117 S.E.2d 821, 823 (1961), that does not necessarily mean that it is reasonable to expect him to understand that the District Court would refuse to enforce the intended "mediated settlement agreement" unless the signatures were notarized or to second guess the alleged assurances of his attorneys, *see Thorpe v. DeMent*, 69 N.C. App. 355, 359, 317 S.E.2d 692, 695 (noting that the plaintiff was a "layman" who became aware of his loss when his attorneys informed him of their error, but affirming dismissal of the complaint because he was so informed within two years of the last act giving rise to his claim), *aff'd per curiam*, 312 N.C. 488, 322 S.E.2d 777 (1984).

The earliest that plaintiff could reasonably have been expected to discover that defect was on 13 April 2012, when Ms. Podrebarac's attorney filed a motion to "dismiss" his motion to enforce the "mediated settlement agreement." This date was more than two years after the last act giving rise to the claim—the agreement was signed on 29 April 2009 and filed with the trial court on 1 May 2009. Therefore, the discovery rule applies. The present complaint was filed on 14 June 2012, well within one year of 13 April 2012, as required by N.C. Gen. Stat. § 1-15(c). Therefore, the complaint was not barred by the statute of limitations.

Although it is certainly possible that discovery will reveal that plaintiff was or ought to have been aware of his injury before that date, or

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3. We reiterate that we are taking all of the allegations of the complaint as true, including his characterization of the "Mediation Stipulations" as an intended mediated settlement agreement. We cannot address the correctness of the trial court's determination in this case or whether the "Mediation Stipulations" may have been enforceable by some other avenue—that issue will be decided in the appeal from that order. The parties have only briefed the issue of the statute of limitations and the trial court explicitly based its order on that issue, not on the sufficiency of the complaint to state a claim.

that plaintiff's claim is defective for some other reason, we conclude that the time bar of the statute of limitations is not apparent from the face of the complaint or the attached exhibits. We cannot say that the complaint "discloses some fact that necessarily defeats the plaintiff's claim." *Burgin*, 181 N.C. App. at 512, 640 S.E.2d at 429 (citation and quotation marks omitted). Therefore, we must reverse the trial court's order dismissing plaintiff's action and remand for further proceedings.

III. Conclusion

We hold that plaintiff's complaint, liberally construed, does not disclose facts necessary to conclude that it is barred by the applicable statute of limitations. Therefore, we reverse the trial court's order dismissing the action and remand for further proceedings.

REVERSED and REMANDED.

Chief Judge MARTIN and Judge GEER concur.

JOANN C. SIMON, PLAINTIFF
v.
BRIAN R. SIMON, DEFENDANT

No. COA13-249

Filed 3 December 2013

1. Divorce—equitable distribution—value and classification of stock

The trial court did not err in an equitable distribution case by failing to make a finding as to the value of the TSCG C stock on the date of distribution. There is no statutory requirement under N.C.G.S. § 50-21(b) that marital property be valued on the date of distribution.

2. Divorce—equitable distribution—classification of profit distributions

The trial court's classification in an equitable distribution case of the 2006 profit distributions received by defendant post separation as divisible property was remanded for further findings of fact. Unless defendant could sufficiently quantify the active post-separation component, the 2006 profit distribution should be classified as divisible property and distributed to plaintiff accordingly.

Plaintiff's argument as to the 2007 profit distribution was without merit because her interest in the TSCG C stock ended on the date of separation and the parties were separated for the entirety of 2007.

3. Divorce—equitable distribution—commission distribution

The trial court's findings of fact and conclusions of law in an equitable distribution case were insufficient to support its denial of plaintiff wife's request to find all of the commissions presented at trial to be divisible. The trial court's decision to deny the admission of business records was error. Thus, this issue was remanded to the trial court for further findings of fact and a possible recalculation and reclassification of property. With regard to the classification of commissions earned after the date of separation, the trial court was instructed to make further findings of fact, and it was to consider the payment journals plaintiff attempted to enter into evidence at trial.

4. Attorney Fees—failure to award—reasonable amount

The trial court erred in an equitable distribution case by failing to award plaintiff wife reasonable attorney fees. This issue was remanded for a determination of reasonable attorney fees to be awarded to plaintiff.

5. Costs—denial of expert witness fees—travel expenses —testimony

The trial court did not err in an equitable distribution case by denying plaintiff wife's request for $6,651.40 for the costs associated with the travel expenses and testimony of certain expert witnesses.

Appeal by plaintiff from orders entered 12 January 2012, 8 August 2012, and 20 September 2012 by Judge Edward L. Hedrick, IV in Iredell County District Court. Heard in the Court of Appeals 11 September 2013.

HAMILTON STEPHENS STEELE & MARTIN, PLLC, by Amy S. Fiorenza, for plaintiff.

No brief filed for defendant.

ELMORE, Judge.

Joanne C. Simon (plaintiff) asserts that the trial court erred in 1) failing to properly classify property, 2) valuing certain marital and divisible marital property, and 3) declining to award her attorney's fees and

additional costs. Portions of the trial court's order are vacated, and this matter is remanded to the trial court for further proceedings consistent with this opinion.

I. Background

Plaintiff and Brian R. Simon (defendant) were married 30 March 1985 and divorced on 8 May 2008. Two children were born of the marriage. The parties separated on 16 September 2006. On 1 October 2007, plaintiff filed a complaint seeking, *inter alia*, temporary and permanent child custody, temporary and permanent child support, post-separation support, alimony, and equitable distribution of marital property.

On 12 January 2011, the trial court entered judgment on plaintiff's claims. It found that that an unequal distribution of marital property to plaintiff was equitable and awarded plaintiff $12,220 per month in alimony and $4,200 per month in child support.

Early in the parties' marriage, plaintiff earned a Bachelor's degree and worked in the field of commercial interior architecture earning $20,000 to $30,000 per year. In the 1990s defendant began working for the Shopping Center Group, Inc. as a salesman; he earned approximately $250,000 in 1993. In 1993, plaintiff stopped working to help defendant with administrative tasks related to his business. Shortly thereafter, plaintiff stayed home after the birth of the parties' first child. During the late 1990s to early 2000s, the Shopping Center Group of the Carolinas, a division of the Shopping Center Group, Inc., grew in the number of offices and employees. In 2002 the company restructured, and the Shopping Center Group, LLC (the Group) was formed. Defendant served as President of the Group from December 2004 to February 2008. As a shareholder of the Carolinas division, defendant received year-end profit distributions from the Group as part of his compensation. The trial court valued his shares of company stock (TSCG C stock) at $832,000 on the parties' date of separation.

In February 2008, defendant was terminated for malfeasance after having an inappropriate relationship with a company associate. As a result, defendant was required to sell the TSCG C stock at book value. On 7 March 2008 (the date of distribution), defendant sold the stock for $60,620.55; he was paid approximately $12,000 and was given a note for $48,496.44 plus interest at 8 percent annually. Defendant was terminated approximately three years short of his retirement. Should he have retired from the company, the buy-back value of his stock was estimated to be in the millions of dollars. After his termination, defendant

continued to work in the same field under the monikers of his companies HRS Retain and HRS Limited.

Plaintiff first appealed to this Court on 7 September 2012, while her claims for attorneys' fees and costs were pending. On 20 September 2012, the trial court denied her claim for attorneys' fees and granted her certain litigation costs. Plaintiff filed a second Notice of Appeal on 24 September 2012; she appealed: (1) the Equitable Distribution, Alimony and Permanent Child Support Order entered 12 January 2012, (2) the Order Re: the parties' Rule 59/60 motions entered 8 August 2012, (3) the Order on Plaintiff's Claim for Attorneys' Fees and Costs entered 20 September 2012, and (4) any intermediary orders affecting these Orders. Plaintiff's appeal is properly before us for our review. *See Duncan v. Duncan*, ___ N.C. ___, 742 S.E.2d 799 (2013).

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 N.C.G.S. §50-20(c)[], will establish an abuse of discretion.

Wiencek-Adams v. Adams, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992) (citations omitted). This is a "generous standard of review," *Robinson v. Robinson*, 210 N.C. App. 319, 322, 707 S.E.2d 785, 789 (2011); however, the trial court must still comply with the three step analysis set forth in N.C. Gen. Stat. § 50-20(c):

> First, the court must identify and classify all property as marital or separate based upon the evidence presented regarding the nature of the asset. Second, the court must determine the net value of the marital property as of the date of the parties' separation, with net value being market value, if any, less the amount of any encumbrances. Third, the court must distribute the marital property in an equitable manner.

Smith v. Smith, 111 N.C. App. 460, 470, 433 S.E.2d 196, 202-03 (1993) (citations omitted), r*ev'd in part on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994).

> The first step of the equitable distribution process requires the trial court to classify *all* of the marital and divisible

> property—collectively termed distributable property—in order that a reviewing court may reasonably determine whether the distribution ordered is equitable. In fact, to enter a proper equitable distribution judgment, the trial court must specifically and particularly *classify and value all assets and debts maintained by the parties at the date of separation.* In determining the value of the property, the trial court must consider the property's market value, if any, less the amount of any encumbrance serving to offset or reduce the market value. Furthermore, in doing all these things the court must be specific and detailed enough to enable a reviewing court to determine what was done and its correctness.

Robinson, 210 N.C. App. at 323, 707 S.E.2d at 789 (citations and quotations omitted) (emphasis in original). Marital property is to be valued as of the date of separation and is defined to include "all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of separation of the parties[.]" N.C. Gen. Stat. § 50-20(b)(1) (2011). Divisible property includes all "appreciation and diminution in value of marital property and divisible property of the parties occurring after the date of separation and prior to the date of distribution," unless that appreciation or diminution in value is the direct result of the post-separation actions or activities of one spouse. N.C. Gen. Stat. § 50-20(b)(4) (2011). "[A]ll appreciation and diminution in value of marital and divisible property is presumed to be divisible property *unless* the trial court finds that the change in value is attributable to the postseparation actions of one spouse." *Wirth v. Wirth*, 193 N.C. App. 657, 661, 668 S.E.2d 603, 607 (2008) (emphasis in original).

III. Failure to Classify Property

In plaintiff's first three arguments, she contends that the trial court erred by not making findings of fact regarding divisible property, by not correctly valuing divisible property, and by incorrectly classifying property as defendant's separate property. We agree with plaintiff on several of her arguments, but disagree as to others.

A. Value and Classification of Stock

[1] Plaintiff's first argument is twofold. First, she avers that the trial court erred by failing to make a finding as to the value of the TSCG C stock on the date of distribution; according to plaintiff, that value is $960,000. Given this valuation, plaintiff next argues that the trial court

erred in failing to classify the $128,000 increase in value from the date of separation to the date of distribution as divisible property. We disagree.

> North Carolina has not enacted or adopted any definitive approaches for valuing stock rights. . . . *The award shall be based on the vested and non-vested accrued benefit, as provided by the plan or fund, calculated as of the date of separation*, and shall not include contributions, years of service, or compensation which may accrue after the date of separation.

Ubertaccio v. Ubertaccio, 161 N.C. App. 352, 356-57, 588 S.E.2d 905, 909 (2003) (citations and quotations omitted) (emphasis in original).

The trial court made the following finding of fact:

> 55. The Plaintiff hired an expert to value the stock. The expert was well-educated and experienced. He appropriately weighed different valuation approaches and researched the company and the industry. The expert factored into his opinion the discounts for risk, the size of the company, the lack of control and lack of marketability. The stock was acquired during the marriage and it existed on the date of separation and was marital property. The court finds that the value of the stock on the date of separation was $832,000.00.

The trial court is required to classify, value, and distribute marital and divisible property of the parties. Accordingly, it classified the shares of TSCG C stock as marital property and accepted the expert's valuation of $832,000 at the date of separation. In doing so, the trial court complied with N.C. Gen. Stat. § 50-21(b), which specifically provides that marital property is to be valued as of the date of separation. There is no statutory requirement that marital property be valued on the date of distribution. N.C. Gen. Stat. § 50-21(b) (2011).

Assuming *arguendo* that we remanded this issue, the trial court would be under no obligation to accept plaintiff's expert's valuation for the stock of $960,000 on the date of distribution merely because it used his valuation of $832,000 on the date of separation. Plaintiff's argument is purely speculative -- her alleged $128,000 increase in stock value between the date of separation and the date of distribution does not exist. Accordingly, we affirm the portion of the trial court's order dealing with the classification and valuation of the TSCG C stock.

B. Classification of Profit Distributions

[2] Plaintiff next contends that the trial court erred by not classifying the 2006 and 2007 profit distributions received by defendant post-separation as divisible property. We remand for further findings of fact.

Under N.C. Gen. Stat. § 50-20(4), divisible property includes passive income from marital property, such as interests and dividends. N.C. Gen. Stat. § 50-20(4) (2011). "Profits of a Subchapter S corporation are owned by the corporation, not by the shareholders, and are referred to as 'retained earnings.' . . . [I]ncome is allocated to shareholders based upon their proportionate ownership of stock. . . . [R]etained earnings of a corporation are not marital property until distributed to the shareholders." *Allen v. Allen*, 168 N.C. App. 368, 375, 607 S.E.2d 331, 336 (2005) (quotations and citations omitted). "[F]unds received after the separation may appropriately be considered as marital property when the right to receive those funds was acquired during the marriage and before the separation." *Id.* at 374, 607 S.E.2d at 335 (citation omitted). "Active appreciation" refers to the substantial "financial or managerial contributions" of one of the spouses. *O'Brien v. O'Brien*, 131 N.C. App. 411, 420, 508 S.E.2d 300, 306 (1998).

In *Allen*, *supra*, we held that the retained earnings of a Subchapter S corporation were properly classified as a non-marital asset when the profits represented a component of the book value of the corporation and there was no evidence that either party actually received a distribution. Conversely, here the parties filed a joint tax return for 2006, and defendant claimed he received $442,436 in non-passive income derived from his ownership interest in a Subchapter S corporation.

Here, the trial court found that "the income from the TSCGC stock received after the date of separation is not divisible property" because "[d]efendant was required to maintain his employment and the distribution of profits was directly related to [d]efendant's performance in the company." We note that the $442,436 profit distribution was tied to the amount of TSCG C stock defendant owned, and this stock was classified by the trial court as marital property. Shares of stock represent "title" to property, but title is not controlling in determining whether an asset is marital property. One aim of the Equitable Distribution Act was "to alleviate the unfairness of the common law [title theory] rule" and to base property distribution instead upon "the idea that marriage is a partnership enterprise to which both spouses make vital contributions[.]" *Friend-Novorska v. Novorska*, 131 N.C. App. 508, 510, 507 S.E.2d 900, 902 (1998).

The trial court was first tasked with classifying the income earned from the stock after the date of separation as marital or separate in accordance with the definitions set forth in N.C. Gen. Stat. § 50-20(b). It did not do so. Additionally, before classifying the property, it would have been advantageous of the trial court to consider how the 2006 profit distribution was generated as a distributional factor under N.C. Gen. Stat. §§ 50-20(c)(1) and (12), specifically looking to whether it was compensation for both pre and post-separation labor.

From the record it appears that the trial court's intention was to classify the 2006 profit distribution as defendant's separate property because he was "required to maintain his employment" and the distribution of profits was directly related to his performance. Defendant bears the burden of showing the property should be classified as separate property. *See Joyce v. Joyce*, 180 N.C. App. 647, 650, 637 S.E.2d 908, 911 (2006) ("A party who claims a certain classification of property has the burden of showing, by the preponderance of the evidence, that the property is within the claimed classification."). Defendant testified that he played no role in the financial management of the Shopping Center Group of the Carolinas in regards to profit distributions, and the record is devoid of other evidence to support the finding that the 2006 profit distribution was derived solely from defendant's financial or managerial contributions.

The parties did not separate until September 2006, and defendant's interest in the 2006 distribution may have been acquired, in part, due to pre-separation labor. The fact that defendant received the 2006 distribution after the parties separated is irrelevant if the right to receive those funds was acquired during the marriage. *See Allen*, *supra*. We remand this issue to the trial court for further findings of fact. Unless defendant can sufficiently quantify the active post-date of separation component, the 2006 profit distribution should be classified as divisible property and distributed to plaintiff accordingly. Plaintiff's argument as to the 2007 profit distribution is without merit because (1) her interest in the TSCG C stock ended on the date of separation, and (2) the parties were separated for the entirety of 2007.

C. Commission Distribution

[3] Plaintiff argues that the trial court's findings of fact and conclusions of law were insufficient to support its denial of her request to find all of the commissions presented at trial to be divisible. We agree.

The conclusion that property is marital, separate, or non-marital must be supported by written findings of fact. "Appropriate findings of fact include, but are not limited to, (1) the date the property was

acquired, (2) who acquired the property, (3) the date of the marriage, (4) the date of separation, and (5) how the property was acquired (i.e., by gift, bequest, or purchase)." *Hunt v. Hunt*, 112 N.C. App. 722, 729, 436 S.E.2d 856, 861 (1993). "The purpose for the requirement of specific findings of fact that support the court's conclusion of law is to permit the appellate court on review "to determine from the record whether the judgment — and the legal conclusions that underlie it — represent a correct application of the law." *Patton v. Patton*, 318 N.C. 404, 406, 348 S.E.2d 593, 595 (1986) (citation and quotation omitted).

The trial court made the following finding:

> 57. The Defendant received commissions after the date of separation which were in different stages of completion due to efforts prior to the date of separation. With the exception of the following commissions, the Plaintiff failed to prove that those commissions received after the date of separation were due to the efforts of the Defendant during the marriage and therefore divisible. The following commissions received after the date of separation were due to the efforts of the Defendant during the marriage and therefore divisible property: (1) Bed, Bath & Beyond-Mooresville, $20,000.00; Aiken $18,000.00; Greensboro, $20,000.00; Knightdale, $15,000.00; and Rocky Mount, $15,000.00. The total divisible property value is $88,000.00 and should be distributed to the Defendant.

The concerning issue before us is the somewhat arbitrary nature of the trial court's classification and distribution of certain commissions defendant earned post-separation. We instruct the trial court to consider the payment journals that plaintiff sought to introduce into evidence at trial because these documents were admissible under the business records exception to the hearsay rules.

A qualifying business record is admissible when "a proper foundation . . . is laid by testimony of a witness who is familiar with the . . . records and the methods under which they were made so as to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy." *State v. Springer*, 283 N.C. 627, 636, 197 S.E.2d 530, 536 (1973). There is "no requirement that the records be authenticated by the person who made them." *In re S.D.J.*, 192 N.C. App. 478, 482-83, 665 S.E.2d 818, 821 (2008) (quotation and citation omitted). The foundational requirements of Rule 803(6) may be satisfied through the submission of

> [a]n affidavit from the custodian of the records in question that states that the records are true and correct copies of records made, to the best of the affiant's knowledge, by persons having knowledge of the information set forth, during the regular course of business at or near the time of the acts, events or conditions recorded[.]

Id. at 483, 665 S.E.2d at 822 (quotation omitted).

Here, Judge Hedrick denied the admission of certain documents into evidence because they were being tendered by affidavit, not live testimony. He stated, "I'm inclined to read the rule fairly strictly since it's exception to the hearsay rule where it says 'through a — the testimony.' " He thus concluded, "I'm inclined to consider testimony from this witness stand through that microphone."

The record reflects that the foundational requirements of Rule 803(6) were satisfied through the submission of the affidavit from Jamie Alexandar-Greene. The affidavit provided that financial records of the Shopping Center Group, LLC were made and kept in the regular course of business by persons having knowledge of the information set forth at or near the time of the acts, events, or conditions recorded. The trial court's decision to deny the admission of the business records was error. Accordingly, we remand this issue to the trial court for further findings of fact and a possible recalculation and reclassification of property.

IV. Attorney Fees

[4] Plaintiff argues that the trial court erred in failing to award her reasonable attorneys' fees. We agree.

Plaintiff sought attorneys' fees in connection with her claims for child custody, child support, and alimony. In a child custody or child support action, "the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit." N.C. Gen. Stat. § 50-13.6A (2011). Furthermore, any time that a dependent spouse is entitled to alimony pursuant to N.C. Gen. Stat. § 50–16.3A, "the court may, upon application of such spouse, enter an order for reasonable counsel fees, to be paid and secured by the supporting spouse in the same manner as alimony." N.C. Gen. Stat. § 50–16.4 (2011). In order to establish that a spouse is entitled to attorneys' fees, he or she must be "(1) the dependent spouse, (2) entitled to the underlying relief demanded (e.g., alimony and/or child support), and (3) without sufficient means to defray the costs of litigation." *Barrett v. Barrett*, 140 N.C. App. 369, 374,

536 S.E.2d 642, 646 (2000) (citation omitted). On appeal, the question posed is whether the trial court erred in concluding that plaintiff had sufficient means to defray the cost of litigation.

In its 20 September 2012 order, the trial court denied plaintiff's claims for attorneys' fees, finding she had "sufficient means" to defray the cost and expense of the suit as her separate estate was valued at $902,139.54. Plaintiff incurred legal expenses of approximately $288,091. Of that, not less than $89,436.89 was related to her claims involving child custody and child support, and not less than $40,953.03 was related to her claims for post-separation support and alimony. At the time of the hearing, plaintiff owed $180,000 in attorneys' fees — approximately $122,000 of which were recoverable by statute. *See* N.C. Gen. Stat. §§ 50-13.6A and 50–16.4.

A review of the records shows that, while plaintiff's estate appears ample, it consists entirely of assets received in equitable distribution, most of which are non-liquid. Additionally, plaintiff has no cash-on-hand and is carrying a balance of approximately $15,000 in credit card debt. Moreover, plaintiff has not worked outside the home for approximately 20 years, and the trial court found that it would take her not less than 3 years to update her college degree in Industrial Design and find employment. Plaintiff's sole source of income is derived almost entirely from pre-tax alimony payments of $12,220 per month; she also earns approximately $1,270 per month income from interests, dividends, and rental property.

Alternatively, the trial court valued defendant's separate estate at $1,095,630, approximately $190,000 more than plaintiff's. While defendant incurred legal expenses between $200,000 to $250,000, he owed less than $10,000 when the 20 September 2012 order was entered. His estate includes $39,500 cash-on-hand. Furthermore, defendant's pre-tax income is $40,937 per month. He has continued to represent commercial tenants in the same field "under the monikers of his companies HRS Retail and HRS Limited" and has maintained his relationships with Costco, Bed Bath & Beyond, and Ikea.

At $902,139.54 and $1,095,630 respectively, the parties' separate estates are nearly equal in value. Nonetheless a disparity of financial resources available to plaintiff to defray the expenses of litigation is apparent. Plaintiff would have to unreasonably deplete her relatively small resources to pay her recoverable attorneys' fees. *See Clark*, *supra*.

Furthermore, the record does not support the trial court's finding of fact #6, that there was insufficient evidence for it to determine what

portion of Allison Holstein's fees were recoverable. Upon review, we conclude that Holstein's testimony coupled with plaintiff's exhibits 5A and 5B constitute sufficient evidence to make the necessary calculation. Accordingly, we reverse the trial court's order and remand for a determination of reasonable attorneys' fees to be awarded to plaintiff.

V. Costs

[5] Plaintiff seeks an additional $6,651.40 for the costs associated with the travel expenses and testimony of certain expert witnesses. We disagree.

If a category of costs is set forth in section N.C. Gen. Stat. § 7A–305(d), "the trial court *is required to assess the item as costs.*" *Priest v. Safety–Kleen Sys., Inc.*, 191 N.C. App. 341, 343, 663 S.E.2d 351, 353 (2008) (emphasis in original). Subsection (d)(11) requires a trial court to assess as costs expert fees for time spent testifying at trial provided the witness was subpoenaed. *Peters v. Pennington*, 210 N.C. App. 1, 26, 707 S.E.2d 724, 741 (2011). Additionally, "a trial court has the authority to award costs for a subpoenaed witness' time attending, but not testifying, at trial under N.C. Gen. Stat. 7A–314(d), as well as transportation costs under N.C. Gen. Stat. 7A–314(b). A trial court may not, however, assess as costs expert witness fees for preparation time." *Id.*

Plaintiff argues that she is entitled to the following expenses: $825 for Matt McDonald's trial testimony; $1,500 for Dr. Rebecca Appleton's travel and trial testimony; $2,713 for Christopher Mitchell's travel and testimony; $913.40 for Larry Batton's appraisal, travel, and testimony; and $700 for Carol Armstrong's travel and testimony. The record shows that only Dr. Rebecca Appleton was subpoenaed; the record does not indicate whether the remaining witnesses testified under subpoena. As to Appleton, the trial court found, and we agree, that plaintiff failed to prove how much time was devoted to her testimony as opposed to travel and preparation. We affirm the portion of the trial court's 20 September 2012 order awarding plaintiff $4,962.52 in court costs.

VII. Conclusion

As discussed above, we vacate portions of the equitable distribution order, and remand. With regard to the classification and valuation of the TSCG C stock, we affirm. With regard to the 2006 profit distribution, the trial court is instructed to make further findings of fact. With regard to the classification of commissions earned after the date of separation, the trial court is instructed to make further findings of fact, and it is to consider the payment journals plaintiff attempted to enter into evidence

at trial. With regard to the award of attorney's fees and costs, the trial court is instructed to make a determination of reasonable attorneys' fees; we affirm the portion of the order awarding plaintiff certain costs. Based upon its revised findings and conclusions, the trial court shall then determine the total net value of the marital estate and allocate the property accordingly.

Affirmed in part; reversed and remanded in part.

Judges CALABRIA and STEPHENS concur.

STATE OF NORTH CAROLINA
v.
SABUR RASHID ALLAH

No. COA13-667

Filed 3 December 2013

1. Burglary and Unlawful Breaking or Entering—intent—felonious restraint—evidence not sufficient

The trial court erred by denying defendant's motion to dismiss a first-degree burglary charge where the indictment alleged the intent to commit felonious restraint inside an apartment, but the record provided no indication that defendant could have possibly intended to commit the offense of felonious restraint against the victim within the confines of the apartment structure. The facts in this case were indistinguishable from those at issue in *State v. Goldsmith*, 187 N.C. App. 162, in any meaningful way. Moreover, while the continuing offense doctrine might support a finding that defendant actually committed the offense of felonious restraint, it did not suffice to show that defendant intended to commit that offense inside the structure into which he broke and entered.

2. Appeal and Error—preservation of issues—no objection at trial—challenge to condition of probation

Defendant did not waive the right to seek appellate review of his challenge to a condition of his probation where he did not object at trial. According to well-established North Carolina law, N.C. R. App. P. 10(a)(1) does not apply to sentencing-related issues.

3. Probation and Parole—condition—supervised visits with daughter—no abuse of discretion

The trial court did not abuse its discretion by imposing as a condition of probation that defendant's visits with his daughter be supervised. The trial court could reasonably conclude under the circumstances that requiring supervised visits would limit the chance that defendant would have inappropriate contact or disputes with Ms. Pickett and help protect defendant's daughter from any untoward event.

Appeal by defendant from judgments entered 28 January 2013 by Judge Susan E. Bray in Forsyth County Superior Court. Heard in the Court of Appeals 24 October 2013.

Attorney General Roy Cooper, by Assistant Attorney General Larissa S. Williamson, for the State.

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

ERVIN, Judge.

Defendant Sabur Rashid Allah appeals from judgments sentencing him to 51 to 71 months imprisonment based upon his conviction for first degree burglary and to a consecutive term of 13 to 16 months imprisonment, which the trial court suspended for 24 months on the condition that Defendant be placed on supervised probation and comply with certain terms and conditions, based upon his convictions for felonious restraint and communicating threats. On appeal, Defendant argues that the trial court erred by denying his motion to dismiss the first degree burglary charge, improperly instructing the jury with respect to the first degree burglary charge, and ordering, as a condition of probation, that Defendant's visitation with his child by the prosecuting witness be supervised. After careful consideration of Defendant's challenges to the trial court's judgments in light of the record and the applicable law, we conclude that the Defendant's first degree burglary conviction should be vacated, that the case should be remanded to the Forsyth County Superior Court for the entry of a new judgment sentencing Defendant based upon a conviction for misdemeanor breaking or entering, and that the trial court's probationary judgment should be affirmed.

I. Factual Background

A. Substantive Facts

In November 2011, Defendant was dating Charon Pickett, with whom he shared an apartment on Melrose Street in Winston-Salem. On the evening of 12 November 2011, Defendant celebrated his birthday at his sister's apartment in Winston-Salem. At approximately midnight, Ms. Pickett's cousin, Erica James, dropped Ms. Pickett off at the apartment at which the birthday party was occurring. Defendant was already intoxicated by the time that Ms. Pickett arrived at the party.

Ms. Pickett and Defendant left the party together at around 12:30 or 1:00 a.m. and returned to their apartment. Upon arriving at the apartment, Defendant became angry because Ms. Pickett refused to have sex with him. In his anger, Defendant flipped over the mattress upon which Ms. Pickett was lying, left the apartment, and drove off in Ms. Pickett's car. At that point, Ms. Pickett telephoned Ms. James and requested that Ms. James pick her up given her fear of being at the apartment when Defendant returned. As a result, Ms. James picked Ms. Pickett up and took her to Ms. James' apartment.

About fifteen to twenty minutes after Ms. Pickett and Ms. James arrived at Ms. James' apartment, a person who identified himself as "Chris" knocked on the door. Upon recognizing the voice as that of Defendant, Ms. Pickett hid in a bedroom closet out of concern about what Defendant might do in the event that he entered the apartment. After Ms. James refused to admit him, Defendant kicked the door in, searched the apartment, and found Ms. Pickett hidden in the closet. At that point, Defendant grabbed Ms. Pickett by her hair and dragged her out of the apartment and into the parking lot in which he had left Ms. Pickett's car with the motor still running. After shoving Ms. Pickett into the car, Defendant drove off toward his sister's apartment.

At the time that the car in which Defendant and Ms. Pickett were traveling arrived at the parking lot outside Defendant's sister's apartment, Defendant told Ms. Pickett he was going to kill her and choked Ms. Pickett until she briefly lost consciousness. After driving to a nearby Krispy Kreme establishment, Defendant reiterated his threat to kill Ms. Pickett, making reference to a man who had recently killed his girlfriend before killing himself. In response, Ms. Pickett pleaded with Defendant, reminding him that they had children and stating that, if he killed her, Defendant would be incarcerated. After responding to Ms. Pickett's plea by stating, "[y]ou're right, you're not worth it," Defendant drove back to the apartment that he and Ms. Pickett shared.

After Defendant and Ms. Pickett entered their apartment, Ms. James called Ms. Pickett for the purpose of telling her that a law enforcement officer wanted to speak with her. At that point, Defendant grabbed the phone from Ms. Pickett and disconnected the call. Over the course of the next 20 minutes, Defendant sent a series of text messages to Ms. James using Ms. Pickett's phone in an attempt to dissuade Ms. James from contacting the police in the hope that Ms. James would think that Ms. Pickett did not want such contact to be made. After Defendant returned the phone to Ms. Pickett, she received another call from Ms. James, who explained that the police officer wanted to see her for the purpose of making sure that she was safe and uninjured.

A few minutes after Ms. Pickett told Defendant that she was going to talk to the police, Defendant and Ms. Pickett left the apartment in Ms. Pickett's car. Shortly thereafter, Officer J.M. Payne of the Winston-Salem Police Department stopped the car. Although Defendant exited the car and attempted to flee, Officer Payne took him into custody by using a taser. At some point after Defendant was taken into custody, however, he and Ms. Pickett began living together again and had a child, who was three months old at the time of the trial.

B. Procedural History

On 13 November 2011, magistrate's orders charging Defendant with first degree kidnaping, first degree burglary, assault on a female, communicating threats, and resisting a public officer were issued. On 30 July 2012, the Forsyth County grand jury returned bills of indictment charging Defendant with felonious restraint, first degree burglary, assault on a female, communicating threats, and resisting a public officer. The charges against Defendant came on for trial before the trial court and a jury at the 21 January 2013 criminal session of the Forsyth County Superior Court. At the conclusion of the State's evidence, the trial court granted Defendant's motion to dismiss the resisting a police officer charge. On 25 January 2013, the jury returned verdicts convicting Defendant of felonious restraint, first degree burglary, and communicating threats and acquitting Defendant of assault on a female. On 28 January 2013, the trial court entered a judgment sentencing Defendant to 51 to 71 months based upon his conviction for first degree burglary; consolidated Defendants' convictions for felonious restraint and communicating threats for judgment; and entered a judgment sentencing Defendant to a consecutive term of 13 to 16 months imprisonment, with this sentence being suspended and with Defendant being placed on supervised probation for a period of 24 months subject to certain terms

and conditions. Defendant noted an appeal to this Court from the trial court's judgments.

II. Substantive Legal Analysis

A. Sufficiency of the Evidence of First Degree Burglary

[1] In his first challenge to the trial court's judgments, Defendant contends that the trial court erred by denying his motion to dismiss the first degree burglary charge for insufficiency of the evidence. More specifically, Defendant contends that the trial court should have dismissed the first degree burglary charge on the grounds that the State failed to adduce sufficient evidence to establish that he broke and entered Ms. James' apartment with the intent to commit felonious restraint inside that structure. Defendant's contention has merit.

In ruling on a motion to dismiss for insufficiency of the evidence, the trial court must determine whether the record contains substantial evidence tending to establish the existence of each essential element of the offense with which Defendant has been charged, with the evidence to be considered in the light most favorable to the State and with the State being given the benefit of any inference that may be reasonably drawn from the evidence. *State v. Davis*, 74 N.C. App. 208, 212, 328 S.E.2d 11, 14, *disc. review denied*, 313 N.C. 510, 329 S.E.2d 406 (1985). On the other hand, in the event that the evidence does nothing more than raise a suspicion of guilt, a motion to dismiss should be granted. *State v. Daniels*, 300 N.C. 105, 114, 265 S.E.2d 217, 222 (1980). This Court reviews a trial court's decision to deny a dismissal motion using a *de novo* standard of review. *See State v. Cox*, 303 N.C. 75, 87, 277 S.E.2d 376, 384 (1981).

The offense of first degree burglary consists of (1) a breaking (2) and entering, (3) in the nighttime, (4) into the dwelling house or sleeping apartment of another, (5) which is actually occupied at the time of the offense, (6) with the intent to commit a felony therein. *State v. Barnett*, 113 N.C. App. 69, 74, 437 S.E.2d 711, 714 (1993). "Intent to commit a felony is an essential element of burglary." *State v. Faircloth*, 297 N.C. 388, 395, 255 S.E.2d 366, 370 (1979), *superseded on other grounds by statute*, *State v. Silas*, 360 N.C. 377, 381, 627 S.E.2d 604, 607 (2006). "Felonious intent usually cannot be proven by direct evidence, but rather must be inferred from the defendant's 'acts, conduct, and inferences fairly deducible from all the circumstances.' " *State v. Goldsmith*, 187 N.C. App. 162, 165, 652 S.E.2d 336, 339-40 (2007) (quoting *State v. Wright*, 127 N.C. App. 592, 597, 492 S.E.2d 365, 368 (1997), *disc. rev. denied*, 347 N.C. 584, 502 S.E.2d 616 (1998)). For that reason, the intent to commit a felony within the structure which the defendant has entered necessary

for a first degree burglary conviction "may be inferred from the circumstances surrounding the occurrence," *State v. Thorpe*, 274 N.C. 457, 464, 164 S.E.2d 171, 176 (1968), with "evidence of what a defendant does after he breaks and enters a house [constituting] evidence of his intent at the time of the breaking and entering." *State v. Gray*, 322 N.C. 457, 461, 368 S.E.2d 627, 629 (1988). " '[W]hen the indictment alleges an intent to commit a particular felony, the State must prove the particular felonious intent alleged.' " *Faircloth*, 297 N.C. at 395, 255 S.E.2d at 371. *See also Silas*, 360 N.C. at 383, 627 S.E.2d at 608 (quoting *State v. Wilkinson*, 344 N.C. 198, 222, 474 S.E.2d 375, 388 (1996)).

The indictment charging Defendant with first degree burglary alleged that he broke and entered Ms. James' apartment "with the intent to commit a felony therein, felonious restraint." For that reason, the State was required, in order to obtain a first degree burglary conviction, to prove that Defendant intended to commit the offense of felonious restraint at the time that he came into Ms. James' apartment.

> A person commits the offense of felonious restraint if he unlawfully restrains another person without that person's consent, or the consent of the person's parent or legal custodian if the person is less than 16 years old, and moves the person from the place of the initial restraint by transporting him in a motor vehicle or other conveyance.

N.C. Gen. Stat. § 14-43.3. Although the offense of felonious restraint is a lesser included offense of kidnaping, *State v. Wilson*, 128 N.C. App. 688, 693, 497 S.E.2d 416, 420, *disc. review improvidently granted*, 349 N.C. 289, 507 S.E.2d 38 (1998), it "contains an element not contained in the crime of kidnaping – transportation by motor vehicle or other conveyance." *Id.* As a result of the fact that guilt of felonious restraint requires proof that the defendant transported the victim by motor vehicle or other conveyance and the fact that the record contains no evidence that Defendant intended to transport Ms. Pickett by vehicle when he entered Ms. James' apartment, Defendant contends that the record did not contain sufficient evidence to permit a rational jury to conclude that he intended to feloniously restrain Ms. Pickett at the time that he broke into and entered Ms. James' apartment.

The leading case addressing the extent to which the State is required to establish that the defendant intended to commit the offense inside the structure into which the defendant broke and entered is *State v. Goldsmith*, 187 N.C. App. 162, 652 S.E.2d 336 (2007), in which the defendant and a friend went to the victim's house at around 3:00 a.m.

with the intent to rob the victim, knocked on the door, pulled the victim out of the house after he answered the door, and demanded that the victim give him money or drugs as they struggled in the yard before fleeing when the victim's wife appeared with a shotgun. *Goldsmith*, 187 N.C. App. at 163, 652 S.E.2d at 338. On appeal, this Court held that the defendant's motion to dismiss the first degree burglary charge should have been allowed given the State's failure to prove that the defendant intended to commit a robbery inside the victim's house. After noting that, immediately after the victim opened the door, the defendant had pulled him out of the house, we stated that the undisputed "evidence [tended to show the existence of] an intent contrary to committing the robbery inside the dwelling, and instead support[ed] an inference that defendant intended to commit the robbery outside of the home." *Goldsmith*, 187 N.C. App. at 166, 652 S.E.2d at 340. As a result, this Court overturned the defendant's first degree burglary conviction and remanded the case in question to the trial court for the entry of a judgment sentencing him based upon a conviction for misdemeanor breaking or entering.

A thorough review of the record persuades us that the facts before us in this case are indistinguishable from those at issue in *Goldsmith* in any meaningful way. The undisputed evidence contained in the present record indicates that Defendant left the motor in the car which he was driving running during his entry into Ms. James' apartment, which was up two flights of stairs, and that, after locating Ms. Pickett in Ms. James' apartment, Defendant grabbed Ms. Pickett, pulled her from Ms. James' apartment into the waiting motor vehicle, and drove off. In view of the fact that the only vehicle in which Defendant could have intended to transport Ms. Pickett was outside in a parking lot, the record provides no indication Defendant could have possibly intended to commit the offense of felonious restraint against Ms. Pickett within the confines of Ms. James' apartment structure as required by *Goldsmith*. As a result, the trial court erred by denying Defendant's motion to dismiss the first degree burglary charge that had been lodged against him.[1]

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1. Although Defendant suggests that an individual could never be properly charged with committing first degree burglary based on the intent to commit felonious restraint on the theory that the offense of felonious restraint could never be committed inside a structure, we are unwilling to accept that argument given our ability to hypothesize situations in which such an intent could plausibly be inferred. As a result, we do not wish to be understood as holding that a first degree burglary conviction could never be upheld in a case in which the State alleged that the defendant intended to commit the offense of felonious restraint. Instead, we simply hold that the record before us in this case would not permit a reasonable juror to infer that Defendant intended to commit the offense of felonious restraint at the time that he broke into and entered Ms. James' apartment.

In seeking to persuade us to reach a different result, the State argues, in reliance on the fact that some crimes are continuing offenses, that the intent to commit a felony within Ms. James' apartment necessary for guilt of first degree burglary exists so long as the defendant committed any element of the offense in question within Ms. James' apartment. In support of this contention, the State cites *State v. Hall*, 305 N.C. 77, 286 S.E.2d 552 (1982), *overruled on other grounds by State v. Diaz*, 317 N.C. 545, 555, 346 S.E.2d 488, 495 (1986), in which the Supreme Court held that a series of acts constituting one continuous transaction established that the defendant had committed a single kidnaping. *Hall*, 305 N.C. at 82-83, 286 S.E.2d at 555-56. Based upon that decision, the State argues that the felonious restraint of Ms. Pickett was a continuing offense which began when he initially restrained Ms. Pickett inside Ms. James' apartment and that the commission of an act constituting an element of felonious restraint indicates that he broke into and entered Ms. James' apartment with the intent to feloniously restrain Ms. Pickett.

The fundamental problem with the State's argument is that it rests upon a misunderstanding of the relationship between a continuing offense and the intent necessary to support a first degree burglary conviction. According to well-established North Carolina law, a continuing offense is a "breach of the criminal law not terminated by a single act or fact, but which subsists for a definite period and is intended to cover or apply to successive similar obligations or occurrences." *State v. Johnson*, 212 N.C. 566, 570, 194 S.E. 319, 322 (1937). In other words, a continuing offense has been committed when the defendant, over some period of time and, possibly, in a number of different places, has committed all of the elements necessary to establish criminal liability. *See Hall*, 305 N.C. at 82-83, 286 S.E.2d at 556 (stating that "the fact that all essential elements of a crime have arisen does not mean the crime is no longer being committed" and that the fact that "the crime was 'complete' does not mean it was completed"). In order to establish the defendant's guilt of first degree burglary, however, the State is required to establish that the defendant intended to commit a felony within the structure into which he broke and entered. As a result, while the continuing offense doctrine might support a finding that Defendant actually committed the offense of felonious restraint, it does not suffice to show that Defendant intended to commit that offense inside the structure into which he broke and entered. Moreover, the State has cited nothing in support of its contention that the completion of a single element required for guilt of a particular offense inside the structure into which the defendant broke and entered is sufficient to establish that the defendant intended to commit the offense in question "within" the structure as required by our

decision in *Goldsmith*, and we know of nothing in our burglary-related jurisprudence which would support such an assertion. In fact, given that the victim in *Goldsmith* was forced from the door of his residence into the yard, one could argue that the assault inherent in the commission of a robbery with a dangerous weapon began in the victim's residence, making the facts at issue there virtually indistinguishable from those at issue here. Thus, given that the "continuing offense" doctrine has no bearing on the extent, if any, to which the State adduced sufficient evidence to permit the jury to find that Defendant broke into and entered Ms. James' apartment with the intent to feloniously restrain Ms. Pickett within that structure and given the absence of any authority indicating that the commission of a single element inside Ms. James' apartment sufficed to permit a jury determination that Defendant intended to commit felonious restraint within that structure, we conclude that the trial court erred by denying Defendant's motion to dismiss the first degree burglary charge that had been lodged against him.

Although the record does not contain sufficient evidence to support Defendant's first degree burglary conviction, it does contain sufficient evidence to support convicting Defendant of misdemeanor breaking or entering, which involves the unlawful breaking or entry into any building. N.C. Gen. Stat. § 14-54(b). "[B]y finding the defendant guilty of burglary, the jury 'necessarily found facts which would support a conviction of misdemeanor breaking and entering,' " so that, "where, as here, the evidence of intent to commit a felony is insufficient," *State v. Freeman*, 307 N.C. 445, 451, 298 S.E.2d 376, 380 (1983) (quoting *State v. Dawkins*, 305 N.C. 289, 291, 287 S.E.2d 885, 887 (1982)), the jury's verdict is tantamount to a decision that the defendant should be found guilty of misdemeanor breaking or entering. As a result, we hold that Defendant's conviction for first degree burglary should be vacated and that this case should be remanded to the Forsyth County Superior Court for the entry of a new judgment finding that Defendant had been convicted of misdemeanor breaking or entering and imposing sentence upon him for committing that lesser included offense.[2]

B. Visitation Restrictions

[2] Secondly, Defendant argues that the trial court erred by ordering, as a condition of probation, that Defendant's visits with his daughter be

2. As a result of our decision with respect to this sufficiency of the evidence issue, we need not address Defendant's related argument that the trial court committed plain error in connection with its instructions to the jury with respect to the issue of Defendant's guilt of first degree burglary.

supervised. In essence, Defendant contends that the trial court lacked the authority to impose the challenged condition of probation. We do not find Defendant's argument persuasive.

Although Defendant did not object to the challenged condition of probation at trial, we do not believe, contrary to the implication of the argument advanced in the State's brief, that Defendant has waived the right to seek and obtain appellate review of his challenge to the relevant condition of probation. Admittedly, N.C.R. App. P. 10(a)(1) provides that, as a general proposition, a party must have raised an issue before the trial court before presenting it to this Court for appellate review. However, according to well-established North Carolina law, N.C.R. App. P. 10(a)(1) does not apply to sentencing-related issues. *See State v. Curmon*, 171 N.C. App. 697, 703, 615 S.E.2d 417, 422 (2005). The extent to which a trial judge erred by imposing a particular condition of probation is clearly a sentencing-related issue. As if the ordinary principles applicable to the lack of any necessity for objecting to sentencing-related issues at trial were not enough to establish that Defendant's challenge to the trial court's judgment is properly before this Court, N.C. Gen. Stat. § 15A-1342(g) provides that any failure on the part of the defendant "to object to a condition of probation [at the time it is] imposed does not constitute a waiver of the right to object at a later time to the condition." Thus, since a 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," *State v. Cooper*, 304 N.C. 180, 183, 282 S.E.2d 436, 439 (1981), and since Defendant has challenged the validity of the condition of probation at issue here prior to any attempt to revoke his probation, Defendant is not, contrary to the State's suggestion, barred from challenging the validity of this condition of probation on appeal from the trial court's judgment despite his failure to challenge the validity of this condition before the trial court for this reason as well. We will now address Defendant's challenge to the condition of probation in question on the merits.

[3] The extent to which a trial judge is entitled to impose a particular condition of probation depends upon the proper application of the relevant statutory provisions. N.C. Gen. Stat. § 15A-1342(c). A number of conditions of probation are automatically included in each probationary judgment unless the trial court specifically elects to exempt the defendant from the necessity for compliance with one or more of those conditions. N.C. Gen. Stat. § 15A-1343(b). In addition, N.C. Gen. Stat. § 15A-1343(b1) provides that a trial judge is entitled to impose one or more of several specified special conditions of probation in the exercise

of its sound discretion. Finally, N.C. Gen. Stat. § 15A-1343(b1)(10) authorizes a trial judge to require the defendant to "[s]atisfy any other conditions determined by the court to be reasonably related to his rehabilitation." The extent to which a particular condition of probation is authorized by N.C. Gen. Stat. § 15A-1343(b1)(10) hinges upon whether the challenged condition bears a reasonable relationship to the offenses committed by the defendant, whether the condition tends to reduce the defendant's exposure to crime, and whether the condition assists in the defendant's rehabilitation. *Cooper*, 304 N.C. at 183, 282 S.E.2d at 438. As a result, although the trial courts have the discretion to devise and impose special conditions of probation other than those specified in N.C. Gen. Stat. § 15A-1343(b1), N.C. Gen. Stat. § 15A-1343(b1)(10) "operates as a check on the discretion [available to] trial judges" during that process. *State v. Lambert*, 146 N.C. App. 360, 367, 553 S.E.2d 71, 77 (2001), *disc. review denied*, 355 N.C. 289, 561 S.E.2d 271 (2002). A challenge to a trial court's decision to impose a condition of probation is reviewed on appeal using an abuse of discretion standard of review, *See State v. Harrington*, 78 N.C. App. 39, 48, 336 S.E.2d 852, 857 (1985), with such an abuse of discretion having occurred when the trial court's ruling is manifestly unsupported by reason or 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).

Although Defendant argues that the trial court abused its discretion by requiring that his visits with his daughter be supervised on the grounds that he has never injured or posed a threat to his daughter, thereby rendering the condition in question devoid of any reasonable relation to the rehabilitative process, we do not find this argument persuasive. Simply put, the evidence in the record clearly shows that, in a fit of anger, Defendant choked and threatened to kill the mother of his child. In light of that set of circumstances, the trial court could reasonably conclude that requiring that Defendant's visits with his daughter be supervised would limit the chance that Defendant would have inappropriate contact or disputes with Ms. Pickett and help protect Defendant's daughter from any untoward event which might occur should he become ferociously angry at Ms. Pickett again. As a result, we conclude that the trial court did not abuse its discretion by requiring that Defendant's visits with his daughter be supervised during the time in which he was subject to probationary supervision.

In addition, Defendant argues that the trial court erred by imposing the challenged condition on the grounds that (1) the district court has exclusive jurisdiction over child custody and visitation disputes

pursuant to N.C. Gen. Stat. § 7A-244; (2) issues relating to custody or visitation are only subject to resolution in civil litigation conducted pursuant to the relevant statutory provisions; (3) a parent must receive notice of a hearing concerning support or visitation-related issues before an order affecting custody and visitation rights can be entered, *Clayton v. Clayton*, 54 N.C. App. 612, 614, 284 S.E.2d 125, 127 (1981); and (4) a custody-related order must include findings of fact which support the trial court's "best interests" determination. N.C. Gen. Stat. § 50-13.2(a). The authorities upon which Defendant relies in support of this argument are, however, all civil in nature and have no bearing on a criminal trial court's authority to adopt otherwise lawful conditions of probation. As a result, none of Defendant's challenges to the limitation upon his ability to visit with his daughter imposed in the trial court's probationary judgment have merit.

III. Conclusion

Thus, for the reasons set forth above, we conclude that, although the trial court erroneously denied Defendant's motion to dismiss the first degree burglary charge, it did not err by requiring that Defendant's visitation with his daughter be conducted on a supervised basis as a condition of probation. As a result, the trial court's judgment based upon Defendant's first degree burglary conviction should be, and hereby is, vacated, and the case in which Defendant was convicted of first degree burglary should be, and hereby is, remanded to the Forsyth County Superior Court for the entry of a new judgment sentencing Defendant for misdemeanor breaking or entering. On the other hand, the trial court's judgment based upon Defendant's convictions for felonious restraint and communicating threats should be, and hereby is, allowed to remain undisturbed.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

Judges GEER and STEPHENS concur.

STATE OF NORTH CAROLINA
v.
KEVIN JAMES DAHLQUIST

No. COA13-276

Filed 3 December 2013

Search and Seizure—driving while impaired—compelled blood sample—no warrant—exigent circumstances

The trial court did not err in a driving while impaired case by improperly denying defendant's motion to suppress evidence from a blood sample taken without a search warrant or defendant's consent. Under the totality of the circumstances, the facts of this case gave rise to an exigency sufficient to justify a warrantless search.

Appeal by Defendant from judgment entered 29 February 2012 by Judge Jerry Cash Martin in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 September 2013.

Attorney General Roy A. Cooper, by Assistant Attorney General Tamara Zmuda, for the State.

Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for Defendant.

DILLON, Judge.

Kevin James Dahlquist ("Defendant") appeals from a judgment convicting him of driving while impaired, arguing the trial court improperly denied his motion to suppress evidence from a compelled blood sample. We affirm.

I. Facts and Procedural History

In the early morning hours of Saturday, 26 September 2009, Officer Charles Jamieson of the Charlotte-Mecklenburg Police Department was working a checkpoint for impaired driving. The checkpoint was equipped with a Blood Alcohol Testing ("BAT") mobile, which housed an intoxilyzer for determining a suspect's blood alcohol level. The BAT mobile also had an area for a magistrate, though no magistrate was present that night.

At approximately 1:45 A.M., Defendant drove up to the checkpoint. Upon smelling a strong odor of alcohol emanating from Defendant,

Officer Jamieson administered several field sobriety tests, which Defendant failed. Defendant admitted to Officer Jamieson that he had consumed alcohol that night. Officer Jamieson arrested Defendant and escorted him to the BAT mobile to administer a breath test. Defendant refused to submit to the test. Officer Jamieson then transported Defendant to Mercy Hospital, where blood samples were drawn from Defendant without his consent. Afterwards, Defendant was taken to the Mecklenburg County Intake Center and appeared before a magistrate.

Defendant filed a pretrial motion to suppress evidence obtained without a search warrant. On 12 January 2012, Superior Court Judge Larry G. Ford denied Defendant's motion to suppress. On 29 February 2012, a jury found Defendant guilty of driving while impaired. From this judgment, Defendant appeals.

II. Anaylsis

In Defendant's sole argument on appeal, he contends the trial court erred in denying his motion to suppress the evidence from the compelled blood samples without first obtaining a search warrant, in violation of the U.S. Constitution, amendment IV and the N.C. Constitution, Article I, Section 20. Specifically, Defendant claims no exigent circumstances existed to allow the warrantless search. We find no error.

"Ordinarily, the scope of appellate review of an order [regarding a motion to suppress] is strictly limited to determining whether the trial [court]'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 [court]'s ultimate conclusions of law." *State v. Salinas*, 366 N.C. 119, 123, 729 S.E.2d 63, 66 (2012) (citation and quotation marks omitted) (alteration in original). When considering a motion to suppress, the trial judge "must set forth in the record his findings of fact and conclusions of law." N.C. Gen. Stat. § 15A-977(f) (2011). These findings and conclusions must be in the form of a written order *unless* "(1) the trial court provides its rationale from the bench, and (2) there are no material conflicts in the evidence at the suppression hearing." *State v. Royster*, __ N.C. App. __, __, 737 S.E.2d 400, 403 (2012).

In the present case, we note that there were no material conflicts in the evidence. Accordingly, the trial court announced its findings of fact and explained the rationale for its decision, in open court. Defendant does not contend the trial court's findings are not supported by competent evidence. Rather, Defendant argues, citing *Missouri v. McNeely*,

__ U.S. __, 185 L. Ed. 2d 696 (2013), that the compelled taking of a blood sample in this case – without a search warrant or Defendant's consent, and allegedly without sufficient exigent circumstances – violated his constitutional right to be free from unreasonable searches and seizures.

The Fourth Amendment provides in relevant part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause[.]" U.S. Const. amend. IV. The United States Supreme Court has held that a warrantless search of the person is reasonable only if it falls within a recognized exception. *Missouri v. McNeely*, __ U.S. __, __, 185 L. Ed. 2d 696, 704 (2013). "One well-recognized exception . . . applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." *Id.* (citation and quotation marks omitted). For instance, "[i]n some circumstances law enforcement officers may conduct a search without a warrant to prevent the imminent destruction of evidence." *Id.* at __, 185 L. Ed. 2d at 705. (citations omitted). "[A] warrantless search is [in certain situations] potentially reasonable because there is compelling need for official action and no time to secure a warrant." *Id.* (citation and quotation marks omitted). "To determine whether a law enforcement officer faced an emergency that justified acting without a warrant, this Court looks to the totality of circumstances." *Id.* (citations omitted).

We have held that "[t]he withdrawal of a blood sample from a person is a search subject to protection by article I, section 20 of our constitution." *State v. Fletcher*, 202 N.C. App. 107, 111, 688 S.E.2d 94, 96 (2010) (citation and quotation marks omitted). "Therefore, a search warrant must be issued before a blood sample can be obtained, unless probable cause and exigent circumstances exist that would justify a warrantless search." *Id.* at 111, 688 S.E.2d at 97 (citation and quotation marks omitted). This rule is also codified at N.C. Gen. Stat. § 20-139.1(d1) (2011), which provides the following:

> If a person refuses to submit to any test or tests pursuant to this section, any law enforcement officer with probable cause may, without a court order, compel the person to provide blood or urine samples for analysis if the officer reasonably believes that the delay necessary to obtain a court order, under the circumstances, would result in the dissipation of the percentage of alcohol in the person's blood or urine.

Id.

While it is "recognized that alcohol and other drugs are eliminated from the blood stream in a constant rate, creating an exigency with regard to obtaining samples," *Fletcher*, 202 N.C. App. at 111, 688 S.E.2d at 97 (citation and quotation marks omitted), the United States Supreme Court recently held, in *Missouri v. McNeely*, *supra*, that the natural dissipation of alcohol in the bloodstream cannot, *standing alone*, create an exigency in a case of alleged impaired driving sufficient to justify conducting a blood test without a warrant. *Id.* Specifically, the Supreme Court concluded that "the natural metabolization of alcohol in the bloodstream" does not create a "a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases," holding that the "exigency in this context must be determined case by case based on the totality of the circumstances." *Id.* at __, 185 L. Ed. 2d at 702. Therefore, after the Supreme Court's decision in *McNeely*, the question for this Court remains whether, considering the totality of the circumstances, the facts of this case gave rise to an exigency sufficient to justify a warrantless search.

In this case, the trial court found, *inter alia*, the following: Defendant pulled up to a checkpoint. A police officer noticed the odor of alcohol. Defendant admitted to drinking five beers. The officer administered field sobriety tests, and Defendant's performance in the tests signified impairment. Defendant was then taken to the BAT Mobile; however, Defendant refused the intoxilyzer test. The officer then took Defendant directly to Mercy Hospital to have a blood sample taken without first obtaining a warrant from a magistrate at the jail's Intake Center. The officer made this decision to go directly to the hospital because he knew that over time the amount of alcohol in blood dissipates; he knew from his years of experience that Mercy Hospital was ten to fifteen minutes away and that its patient load on Saturday mornings was typically fairly light; he surmised from his past experience that getting a blood draw at Mercy Hospital would take approximately forty-five minutes to one hour; he surmised from his past experience that, on a weekend night, it would take between four and five hours to obtain a blood sample if he first had to travel to the Intake Center at the jail to obtain a search warrant.[1]

Based on its findings, the trial court concluded that the police officer had exigent circumstances before him so as to allow Defendant's blood to be drawn without first obtaining a search warrant and that the officer had a reasonable belief that the delay to obtain the search warrant under

1. This recitation is not an exhaustive recount of the trial court's findings but is merely a summary.

the circumstances would result in dissipation of the percentage of alcohol in Defendant's blood.

After reviewing the trial court's findings of fact and the evidence presented at the hearing on Defendant's motion to suppress, we believe the evidence supports the trial court's findings and conclusions regarding the existence of exigent circumstances in this particular case. Considering the totality of the circumstances – including, but not limited to, the distance from and time needed to travel to the Intake Center and the hospital, and the officer's knowledge of the approximate probable wait time at each place – we conclude the facts of this case gave rise to an exigency sufficient to justify a warrantless search. Accordingly, we find no error.

We would, however, elaborate on one point regarding the procedure of obtaining warrants from magistrates in cases such as this, which was addressed by the United Supreme Court in McNeely – advances in technology. The Supreme Court noted that "[t]he Federal Rules of Criminal Procedure were amended in 1977 to permit federal magistrate judges to issue a warrant based on sworn testimony communicated by telephone[:] . . . As amended, the law now allows a federal magistrate judge to consider 'information communicated by telephone or other reliable electronic means.' " *McNeely*, __ U.S. at __, 185 L. Ed. 2d at 708 (quoting Fed. Rule Crim. Proc. 4.1, which provides that "[a] magistrate judge may consider information communicated by telephone or other reliable electronic means when reviewing a complaint or deciding whether to issue a warrant or summons"). The *McNeely* Court also recognized that "[s]tates have also innovated[:] Well over a majority of States allow police officers or prosecutors to apply for search warrants remotely through various means, including telephonic or radio communication, electronic communication such as e-mail, and video conferencing." *Id.*, __ U.S. at __, 185 L. Ed. 2d at 708. Indeed, in North Carolina, pursuant to N.C. Gen. Stat. § 15A-245(a)(3) (2011), a "sworn law enforcement officer" may employ "audio and video transmission in which both parties can see and hear each other" to obtain a search warrant. *Id.*

Though the North Carolina rules of criminal procedure have allowed a search warrant to be issued based on information communicated by a "video transmission" since 2005, the record in this case does not indicate that the arresting officer attempted to videoconference with the magistrate to obtain a search warrant or that he had the technology to do so.[2]

2. We further note that N.C. Gen. Stat. § 15A-245(a)(3) provides that "[p]rior to the use of audio and video transmission pursuant to this subdivision, the procedures and the type

N.C. Gen. Stat. § 15A-245(a)(3). Rather, it appears from the transcript that the arresting officer may have assumed he only had two options in this case: (1) to take Defendant to the hospital and compel a warrantless blood draw sample; or (2) to drive to the jail Intake Center, wait for a magistrate to issue a warrant, and then return to the hospital, at which time the alcohol in Defendant's blood may have dissipated. In our opinion, the "video transmission" option that has been allowed by N.C. Gen. Stat. § 15A-245(a)(3) for the past eight years is a method that should be considered by arresting officers in cases such as this where the technology is available. In the same vein, we believe the better practice in such cases might be for an arresting officer, where practical, to call the hospital and the Intake Center to obtain information regarding the wait times on that specific night, rather than relying on previous experiences. Having noted this, we also repeat the following statement of the United States Supreme Court:

> We by no means claim that telecommunications innovations have, will, or should eliminate all delay from the warrant-application process. Warrants inevitably take some time for police officers or prosecutors to complete and for magistrate judges to review. Telephonic and electronic warrants may still require officers to follow time-consuming formalities designed to create an adequate record[.] . . . And improvements in communications technology do not guarantee that a magistrate judge will be available when an officer needs a warrant after making a late-night arrest. But technological developments that enable police officers to secure warrants more quickly, and do so without undermining the neutral magistrate judge's essential role as a check on police discretion, are relevant to an assessment of exigency. That is particularly so in this context, where BAC evidence is lost gradually and relatively predictably.

McNeely, __ U.S. at __, 185 L. Ed. 2d at 709.

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of equipment for audio and video transmission shall be submitted to the Administrative Office of the Courts by the senior resident superior court judge and the chief district court judge for a judicial district or set of districts and approved by the Administrative Office of the Courts." In the present case, Defendant does not assert that the arresting officer should have, but did not, employ the procedure allowed in N.C. Gen. Stat. § 15A-245(a). Neither the State, nor Defendant, develop any argument pertaining to this statute, nor do the parties point us to information in the record regarding whether Mecklenburg County, Judicial District 26, has even submitted the necessary information to AOC for approval.

III. Conclusion

In conclusion, we affirm the trial court's order denying Defendant's motion to suppress in this case, because, after considering a totality of the circumstances, we believe exigent circumstances existed to compel a warrantless blood draw sample from Defendant.

AFFIRMED.

Judge McGEE and Judge McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
DANNY DALE GOSNELL

No. COA13-614

Filed 3 December 2013

1. Homicide—first-degree murder—not guilty verdict—jury instructions

The trial court did not commit plain error in a first-degree murder case by failing to instruct the jury of its duty to return a not guilty verdict for first-degree murder based on the theory of premeditation and deliberation if the State failed to establish any essential element beyond a reasonable doubt. The verdict sheet provided a space for a "not guilty" verdict, and the trial court's instructions on second-degree murder and the theory of lying in wait comported with the requirement in *State v. McHone*, 174 N.C. App. 289.

2. Homicide—first-degree murder—lying in wait—jury instructions—sufficient evidence

The trial court did not err in a first-degree murder case by instructing the jury that it could convict defendant of first-degree murder based on the theory of lying in wait where there was sufficient evidence to support the instruction. Furthermore, any error was not prejudicial.

Appeal by Defendant from judgment entered 3 October 2012 by Judge Marvin P. Pope in Superior Court, Buncombe County. Heard in the Court of Appeals 5 November 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Marc Bernstein, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Emily H. Davis, for Defendant.

McGEE, Judge.

Danny Dale Gosnell ("Defendant") was indicted for first-degree murder of Brenda Kay Roberts Williams ("Ms. Williams") on 9 January 2012. The facts relevant to a determination of the issues on appeal are presented in the analysis portion of this opinion. A jury found Defendant guilty of first-degree murder on 2 October 2012. Defendant appeals.

I. "Premeditation and Deliberation" Instruction

[1] Defendant argues "the trial court committed plain error by failing to instruct the jury of its duty to return a not guilty verdict for first-degree murder based on the theory of premeditation and deliberation if the State failed to establish any essential element beyond a reasonable doubt."

A. Standard of Review

"Because defendant did not object at trial to the omission of the not guilty option from the trial court's final mandate to the jury, we review the trial court's actions for plain error." *State v. McHone*, 174 N.C. App. 289, 294, 620 S.E.2d 903, 907 (2005).

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

B. Analysis

"Our Supreme Court has held that the failure of the trial court to provide the option of acquittal or not guilty in its charge to the jury can constitute reversible error." *McHone*, 174 N.C. App. at 295, 620 S.E.2d at 907. This Court held that "[t]elling the jury 'not [to] return a verdict of guilty' as to each theory of first degree murder does not comport with the necessity of instructing the jury that it must or would return a verdict of not guilty[,]" if it rejected the conclusion that the defendant committed first-degree murder. *Id.* at 297, 620 S.E.2d at 909.

As in *McHone*, we "first consider the jury instructions on murder in their entirety in determining whether the failure to provide a not guilty mandate constitutes plain error." *Id.* The instructions on premeditation and deliberation, which Defendant challenges on appeal, are quoted below:

> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant, acting with malice, killed the victim with a deadly weapon, thereby proximately causing the victim's death, that the defendant intended to kill the victim and that the defendant acted after premeditation and with deliberation, it would be your duty to return a verdict of "guilty of first-degree murder["] on the basis of malice, premeditation and deliberation. If you do not so find or have a reasonable doubt as to one or more of these things you would not return a verdict of "guilty of first-degree murder" on the basis of malice, premeditation and deliberation. (emphasis added).

As to the theory of lying in wait, the trial court instructed the jury as follows:

> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant assaulted the victim while lying in wait for her and that the defendant's act proximately caused the victim's death, it would be your duty to return a verdict of "guilty of first-degree murder." If you do not so find or if you have a reasonable doubt as to one or more of these things it would be your duty to return a verdict of "not guilty." (emphasis added).

As to second-degree murder, the trial court instructed the jury as follows:

> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant intentionally and with malice wounded the victim with a deadly weapon and that this proximately caused the victim's death, it would be your duty to return a verdict of "guilty of second-degree murder." If you do not so find or have a reasonable doubt as to one or more of these things it would be your duty to return a verdict of "not guilty." (emphasis added).

From our review of the entirety of the jury instructions on murder, it appears that, as to the theory of premeditation and deliberation, the trial court failed to comport precisely with the requirement to instruct that the jury would return a verdict of "not guilty" if it rejected the conclusion that Defendant committed first-degree murder on the basis of premeditation and deliberation, per *McHone*. However, it further appears that the trial court, in its instructions, comported with the requirement regarding both lying in wait and second-degree murder.

By contrast, the trial court in *McHone* "failed to instruct the jury on the option of finding defendant not guilty during its final mandate." *McHone*, 174 N.C. App. at 296, 620 S.E.2d at 908. "Indeed, it neither stated that the jury could find [the] defendant not guilty of first degree murder, nor that it was their duty to do so should they conclude the State failed in its burden of proof." *Id.* Rather, the trial court "essentially pitted one theory of first degree murder against the other, and impermissibly suggested that the jury should find that the killing was perpetrated by [the] defendant on the basis of at least one of the theories." *Id.* at 297, 620 S.E.2d at 909.

In *McHon*e, this Court also stated that "[s]econdly, we consider the content and form of the first degree murder verdict sheet in determining whether the failure to provide a not guilty mandate constitutes plain error." *Id.* The verdict sheet in the present case is structured as follows:

1. ____ GUILTY OF FIRST DEGREE MURDER by

(you may check one, both or neither of the following:)

____ MALICE, PREMEDITATION AND DELIBERATION and/or

____ LYING IN WAIT.

2. ____ GUILTY OF SECOND DEGREE MURDER.

3. ____ NOT GUILTY.

By contrast, the verdict sheet in *McHone* "did not provide a space or option of 'not guilty.' " *McHone*, 174 N.C. App. at 298, 620 S.E.2d at 909.

This Court in *McHone* considered the instructions and verdict sheet for the other offenses with which the defendant was charged.

> Rather than help correct the failure to provide a similar not guilty mandate with respect to the first degree murder charge, the presence of a not guilty final mandate as to the taking offenses likely reinforced the suggestion that the jury should return a verdict of first degree murder based upon premeditation and deliberation and/or felony murder.

McHone, 174 N.C. App. at 298, 620 S.E.2d at 909.[1] Additionally, this Court noted that the verdict sheet for the other offenses, "which did afford a space for a not guilty verdict, also likely reinforced the suggestion that [the] defendant must have been guilty of first degree murder on some basis[.]" *McHone*, 174 N.C. App. 298, 620 S.E.2d at 909.

In the present case, there are no other offenses to analyze in the course of our plain error review. The verdict sheet provided a space for a "not guilty" verdict, and the trial court's instructions on second-degree murder and the theory of lying in wait comported with the requirement in *McHone*. The trial court did not commit plain error in failing to instruct that the jury would or must return a "not guilty" verdict if it did not conclude that Defendant committed first-degree murder on the basis of premeditation and deliberation.

II. "Lying in Wait" Instruction

[2] Defendant also argues the trial court erred by instructing the jury that it could convict Defendant of first-degree murder based on the theory of lying in wait.

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1. The versions of *McHone* available online through Westlaw and LexisNexis contain the full sentence quoted above. The South Eastern Reporter, 2d Series also contains this full sentence. The slip opinion available online also contains this full sentence. *State v. McHone*, COA04-1605, slip op. at 13. However, the subject of the sentence is missing from the hard copy of the N.C. Court of Appeals Reports. The N.C. Court of Appeals Reports has only the following incomplete sentence: "Rather than help correct the failure to provide a similar not guilty mandate with respect to the taking offenses likely reinforced the suggestion that the jury should return a verdict of first degree murder based upon premeditation and deliberation and/or felony murder." *McHone*, 174 N.C. App. at 298.

"Where jury instructions are given without supporting evidence, a new trial is required." *State v. Porter*, 340 N.C. 320, 331, 457 S.E.2d 716, 721 (1995) (citing *State v. Buchanan*, 287 N.C. 408, 421, 215 S.E.2d 80, 88 (1975) (the trial court "should never give instructions to a jury which are not based upon a state of facts presented by some reasonable view of the evidence")).

"A murder which shall be perpetrated by means of . . . lying in wait . . . shall be deemed to be murder in the first degree[.]" N.C. Gen. Stat. § 14-17 (2011). "[W]hen G.S. 14-17 speaks of murder perpetrated by lying in wait, it refers to a killing where the assassin has stationed himself or is lying in ambush for a private attack upon his victim." *State v. Allison*, 298 N.C. 135, 147, 257 S.E.2d 417, 425 (1979).

> However, it is not necessary that he be actually concealed in order to lie in wait. If one places himself in a position to make a private attack upon his victim and assails him at a time when the victim does not know of the assassin's presence or, if he does know, is not aware of his purpose to kill him, the killing would constitute a murder perpetrated by lying in wait.

Id. at 148, 257 S.E.2d at 425 (citing *State v. Wiseman*, 178 N.C. 785, 789-90, 101 S.E. 629, 631 (1919)). "Certainly one who has lain in wait would not lose his status because he was not concealed at the time he shot his victim. The fact that he reveals himself or the victim discovers his presence will not prevent the murder from being perpetrated by lying in wait." *Allison*, 298 N.C. at 148, 257 S.E.2d at 425.

In *State v. Wiseman*, *supra*, the evidence showed that the victim, "almost immediately on getting off the train, was fired upon by one or more persons, at short range[.]" *Wiseman*, 178 N.C. at 790, 101 S.E. at 631. Our Supreme Court concluded that "the killing, in any aspect of this case, was an assassination by lying in wait, and by taking the victim unawares without opportunity to defend himself." *Wiseman*, 178 N.C. at 790, 101 S.E. at 631.

In the present case, Defendant's vehicle was parked on "the other side of the barn" from Ms. Williams' house ("the house") at about 7:20 or 7:25 a.m. One of Ms. Williams' daughters, Amanda Williams ("Amanda"), testified that Ms. Williams received "three or four" phone calls from Defendant on the morning of the offense. Amanda was inside the house with her mother and her sister, Amber Williams ("Amber").

Amanda testified that, at 7:48 a.m., Ms. Williams told Amanda that she was running late and, shortly thereafter, left for work. Amber testified

that, after her mother left the house, her mother "screamed, 'No!' " That was the last time Amber heard her mother speak. Amber further testified that Ms. Williams and Defendant did not argue outside the house for a long period of time. Amber saw Defendant shoot Ms. Williams twice, the second shot occurring while Ms. Williams was on the ground.

A neighbor testified that he drove past Ms. Williams' house on the morning of the offense. At approximately 7:45 or 7:50 a.m., he drove past the house, turned around at a dead-end, and drove past the house again. He noticed an unfamiliar truck parked behind the barn and decided to check on the residents. As he approached the house, he saw Ms. Williams lying on the ground by the barn.

Defendant told the neighbor: "Go away; go away. Leave; leave." When Defendant said the second "leave," he shot Ms. Williams while she was lying on the ground. The neighbor saw Ms. Williams' body "bounce[] up off the ground[.]" The neighbor drove back to the road and called 911. A deputy sheriff responded to the 911 dispatch and arrived at the scene of the offense at approximately 8:05 or 8:10 a.m. The deputy sheriff testified that "[f]our and a-half or five minutes" passed "from the time of dispatch to arrival[.]"

Defendant relies on *State v. Lynch*, 327 N.C. 210, 393 S.E.2d 811 (1990), in arguing that the trial court erred in instructing the jury on the theory of lying in wait. In *Lynch*, our Supreme Court noted that *Allison* established "that a lying in wait killing requires some sort of ambush and surprise of the victim." *Id.* at 217, 393 S.E.2d at 815. In *Lynch*, there was "no evidence that [the] defendant ambushed or surprised [the victim] when he fatally stabbed her." *Id.* at 218, 393 S.E.2d at 816.

> The evidence shows without contradiction that before the fatal stabbing [the] defendant walked with his arm around the victim through the parking lot. Later [the] defendant was observed chasing the victim across the lot, catching her and forcing her back to a car in the lot. The victim was heard to say, "No, please, don't do that," after which she was observed coming from between some cars, bleeding and calling for help. [The d]efendant was observed running across the parking lot.

Id. at 218-19, 393 S.E.2d at 816. Our Supreme Court concluded that there was "simply no evidence that [the] defendant lay in wait by ambushing or surprising his victim immediately before he inflicted the fatal stab wounds." *Id.* at 218-19, 393 S.E.2d at 816.

In the present case, Defendant contends only that there was no ambush or surprise "immediately before the shooting" because Defendant and Ms. Williams "interacted outside" for approximately ten to thirteen minutes. The evidence, however, does not support this conclusion. Defendant parked on the opposite side of the barn from the house and waited for Ms. Williams. Ms. Williams left the house shortly after 7:48 a.m. By 8:05 or 8:10 a.m., all the following events had transpired: (1) Defendant confronted Ms. Williams, and a short argument ensued; (2) Defendant shot Ms. Williams; (3) a neighbor arrived to check on the residents; (4) he saw Ms. Williams lying on the ground, and Defendant told the neighbor to leave; (5) Defendant shot Ms. Williams a second time while she was lying on the ground; (6) the neighbor drove back to the road and called 911; (7) the 911 call was dispatched to a deputy sheriff's radio; and (8) the deputy sheriff arrived on the scene. The deputy arrived approximately four and a half or five minutes after receiving the dispatch.

The evidence suggests that the shooting immediately, or almost immediately, followed Defendant's ambush of Ms. Williams outside the house. As stated above, our Supreme Court has held that "a lying in wait killing requires some sort of ambush and surprise of the victim." *Lynch*, 327 N.C. at 217, 393 S.E.2d at 815. The evidence does not show that Ms. Williams was aware of Defendant's presence outside the house or Defendant's purpose to kill her. Under *Allison* and *Lynch*, the evidence in this case supports an instruction on lying in wait. The trial court did not err in giving the instruction.

Even assuming Defendant can show error on this basis, Defendant cannot show prejudice resulting from the error because there is no possibility that, had the error in question not been committed, a different result would have been reached at trial. N.C. Gen. Stat. § 15A-1443(a) (2011). The jury returned guilty verdicts on (1) lying in wait and (2) premeditation and deliberation. Defendant has not shown that prejudicial error occurred in this case.

No error.

Judges BRYANT and STROUD concur.

STATE OF NORTH CAROLINA
v.
LADARRIUS TAVON HATCHER

No. COA13-632

Filed 3 December 2013

1. Homicide—handgun discharge—second-degree murder—evidence of malice—not sufficient—remanded for involuntary manslaughter sentencing

The trial court erred in denying defendant's motion to dismiss the charge of murder where the State failed to present sufficient evidence of malice. A group of young men were debating whether a 9mm pistol that one of them had would fire .380 ammunition; they loaded and attempted to fire the gun outside without success; they returned inside with the gun; there was a gunshot when defendant and the victim were alone in a room; and the victim was killed. The evidence was at best sufficient only to raise a suspicion of malice; however, there was sufficient evidence to support a finding that defendant was culpably negligent in handling the pistol and the case was remanded for sentencing on involuntary manslaughter.

2. Criminal Law—prosecutor's argument—murder conviction—errors concerning intent—remanded for involuntary manslaughter sentencing—no prejudice

There was no plain error in a murder prosecution where the trial court did not limit cross-examination and did not intervene *ex mero motu* in the prosecutor's closing argument where all of the alleged errors related to the State's attempt to show an intentional killing. Even assuming that the trial court erred as contended, defendant cannot show prejudice given that his murder conviction was reversed and the case was remanded for resentencing on involuntary manslaughter.

Appeal by defendant from Judgment entered on or about 16 November 2012 by Judge Walter H. Godwin, Jr. in Superior Court, Edgecombe County. Heard in the Court of Appeals 22 October 2013.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Brandon L. Truman, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Constance E. Widenhouse, for defendant-appellant.

STROUD, Judge.

Ladarrius Hatcher ("defendant") appeals from the judgment entered on or about 16 November 2012 after a jury found him guilty of murder in the second degree. For the following reasons, we vacate defendant's conviction for murder in the second degree and remand for entry of judgment and resentencing on involuntary manslaughter.

I. Background

On 10 January 2011, defendant was indicted by a grand jury in Edgecombe County for the murder of Murray Chamberlin by short form indictment. Defendant pled not guilty and proceeded to jury trial. At trial, the State's evidence tended to show the following:

On 30 November 2010, defendant, Mr. Chamberlin, Kalik Davis, and several other friends were at the home owned by Mr. Davis's mother. The group of friends had known each other for years and often spent time together. At the time, Mr. Chamberlin was seventeen years old, Mr. Davis was fifteen, and defendant was eighteen. Mr. Chamberlin had a 9mm pistol with him. Defendant asked if he could see the gun, so Mr. Chamberlin handed it to him. Defendant noticed it was unloaded when he pulled out the ammunition clip. Defendant asked Mr. Chamberlin if he had ammunition for the gun. Mr. Chamberlin responded that he had .380 caliber bullets and pulled out a plastic bag of bullets from his pocket. Defendant and Mr. Chamberlin began discussing whether a 9mm handgun would fire .380 caliber bullets. Defendant asserted that it would fire, while Mr. Chamberlin disagreed. Defendant loaded the gun with five or six .380 bullets and went outside, accompanied by Mr. Davis and Mr. Chamberlin.

Once outside, defendant attempted to fire the gun into the air several times, but the gun would not discharge. As he was trying to fire the gun, two of the bullets fell out. The three then gave up trying to fire the gun and went back inside to Mr. Davis's room. Once back in the room, Mr. Chamberlin sat near the rear of the bed, Mr. Davis sat near the front, and defendant sat on a nearby stool with the gun in his lap. Defendant began playing with the gun again, looking at it and pointing it around, though not aiming it at anyone. Mr. Davis asked defendant to watch where he was aiming the gun. Mr. Davis then left the bedroom to retrieve his cellphone. He overheard Mr. Chamberlin telling defendant to "Get that fucking gun out of my face" in a "low," or "medium" tone of voice.

Shortly thereafter, Mr. Davis heard one gunshot from his bedroom. He did not react immediately and kept trying to call his friends because

he did not think anything had happened. Mr. Davis went back to his room and saw Mr. Chamberlin laying on the bed. He asked defendant what he had done, then ran out of the house.

When Mr. Davis returned to his house, he saw defendant dragging Mr. Chamberlin's body outside. The police later found his body naked, hidden under a pile of leaves behind a nearby abandoned house. They found Mr. Chamberlin's clothes in a trashcan. Mr. Davis was the only witness called by the State who was present when Mr. Chamberlin was shot.

The forensic pathologist who examined Mr. Chamberlin found one fatal bullet hole in Mr. Chamberlin's head. He could not determine the distance from which the bullet had been fired. He also found abrasions and contusions on Mr. Chamberlin's body, but could only testify that the abrasions were consistent with being dragged and that the contusions were consistent with blunt force trauma. The pathologist found no evidence of defensive wounds.

After the State rested, defendant moved to dismiss the first degree murder charge. The trial court denied the motion. Defendant then presented the testimony of several witnesses, including Mr. Davis, and testified on his own behalf.

Defendant testified that he and Mr. Chamberlin were close friends who had known each other for over eight years. He testified that they had no problems with each other. Defendant's story largely matched that of Mr. Davis until the point Mr. Davis left the room. Defendant testified that after Mr. Davis left, he continued "messing with" the gun, trying to figure out why it would not fire. He then cocked the gun and it discharged, hitting Mr. Chamberlin. He testified that when he saw Mr. Chamberlin fall over, bleeding, he began sweating and crying. When Mr. Davis came back and saw Mr. Chamberlin laying on the bed, Mr. Davis asked defendant what he had done. Defendant said it was an accident, and that he made a mistake and shot Mr. Chamberlin.[1] Defendant admitted hiding Mr. Chamberlin's body behind the abandoned house. He explained that after the shooting he was scared of going to jail and panicked. Defendant turned himself in and was arrested the next day.

At the close of all evidence, defendant renewed his motion to dismiss the murder charge. The trial court again denied the motion. The trial court instructed the jury on first degree murder, second degree murder, and

1. Both defendant and Mr. Davis testified that he had said it was an accident.

involuntary manslaughter. The jury returned a verdict of guilty of second degree murder. Defendant was sentenced to 157 months to 198 months imprisonment. Defendant gave oral notice of appeal in open court.

II. Motion to Dismiss

[1] Defendant first argues that the trial court erred in denying his motion to dismiss the charge of murder because there was insufficient evidence of malice. We agree.

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

State v. Teague, ___ N.C. App. ___, ___, 715 S.E.2d 919, 923 (2011), *app. dismissed and disc. rev. denied*, 365 N.C. 547, 742 S.E.2d 177 (2012).

"The defendant's evidence, unless favorable to the State, is not to be taken into consideration, except when it is consistent with the State's evidence, the defendant's evidence may be used to explain or clarify that offered by the State." *State v. Abshire*, 363 N.C. 322, 328, 677 S.E.2d 444, 449 (2009) (citations and quotation marks omitted). "Although the evidence need not point unerringly toward the defendant's guilt so as to exclude all other reasonable hypotheses, it is well established that evidence which is sufficient only to raise a suspicion or conjecture of guilt is insufficient to withstand a motion to dismiss." *State v. Williams*, ___ N.C. App. ___, ___, 741 S.E.2d 9, 22 (2013) (citations, quotation marks, and brackets omitted).

"The unlawful killing of a human being with malice but without premeditation and deliberation is murder in the second degree." *State v. Bedford*, 208 N.C. App. 414, 417, 702 S.E.2d 522, 526-27 (2010) (citation and quotation marks omitted).

> What constitutes malice varies depending upon the facts of each case. Our courts have specifically recognized three kinds of malice:

> One connotes a positive concept of express hatred, ill-will or spite, sometimes called actual, express or particular malice. Another kind of malice arises when an act which is inherently dangerous to human life is done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief. Both these kinds of malice would support a conviction of murder in the second degree. There is, however, a third kind of malice which is defined as nothing more than that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification.

State v. Grice, 131 N.C. App. 48, 53, 505 S.E.2d 166, 169 (1998) (citations and quotation marks omitted), *disc. rev. denied*, 350 N.C. 102, 533 S.E.2d 473 (1999). The State has not argued either at trial or on appeal that the evidence supports either of the first two kinds of malice.[2] The only theory of malice relied on by the State is an intentional killing. Therefore, we must consider whether there was sufficient evidence that defendant intentionally shot and killed Mr. Chamberlin.

Here, the State points us to two pieces of evidence which it claims supports the theory of an intentional shooting: (1) that Mr. Chamberlin said, "Get that fucking gun out of my face" before being shot, and (2) that defendant fled the scene and hid Mr. Chamberlin's body.

As to the first piece of evidence, although we must consider the evidence in the light most favorable to the State, that does not mean we must take pieces of evidence out of context. Before Mr. Chamberlin told defendant to "[g]et that fucking gun out of my face," defendant had been playing with the gun. Defendant and Mr. Chamberlin were debating whether a .380 bullet would fire out of a 9mm pistol. Defendant claimed that it would. Defendant, Mr. Davis, and Mr. Chamberlin went outside to see who was right. Defendant loaded the 9mm pistol with approximately five or six .380 cartridges and tried firing the gun into the air, but it would not fire. As defendant was trying to get it to fire, two of the bullets fell out—apparently ejected as defendant tried operating the slide—leaving approximately three or four bullets in the gun.

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2. "[O]rdinarily an unintentional homicide resulting from the reckless use of firearms in the absence of intent to discharge the weapon, or in the belief that it is not loaded, and under circumstances not evidencing a heart devoid of a sense of social duty, is involuntary manslaughter." *State v. Wilkerson*, 295 N.C. 559, 579, 247 S.E.2d 905, 916 (1978). The State has not pointed us to evidence of a "heart devoid of a sense of social duty" here. *Id.*

Defendant and his friends went back to Mr. Davis' room and defendant continued playing with the loaded gun. He was manipulating the gun without paying attention to where the muzzle was pointing. Mr. Davis warned him, "Watch where you're aiming that gun." Mr. Davis then left the room, which is when he heard Mr. Chamberlin said "Get that fucking gun out of my face" in a "low" or "medium" tone. Shortly thereafter, one shot was fired. The projectile struck Mr. Chamberlin in the head and killed him. Mr. Davis did not testify that he heard a scuffle, an argument, or anything of the sort in the short amount of time between when he left the room and the gunshot. In this context, despite the State's arguments to the contrary, the phrase "[g]et that fucking gun out of my face" does not show that defendant intentionally pointed the gun at Mr. Chamberlin or that he intentionally fired it.

The only other evidence that the State argues shows that defendant intentionally killed Mr. Chamberlin is defendant's flight from the scene, including his decision to strip and hide Mr. Chamberlin's body. After Mr. Chamberlin was shot, defendant dragged his body outside, stripped him of his clothes, and hid the body under a pile of leaves. Defendant then left the scene and did not call an ambulance or the police. After speaking with his mother, however, defendant turned himself in the next morning.

"While the flight of an accused person may be admitted as a circumstance tending to show guilt, it does not create a presumption of guilt, nor is it sufficient standing alone, but it may be considered in connection with other facts in determining whether the combined circumstances amount to an admission." *State v. Gaines*, 260 N.C. 228, 231, 132 S.E.2d 485, 487 (1963) (citation, quotation marks, and parentheses omitted).

Considering defendant's flight in connection with the other facts in evidence and considering the evidence in the light most favorable to the State, we conclude that the State failed to provide sufficient evidence that defendant intentionally shot Mr. Chamberlin. The evidence is—at best—"sufficient only to raise a suspicion or conjecture" of malice. *Williams*, ___ N.C. App. at ___, 741 S.E.2d at 22. There was no evidence of any animosity or fighting between defendant and Mr. Chamberlin. There was no evidence of multiple shots being fired at Mr. Chamberlin. There was no evidence that defendant had any financial or social incentive to kill Mr. Chamberlin. Indeed, all of the State's evidence—and all of defendant's—indicated that defendant and Mr. Chamberlin were close friends and that there was no ill will between them. No one else was in the room when the lethal shot was fired. No one testified that defendant aimed the gun at Mr. Chamberlin and fired. Given the lack of evidence that defendant intentionally fired the shot that killed Mr.

Chamberlin, we hold that the State failed to present sufficient evidence of malice and therefore that the trial court erred in denying defendant's motion to dismiss the charge of murder.

"This error, however, does not require[] that we reverse the trial court's denial of [his] motion to dismiss, vacate the jury verdict[] on [this] charge[], and acquit [him], as . . . defendant contends." *State v. Suggs*, 117 N.C. App. 654, 662, 453 S.E.2d 211, 216 (1995). If the jury necessarily had to find facts establishing a lesser-included offense, and the evidence supports the jury's finding, we may remand for entry of judgment on the lesser offense. *See State v. Jolly*, 297 N.C. 121, 130, 254 S.E.2d 1, 7 (1979) (vacating the judgment of first degree burglary and remanding for entry of judgment on a lesser included offense when there was insufficient evidence of an additional essential element of the greater offense). "As involuntary manslaughter does not contain an essential element not present in the crime[] of murder . . . and the essential element that the killing be unlawful is common to all four degrees of homicide, . . . involuntary manslaughter is a lesser included offense of murder[.]" *State v. Greene*, 314 N.C. 649, 652, 336 S.E.2d 87, 89 (1985). By finding defendant guilty of second degree murder, the jury necessarily found that defendant unlawfully killed Mr. Chamberlin with malice. *See Bedford*, 208 N.C. App. at 417, 702 S.E.2d at 526-27.

Although we have concluded that there was insufficient evidence of malice, there is sufficient evidence of an unlawful killing. *See Wilkerson*, 295 N.C. at 579, 247 S.E.2d at 916. Specifically, there was sufficient evidence to support a finding that defendant was culpably negligent in handling the pistol. See generally, *State v. Hill*, 311 N.C. 465, 471, 319 S.E.2d 163, 167 (1984) ("[I]nvoluntary manslaughter is the unintentional killing of a human being without malice, proximately caused by (1) an unlawful act not amounting to a felony nor naturally dangerous to human life, or (2) a culpably negligent act or omission." (citation and quotation marks omitted)); *Greene*, 314 N.C. at 652, 336 S.E.2d at 89 ("That the killing be unlawful is the essential element that must be proved [for involuntary manslaughter]; showing that the killing was by an unlawful act not amounting to a felony or by culpable conduct is evidence to prove that the killing was unlawful."). Therefore, the jury found the necessary elements of the lesser included offense of involuntary manslaughter and we may remand for entry of judgment on that offense. *See Suggs*, 117 N.C. App. at 662, 453 S.E.2d at 216; *Greene*, 314 N.C. at 652, 336 S.E.2d at 89 ("[T]he essential element that the killing be unlawful is common to all four degrees of homicide[.] [Therefore,] we hold that involuntary manslaughter is a lesser included offense of murder."). Before deciding

whether to remand for entry of judgment on the lesser offense, however, we must determine whether defendant is entitled to a new trial based on his remaining arguments concerning the conduct of the trial.

III. Remaining Arguments

[2] Defendant next argues that the trial court committed plain error by failing to limit the State's cross-examination of defendant and Mr. Davis on their "gang" membership and use of guns, and cross-examining Mr. Davis in a way that insinuated Mr. Davis believed that the shooting could have been intentional. Defendant also argues that the trial court erred by failing to intervene *ex mero motu* in the prosecutor's closing argument when several points of the argument were not based on the evidence.

The standard of review for defendant's evidentiary challenges is plain error, as he failed to object at trial.

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

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

Because defendant did not object during the prosecutor's closing argument,

> our review is limited to whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. Under this standard, only an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken. To establish such an abuse, defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair.

State v. Oakes, 209 N.C. App. 18, 22, 703 S.E.2d 476, 480 (citations and quotation marks omitted), *app. dismissed and disc. rev. denied*, 365 N.C. 197, 709 S.E.2d 918, 920 (2011).

Even assuming that the trial court did err as contended, defendant cannot show prejudice, given that we have reversed his conviction for murder. All of the alleged errors relate to the State's attempts to elicit evidence and argue that defendant intentionally shot Mr. Chamberlin. Despite the State's attempts to imply through its questions and arguments that this shooting was intentional, none of the challenged questions actually produced evidence relevant to intent and the prosecutor's arguments about intent in closing were based only upon those questions and not any facts in evidence. For example, the prosecutor attempted, but failed, to get Mr. Davis to say that the group of friends was a "gang:"

> Q. And you-all all hung around, to use your word, chilled out all the time.
>
> A. Yes.
>
> Q. Everyone of you was a member of something called the Grand Hustle Team, weren't you?
>
> A. Yes.
>
> Q. And the Grand Hustle Team is a gang, isn't it?
>
> A. Not really.
>
> Q. Well, what word do you want to use to describe it?
>
> A. Just friends that hung around each other in the same neighborhood.

The prosecutor continued with an extended line of questioning, still trying to characterize the group as a "gang," without success, and ultimately the trial court sustained a defense objection and ended the line of questioning. Despite the fact that neither this nor other similar lines of questioning of other witnesses elicited any evidence of a "gang" or that the shooting had anything to do with the "Grand Hustle Team," in his closing argument, the prosecutor implied that this act was somehow gang-related by noting the connection to the "Grand Hustle Team" and its fascination with guns. None of the alleged errors would affect a conviction for involuntary manslaughter. We hold that, even assuming the trial court erred, defendant cannot show plain error on the evidentiary issues, nor prejudicial error from the trial court's failure to

intervene *ex mero motu* during the State's closing argument. Therefore, he is not entitled to a new trial.

IV. Conclusion

We hold that the trial court erred in denying defendant's motion to dismiss the charge of second degree murder because the State failed to present sufficient evidence of malice. Therefore, we vacate defendant's conviction for second degree murder. We remand for entry of judgment and resentencing on involuntary manslaughter because there was sufficient evidence to sustain a conviction as to that lesser included offense. Given our decision to vacate the murder conviction, defendant cannot show prejudice from the alleged errors at trial, all of which relate to the State's attempt to show an intentional killing through cross-examination and argue in its closing that the shooting was intentional. As a result, defendant is not entitled to a new trial.

VACATED and REMANDED; NO PREJUDICIAL ERROR.

Judges McGEE and BRYANT concur.

STATE OF NORTH CAROLINA
v.
JEFFREY BRIAN JONES

No. COA13-286

Filed 3 December 2013

1. Notice—satellite-based monitoring—copy of notice not included

Defendant's argument in a satellite-based monitoring (SBM) case that he was not afforded sufficient notice with respect to the SBM proceedings was dismissed where defendant failed to include in the appellate record a copy of the written notice sent to him concerning the SBM hearing.

2. Satellite-Based Monitoring—ex post fact laws—no violation

Defendant's argument that the retroactive application of satellite-based monitoring (SBM) in his case violated constitutional guarantees against ex post facto laws was rejected under *State v. Bowditch*, 364 N.C. 335.

3. Satellite-Based Monitoring—unreasonable search and seizure—no violation

Defendant's argument in a satellite-based monitoring (SBM) case that SBM violated his right to be free from unreasonable search and seizure under our federal and state constitutions was rejected under *State v. Martin*, 735 S.E.2d 238.

Appeal by Defendant from orders entered 12 December 2012 by Judge Marvin P. Pope, Jr., in Buncombe County Superior Court. Heard in the Court of Appeals 28 August 2013.

Attorney General Roy Cooper, by Assistant Attorney General Scott B. Goodson, for the State.

Amanda S. Zimmer, for Defendant.

DILLON, Judge.

Jeffrey Brian Jones (Defendant) appeals from orders requiring him to enroll in satellite based monitoring (SBM) for the remainder of his life. We affirm.

I. Factual & Procedural Background

On 5 August 2004, Defendant pled guilty to two counts of taking indecent liberties with a child and one count of failure to register as a sex offender.[1] Defendant served an active sentence for these offenses and was subsequently released from incarceration on 23 January 2009.

More than three years later, Defendant was notified that he was required to appear for an SBM hearing to determine whether he qualified for SBM monitoring.[2] The matter was heard in Buncombe County Superior Court on 12 December 2012, at which time defense counsel, citing a written motion to dismiss that she had filed six days prior to the hearing, moved to dismiss the proceeding, contending, *inter alia*, (1) that the SBM regulatory regime was enacted after Defendant had committed the offenses for which he was sentenced,[3] and, therefore,

1. We note that Defendant's middle name appears as "Bryan" rather than "Brian" on the plea transcript.

2. As discussed further *infra*, the record does not reveal precisely when Defendant was notified of the SBM hearing.

3. The provisions comprising North Carolina's SBM regime were enacted and became effective in 2006. *State v. Bare*, 197 N.C. App. 461, 463-64, 677 S.E.2d 518, 522 (2009) (citing N.C. Sess. Laws 2006–247, section 15(a)).

retroactive application of the SBM regime to Defendant would violate Defendant's right to be free from *ex post facto* laws; and (2) that, in light of the United States Supreme Court's recent decision in *United States v. Jones*, __ U.S. __, 132 S.Ct. 945 (2012), subjecting Defendant to SBM would violate Defendant's constitutional right to be free from unlawful search and seizure. After hearing arguments from both sides, the trial court denied Defendant's motion to dismiss. The Assistant District Attorney then produced an Administrative Office of the Courts (AOC) form and entered the following findings of fact on the court's behalf:

> 1. The defendant was convicted of a reportable conviction as defined by G.S. 14-208.6(4), but the sentencing court made no determination on whether the defendant should be required to enroll in [SBM] under Article 27A of Chapter 14 of the General Statutes.
>
> 2. The Department of Correction has made an initial determination that the offender falls into at least one of the categories requiring [SBM] under G.S. 14-208.40, and gave notice to the offender of the aplicable [sic] category(ies).
>
> 3. The District Attorney scheduled a hearing in the county named above, which is the county of the defendant's residence, the Department provided notice to the defendant as required by G.S. 14-208.40B, and the hearing was not held sooner than 15 days after the date the Department gave notice.
>
> 4. The defendant . . . falls into at least one of the categories requiring [SBM] monitoring under G.S. 14-208.40 in that . . . the defendant is a recidivist.

Relying on the foregoing findings, the trial court ordered that Defendant enroll in SBM for the remainder of his natural life. From these orders[4], Defendant appeals.

II. Analysis

A. Notice

[1] Defendant's first three arguments on appeal challenge the propriety of the notice he was afforded with respect to the SBM proceedings below. Specifically, Defendant contends (1) that the evidence of record

4. The court entered two identical orders, one for each of Defendant's indecent liberties convictions.

fails to support the trial court's finding that Defendant was afforded notice as required under N.C. Gen. Stat. § 14-208.40B; (2) that the State's failure to provide sufficient notice violated Defendant's right to procedural due process; and (3) that the insufficient notice deprived the trial court of its subject matter jurisdiction to conduct the SBM hearing. We find these arguments unpersuasive.

N.C. Gen. Stat. § 14-208.40B(a) (2011) provides that the Department of Correction (DOC) "shall make an initial determination on whether the offender falls into one of the categories described in G.S. 14-208.40(a)." *Id.* This provision further provides that once this determination has been made

> the district attorney, representing the Department, shall schedule a hearing in superior court for the county in which the offender resides. The Department shall notify the offender of the Department's determination and the date of the scheduled hearing by certified mail sent to the address provided by the offender pursuant to G.S. 14–208.7. The hearing shall be scheduled no sooner than 15 days from the date the notification is mailed.

Id. "Thus, the statute requires notice of two facts: (1) the hearing date and (2) the Department's determination with respect to N.C. Gen. Stat. § 14-208.40(a)." *State v. Stines*, 200 N.C. App. 193, 199, 683 S.E.2d 411, 415 (2009).

Here, Defendant concedes that he had some notice of his SBM hearing, a point that is obvious in light of his appearance at the 12 December 2012 hearing. We note that Defendant was represented by counsel at the SBM hearing and, further, that defense counsel filed a substantive motion to dismiss the SBM proceedings six days prior to the hearing. We also note that Defendant did not challenge the sufficiency of the State's notice at the SBM hearing, nor does he now contend that he was in any way prejudiced by the State's allegedly defective notice. Regardless, we find it dispositive that Defendant has failed to include in the appellate record a copy of the written notice sent to him concerning the SBM hearing. This Court's review of Defendant's arguments is limited to what appears in the record. *See* N.C. R. App. P. 9(a) (2013) (providing that "[i]n appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal, the verbatim transcript of proceedings, if one is designated, and any other items filed pursuant to this Rule 9"). "It is well established in this jurisdiction that it is the duty of the appellant to see that the record on appeal is properly made up

and transmitted." *State v. Dellinger*, 308 N.C. 288, 294, 302 S.E.2d 194, 197 (1983) (citing *State v. Stubbs*, 265 N.C. 420, 144 S.E.2d 262 (1965)). Without reviewing the written notice sent to Defendant, we are unable to consider the merits of Defendant's arguments that he was afforded insufficient notice of the SBM hearing; that the evidence does not support the trial court's finding that notice was given; or that the notice failed to comport with due process. These arguments are dismissed.[5]

B. SBM as an Ex Post Facto Law

[2] Defendant next contends that the retroactive application of SBM in his case would violate guarantees against ex post facto laws contained in both the federal and state constitutions. However, our Supreme Court has specifically held that "subjecting defendants to the SBM program does not violate constitutional prohibitions against ex post facto laws." *State v. Bowditch*, 364 N.C. 335, 336, 700 S.E.2d 1, 2 (2010). This argument is overruled.

C. SBM as an Unreasonable Search and Seizure

[3] Defendant further contends that subjecting him to SBM violates his right to be free from unreasonable search and seizure under our federal and state constitutions. This Court recently addressed and rejected this precise argument in *State v. Martin*, __ N.C. App. __, 735 S.E.2d 238 (2012). Accordingly, this argument is overruled.

We note Defendant's reliance on the United States Supreme Court's decision in *Jones*, __ U.S. __, 132 S.Ct. 945, where the Court held "that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search' " within the meaning of the Fourth Amendment. *Id.* at __, 132 S.Ct. at 949 (footnote omitted). Defendant essentially argues that if affixing a GPS to an individual's vehicle constitutes a search of the individual, then the arguably more intrusive act of affixing an ankle bracelet to an individual must constitute a search of the individual as well. We disagree. The context presented in the instant case – which involves a civil SBM proceeding – is readily distinguishable from that presented in *Jones*, where the Court considered the propriety of a search in the context of a motion to suppress evidence. We conclude, therefore, that the specific holding in *Jones* does not control in the case *sub judice*.

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5. We note that even if Defendant had included the SBM hearing notice in the record on appeal, his due process argument would still fail, as he did not raise this constitutional issue below. *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001) ("Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal.").

Furthermore, we recognize that in *State v. Martin*, __ N.C. App. __, 735 S.E.2d 238 (2012), a case decided subsequent to *Jones*, this Court addressed and rejected the defendant's argument that SBM violated his Fourth Amendment rights. We held the following:

> *Bowditch* considered the defendants' argument that SBM was punitive in effect, in part because SBM requires certain infringements upon the offender's privacy as required for DCC's maintenance of the SBM equipment, including visits to his home. Thus, our Supreme Court considered the fact that offenders subject to SBM are required to submit to visits by DCC personnel and determined that this type of visit is not a search prohibited by the Fourth Amendment, exactly the opposite of what defendant herein claims. As the Fourth Amendment was one of the factors which the Supreme Court considered to support its conclusion of the punitive effect of SBM, this language would not be dicta.
>
> But even if we were to assume arguendo that the quoted language from *Bowditch* is dicta, we find the Supreme Court's reasoning in that case highly persuasive and would apply it here. Accordingly, we affirm the order of the trial court ordering defendant to enroll in SBM.

Id. at __, 735 S.E.2d at 239. Although it does not appear that the *Martin* court addressed *Jones* in reaching its holding, *supra*, we do not believe that *Jones* is controlling under the circumstances presented here. Accordingly, we are bound by our decision in *Martin*, *see In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989), and Defendant's argument is overruled.

III. Conclusion

In light of the foregoing, we affirm the trial court's 12 December 2012 orders.

AFFIRMED.

Judges BRYANT and STEPHENS concur.

STATE v. POWELL

[231 N.C. App. 129 (2013)]

STATE OF NORTH CAROLINA
v.
TROY LAMONT POWELL

No. COA13-593

Filed 3 December 2013

1. Appeal and Error—appealability—prior record level points—sentencing duration error

The State's motion to dismiss defendant's appeal on the ground that N.C.G.S. § 15A-1444(a2) does not authorize an appeal of right to correct a court's determination of a defendant's prior record level points was denied. N.C.G.S. § 15A-1444(a2)(3) allows defendant an appeal as a matter of right when the sentence contains a term of imprisonment that is for a duration not authorized by N.C.G.S. § 15A-1340.17 or N.C.G.S. § 15A-1340.23 for the defendant's class of offense and prior record or conviction level.

2. Sentencing—malicious conduct by prisoner—violation of statutory mandate

Defendant's sentence for malicious conduct by a prisoner was vacated and remanded for entry of a corrected sentence. The trial court's sentence of a maximum term of 30 months imprisonment for a 25 month minimum term was violative of the statutory mandate under the applicable sentencing guidelines of N.C.G.S. § 15A-1340.17(d) for a Class F felony committed on 9 June 2012, pursuant to N.C.G.S. § 15A-1447(f).

3. Sentencing—clerical error—prior record level points

A malicious conduct by a prisoner case was remanded to the trial court to amend the judgment form to reflect defendant's correct prior record level point total.

Appeal by defendant from judgment entered 8 January 2013 by Judge Milton F. Fitch, Jr. in Hertford County Superior Court. Heard in the Court of Appeals 18 November 2013.

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

Michelle FormyDuval Lynch, for defendant-appellant.

MARTIN, Chief Judge.

Defendant Troy Lamont Powell appeals from a judgment entered pursuant to his guilty plea for one count of malicious conduct by a prisoner. For the reasons stated herein, we vacate defendant's sentence and remand for entry of a corrected sentence consistent with this opinion.

On 7 January 2013, defendant was indicted for malicious conduct by a prisoner, a Class F felony, which was alleged to have been committed on 9 June 2012. Defendant pled guilty to the charge and stipulated to being a Prior Record Level IV offender. The prior record level stipulation is consistent with the entries on the prior record level worksheet included in the record, which indicates that defendant had a total of twelve prior record level points; two points for one prior Class H or I felony conviction, nine points for nine prior Class A1 or 1 misdemeanor convictions, and one point because "all of the elements of the present offense [we]re included in any prior offense."

The trial court initially sentenced defendant to a term of 25 to 39 months imprisonment based on defendant's prior record level and his conviction for a Class F felony. However, when defendant returned to court to give his oral notice of appeal, the court purported to correct defendant's sentence as follows:

> THE COURT: Madam Clerk, the judgment is not correct, unless I'm looking at the wrong chart. I can't give him 39 months. I can give him 25, which is at the high end of the presumptive for an F. He's a Record Level IV. The maximum I can give him under the law that corresponds with 25—you actually have the printed chart. . . .
>
> [ADA]: Yes, sir, Judge.
>
> THE COURT: The date of offense is on or after December 1st, 2011; is that correct? The date of offense is 6/9/12?
>
> [ADA]: Yes, sir, Judge. . . .
>
> THE COURT: Just tell me if I'm accurate. Is the highest [maximum] 30?
>
> [ADA]: For an F on the 25, 25 takes you out to 30, Judge.
>
> THE COURT: Then the Court on its own motion will correct the judgment entered on 1/8/2013. . . .

> After examining the judgment and commitment the Court realizes that the Court gave 39 months. The 39 months would correspond to 32 months. If the Court gave, 39 months, the Court was in error. So the Court, on its own motion, corrects the judgment to comport with the statute. Give the defendant 25 months minimum, 30 months maximum in the North Carolina Department of Corrections.

The court then amended its written judgment to reflect a sentence of 25 to 30 months imprisonment. Defendant appealed.

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[1] As a preliminary matter, we note that the State filed a motion to dismiss defendant's appeal on the ground that the statute under which defendant purports to take his appeal—N.C.G.S. § 15A-1444(a2)—does not authorize an appeal of right to correct a court's determination of a defendant's prior record level *points*, when such a correction does not affect the court's finding of that defendant's prior record *level*, which comprises the entirety of defendant's sole issue on appeal. *See* N.C. Gen. Stat. § 15A-1444(a2)(1) (2011) ("A defendant who has entered a plea of guilty or no contest to a felony or misdemeanor in superior court is entitled to appeal as a matter of right the issue of whether the sentence imposed . . . [r]esults from an incorrect finding of the defendant's prior record *level* under G.S. 15A-1340.14 or the defendant's prior conviction *level* under G.S. 15A-1340.21. . . ." (emphases added)). While we agree that defendant's issue on appeal, standing alone, does not entitle defendant to an appeal as a matter of right within the express language of N.C.G.S. § 15A-1444(a2)(1), we have identified a sentencing error that appears on the face of the record that caused defendant to be sentenced to a term of imprisonment that is for a duration not authorized by the applicable version of N.C.G.S. § 15A-1340.17(d). Thus, because N.C.G.S. § 15A-1444(a2)(3) allows a defendant an appeal as a matter of right when his or her sentence "[c]ontains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level," N.C. Gen. Stat. § 15A-1444(a2)(3), we deny the State's motion to dismiss.

[2] "The criminal judgment entered against a person in either district or superior court shall be consistent with the provisions of Article 81B of [Chapter 15A of the North Carolina General Statutes] and contain a

sentence disposition consistent with that Article . . . ." N.C. Gen. Stat. § 15A-1331 (2011). Pursuant to N.C.G.S. § 15A-1340.17(d), after a trial court determines the minimum duration of a defendant's sentence, in order to calculate the maximum sentence for a Class F through Class I felony that is not otherwise provided by statute for a specific crime, the court should select, "for each minimum term of imprisonment in the chart in subsection (c) of this section, expressed in months, the corresponding maximum term of imprisonment, also expressed in months, is as specified in the table [in subsection (d)]," in which "[t]he first figure in each cell in the table is the minimum term and the second is the maximum term." N.C. Gen. Stat. § 15A-1340.17(d) (2011). Moreover, "[t]rial courts are required to enter criminal judgments in compliance with the sentencing provisions in effect at the time of the offense." *State v. Whitehead*, 365 N.C. 444, 447, 722 S.E.2d 492, 495 (2012).

In the present case, as evidenced by his guilty plea, defendant committed the offense of malicious conduct by a prisoner on 9 June 2012. Therefore, in order to determine defendant's maximum sentence for this Class F felony committed on 9 June 2012, the trial court should have used the version of the sentencing grid codified in N.C.G.S. § 15A-1340.17(d) that became effective on 1 December 2011 and "applie[d] to offenses committed on or after that date" as a result of the amendments promulgated under the Justice Reinvestment Act of 2011. 2011 N.C. Sess. Laws 758, 762, 765, ch. 192, § 2(e), (j).

Here, the trial court first sentenced defendant to a minimum term of 25 months imprisonment and a maximum term of 39 months imprisonment, which sentence was in compliance with the post Justice Reinvestment Act amendments to N.C.G.S. § 15A-1340.17(d) for offenses committed on or after 1 December 2011. *See id.* Then, at a subsequent hearing, on its own motion, the court sought to "correct" this sentence by directing defendant to serve a maximum term of 30 months imprisonment for the same minimum presumptive-range term of 25 months, because, as the colloquy excerpted above indicates, the trial court was convinced that it was "looking at the wrong chart." However, when the court "corrected" its sentence and changed defendant's maximum term to 30 months imprisonment, the court actually sentenced defendant to the term that was correct for offenses committed *before* the amendments of the Justice Reinvestment Act of 2011 took effect. *See* N.C. Gen. Stat. § 15A-1340.17(d) (2009). Because the trial court's sentence of a maximum term of 30 months imprisonment for a 25 month minimum term is violative of the statutory mandate under the applicable sentencing guidelines of N.C.G.S. § 15A-1340.17(d) for a Class F felony committed on 9 June

2012, pursuant to N.C.G.S. § 15A-1447(f), we vacate the trial court's sentence and remand this matter to the trial court with instructions to enter its original maximum sentence of 39 months imprisonment. *See* N.C. Gen. Stat. § 15A-1447(f) (2011) ("If the appellate court finds that there is an error with regard to the sentence which may be corrected without returning the case to the trial division for that purpose, it may direct the entry of the appropriate sentence."). Moreover, although we recognize that our order directing the trial court to impose a 39 month maximum sentence seems, itself, to instruct the court to violate the statutory mandate prohibiting a trial court from imposing a more severe sentence than the sentence originally imposed, *see* N.C. Gen. Stat. § 15A-1335 (2011) ("When a conviction or sentence imposed in superior court has been set aside on direct review or collateral attack, the court may not impose a new sentence for the same offense, or for a different offense based on the same conduct, which is more severe than the prior sentence less the portion of the prior sentence previously served."), our Court has recognized that, "where the trial court is required by statute to impose a particular sentence (on resentencing) G.S. § 15A-1335 does not apply to prevent the imposition of a more severe sentence." *State v. Kirkpatrick*, 89 N.C. App. 353, 355, 365 S.E.2d 640, 641 (1988).

[3] Finally, defendant contends the trial court erred by determining that he had twelve prior record level points. While defendant concedes that the trial court correctly gave him two points for one prior Class H or I felony conviction and nine points for nine prior Class A1 or 1 misdemeanor convictions, defendant asserts that the court should have determined that he had only eleven prior record level points because defendant had no prior convictions for malicious conduct by a prisoner and had no prior convictions that had all of the elements of this offense, which was the basis for the additional prior record level point in the court's calculation in accordance with N.C.G.S. § 15A-1340.14(b)(6).

One of the five essential elements of malicious conduct by a prisoner is that "the defendant threw, emitted, or caused to be used as a projectile a bodily fluid or excrement at the victim." *State v. Robertson*, 161 N.C. App. 288, 292, 587 S.E.2d 902, 905 (2003). Because the record does not reflect that any of defendant's prior convictions also included this element, the trial court erred by assessing an additional prior record level point to defendant's prior record level point total on this basis. However, since, as defendant concedes, subtracting this point from defendant's prior record level point total of twelve does not alter the court's determination that defendant is still a Prior Record Level IV offender, *see* N.C. Gen. Stat. § 15A-1340.14(c)(4) (2011) (providing that a Prior Record

Level IV offender has "[a]t least 10, but not more than 13 points"), we conclude that such error is harmless. *See*, *e.g.*, *State v. Lowe*, 154 N.C. App. 607, 610–11, 572 S.E.2d 850, 853–54 (2002). Nonetheless, we agree with defendant that the trial court also erroneously recorded his prior record level point total on the judgment form as "17" points, which *would* cause defendant to be a higher prior record level offender. As the State concedes, this error appears to be a clerical one, and "[w]hen, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record 'speak the truth.' " *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696–97 (2008) (quoting *State v. Linemann*, 135 N.C. App. 734, 738, 522 S.E.2d 781, 784 (1999)). Accordingly, inasmuch as we remand this matter for entry of a corrected sentence, we further instruct the trial court to amend the judgment form to reflect defendant's correct prior record level point total.

Sentence vacated; remanded for entry of corrected sentence and for correction of clerical error on the judgment.

Judges HUNTER, JR. and DILLON concur.

STATE OF NORTH CAROLINA
v.
ROBERT KENNETH STEWART

No. COA13-283

Filed 3 December 2013

1. Evidence—homicide—testimony—relevant—state of mind

The trial court did not commit plain error in a multiple homicide case by allowing certain testimony into evidence where the challenged testimony was relevant to show defendant's advanced planning and state of mind. Furthermore, assuming *arguendo* the admission of the testimony was erroneous, defendant failed to show that the admission of the testimony had a probable impact on the jury's finding him guilty.

2. Evidence—homicide—photographs—relevant—illustrative

The trial court did err in a multiple homicide case by allowing crime scene and autopsy photographs of the victim's bodies into evidence over his objection. The photographs were relevant as they

depicted the crime scene and the victims' injuries and all the photographs were introduced to illustrate witness testimony concerning either the crime scene as it existed immediately following the shootings, each victim's location in the nursing home, or the specific injuries sustained by the victims.

3. Assault—with deadly weapon with intent to kill police officer—sufficient evidence

The trial court did not err by denying defendant's motion dismiss the charge of assault with a deadly weapon with intent to kill a police officer. There was sufficient evidence of each element of the offense, including defendant's intent to kill the officer.

Appeal by defendant from judgments entered 3 September 2011 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 28 August 2013.

Attorney General Roy Cooper, by Assistant Attorney General Amy Kunstling Irene, for the State.

Haral E. Carlin, for defendant appellant.

McCULLOUGH, Judge.

Robert Kenneth Stewart ("defendant") appeals from his convictions for second-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, discharging a weapon into occupied property, assault with a deadly weapon with intent to kill, assault with a firearm on a law enforcement officer, and assault by pointing a gun. For the following reasons, we find no error.

I. Background

On the morning of 29 March 2009, approximately two weeks after defendant's wife left him, defendant went to Pine Lake Health and Rehabilitation in Carthage, North Carolina, armed with a 12-gauge shotgun and several other firearms. Defendant's estranged wife typically worked as a certified nurse's assistant on the 200 hallway of the nursing home; however, she was working in the locked Alzheimer's unit on 29 March 2009.

Shortly before 10:00 A.M., before entering the nursing home, defendant fired the long-barreled weapon at an occupied Ford truck in the parking lot three times, striking the occupant once in the left shoulder.

Thereafter, defendant entered the nursing home brandishing the shotgun. Defendant walked through the nursing home firing the shotgun at residents and staff. Seven residents and one nurse were killed.

Officer Justin Garner of the Carthage Police Department was the first officer on the scene. Officer Garner encountered defendant near the intersection of the 300 and 400 hallways while defendant was reloading the shotgun. Officer Garner instructed the defendant to drop the weapon three times, but defendant did not comply. Defendant then turned towards Officer Garner and lowered the shotgun in Officer Garner's direction. At approximately the same time, defendant and Officer Garner each fired one shot at each other. Officer Garner testified that he felt something strike his left leg and quickly stepped into a nearby room for cover. Officer Garner then reentered the hallway and saw defendant lying face down on the floor with the shotgun nearby. Officer Garner approached and secured defendant. Defendant had been shot in his shoulder.

Besides the shotgun, a loaded .38 caliber revolver and a loaded .22 caliber handgun were recovered from holsters on defendant's belt. A .22 caliber rifle was later recovered from the top of a Jeep in the nursing home parking lot. Ammunition for the firearms was recovered from defendant's pockets and a green military style satchel from around defendant's neck.

Defendant was indicted by a Moore County Grand Jury on 13 April 2009 of eight counts of first-degree murder, two counts of attempted first-degree murder, two counts of assault with a deadly weapon with intent to kill inflicting serious injury, one count of discharging a firearm into occupied property, one count of assault with a firearm on a law enforcement officer, and two counts of assault by pointing a gun. Shortly thereafter, the State filed notice that it would proceed capitally.

On 9 November 2010, the trial court ordered the venue of the proceedings be transferred to Stanly County for the limited purpose of jury selection. Defendant's case then came on for trial on 11 July 2011 in Stanly County Superior Court, the Honorable James M. Webb, Judge presiding. Following jury selection, the case was moved back to Moore County Superior Court where the jury began to hear evidence on 1 August 2011.

After weeks of evidence, closing arguments were heard on 1 September 2011. The case was then given to the jury on 2 September 2011. On 3 September 2011, the jury returned verdicts finding defendant guilty on eight counts of second-degree murder, one count of assault

with a deadly weapon with intent to kill inflicting serious injury, one count of discharging a weapon into occupied property, one count of assault with a deadly weapon with intent to kill, one count of assault with a firearm on a law enforcement officer, and two counts of assault by pointing a gun. The jury found defendant not guilty on the two counts of attempted first-degree murder. Separate judgments were entered for each of defendant's convictions and defendant was sentenced to fourteen consecutive terms totaling 1,699 months to 2,149 months imprisonment, plus 150 days. Defendant gave notice of appeal in open court.

II. Discussion

Testimony at Trial

[1] In defendant's first four issues on appeal, defendant contends that the trial court plainly erred in allowing certain testimony into evidence. Specifically, defendant challenges the relevancy of testimony from various officers concerning firearms and ammunition found in defendant's residence, ammunition found in defendant's truck, instructions for claymore mines found on defendant's kitchen table, and unfruitful searches of both defendant's and defendant's estranged wife's residences for claymore mines. Defendant did not object to the testimony at trial, but now asserts the admission of the testimony into evidence was plain error. We address defendant's arguments together.

"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 . . . ." N.C.R. App. P. 10(a)(1) (2013). However,

> [i]n criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C.R. App. P. 10(a)(4); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008).

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice that, after examination of the entire record, the error had a probable impact on the jury's

> finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings[.]

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

In asserting error, defendant argues the testimony from officers concerning their search for weapons and their recovery of firearms, ammunition, and instructions for claymore mines from defendant's property following the shooting was irrelevant because "[t]he evidence presented at trial was undisputed that all of the victims were killed with the shotgun[]" recovered at the scene. Moreover, defendant argues the only purpose in introducing the testimony was to portray him "as an extremely dangerous person who possessed dangerous weapons." As a result, defendant contends the testimony should have been excluded pursuant to N.C. Gen. Stat. § 8C-1, Rule 402.[1] Defendant cites *State v. Patterson*, 59 N.C. App. 650, 297 S.E.2d 628 (1982), and *State v. Samuel*, 203 N.C. App. 610, 693 S.E.2d 662 (2010), in support of his argument.

In *Patterson* the State introduced evidence of a sawed-off shotgun found in the defendant's car in addition to a pistol identified by the victim as the weapon used in the armed robbery for which the defendant was on trial. 59 N.C. App. at 652, 297 S.E.2d at 630. On appeal of the defendant's conviction, this Court granted the defendant a new trial holding "[t]he shotgun was not connected to the robbery and it was clearly not relevant to any issues in the case[]" and "there [was] a reasonable possibility that the erroneous admission of the shotgun evidence contributed to the defendant's conviction, particularly in light of the conflicting evidence regarding the identity of the defendant as the man who robbed [the victim]." *Id.* at 653-54, 297 S.E.2d at 630. Similarly, in *Samuel* the State introduced evidence of two guns found in the defendant's home in order to link the defendant to the armed robbery for which he was on trial. 203 N.C. App. at 619-20, 693 S.E.2d at 668-69. On appeal, this Court held "the evidence about the guns was wholly irrelevant and, thus, inadmissible[]" because "there was not a scintilla of evidence

1. Defendant also briefly alludes to N.C. Gen. Stat. § 8C-1, Rule 403 in his argument. This Court, however, has opted not to review discretionary rulings under Rule 403 for plain error. *See State v. Cunningham*, 188 N.C. App. 832, 837, 656 S.E.2d 697, 700 (2008) ("The North Carolina Supreme Court has specifically refused to apply the plain error standard of review 'to issues which fall within the realm of the trial court's discretion[.]'" (quoting *State v. Steen*, 352 N.C. 227, 256, 536 S.E.2d 1, 18 (2000))).

linking either of the guns to the crimes charged." *Id.* at 621, 693 S.E.2d at 669. Additionally, "[g]iven the weakness in the State's evidence that [the d]efendant was the assailant and the substantial evidence tending to show that [the d]efendant was not the assailant," this Court concluded "that the admission of the evidence of the guns, and the prosecutor's reliance upon the revolver to link [the d]efendant to the crimes charged, had a probable impact on the jury's finding that the defendant was guilty[]" and therefore amounted to plain error. *Id.* at 624, 693 S.E.2d at 671 (citation and quotation marks omitted).

Although we acknowledge the holdings in *Patterson* and *Samuel*, we find the present case distinguishable.

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2011). Pursuant to N.C. Gen. Stat. § 8C-1, Rule 402, "[a]ll relevant evidence is admissible . . . . Evidence which is not relevant is not admissible." "Although the trial court's rulings on relevancy technically are not discretionary . . . , such rulings are given great deference on appeal." *Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (citation and quotation marks omitted).

As the State points out, in the present case defendant was indicted on eight counts of first-degree murder and two counts of attempted first-degree murder. Although defendant was only convicted of second-degree murder, the State attempted to prove the first-degree offenses and therefore had to prove premeditation and deliberation. *See State v. Wilds*, 133 N.C. App. 195, 199, 515 S.E.2d 466, 471 (1999) (" 'First-degree murder is the unlawful killing of a human being with malice, premeditation and deliberation.' " (quoting *State v. Misenheimer*, 304 N.C. 108, 113, 282 S.E.2d 791, 795 (1981))). Additionally, instead of denying he was the shooter, defendant asserted insanity and automatism defenses. Accordingly, the State attempted to rebut those defenses with evidence of defendant's mental state.

The State now argues the challenged testimony was relevant to show defendant's advanced planning and state of mind. We agree. The facts that defendant had multiple firearms and various types of ammunition at his disposal were relevant to show that defendant made choices about which firearms to arm himself with and selected the correct ammunition for those firearms prior to the shootings. Additionally, the facts that officers searched for claymore mines and found instructions for claymore mines on defendant's kitchen table were relevant to show that defendant

had likely removed the instructions from the green satchel found around defendant's neck in order to fill it with ammunition to be used in the shootings. Based on the tendency of the evidence to show defendant's advanced planning and mental state prior to going to the nursing home, we hold the challenged testimony was relevant.

Moreover, assuming arguendo the admission of the testimony was error, defendant has not shown that the admission of the testimony amounted to plain error; namely, that "the error had a probable impact on the jury's finding that [he] was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. Although defendant argues the testimony portrayed him "as an extremely dangerous person who possessed dangerous weapons[,]", defendant has not argued how the alleged prejudicial testimony impacted the jury's finding of guilt in light of the overwhelming evidence presented by the State.[2]

Photographs

[2] In defendant's next issue on appeal, defendant contends the trial court erred by allowing crime scene and autopsy photographs of the victim's bodies into evidence over his objection. Specifically, defendant argues the photographs should have been excluded pursuant to N.C. Gen. Stat. § 8C-1, Rules 401, 402, and 403.

The photographs challenged on appeal were introduced at trial as follows: The State first sought to introduce forty-three crime scene photographs as the State's exhibits 123 through 165 to illustrate testimony of a crime scene investigator who processed the scene. Defendant objected to twelve of the photographs depicting the victims' bodies at the scene on the basis that the photographs were unduly inflammatory or prejudicial under N.C. Gen. Stat. § 8C-1, Rule 403. After reviewing the photographs, the trial court allowed all but one of the crime scene photographs into evidence; the trial court found the one excluded photograph duplicative. The State later sought to introduce the State's exhibits 320 and 322-327. Each of these exhibits consisted of an SBI prepared diagram illustrating the location where each victim was found within the nursing home with an enlarged copy of a previously admitted crime scene photograph. Defendant objected to each exhibit on the basis that the seven attached photographs were duplicative and unnecessary. After reviewing each exhibit and comparing the size of the enlarged photographs

2. We additionally note that the officer's testimony regarding the search of defendant's and defendant's estranged wife's residences for claymore mines was not prejudicial because the officer indicated that no such devices were found.

to the originals, the trial court allowed the exhibits into evidence for illustrative purposes. Lastly, the State introduced photographs from the victims' autopsies to illustrate testimony from medical examiners concerning the victims' injuries. Defendant specifically objected to the State's exhibit 383, a photograph of a victim's heart, pursuant to N.C. Gen. Stat. § 8C-1, Rule 403. The trial court, however, allowed the autopsy photographs into evidence.

Now on appeal, defendant first contends the photographs of the victims' bodies had no probative value because there was no issue as to the identity of the victims, the cause of the victims' deaths, the manner of the shootings, or defendant's role as the shooter. Consequently, defendant asserts the photographs served only to inflame the passions of the jury.

Addressing the issue of relevance under N.C. Gen. Stat. § 8C-1, Rules 401 and 402, we note that "[b]ecause defendant objected to the admission of [the] photograph[s] solely on the basis of [N.C. Gen. Stat. § 8C-1, Rule 403], he has waived appellate review on the issue of the relevance of the photograph[s]." *State v. Lloyd*, 354 N.C. 76, 97, 552 S.E.2d 596, 613 (2001) (citing N.C. R. App. P. 10(b)(1)). Nevertheless, had defendant properly preserved the issue of relevance for appeal, both the crime scene and autopsy photographs of the victims' bodies were relevant and properly admitted for illustrative purposes. As stated by our Supreme Court, "[p]hotographs are usually competent to be used by a witness to explain or illustrate anything that it is competent for him to describe in words. The fact that the photograph may be gory, gruesome, revolting or horrible, does not prevent its use by a witness to illustrate his testimony." *State v. Cutshall*, 278 N.C. 334, 347, 180 S.E.2d 745, 753 (1971).

> Thus, photographs of the victim's body may be used to illustrate testimony as to the cause of death[.] Photographs may also be introduced in a murder trial to illustrate testimony regarding the manner of killing so as to prove circumstantially the elements of murder in the first degree, and for this reason such evidence is not precluded by a defendant's stipulation as to the cause of death.

State v. Hennis, 323 N.C. 279, 284, 372 S.E.2d 523, 526 (1988) (citations omitted).

First, the photographs were relevant as they depicted the crime scene and the victims' injuries. Moreover, as discussed above, the State attempted to prove first-degree murder and attempted first-degree murder. Consequently, the photographs of the victims' bodies were not

precluded by the fact that defendant acknowledged that he shot and killed the victims; the photographs remained relevant "to illustrate testimony regarding the manner of [the shootings] so as to prove circumstantially the elements of murder [and attempted murder] in the first degree[.]" *Id.*

Having decided the photographs were relevant, the issue remains whether the photographs should have been excluded pursuant N.C. Gen. Stat. § 8C-1, Rule 403. N.C. Gen. Stat. § 8C-1, Rule 403 provides, "[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, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." " 'Unfair prejudice' means an undue tendency to suggest a decision on an improper basis, usually an emotional one." *Hennis*, 323 N.C. at 283, 372 S.E.2d at 526.

> Whether the use of photographic evidence is more probative than prejudicial and what constitutes an excessive number of photographs in the light of the illustrative value of each . . . lies within the discretion of the trial court. 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.

Id. at 285, 372 S.E.2d at 527 (citations omitted).

Defendant contends the trial court abused its discretion because the photographs of the victims' bodies had little probative value, were unnecessarily repetitive and cumulative, and served only to inflame the passions of the jury. Moreover, defendant asserts he was prejudiced by the manner in which the photographs were presented. Defendant cites our Supreme Court's decision in *State v. Hennis*, 323 N.C. 279, 372 S.E.2d 523 (1988), in support of his arguments.

In *Hennis*, the defendant was convicted on three counts of first-degree murder and sentenced to death. On appeal, our Supreme Court addressed whether the trial court erred in admitting thirty-five photographs, nine photographs depicting the victims' bodies at the crime scene and twenty-six autopsy photographs, into evidence over the defendant's objection. *Id.* at 282-83, 372 S.E.2d at 525-26. The challenged photographs were first published to the jury by projecting them onto a large screen just above the defendant's head during witness testimony. *Id.* at 282, 372 S.E.2d at 525. Thereafter, just before the State rested its

case, the photographs were republished to the jury one at a time over the course of an hour, unaccompanied by additional testimony. *Id.* at 283, 572 S.E.2d at 526.

While reviewing whether the trial court abused its discretion by allowing the photographs into evidence, the Court explained "that when the use of photographs that have inflammatory potential is excessive or repetitious, the probative value of such evidence is eclipsed by its tendency to prejudice the jury." *Id.* at 284, 372 S.E.2d at 526. Yet,

> [t]he test for excess is not formulaic: there is no bright line indicating at what point the number of crime scene or autopsy photographs becomes too great. The trial court's task is rather to examine both the content and the manner in which photographic evidence is used and to scrutinize the totality of circumstances composing that presentation. What a photograph depicts, its level of detail and scale, whether it is color or black and white, a slide or a print, where and how it is projected or presented, the scope and clarity of the testimony it accompanies-these are all factors the trial court must examine in determining the illustrative value of photographic evidence and in weighing its use by the state against its tendency to prejudice the jury.

Id. at 285, 372 S.E.2d at 527.

Applying the above law, the Court in *Hennis* noted that many of the autopsy photographs were repetitive, "added nothing to the [S]tate's case as already delineated in the crime scene [photographs] and their accompanying testimony[,]" and "had potential only for inflaming the jurors." *Id.* at 286, 372 S.E.2d at 527-28. The Court further noted that "the prejudicial effect of the photographs . . . was compounded by the manner in which the photographs were presented." *Id.* at 286, 372 S.E.2d at 528. As a result, the Court held the trial court erred in admitting the photographs. Moreover, the Court found the error prejudicial and granted the defendant a new trial due to the fact "defendant was linked to the crime through circumstantial evidence and through direct evidence upon which the witnesses' own remarks cast considerable doubt." *Id.* at 287, 372 S.E.2d at 528. The Court specifically remarked, "[o]verwhelming evidence of [the defendant's] guilt was not presented." *Id.*

Defendant argues for the same result in the present case. As we have previously stated, " '[t]his Court has rarely held the use of photographic evidence to be unfairly prejudicial, and the case presently before us

is distinguishable from the few cases in which we have so held.' " *State v. Bare*, 194 N.C. App. 359, 364, 669 S.E.2d 882, 886 (2008) (quoting *State v. Robinson*, 327 N.C. 346, 357, 395 S.E.2d 402, 409 (1990)).

Applying the law as provided in *Hennis*, we hold the trial court did not abuse its discretion in admitting the photographs in the present case where all the photographs were introduced to illustrate witness testimony concerning either the crime scene as it existed immediately following the shootings, each victim's location in the nursing home, or the specific injuries sustained by the victims. Moreover, we do not find the number of photographs or manner of presentation extraordinary given the number of victims and the size of the enlarged photographs.[3] Lastly, we find it pertinent that the jury was properly instructed to consider the photographs solely for illustrative purposes. As a result, we cannot say that the trial court's decision to admit the photographs was so arbitrary that it could not have been the result of a reasoned decision.

Nevertheless, assuming arguendo the trial court abused its discretion in admitting the photographs, the error was harmless considering the overwhelming evidence of defendant's guilt.

Motion to Dismiss

[3] In defendant's final issue on appeal, defendant contends the trial court erred in denying his motion to dismiss the charge of assault with a deadly weapon with intent to kill Officer Garner.[4] As a result of the purported error, defendant contends the case must be remanded for a new trial.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). " 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence

3. The largest photograph attached to an SBI diagram was a fourteen and a half by nineteen inch photograph.

4. Defendant was originally indicted for assault of Officer Garner with a deadly weapon with intent to kill inflicting serious injury. However, considering the nature of Officer Garner's injury, the trial court only allowed the jury to consider the lesser offense of assault with a deadly weapon with intent to kill.

is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

> Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, *taken singly or in combination*, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.

Fritsch, 351 N.C. at 379, 526 S.E.2d at 455 (citation and quotation marks omitted).

"[T]he elements of assault with a deadly weapon with intent to kill are: '(1) an assault; (2) with a deadly weapon; (3) with the intent to kill[.]' " *State v. Garris*, 191 N.C. App. 276, 287, 663 S.E.2d 340, 349 (2008) (quoting *State v. Coria*, 131 N.C. App. 449, 456, 508 S.E.2d 1, 5 (1998)); *see also* N.C. Gen. Stat. § 14–32(c) (2011).

On appeal, defendant only challenges the sufficiency of the evidence with respect to the third element of the offense, intent to kill. Specifically, defendant contends the evidence shows he never intended to kill Officer Garner, but instead intended for Officer Garner to kill him. In support of his contention, defendant points to evidence tending to show he was depressed and felt his end was near, the deceased were all shot in their abdominal areas whereas Officer Garner was shot in the leg by three shotgun pellets on a ricochet, he made no attempt to use either of the two handguns on his person after he was shot by Officer Garner, and he told numerous officers to "shoot him" or "kill him." Moreover, defendant emphasizes he never expressed intent to kill Officer Garner.

Despite consideration of the evidence pointed to by defendant, we hold that, upon consideration of all the evidence in the light most favorable to the State, there is sufficient evidence of "intent to kill" to support

the charge of assault with a deadly weapon with intent to kill Officer Garner. As our Supreme Court stated long ago,

> [a]n intent to kill is a mental attitude, and ordinarily it must be proved, if proven at all, by circumstantial evidence, that is, by proving facts from which the fact sought to be proven may be reasonably inferred. An intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances.

State v. Cauley, 244 N.C. 701, 708, 94 S.E.2d 915, 921 (1956) (citation and quotation marks omitted).

In this case, the evidence tended to show that defendant had already fatally shot eight people with the shotgun at the time Officer Garner confronted defendant in the hallway. Defendant then ignored Officer Garner's repeated instructions to drop the shotgun and continued to reload it. Defendant then turned toward Officer Garner, lowered the shotgun, and fired one shot at Officer Garner at approximately the same time that Officer Garner fired at defendant and ducked into a doorway. Although Officer Garner was only struck in the leg by shotgun pellets on a ricochet, considering the relevant circumstances and viewing all the evidence in the light most favorable to the State, we find sufficient circumstantial evidence to support a reasonable inference of intent to kill. Therefore, the trial court did not err in denying defendant's motion to dismiss the assault with a deadly weapon with intent to kill charge.

III. Conclusion

Based on the forgoing reasons, we find neither plain nor prejudicial error in the trial court's admission of evidence below and hold defendant received a fair trial. Moreover, we find sufficient evidence to support the charge of assault with a deadly weapon with intent to kill and hold the trial court did not err in denying defendant's motion to dismiss.

No error.

Judges HUNTER (Robert C.) and GEER concur.

JORGE TOVAR-MAURICIO, EDEMIAS DELEON MORALES, MARIO M. TOVAR, RANULFO DELEON VASQUEZ, BERNABE FRANCISCO CALIXTO, TOMAS MARTINEZ GUERRERO AND GABRIEL DOMINGUEZ-CONTRERA, EMPLOYEES, PLAINTIFFS-APPELLEES

v.

T.R. DRISCOLL, INC., EMPLOYER, GENERAL CASUALTY INSURANCE COMPANY, CAROLINAS ROOFING AND SHEET METAL CONTRACTORS SELF-INSURED FUND, CARRIER, DEFENDANTS-APPELLANTS

No. COA13-517

Filed 3 December 2013

1. Workers' Compensation—general casualty policy—no coverage in North Carolina

The Industrial Commission did not err in a workers' compensation case by concluding that the General Casualty policy afforded no coverage for plaintiffs' claims filed in North Carolina. The record indicated that plaintiffs received compensation under the workers' compensation laws of Virginia.

2. Workers' Compensation—fund agreement—coverage

The Industrial Commission did not err in a workers' compensation case by concluding that the Fund Agreement afforded coverage for plaintiffs' claims.

3. Appeal and Error—preservation of issues—failure to challenge findings of fact or conclusion of law—parol evidence—intent

Although defendant insurance carrier contended that the Industrial Commission erred in a workers' compensation case by considering parol evidence to determine the intent of the general casualty policy, it failed to challenge a finding of fact as unsupported by competent evidence or a conclusion of law as not justified by the findings of fact.

4. Workers' Compensation—general casualty policy—intent—reliance on agency relationship

The Industrial Commission did not err in a workers' compensation case by relying upon the alleged agency relationship between Davis-Garvin and the employer to determine the intent of the General Casualty policy. Even if defendant insurance carrier could demonstrate some error in a finding regarding agency, it could not demonstrate that the finding undermined a conclusion of law such that it justified reversal of the Commission's order.

5. Workers' Compensation—failure to reimburse benefits—claims transferred to North Carolina

The Industrial Commission did not err in a workers' compensation case by failing to award General Casualty reimbursement for benefits it paid to plaintiffs after they transferred their workers' compensation claims to North Carolina. N.C.G.S. § 97-86.1(d) does not permit repayment for compensation paid under the order of another state.

Judge DILLON concurring in part and dissenting in part in separate opinion.

Appeals by Defendants General Casualty Insurance Company and Carolinas Roofing and Sheet Metal Contractors Self-Insured Fund from opinion and award entered by the North Carolina Industrial Commission on 21 December 2012. Heard in the Court of Appeals 24 September 2013.

Diener Law, by Cynthia E. Everson, for Plaintiffs-Appellees.

Orbock Ruark & Dillard, PC, by Roger L. Dillard, Jr. and Jessica E. Lyles, for Defendant-Appellee T.R. Driscoll, Inc.

Goodman McGuffey Lindsey & Johnson, LLP, by Adam E. Whitten, for Defendant-Appellant Carolinas Roofing and Sheet Metal Contractors Self-Insured Fund.

Teague Campbell Dennis & Gorham, LLP, by Brian M. Love and George H. Pender, for Defendant-Appellant General Casualty Insurance Company.

McGEE, Judge.

T.R. Driscoll, Inc. ("Employer") is a company with a principal place of business in North Carolina. Employer intermittently sends its employees to work in other states, including Virginia. Employer joined the Carolinas Roofing and Sheet Metal Contractors Self-Insured Fund ("the Fund") in the early 1980s. Employer entered into an agreement with the Fund for workers' compensation insurance "coverage for North Carolina and South Carolina operations[.]" The Davis-Garvin Agency, Inc. ("Davis-Garvin") served as Employer's agent in purchasing insurance for "exposure not covered by the Fund." Davis-Garvin obtained workers' compensation insurance for Employer from Capital

City Insurance Company in 2005. General Casualty Insurance Company ("General Casualty") acquired Capital City Insurance Company in 2009.

Employer sent Jorge Tovar-Mauricio, Edemias Deleon Morales, Mario M. Tovar, Ranulfo Deleon Vasquez, Bernabe Francisco Calixto, Tomas Martinez Guerrero, and Gabriel Dominguez-Contrera ("Plaintiffs") to Virginia to work on a roofing project. Plaintiffs were injured in the course and scope of their employment when a gas line exploded on 29 November 2009. Plaintiffs filed workers' compensation claims in Virginia. General Casualty "accepted the claims as compensable pursuant to the Virginia Workers' Compensation Act and began making payments[.]" The North Carolina Industrial Commission found that, as "of November 2011, General Casualty has paid compensation and medical benefits pursuant to the Virginia Workers' Compensation Act to [Plaintiffs] in an approximate amount of $1,960,000.00."

In September 2010, Plaintiffs filed Form 33 Requests for Hearing with the North Carolina Industrial Commission, indicating that the parties had been unable to agree, noting only "change of jurisdiction from VA to NC[.]" General Casualty responded that "it provided no coverage to [Employer] for claims filed in North Carolina and that such claims were properly covered by the Fund."

The Commission found that Employer "had a valid workers' compensation insurance policy with General Casualty covering Georgia, Tennessee, and Virginia." The Commission also found that Employer "was covered for workers' compensation claims filed in North Carolina by [the Fund] at the time of Plaintiffs' injuries."

The Commission concluded that the Fund "is the insurance carrier on the risk for [Employer] for workers' compensation claims filed under the North Carolina Workers' Compensation Act[.]" The Commission did "not address the issue of Plaintiffs' disability or average weekly wages" because the hearing "was limited to the establishment of jurisdiction and carrier liability[.]" The Fund and General Casualty appeal.

I. Standard of Review

"Appellate review of an award from the Industrial Commission is generally limited to two issues: (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Starr v. Gaston Cty. Bd. Of Educ.*, 191 N.C. App. 301, 304, 663 S.E.2d 322, 325 (2008). "Where there is competent evidence to support the Commission's findings, they are binding on appeal even in light of evidence to support contrary findings." *Id.*

at 304-05, 663 S.E.2d at 325. "The Commission's conclusions of law are reviewed *de novo*." *Id.* at 305, 663 S.E.2d at 325.

II. The Fund's Appeal

A. Conclusion "that the General Casualty Policy Affords No Coverage for Plaintiffs' Claims"

i. Conclusion of Law 4

[1] The Fund first argues that the "Commission erred in concluding that the General Casualty policy affords no coverage for Plaintiffs' claims[.]" The Fund fails to specify which conclusion of law it challenges on appeal. The only conclusion concerning General Casualty's coverage of Plaintiffs' claims is conclusion 4, quoted below:

> 4. . . . . Based upon a review of the plain language of the General Casualty policy, North Carolina was not a covered state at any time during the policy, either before or after the modification by endorsement.

We interpret the Commission's language that "North Carolina was not a covered state" as meaning that "the General Casualty policy affords no coverage for the claims before the Commission, i.e. Plaintiffs' claims that were filed in North Carolina." We interpret the language in this manner because of the plain language in the General Casualty insurance policy: "We will pay promptly when due the benefits required of you by the workers compensation law." According to the policy, "Workers Compensation Law means the workers or workmen's compensation law and occupational disease law of each state or territory named in Item 3.A. of the Information Page."

The "Information Page" lists Georgia, Tennessee, and Virginia:

> 3A. Workers compensation insurance: Part one of the policy applies to the workers compensation law of the states listed here: GA, TN, VA

Where "the language of an insurance policy is plain, unambiguous, and susceptible of only one reasonable construction, the courts will enforce the contract according to its terms." *Walsh v. Insurance Co.*, 265 N.C. 634, 639, 144 S.E.2d 817, 820 (1965); *see also Register v. White*, 358 N.C. 691, 599 S.E.2d 549 (2004).

The General Casualty policy is plain, unambiguous, and susceptible of only one reasonable construction. The General Casualty policy applies to benefits required by the workers' compensation laws of Virginia, in

this case. The Commission did not and indeed cannot award compensation except as required by the North Carolina Workers' Compensation Act. The Commission cannot award compensation under the laws of any state other than North Carolina.

The record indicates that Plaintiffs received compensation under the workers' compensation laws of Virginia. Thus, N.C. Gen. Stat. § 97-36 will apply in this case if future proceedings are instituted to determine the specific amount of compensation due Plaintiffs under our workers' compensation laws. *See* N.C. Gen. Stat. § 97-36 (2011) ("[I]f an employee . . . shall receive compensation or damages under the laws of any other state nothing herein shall be construed so as to permit a total compensation for the same injury greater than is provided for in this Article."). The Commission did not err in concluding that the General Casualty policy affords no coverage for Plaintiffs' claims filed in North Carolina.

ii. Liability under Virginia Workers' Compensation Law

The Fund requests this Court to "hold that General Casualty is liable to the Plaintiffs injured in Virginia, to the extent required by Virginia workers' compensation law, even after their claims are transferred to North Carolina for convenience." We note that the record indicates that the Commission ordered no such "transfer." Also, the Fund cites no provision in our General Statutes authorizing the Commission to "transfer" a claim from another state to North Carolina.

The conclusion that the General Casualty policy affords no coverage for these claims filed in North Carolina has no implications for General Casualty's liability under Virginia workers' compensation law. We therefore make no conclusions about General Casualty's past or continuing liability under Virginia law.

B. Finding of Fact 28 and Conclusion of Law 5

[2] The Fund next argues the Commission erred in concluding that the Fund agreement affords coverage for Plaintiffs' claims. We disagree.

The Fund challenges finding of fact 28 and conclusion of law 5. Finding of fact 28 is as follows:

> 28. . . . . The Full Commission further finds that [Employer] was covered for workers' compensation claims filed in North Carolina by [the Fund] at the time of Plaintiffs' injuries.

Conclusion 5 states:

> 5. Under the terms of the workers' compensation insurance policy with the Fund, [Employer] was properly covered for workers' compensation claims filed in North Carolina. N.C. Gen. Stat. § 97-36[.]

The Fund directs this Court to the following language in the Fund agreement:

> 1. To the extent that coverage is afforded the Member under Article II of this Agreement, the Fund shall neither be obligated to pay nor incur defense costs with respect to the following:
>
> a. Under Coverage A, for any liability, judgment or award rendered against the Member or the Fund by the governing authorities of a State not listed in the Preamble of this Agreement[.]
>
> b. Under Coverage A, for any liability, judgment or award rendered against the Member or the Fund, pursuant to a workers' compensation law other than that identified in Article II, section 3 of this Agreement[.]
>
> c. Under Coverages A and B, for operations conducted at or from any workplace if the Member has separate insurance for such operations[.] (emphasis added).

Coverage A refers to workers' compensation; Coverage B refers to "damages because of bodily injury or death[.]" The Fund agreement further states:

> Coverage A - Workers' Compensation. The Fund will pay promptly from the funds received from or on behalf of the Members when due all compensation and other benefits which the Member is ordered to pay by the governing authorities of the state(s) listed in the Preamble, pursuant to the Workers' Compensation law named in Article II, paragraph 3 of this Agreement. (emphasis added).

Article II, section 3 refers to the "Preamble." The "Preamble" lists North Carolina and South Carolina.

The Fund agreement plainly states that the exclusions in subparts "a" and "b" apply to awards rendered by States other than North and South Carolina. Thus, we consider whether the exclusion in subpart "c" applies. The Fund concedes it would "be liable for any excess liability *above* the liability owed under Virginia law." The Fund contends that

"any such coverage is nevertheless extinguished by the operation of" subpart "c." However, the record indicates that Employer has no separate insurance for the Virginia operations for the purpose of claims filed with the North Carolina Industrial Commission. For the claims in this case, which were claims filed with the North Carolina Industrial Commission, only the Fund agreement is applicable. The Commission did not err in the finding or the conclusion regarding the Fund's coverage in North Carolina.

C. Parol Evidence

[3] The Fund further argues the Commission erred in considering parol evidence to determine the intent of the General Casualty policy.

The Fund again fails to specify a finding of fact or conclusion of law to challenge on appeal. As stated above, our appellate review is limited to two issues: "(1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Starr*, 191 N.C. App. at 304, 663 S.E.2d at 325; *see also Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005); *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 379 (1986).

Because the Fund fails to challenge a finding of fact as unsupported by competent evidence or a conclusion of law as not justified by the findings of fact, this argument falls outside the well-established scope of our review on appeal.

D. Agency Relationship

[4] The Fund next argues the Commission erred in relying upon the alleged agency relationship between Davis-Garvin and Employer to determine the intent of the General Casualty policy.

The Fund again fails to specify a finding of fact or conclusion of law to challenge on appeal. Rather, the Fund contends that the issue "permeates the entire decision of the Full Commission." The Fund argues that evidence of "the knowledge or intent of Davis-Garvin . . . should not have formed the basis for the erroneous conclusions of law concerning the intent of the General Casualty policy and the efficacy of the attempted retroactive endorsement thereto."

However, the Commission held as follows:

> 8. As the Full Commission concludes that North Carolina was not a covered state either under the terms of the General Casualty policy, either before or after the modification by endorsement, the issues regarding the

> retroactive application of the amended endorsement and reformation of the contract are moot and not addressed by this Opinion and Award.

Because of our holding in Section II.A., affirming the Commission's conclusion as to General Casualty's lack of coverage over claims filed in North Carolina, we do not address this argument. Even if the Fund could demonstrate some error in a finding regarding agency, the Fund could not demonstrate that the finding undermined a conclusion of law such that it justified reversal of the Commission's order.

III. General Casualty's Appeal

[5] General Casualty's sole argument on appeal is that the Commission erred in failing to award General Casualty "reimbursement for benefits it paid to Plaintiffs after they transferred their workers' compensation claims to North Carolina."

General Casualty challenges only the following conclusion:

> There is no legal or contractual basis under the North Carolina Workers' Compensation Act that would entitle General Casualty to be reimbursed by the Fund for compensation already paid to Plaintiffs.

General Casualty cites N.C. Gen. Stat. § 97-86.1(d), quoted below:

> In any claim under the provisions of this Chapter wherein one employer or carrier has made payments to the employee or his dependents pending a final disposition of the claim and it is determined that different or additional employers or carriers are liable, the Commission may order any employers or carriers determined liable to make repayment in full or in part to any employer or carrier which has made payments to the employee or his dependents.

N.C. Gen. Stat. § 97-86.1(d) (2011).

General Casualty seems to imply that General Casualty has paid some compensation to Plaintiffs beyond that ordered by Virginia. However, the Commission made no such finding. The Commission found only that "General Casualty has paid compensation and medical benefits pursuant to the Virginia Workers' Compensation Act to [Plaintiffs] in an approximate amount of $1,960,000.00." (emphasis added). N.C.G.S. § 97-86.1(d) does not permit repayment for compensation paid under the order of another state. Rather, the statute refers only to where a carrier makes

payments pending a final disposition of "any claim under the provisions of this Chapter[.]" N.C.G.S. § 97-86.1(d).

The Commission did not err in making the challenged conclusion denying General Casualty reimbursement for compensation already paid to Plaintiffs.

IV. Conclusion

As to the Fund's appeal, the Commission did not err in its findings and conclusions relating to General Casualty's coverage in North Carolina or the Fund's coverage in North Carolina. As to General Casualty's appeal, the Commission did not err in failing to award General Casualty reimbursement for amounts paid to Plaintiffs.

Affirmed.

Judge McCULLOUGH concurs.

DILLON, Judge, concurring in part and dissenting in part.

I concur with Section III of the majority's opinion affirming the Commission's order with respect to the issues raised in the cross-appeal filed by General Casualty Insurance Company ("General Casualty"). However, I respectfully dissent from Section II with respect to the appeal filed by the Sheet Metal Contractors Self-Insurance Fund (the "Fund") to the extent the majority holds that General Casualty is not obligated under its policy to provide coverage to its insured, T.R. Driscoll, Inc. (the "Employer"), for benefits that Plaintiffs may be awarded that would otherwise have been required to be paid under Virginia workers' compensation law had Plaintiffs sought said benefits in Virginia.

I. Background

In this action, Plaintiffs are seeking workers' compensation benefits under North Carolina law arising from injuries that occurred while they were working on a job in Virginia. At the time of the accident, the Employer, which is based in North Carolina, was covered for workers' compensation claims under two separate insurance contracts, one provided by the Fund and the other by General Casualty.

In its order, the Commission determined that the Fund was solely liable to provide the Employer coverage for any benefits that the Commission may award Plaintiffs arising from the Virginia accident; and, therefore, dismissed General Casualty as a party to the proceeding.

The majority affirmed the Commission's order, holding that "[t]he Commission did not err in concluding that the General Casualty policy affords no coverage for Plaintiffs' claims filed in North Carolina." The issues encompassed in the Commission's order were, however, limited to "the establishment of jurisdiction and carrier liability[1][.]" In other words, the Commission has yet to determine the exact nature and amount of benefits that Plaintiffs will ultimately be awarded in the North Carolina proceeding.

I believe General Casualty's insurance contract provides coverage to the Employer for workers' compensation benefits that would be due under Virginia law for an accident occurring in Virginia, even if those benefits are ultimately sought and awarded under the laws of another state. Therefore, since it is unknown at this stage of the proceeding whether Plaintiffs will seek any benefits that would have been due under Virginia law had Plaintiffs sought those benefits in a Virginia proceeding, I believe the Commission was premature in concluding that the Fund is solely liable, to the exclusion of General Casualty, to provide coverage to the Employer for *all* the benefits that the Commission may award the Plaintiffs.

II. Analysis

The Fund's contract provides coverage, *inter alia*, for benefits the Employer is "ordered to pay by the governing authorities of [North Carolina,]" but excludes from coverage, those "operations conducted at or from any workplace if [the Employer] has separate insurance for such operations." The Fund, here, argues that the Employer "has separate insurance" – provided by General Casualty – to provide benefits arising from the Plaintiffs' Virginia accident.

The provision at issue in the General Casualty policy provides that General Casualty will pay benefits as "required of [the Employer] by the workers compensation law [of Virginia]." General Casualty argues that this provision limits its exposure to pay benefits arising from claims actually *filed* in Virginia, and otherwise does not extend to any benefits

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1. The interpretation of insurance contract language is, generally, determined by a trial court. However, our Supreme Court has held that the Commission is authorized, pursuant to N.C. Gen. Stat. § 97-91, to hear "'all questions arising under' the Compensation Act [which include] . . . the right and duty to hear and determine questions of fact and law respecting the existence of insurance coverage and liability of the insurance carrier." *Greene v. Spivey*, 236 N.C. 435, 445, 73 S.E.2d 488, 495-96 (1952); *see also Smith v. First Choice Servs.*, 158 N.C. App. 244, 248, 580 S.E.2d 743, 747, *disc. review denied*, 357 N.C. 461, 586 S.E.2d 99 (2003).

awarded in an action filed in another state, even where the accident occurs in Virginia and Virginia law *would* require benefits to be paid.

The Fund, on the other hand, argues that this provision is merely a "choice of law" provision; and, accordingly, General Casualty's obligation to provide the Employer coverage as required under Virginia workers' compensation law is not obviated simply because Plaintiffs chose to file for benefits for the Virginia accident in a state other than Virginia.

Neither party has cited a North Carolina case that is on point regarding the proper interpretation of the language in General Casualty's coverage provision. Rather, the parties cite cases from other jurisdictions in their briefs which illustrate the difference in judicial opinion throughout the United States regarding this issue. An Illinois appellate court has explained this difference as follows:

> [This coverage question has] produced two divergent lines of decisions. One line of cases agrees with [the employer] that alleged territorial limitation provisions are in fact choice of law provisions, not limiting coverage based on where the employee chooses to file his claim, but only to restrict benefit eligibility and to set indemnification limits based on the state law specified in the policy. This line of cases includes *Smith & Chambers Salvage v. Insurance Management Corp.*, 808 F. Supp. 1492 (E.D. Wash. 1992); *Sieman v. Postorino Sandblasting & Painting Co.*, 111 Mich. App. 710, 314 N.W.2d 736 (1981); *American Mutual Insurance Co. v. Duvall*, 117 N.H. 221, 372 A.2d 263 (1977); *Toebe v. Employers Mutual of Wausau*, 114 N.J. Super. 39, 274 A.2d 820 (App. Div. 1971); *Kacur v. Employers Mutual Casualty Co.*, 253 Md. 500, 254 A.2d 156 (1969); and *Weinberg v. State Workmen's Insurance Fund*, 368 Pa. 76, 81 A.2d 906 (1951). The other line of cases agrees with [the insurer] that, for there to be coverage, the claim must actually be filed in the state whose law is made to apply in defining the term "worker's compensation law." This line of cases includes *Travelers Insurance Co. v. Industrial Accident Comm'n*, 240 Cal. App. 2d 804, 809-10, 50 Cal.Rptr. 114, 118-119 (1966); *Lumber Transport, Inc. v. International Indemnity Co.*, 203 Ga. App. 588, 590, 417 S.E.2d 365, 366-67 (1992); *Foster Wheeler Corp. v. Bennett*, 1960 OK 186, 354 P.2d 764, 768 (Okla. 1960); *Consolidated Underwriters v. King*, 160 Tex. 18, 20, 325 S.W.2d 127, 129, 2 Tex. Sup. Ct. J. 338 (1959); *Rood*

> *v. Nelson*, 14 Misc. 2d 859, 860-861, 178 N.Y.S.2d 969, 971 (1958); *Jones v. Henessy*, 232 La. 786, 793, 95 So.2d 312, 314 (1957); *Mandle v. Kelly*, 229 Miss. 327, 345, 90 So.2d 645; 649-50 (1956); and *Miller Brothers Construction Co. v. Maryland Casualty Co.*, 113 Conn. 504, 519-20, 155 A. 709, 714,-15 (1931).

Szarek, Inc. v. Maryland Cas. Co., 357 Ill. App. 3d 584, 588, 829 N.E.2d 871, 875 (2005) (construing the policy language at issue as a "choice of law" provision).

Our Supreme Court has held "[a] difference of judicial opinion regarding proper construction of policy language is some evidence" that the policy language is ambiguous. *Brown v. Lumbermens Mut. Cas. Co.*, 326 N.C. 387, 392, 390 S.E.2d 150, 153 (1990) (citations omitted). I believe the language in General Casualty's policy is ambiguous on the issue; and, accordingly, I would hold that the General Casualty policy does provide coverage for the claims sought in North Carolina by Plaintiffs to the extent that the benefits would be required under Virginia workers' compensation law. *See W&J Rives, Inc. v. Kemper Ins. Group*, 92 N.C. App. 313, 316, 374 S.E.2d 430, 433 (1988), *disc. review denied*, 324 N.C. 342, 378 S.E.2d 809 (1989) (holding that "an insurance contract should be construed as a reasonable person in the position of the insured would have understood it [and that if] the language used in the policy is reasonably susceptible to different constructions, it must be given the construction most favorable to the insured"). I believe that the word "require" in the coverage provision could reasonably be construed to allow for either interpretation asserted by the two lines of cases described in *Szarek*, *supra*. I believe it is reasonable for the Employer to have assumed that the language in the General Casualty policy would provide coverage for accidents occurring in Virginia, to the extent that the listed state would require the insured to pay benefits, and that General Casualty could not avoid providing this coverage simply because Plaintiffs chose to file for benefits in another state that may also have jurisdiction.

If the interpretation propounded by General Casualty is adopted, then it is conceivable that a North Carolina employer who had policy with this provision – but providing coverage for benefits required under North Carolina law – would be afforded no coverage under its policy for an accident occurring in North Carolina where the employee chose to file for benefits in another state that might also have jurisdiction. For instance, another state may assert jurisdiction because the injured employee originally accepted the employer's offer of employment while in the that state. *See Murray v. Ahlstrom Indus. Holdings, Inc.*,

131 N.C. App. 294, 506 S.E.2d 724 (1998) (holding that North Carolina has jurisdiction over a claim arising from an accident in Mississippi because the original offer of employment was accepted over the telephone while the employee was in North Carolina).

General Casualty, which drafted the policy language, could have included language to clearly state that it was providing coverage only for claims "filed" in Virginia or, alternatively, for benefits that the Employer would be ordered to pay "by the regulating body" in Virginia. Indeed, the Fund's policy contains very specific language indicating that it would provide coverage to the Employer only as ordered "by the governing authorities of [North Carolina]." However, General Casualty chose not to include such language in its policy. Therefore, because I believe that the coverage language is ambiguous, I would construe this ambiguity against the insurer, General Casualty, and hold that the policy provides coverage for the claims filed in North Carolina to the extent that Virginia workers' compensation law would require General Casualty to provide benefits.

PAULETTE SMITH WISE, EXECUTOR OF THE ESTATE OF HARVEY SMITH, DECEASED EMPLOYEE, PLAINTIFF
v.
ALCOA, INC., EMPLOYER, SELF-INSURED, DEFENDANT

No. COA13-29

Filed 3 December 2013

1. Workers' Compensation—evidence—expert testimony—witnesses sufficiently qualified

The Industrial Commission did not err in a workers' compensation case by admitting testimony of medical experts. There was evidence in the record to support the Commission's determination that defendant's witnesses were sufficiently qualified in their respective fields.

2. Workers' Compensation—findings of fact—supported by the evidence

The Industrial Commission did not err in a workers' compensation case by finding that plaintiff's decedent suffered from Barrett's esophagus. The report of a pathologist, whose credentials were not challenged by plaintiff, supported a finding of Barrett's esophagus and was sufficient evidence to support the Commission's finding.

3. Workers' Compensation—findings of fact—supported by the evidence

The Industrial Commission did not err in a workers' compensation case by giving weight to the known risk factors for esophageal disease. There was evidence in the record to support the Commission's finding that these risk factors were present.

4. Workers' Compensation—admission of additional evidence—denial of motion—not prejudicial

The Industrial Commission did not abuse its discretion in a workers' compensation case by denying plaintiff's motion to admit a deposition from another case as additional evidence. Even assuming *arguendo* that the denial was erroneous, plaintiff failed to show that the error was prejudicial.

5. Workers' Compensation—quashed subpoena—no error

The Industrial Commission did not err in a workers' compensation case by quashing plaintiff's subpoena of defendant's company representative regarding defendant's knowledge of asbestos-related health risks. Defendant had already stipulated that plaintiff was exposed to asbestos during his employment with defendant and defendant's knowledge or lack thereof of the risks of asbestos exposure was not relevant to the issue of whether defendant's exposure to asbestos was the cause of his esophageal cancer.

6. Workers' Compensation—finding of fact—supported by the evidence

The Industrial Commission's challenged finding of fact in a workers' compensation case did not lack evidentiary support. An expert witness cited the report which formed the basis of the finding as an authoritative source and the report was properly introduced into evidence. Furthermore, even assuming *arguendo* that this finding was erroneous, it was not essential to the Commission's decision.

7. Workers' Compensation—opinion not contrary to law—federal provision not dispositive

The Industrial Commission did not err as a matter of law in a workers' compensation case by issuing an opinion contrary to the law of North Carolina. Where a non-mandatory provision of federal law recognized the existence of an "association" between asbestos exposure and esophageal cancer, that provision was not dispositive of the issue of whether decedent's esophageal cancer was caused by asbestos exposure.

Appeal by plaintiff from order entered 17 September 2012 by the North Carolina Industrial Commission. Heard in the Court of Appeals 4 June 2013.

Wallace and Graham, P.A., by Michael B. Pross, for plaintiff-appellant.

Smith Moore Leatherwood LLP, by Jeri L. Whitfield and Lisa K. Shortt, for defendant-appellee.

STEELMAN, Judge.

Where medical experts testified concerning subjects within their areas of expertise, the Industrial Commission did not err in admitting their testimony. The Commission did not err in finding that plaintiff's decedent suffered from Barrett's esophagus. There was evidence in the record to support the Commission's findings concerning risk factors applicable to decedent. The Commission did not abuse its discretion in denying plaintiff's motion to admit a deposition from another case as additional evidence. Where plaintiff moved to subpoena evidence that was not relevant to the issue before the Commission, the Commission's failure to address plaintiff's motion was harmless. Where a non-mandatory provision of federal law recognized the existence of an "association" between asbestos exposure and esophageal cancer, that provision was not dispositive of the issue of whether decedent's esophageal cancer was caused by asbestos exposure.

I. Factual and Procedural History

Harvey Smith (Smith) worked for Alcoa, Inc. (defendant) from 1935 until 1978. The parties stipulated that he was exposed to asbestos during his employment with defendant. On 12 February 2008, Smith was diagnosed with esophageal cancer, specifically esophageal adenocarcinoma, from which he died on 9 March 2008 at an advanced age. Subsequently, the executor of his estate, Paulette Smith Wise, (plaintiff) filed this worker's compensation claim, contending that Smith's cancer and death were caused or contributed to by asbestos exposure that occurred during his employment with defendant.

Plaintiff offered three expert witnesses: Dr. Nicholas Shaheen, head of the Center for Esophageal Disease and Swallowing at the University of North Carolina; Dr. Ravi Reddy, Smith's treating physician; and Dr. Arthur Frank, a board certified expert of occupational medicine. Defendant also offered three expert witnesses: Dr. Ernest McConnell,

a veterinary pathologist and toxicologist, and expert in animal medical studies; Dr. Kenneth Karb, a general oncologist; and Dr. Michael Morse, an expert in oncology.

On 17 September 2012, the Industrial Commission entered its Opinion and Award. The Commission concluded that plaintiff had failed to prove that Smith's esophageal cancer was characteristic of individuals engaged in his particular trade or occupation with defendant; that Smith's employment had put him at increased risk of developing esophageal cancer as compared to members of the general public; and that Smith had contracted a compensable occupational disease while working for defendant. The Industrial Commission denied plaintiff's claim.

Plaintiff appeals.

II. Standard of Review

Review of an opinion and award of the Industrial Commission "is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law. This court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citations and quotations omitted).

"The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965).

III. Arguments

A. Admission of Expert Testimony

[1] In her first argument, plaintiff contends that the Commission erred in admitting the testimony of defendant's experts. We disagree.

Rule 702 of the North Carolina Rules of Evidence states:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

N.C. R. Evid. 702(a), N.C. Gen. Stat. § 8C-1 (2009).[1] Our Supreme

1. We note that this language has since been amended by statute for cases commenced on or after 1 October 2011. The current language of Rule 702 implements the

Court, in *Howerton v. Arai Helmet, Ltd.*, detailed a three-step inquiry for evaluating the admissibility of expert testimony: (1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? (2) Is the witness testifying at trial qualified as an expert in that area of testimony? (3) Is the expert's testimony relevant? *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004) (citing *State v. Goode*, 341 N.C. 513, 527-529, 461 S.E.2d 631, 639-641 (1995)).

Plaintiff contends that defendant's witnesses, Drs. Karb, Morse and McConnell, were not experts in a medical field relevant to the issue in this case, which plaintiff contends is esophageal cancer resulting from asbestos exposure. However, our Supreme Court held in *Howerton* that:

> "It is not necessary that an expert be experienced with the identical subject matter at issue or be a specialist, licensed, or even engaged in a specific profession." "It is enough that the expert witness 'because of his expertise is in a better position to have an opinion on the subject than is the trier of fact.' "

Id. at 461, 597 S.E.2d at 688 (quoting *Goode* at 529, 461 S.E.2d at 640).

Dr. Karb was tendered as an expert in oncology. Plaintiff does not challenge this fact. Plaintiff argues, however, that Dr. Karb was not offered as an expert regarding the harms of asbestos, or with regard to gastrointestinal disease such as Barrett's esophagus. As was stated in *Howerton*, while this level of detail may have been relevant to Dr. Karb's credibility before the Commission, it did not mandate the exclusion of his testimony. It was sufficient that Dr. Karb was an expert in oncology, the study, diagnosis and treatment of cancer in general.

Dr. Morse was also tendered as an expert in "oncology and gastrointestinal oncology." Again, plaintiff does not challenge his credentials as an oncologist. Rather, plaintiff contends that Dr. Morse, like Dr. Karb, was not qualified to address the specific issue of causation of esophageal cancer. As with plaintiff's argument concerning Dr. Karb, we are unconvinced by this argument.

Dr. McConnell, a veterinarian, was tendered as an expert in "toxicology, pathology, and asbestos-associated diseases." Plaintiff notes that Dr. McConnell is not qualified to treat or evaluate humans for

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standards set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L.Ed.2d 469 (1993). However, the quoted version of Rule 702 was in effect at the time that the instant case was filed.

asbestos-related disease, and that he had never been tendered as an expert in human disease resulting from asbestos exposure. However, Dr. McConnell's testimony was offered to present animal studies which had shown no link between asbestos exposure and esophageal cancer. Dr. McConnell was not called to testify about the treatment or diagnosis of asbestos exposure in humans, but instead to interpret a medical study. We hold that this was within his area of expertise.

It is the role of the Commission to consider the reliability and credibility of witnesses. It is not the role of this Court to make *de novo* determinations concerning the credibility to be given to testimony, or the weight to be given to testimony. We hold that there was evidence in the record to support the Commission's determination that defendant's witnesses were sufficiently qualified in their respective fields to testify as experts, and that the Commission was within its discretion to determine the credibility of their testimony and the weight to be given to that testimony.

This argument is without merit.

B. Finding of Fact 11

[2] In her second argument, plaintiff contends that the Commission erred in finding that Smith suffered from a condition called Barrett's esophagus. We disagree.

Defendant's position before the Commission was that Smith's esophageal cancer was caused by a condition called Barrett's esophagus. In finding of fact 11, the Commission found:

> Decedent suffered from GERD [gastrointestinal reflux disease] for more than twenty years. Based upon the results of pathological examination of the tissue of his esophagus and a preponderance of the credible expert evidence of record, the Full Commission also finds that decedent had Barrett's esophagus and erosive esophagitis. All three conditions – GERD, Barrett's esophagus, and erosive esophagitis – are known risk factors for EAC [esophageal adenocarcinoma]. Other risk factors for esophageal cancer that were present in decedent's medical history were race (white), sex (male), age (elderly), mild obesity, and hiatal hernia (diagnosed in 1983).

Plaintiff contends that, because none of defendant's experts have backgrounds in gastroenterology or Barrett's esophagus, their testimony was not sufficient to support this finding. Similarly, plaintiff

contends that plaintiff's experts, specifically Drs. Reddy and Shaheen, who were qualified in gastroenterology, asserted that Smith did not have Barrett's esophagus.

According to the pathology report, a biopsy of Smith's esophagus revealed "intestinal metaplasia[,]" "poorly differentiated adenocarcinoma[,]" and "histologic findings consistent with Barrett's esophagus." This diagnosis was made by the pathologist, whose credentials are unchallenged by plaintiff. Because the Commission had before it the pathologist's report, which supports a finding of Barrett's esophagus, and because the pathologist's credentials were not challenged by plaintiff, we hold that there was evidence in the record sufficient to support the Commission's finding that Smith suffered from Barrett's esophagus.

This argument is without merit.

C. Weight Given to Risk Factors

[3] In her third argument, plaintiff contends that the Commission erred in giving weight to the known risk factors for esophageal disease. We disagree.

Plaintiff's argument is cursory, noting simply that while there are references in the record to these risk factors, no witness stated that they were the cause of Smith's esophageal cancer. However, the Commission did not conclude that any of these risk factors caused Smith's cancer; the Commission merely found their existence. Plaintiff herself concedes that references exist in the record to these risk factors. We hold that there was evidence in the record to support the Commission's finding that these risk factors were present.

This argument is without merit.

D. Motion for Additional Evidence

[4] In her fourth argument, plaintiff contends that the Commission erred in failing to address plaintiff's motion for additional evidence. We disagree.

In the Pre-Trial Agreement and Stipulations of the Parties, plaintiff listed Dr. Mark Cullen, a resident of California, as a potential witness. On appeal to the Full Commission, plaintiff moved to admit a deposition of Dr. Cullen from a prior civil action against defendant. Defendant opposed this motion, arguing that the deposition was inadmissible hearsay. Defendant contended that plaintiff had failed to show Dr. Cullen's unavailability; that the subject of the deposition was mesothelioma instead of esophageal cancer; that defendant had no reason

to cross-examine Dr. Cullen on the relationship between asbestos and esophageal cancer at the deposition; that because Dr. Cullen was an outside consultant, and not an employee of defendant, plaintiff was free to depose him at plaintiff's discretion; that plaintiff's failure to do so was deliberate; and that no good grounds existed for the admission of this evidence. The Full Commission denied plaintiff's motion.

According to Rule 701(f) of the Industrial Commission Rules, "[n]o new evidence will be presented to or heard by the Full Commission unless the Commission in its discretion so permits." 4 N.C. Admin. Code 10A.0701 (2011). The General Statutes provide that "the full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award[.]" N.C. Gen. Stat. § 97-85 (2011). In resolving an apparent conflict between the statute and the Industrial Commission Rules, we have held that:

> A plaintiff does not have a substantial right to require the Commission to hear additional evidence, and the duty to do so only applies if good ground is shown. *See Eaton v. Klopman Mills, Inc.*, 2 N.C. App. 363, 163 S.E.2d 17 (1968). Furthermore, plaintiff concedes that, "[t]he question of whether to reopen a case for the taking of additional evidence is addressed to the sound discretion of the Commission, and its decision is not reviewable on appeal in the absence of a manifest abuse of that discretion." *Pickrell v. Motor Convoy, Inc.*, 82 N.C. App. 238, 243-44, 346 S.E.2d 164, 168 (1986), *rev'd on other grounds*, 322 N.C. 363, 368 S.E.2d 582 (1988).

Allen v. Roberts Elec. Contr., 143 N.C. App. 55, 65-66, 546 S.E.2d 133, 141 (2001). We discern no abuse of discretion in the Commission's denial of plaintiff's motion to introduce the deposition of Dr. Cullen.

Even assuming *arguendo* that the Commission's denial of plaintiff's motion was in error, we have held that "[a]n error in the admission of evidence is not grounds for granting a new trial or setting aside a verdict unless the admission amounts to the denial of a substantial right." *Gray v. Allen*, 197 N.C. App. 349, 353, 677 S.E.2d 862, 865 (2009). "The burden is on the appellant to not only show error, but also to show that he was prejudiced and a different result would have likely ensued had the error not occurred." *Id.* In the instant case, plaintiff failed to demonstrate that this error prejudiced plaintiff.

This argument is without merit.

E. Objection to Quashed Subpoena

[5] In her fifth argument, plaintiff contends that the Commission erred in quashing plaintiff's subpoena of defendant's company representative. We disagree.

Plaintiff sought to subpoena defendant's company representative regarding defendant's knowledge of asbestos-related health risks. This subpoena was quashed by the Deputy Commissioner. Plaintiff contends that this prejudiced plaintiff, in that plaintiff could not cross-examine defendant about defendant's knowledge of the risks of asbestos exposure. Plaintiff raised this issue on review before the Full Commission. However, the Full Commission did not address this issue in its opinion.

We acknowledge that the Full Commission erred in failing to rule on plaintiff's objection concerning the quashed subpoena. However, defendant had already stipulated that Smith was exposed to asbestos during his employment with defendant. Defendant's knowledge or lack thereof of the risks of asbestos exposure was not relevant to the issue of whether Smith's exposure to asbestos was the cause of his esophageal cancer. Defendant's representative could not have addressed that issue. As such, even had the ruling to quash the subpoena been reversed, the testimony would not have been relevant. We hold any error to be harmless.

This argument is without merit.

F. Finding of Fact 14

[6] In her sixth argument, plaintiff contends that the Commission lacked evidentiary support for its finding of fact 14. We disagree.

In finding of fact 14, the Commission found:

> The National Academy of Sciences was ordered by Congress to study the issue and advise Congress whether asbestos causes gastrointestinal cancers. The National Academy of Sciences' panels are typically used for politically sensitive issues in areas of science upon which an objective opinion, not influenced by bias, is needed. The panel's initial report is forwarded to a diverse set of reviewers to achieve a greater consensus and to insure that all sides of the issue are heard and fully considered before a final consensus opinion is reached. In 2006, the Institute of Medicine of the National Academy of Sciences published its findings in a book entitled *Asbestos: Selected*

> *Cancers*. The conclusion reached by the Institute of Medicine ("IOM") with regard to esophageal cancer specifically was as follows:
>
> Some studies have found an association between asbestos exposure and esophageal cancer, but the overall results of epidemiology studies are mixed. In addition, what little evidence there is from animal experiments about asbestos' carcinogenic potentials specifically on esophageal tissues do not support biological activity at this site. On the basis of these observations, the committee concluded that the evidence is *inadequate* to infer the presence or absence of a causal relationship between asbestos exposures and esophageal cancer.

Plaintiff does not contend that the facts cited above are incorrect, but rather contends that there was no evidence in the record to support this finding. Plaintiff overlooks the fact that Dr. McConnell testified concerning this report, citing it as an authoritative source. His testimony properly introduced this report into evidence.

Even assuming *arguendo* that this finding was in error, however, it was not essential to the Commission's decision. As we have discussed, the Commission heard the testimony of experts regarding whether asbestos exposure or Barrett's esophagus caused Smith's esophageal cancer. Even if we were to assume that this particular finding was in error, that would not detract from the Commission's ultimate conclusion that plaintiff had failed to prove causation.

This argument is without merit.

G. OSHANC

[7] In her seventh argument, plaintiff contends that the Commission erred as a matter of law in issuing an opinion contrary to the law of North Carolina. We disagree.

Plaintiff contends that the Occupational Safety and Health Act of North Carolina ("OSHANC") "recognizes that there is a well-established association between asbestos exposure and esophageal cancer." Plaintiff cites to the Code of Federal Regulations in support of this position.[2]

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2. Plaintiff incorrectly cites to OSHANC (calling it NCOSHA). North Carolina has adopted, in OSHANC, the provisions of the federal OSHA. N.C. Gen. Stat. § 95-131 (2011). However, the C.F.R. provisions cited by plaintiff are elements of OSHA, not OSHANC, and should properly be attributed to the federal source.

The C.F.R. provision in question is entitled "Medical Surveillance Guidelines for Asbestos Non-Mandatory," and concerns the toxicology, symptoms, and preventative considerations of asbestos exposure and asbestos-related diseases. 29 C.F.R. § 1910.1001, App. H (2012). The C.F.R. notes that clinical studies have "shown a definite association between exposure to asbestos and an increased incidence of lung cancer, pleural and peritoneal mesothelioma, gastrointestinal cancer, and asbestosis." *Id.* Studies have also shown that "[e]xposure to asbestos has also been associated with an increased incidence of esophageal, kidney, laryngeal, pharyngeal, and buccal cavity cancers." *Id.*

We note first that this Appendix is labeled "non mandatory." Such Appendices generally are designed to provide guidance, rather than imposing specific rules. *See e.g.* 29 C.F.R. § 1910.1450, App. B ("The materials listed below are offered as non-mandatory guidance."); 29 C.F.R. § 1910.1200, App. F ("This non-mandatory Appendix provides additional guidance on hazard classification for carcinogenicity."); 29 C.F.R. § 1910.217, App. D ("Although this appendix as such is not mandatory, it references sections and requirements which are made mandatory by other parts of the PSDI standard and appendices."). We hold that this federal guideline does not constitute North Carolina law, and was not binding upon the Commission.

Even assuming *arguendo* that this guideline was binding, it would not be dispositive of this case. At most, this provision recognizes the existence of an "association" between asbestos exposure and esophageal cancer, and this association is at best a general one. This general association does not address the pivotal issue before the Commission, which was whether asbestos exposure caused Smith's esophageal cancer in the instant case. While this guideline may constitute some evidence of causation, it was not dispositive of that issue.

This argument is without merit.

IV. Conclusion

The Commission weighed the evidence before it and concluded that plaintiff failed to meet her burden of proving causation. We hold that there was evidence in the record to support the Commission's findings of fact, and that these findings in turn support the Commission's conclusion that plaintiff failed to prove causation.

AFFIRMED.

Judges McGEE and ERVIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 3 DECEMBER 2013)

CHURCH v. DECKER No. 13-455	Caldwell (01CVD1391)	Reversed and Remanded
FRYE REG'L MED. CTR., INC. v. HOSTETTER & KEACH, INC. No. 13-313	Mecklenburg (11CVS22084)	Affirmed
GREER STATE BANK v. EVANS No. 13-560	Jackson (11CVS763)	Reversed in part, affirmed in part.
HEDGEPETH v. WINSTON-SALEM STATE UNIV. No. 13-577	Forsyth (12CVS7048)	Affirmed
IN RE D.P.W. No. 13-806	Dare (08JT28)	Affirmed
IN RE HENDRICK No. 13-284	Cleveland (11E568)	Affirmed
IN RE J.A.R. No. 13-636	New Hanover (10JT336)	Affirmed
IN RE L.G. No. 13-875	Burke (11J157-158)	Affirmed
MACMILLAN v. THOMPSON No. 13-611	Forsyth (85CVD351)	Vacated
PACE v. STATE No. 13-252	Henderson (12CVD1400)	Affirmed
RAYNOR v. DEP'T OF CRIME CONTROL & PUB. SAFETY No. 13-197	N.C. Industrial Commission (TA-21549)	Affirmed
RETTIG v. RETTIG No. 13-287	Cumberland (12CVD2163)	Affirmed
SKIPPER v. WAYNE OIL CO., INC. No. 13-657	Wayne (12CVS312)	Affirmed

STATE v. ADDISON No. 13-145	Cleveland (10CRS2476-78) (10CRS51931-33)	No Error
STATE v. ALBRIGHT No. 13-763	Alamance (08CRS53045)	No Error
STATE v. BOWDEN No. 13-290	Montgomery (08CRS1694) (11CRS321-22)	Convictions Affirmed; Sentence Vacated and Remanded for Resentencing.
STATE v. BRENNICK No. 13-627	Brunswick (10CRS52854)	Affirmed
STATE v. BRICE No. 13-363	Mecklenburg (10CRS241907)	Affirmed
STATE v. BRINCEFIELD No. 13-434	Alamance (11CRS55533) (12CRS173)	Affirmed
STATE v. BULLOCK No. 13-514	Durham (10CRS56171) (11CRS3849)	No error in part; reversed and remanded in part
STATE v. CALDWELL No. 13-272	Wilkes (12CRS686-89)	Reversed and Remanded
STATE v. CHEEK No. 13-783	Guilford (12CRS81774-75)	No Error
STATE v. COMPEL No. 13-730	Granville (11CRS52679)	No Error
STATE v. EGGLESTON No. 13-185	Mecklenburg (02CRS238864) (02CRS238869)	Affirmed
STATE v. GATEWOOD No. 13-669	Anson (10CRS1780) (11CRS1262)	Affirmed
STATE v. GLASPIE No. 13-123	Wayne (10CRS50827)	No Error
STATE v. GRUBB No. 13-625	Lee (10CRS53428)	No Error

STATE v. HILL No. 13-106	Catawba (11CRS4537) (11CRS51882)	No Error
STATE v. LEWIS No. 13-418	Pitt (08CRS50587) (08CRS56245)	Remand for resentencing.
STATE v. MASKE No. 13-120	Mecklenburg (04CRS235596-97)	Affirmed
STATE v. MERRELL No. 13-244	Forsyth (11CRS62170) (11CRS729998-30000)	Affirmed
STATE v. MILLS No. 13-867	Mecklenburg (10CRS238763-64) (10CRS238766-67) (10CRS238769-70) (10CRS238772-73)	No Error
STATE v. MOODY No. 13-122	Brunswick (11CRS3477) (11CRS53615-16)	No Error
STATE v. MORTON No. 13-146	Cabarrus (09CRS52656) (09CRS52747) (11CRS1116)	No Error
STATE v. RANKIN No. 13-234	Iredell (11CRS2689) (11CRS52119) (12CRS54793)	No Error
STATE v. ROBINSON No. 13-415	Wake (11CRS214299)	Affirmed
STATE v. ROUNDTREE No. 13-633	Halifax (12CRS52276)	No error as to the conviction; vacated and remanded as to the restitution
STATE v. RUMLEY No. 13-408	Rockingham (10CRS52148)	No Error
STATE v. SKEENS No. 13-595	Burke (11CRS53194) (11CRS53262-63)	No Error

STATE v. SMITH No. 13-15	Wake (07CRS101795)	No Error
STATE v. YELVERTON No. 13-211	Wayne (00CRS55293) (00CRS6696)	No Error
STATE v. WILLIAMS No. 12-1097	Pasquotank (09CRS50937)	Affirmed in part; reversed and remanded in part.
STRICKLAND v. GOETZ No. 13-605	Pitt (02CVD2130)	Dismissed
STATE BAR v. BURFORD No. 13-647	Disciplinary Hearing Commission (11DHC3)	Dismissed
VOGEL v. HEALTH SCI. FOUND., INC. No. 13-303	New Hanover (12CVS3416)	Affirmed
WAHL v. PORTER No. 13-333	Avery (11CVS307)	Affirmed

ESPINOSA v. TRADESOURCE, INC.

[231 N.C. App. 174 (2013)]

JORGE A. ESPINOSA, EMPLOYEE, PLAINTIFF
v.
TRADESOURCE, INC., EMPLOYER, ARCH INSURANCE COMPANY, CARRIER, AND (GALLAGHER BASSETT SERVICES, INC.,THIRD-PARTY ADMINISTRATOR), DEFENDANTS

No. COA13-220, COA13-466

Filed 3 December 2013

1. Workers' Compensation—notice of appeal—timely filed—Rule 702

Plaintiff's argument that Paradigm's notice of appeal in a workers' compensation case was untimely filed was erroneous. Paradigm's motion for reconsideration and the Industrial Commission's denial of that motion did not arise under Rule 60(b) of the North Carolina Rules of Civil Procedure. Instead, Industrial Commission Rule 702 was applicable and Paradigm's motion for reconsideration tolled the filing period for its notice of appeal, which was filed well within thirty days of the Industrial Commission's order.

2. Workers' Compensation—adaptive housing—cost distributed pro rata

The Industrial Commission did not err in a workers' compensation case by distributing the cost of plaintiff's adaptive housing on a *pro rata* basis. The rent plaintiff had to pay before his injury constituted an ordinary expense of life and, thus, should have been paid by plaintiff. The change in such expense, which was necessitated by plaintiff's compensable injury, should have been compensated for by the employer.

3. Workers' Compensation—retroactive attendant care—reimbursement timely sought

The Industrial Commission did not err in a workers' compensation case by awarding retroactive attendant care to plaintiff where plaintiff timely sought reimbursement for the attendant care services provided by his father and sister.

4. Workers' Compensation—cost of life care plan—findings did not support conclusion

The Industrial Commission erred in a workers' compensation case by requiring defendants to pay the costs of plaintiff's life care plan. The evidence did not support the findings of fact or the conclusion that the life care plan was, in fact, a reasonably necessary rehabilitative service.

5. Workers' Compensation—attorney fees—stubborn and unfounded litigiousness

The Industrial Commission did not err in a workers' compensation case by failing to award plaintiff the entire cost of his attorneys' fees on grounds that defendants exhibited "a stubborn and unfounded litigiousness" throughout the case. Plaintiff offered no evidence of a stubborn or unfounded litigiousness.

6. Workers' Compensation—Rules for Utilization of Rehabilitation Professionals in Workers' Compensation Claims—no rules violation

The Industrial Commission erred in a workers' compensation case by concluding that the assigned nurse case managers were not operating within the Commission's Rules for Utilization of Rehabilitation Professionals in Workers' Compensation Claims ("the RP Rules") and ordering defendants to assign different nurse case managers. Assuming *arguendo* that the Commission's findings were based on competent evidence, they did not support its conclusion that the nurse case managers violated the RP Rules. Further, there was no support for the Commission's conclusion that the relationship between Paradigm and defendants conflicted with those rules.

7. Workers' Compensation—pretrial motions—no jurisdiction—no abuse of discretion

The Industrial Commission did not err in a workers' compensation case by denying Paradigm's motions for reconsideration, to present additional evidence, and to intervene. Paradigm filed these motions after plaintiff had already filed his notice of appeal so the Commission lacked jurisdiction to issue a ruling on those motions. Furthermore, the Commission did not err in denying Paradigm's motion for an advisory opinion as the decision to decline to give one was entirely reasonable.

8. Appeal and Error—record insufficient

The record was insufficient in a workers' compensation case to address Paradigm's remaining arguments on appeal.

Appeal by Plaintiff, Defendants, and Paradigm from opinion and award entered 6 November 2012 by the North Carolina Industrial Commission. Appeal by Paradigm from orders entered 28 November 2012 and 4 January 2013 by the North Carolina Industrial Commission. Heard in the Court of Appeals 14 and 28 August 2013.

R. James Lore for Plaintiff.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Martha W. Surles, M. Duane Jones, and Rochelle N. Bellamy, for Defendants.

Womble Carlyle Sandridge & Rice, by Philip J. Mohr and Jennifer B. Lyday, for Paradigm Management Services, LLC.

STEPHENS, Judge.

Introduction

COA 13-220 and COA 13-466[1] involve issues surrounding the workers' compensation benefits provided to Jorge Espinosa ("Plaintiff") after he was shot while employed as a construction crew supervisor for Tradesource, Inc. ("Tradesource"). As a result of Plaintiff's admittedly compensable injury, he is a high-level paraplegic. Additional facts necessary to the discussion of the issues raised by this appeal are provided below.

A. Procedural History

Plaintiff was injured on 13 August 2010. Tradesource and its insurer, Arch Insurance Company ("Arch"),[2] (collectively, "Defendants") admitted compensability for Plaintiff's injury on 18 January 2011 by way of an Industrial Commission Form 60. Defendants later contracted with Paradigm to manage Plaintiff's medical care.[3]

On 28 January 2011, Plaintiff filed a request for hearing and motion for emergency relief. In anticipation of that hearing, scheduled for 21 March 2011, Plaintiff listed the following issue in his pre-trial agreement with Defendants: "Should Paradigm . . . be removed from the case for conflict of interest and violation of the [North Carolina] Vocational

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1. Because these two cases are factually and legally interconnected, we consolidate them for resolution in the same opinion. *See generally* N.C.R. App. P. 40.

2. Gallagher Bassett Services, Inc., is the third-party administrator.

3. Specifically, Paradigm was hired "to provide case management, rehabilitation[,] and vocational rehabilitation services." In return for more than two million dollars in consideration paid by Arch, Paradigm also accepted a significant share of the insurable risk. This required Paradigm "to undertake medical management responsibilities, including the payment of all medical costs." Pursuant to the contract, Paradigm would receive "the difference in the cost of rehabilitation, vocational[,] and case management services it [had] agreed to provide and the amount of the fixed sum payment it received . . . for assuming the risk of such services."

Rehabilitation Guidelines?" Counsel for Paradigm was not included in the pre-trial agreement.

A full evidentiary hearing was held on 21 March 2011.[4] Following the hearing, Plaintiff filed a written motion to remove Paradigm from the case. The motion was not served on either Paradigm or counsel for Paradigm, and the record does not reflect that Paradigm or counsel for Paradigm was otherwise notified of the motion. The deputy commissioner who heard the case filed an opinion and award one year later, on 12 March 2012, and, *inter alia*, denied Plaintiff's motion to remove Paradigm. From there, Plaintiff and Defendants appealed to the full North Carolina Industrial Commission ("the Commission"). Paradigm was not given notice of the parties' appeal and did not appear before the Commission.

The Commission filed its opinion on 6 November 2012, awarding permanent and total disability compensation to Plaintiff at a rate of $764.81 per week from the date of his injury to the end of his life, with a credit for compensation already paid. The Commission also awarded medical compensation for all injury-related conditions and retroactive payments to Plaintiff's father and sister at a rate of $14 per hour for eight hours per day, seven days per week, as compensation for the attendant care they provided from 4 February 2011 to 1 August 2011, subject to a credit for the attendant care provided by Defendants during that time. In addition, Defendants were ordered to pay for (1) ongoing attendant care services for eight hours per day, seven days per week; (2) the *pro rata* difference between Plaintiff's pre-injury rent and his post-injury rent; and (3) private transportation services at an average of two hours per day, seven days per week, for medical services and treatment, all "until further [o]rder of the . . . Commission." Further, Defendants were ordered to pay the costs for preparing Plaintiff's life care plan and to provide a medical case manager. Both parties' requests for attorneys' fees under N.C. Gen. Stat. § 97-88.1 were denied. Plaintiff's counsel was awarded 25% of the compensation due as attorneys' fees, and Defendants were ordered to pay costs. Both parties appealed.

Regarding Paradigm, the Commission denied Plaintiff's motion to remove it from the case and "ordered that this matter be referred to the North Carolina Department of Insurance [("the DOI")] to investigate whether Paradigm . . . [is] properly operating under North Carolina law . . . ." Paradigm alleges on appeal that it was not served with a copy of the Commission's 6 November 2012 opinion and award.

4. The record does not reflect that Paradigm received notice of this hearing.

Plaintiff filed his notice of appeal from the Commission's 6 November 2012 opinion and award on 14 November 2012, and Defendants filed their notice of appeal on 7 December 2012. On 15 November 2012, one day after Plaintiff's notice of appeal was received by the Commission, Paradigm filed a motion to intervene, to present additional evidence, and for reconsideration. Plaintiff filed a motion to dismiss Paradigm's motions the next day. The Commission dismissed Paradigm's motions on 28 November 2012, stating as grounds that Plaintiff had already filed his notice of appeal to this Court and the Commission lacked jurisdiction to review the motions. On 5 December 2012, Paradigm sent an e-mail to the Commission again requesting reconsideration and asking "what actions [the Commission] would have taken on [Plaintiff's motion to dismiss] if the notice of appeal had not been filed [by Plaintiff]." On 4 January 2013, the Commission denied Paradigm's second motion for reconsideration and its request for an advisory opinion. On 17 January 2013, Paradigm filed notice of appeal from the Commission's 6 November 2012 opinion and award, as well as its 28 November 2012 and 4 January 2013 orders.

Shortly thereafter, on 22 January 2013, Plaintiff filed a motion to dismiss Paradigm's appeal, and the Commission denied that motion. Just over three months later, on 2 May 2013, Plaintiff filed a separate motion to dismiss Paradigm's appeal in this Court. That same day Paradigm filed a motion to intervene in COA 13-220 and/or to consolidate COA 13-220 and 13-466. Plaintiff filed a response to that motion on 7 May 2013, and this Court denied Paradigm's motion by order entered 8 May 2013. On 16 May 2013, Paradigm filed a response to Plaintiff's motion to dismiss its appeal. In the alternative, Plaintiff submitted a conditional petition for writ of certiorari. Plaintiff filed a response to Paradigm's conditional petition on 17 May 2013.

B. Plaintiff's Motion to Dismiss

[1] In his motion to dismiss, Plaintiff argues that Paradigm's 17 January 2013 notice of appeal was "filed about 20 days too late." This argument is based on Plaintiff's assertion that Paradigm's motion for reconsideration "must necessarily be founded upon Rule 60(b)" of the North Carolina Rules of Civil Procedure. We disagree.

Plaintiff's argument is based on the following correctly stated rules: (1) An appeal from an opinion and award of the Commission must be given within thirty days of the date of such award or thirty days of receipt of notice of such award. N.C. Gen. Stat. § 97-86 (2011). (2) The procedure for such an appeal is as provided by the Rules of Appellate Procedure. *Id.* (3) When a party moves for reconsideration under Rule

60(b), the time for filing notice of appeal is not tolled. *See* N.C.R. App. P. 3(c); *Wallis v. Cambron*, 194 N.C. App. 190, 193, 670 S.E.2d 239, 241 (2008). Because the Commission may consider a motion for reconsideration in the same manner as provided under Rule 60(b), *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 337 S.E.2d 477 (1985), Plaintiff assumes that Paradigm's motion was filed pursuant to Rule 60(b) and, therefore, insufficient to toll the thirty-day time period for filing notice of appeal. This is incorrect.

Noting that "[t]he Rules of Civil Procedure are not strictly applicable to proceedings under the Workers' Compensation Act" ("the Act"), our Supreme Court has stated that, while the Commission's power to set aside judgments on a motion for reconsideration "is analogous" to the power granted trial courts under Rule 60(b)(6), it arises from a different source — "the judicial power conferred on the Commission by the legislature . . . ," not the North Carolina Rules of Civil Procedure. *Id.* at 137, 337 S.E.2d at 483 ("[W]e find no counterpart to Rule 60(b)(6) in the Act or the Rules of the Industrial Commission."). Accordingly, Paradigm's motion for reconsideration and the Commission's denial of that motion did not arise under the authority of Rule 60(b), and our cases interpreting Rule 60(b) are not directly applicable. Therefore, in order to determine whether Paradigm's notice of appeal was timely, we must look to the Commission's own rules and the cases interpreting those rules. *See id.*; *see also* N.C. Const. art. IV, § 3 ("The General Assembly may vest in administrative agencies established pursuant to law such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created.").

Industrial Commission Rule 702 states:

> (a) Except as otherwise provided in N.C. Gen. Stat. § 97-86, in every case appealed to the North Carolina Court of Appeals, the Rules of Appellate Procedure shall apply. *The running of the time for filing and serving a notice of appeal is tolled as to all parties by a timely motion filed by any party* to amend, to make additional findings[,] or *to reconsider the decision*, and the full time for appeal commences to run and is to be computed from the entry of an [o]rder upon any of these motions, in accordance with Rule 3 of the Rules of Appellate Procedure.

4 N.C. Admin. Code 10A.0702 (2012) (amended effective 1 January 2011) (emphasis added). In an unpublished decision of this Court, we

recognized the deference given to the Commission in the application of its own rules of procedure, stating unequivocally that "the time for filing notice of appeal is tolled when a timely motion for reconsideration is filed." *Allender v. Starr Elec. Co., Inc.*, __ N.C. App. __, 734 S.E.2d 139 (Nov. 6, 2012) (unpublished disposition), *available at* 2012 WL 5395036. Though an unpublished opinion has no binding precedential value, the *Allender* Court correctly acknowledged the application of Rule 702 in that case, and we enforce it here. Accordingly, Paradigm's motion for reconsideration tolled the filing period for its notice of appeal, which was filed well within thirty days of the Commission's 4 January 2013 order. Therefore, Plaintiff's motion to dismiss is denied, and Paradigm's conditional petition for writ of *certiorari* is dismissed.

Discussion

Our 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." *Richardson v. Maxim Healthcare/ Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citations omitted). The Commission's conclusions of law are fully reviewable on appeal. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E.2d 682 (1982). "If the finding of fact is essentially a conclusion of law, however, it will be treated as a conclusion of law which is reviewable [*de novo*] on appeal." *Bowles Distrib. Co. v. Pabst Brewing Co.*, 69 N.C. App. 341, 344, 317 S.E.2d 684, 686 (1984).

Section I includes an analysis of most of the issues raised by Plaintiff and Defendants on appeal. It does not, however, address Plaintiff's argument that the Commission should have removed Paradigm from the case or Defendants' argument that the Commission erred in determining that the rehabilitation professionals were acting as insurance adjusters in violation of its rules. Those questions are considered in *Section II* of this opinion, which focuses on the issues relating to Paradigm.

I. Plaintiff's and Defendants' Appeals

On appeal, Plaintiff and Defendants both contest the Commission's award of *pro rata* adaptive housing to Plaintiff. Defendants also argue that the Commission erred by granting payment for retroactive attendant care and by requiring Defendants to pay the cost of Plaintiff's life care plan. In addition, Plaintiff asserts that the Commission erred by failing to award him "all of the cost of [his a]ttorneys' fees." We affirm the Commission's awards of *pro rata* adaptive housing, retroactive

attendant care, and attorneys' fees and reverse its award of the cost of Plaintiff's life care plan.

A. Adaptive Housing

[2] Both parties argue on appeal that the Commission erred by distributing the cost of adaptive housing on a *pro rata* basis. Plaintiff contends that the Commission erred in reducing his award by the amount he paid in rent before his injury, and Defendants argue that the Commission erred in requiring them to pay any cost beyond those necessary to make Plaintiff's apartment accessible. We affirm the Commission on this issue.

In its 6 November 2012 opinion and award, the Commission found the following pertinent facts:

> 42. . . . Prior to Plaintiff's injury, ... [h]e shared a rental house with three other individuals, one of whom was his father. His *pro rata* share of the rent was $237.50 per month. As a result of his injury, Plaintiff requires increased livable square footage to accommodate his wheelchair and other medical supplies. Plaintiff's pre-injury shared living arrangement is no longer available and would not be suitable for his current condition.
>
> 43. Neither before[] nor since his injury[] has Plaintiff owned any real property that could be adapted to accommodate his current condition. [T]he handicap[ped-] accessible apartment[] in which Plaintiff currently resides . . . at a monthly rental rate of $881.00[] reasonably fulfills Plaintiff's need for wheelchair[-]accessible, handicapped adaptive housing . . . .
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> 44. [I]t is reasonable under the circumstances for Defendants to pay the difference between Plaintiff's pre-injury rent and his post-injury cost in renting wheelchair[-]accessible, handicapped adaptive housing from the time he first moved into his own rented housing . . . . on or about February 4, 2011.

(Italics added). The Commission also came to the following conclusions:

> 7. As a direct result of his compensable injury . . . , Plaintiff is a paraplegic and requires wheelchair[-] accessible, handicapped adaptive housing located in a reasonably safe community and in reasonable

> proximity to family, friends[,] and medical providers to provide relief and lessen his functional disability from his injury. Plaintiff is entitled to be furnished at Defendants' expense such wheelchair[-]accessible, handicapped adaptive housing. Since Plaintiff owns no real property capable of being adapted to suit his current needs, Defendants may fulfill their obligation to furnish Plaintiff with such wheelchair[-]accessible, handicapped adaptive housing through a suitable rented apartment. Plaintiff's current rental apartment is reasonable. N.C. Gen. Stat. § 97-25; *Derebery v. Pitt [Cnty. Fire Marshall]*, 318 N.C. 192, 347 S.E.2d 814 (1986).
>
> 8. It would be reasonable under the circumstances for Defendants to pay the difference between Plaintiff's pre-injury rent and post-injury rent dating back from the time he . . . first moved into private, adaptive housing following his August 13, 2010 work injury. N.C. Gen. Stat. § 97-25; *Derebery*[, 318 N.C. at 203, 347 S.E.2d at 821]; *Timmons*[*v. N.C. Dep't of Transp.*], 123 N.C. App. 456, 462, 473 S.E.2d 356, 359 (1996), *affirmed per curiam*, 346 N.C. 173, 484 S.E.2d 551 (1997).

Given those findings and conclusions, the Commission awarded Plaintiff "the difference between Plaintiff's pre-injury rent of $237.50 and his post-injury rent for handicap[ped] adaptive housing until further [o]rder of the Commission."

At the time of Plaintiff's injury, N.C. Gen. Stat. § 97-25 provided in pertinent part that

> [m]edical compensation shall be provided by the employer. In case of a controversy arising between the employer and employee relative to the continuance of medical, surgical, hospital, or other treatment, the [Commission] may order such further treatments as may in the discretion of the Commission be necessary.

2005 N.C. Sess. Laws ch. 448, § 6.2. "Medical compensation" was defined at that time as

> medical, surgical, hospital, nursing, and rehabilitative services, and medicines, sick travel, and other treatment, including medical and surgical supplies, as may reasonably

> be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability . . . .

1991 N.C. Sess. Laws Ch. 703, § 1.

The controlling Supreme Court opinion in this case is *Derebery v. Pitt Cnty. Fire Marshall*, 318 N.C. 192, 347 S.E.2d 814 (1986). In *Derebery*, the plaintiff lived with his parents before and after his injury. *Id.* at 194, 347 S.E.2d at 816. The plaintiff did not have any property of his own. *See id.* Because the owner of the parents' home refused to allow it to be adapted for the plaintiff's use, the Commission concluded that "[the d]efendant should furnish [the] plaintiff with a completely wheelchair-accessible place to live and provide all reasonable and necessary care for [the] plaintiff's well-being," including "an appropriate place for [the] plaintiff to live in view of his condition." *Id.*

On appeal to this Court, we held "that the provision of [section] 97-29[5] requiring payment for 'other treatment or care' cannot be reasonably interpreted to extend the [defendant's] liability to provide a residence for an injured employee." *Id.* at 193, 347 S.E.2d at 815 (citation, certain quotation marks, ellipsis, and brackets omitted). The Supreme Court reversed that holding on grounds that the statutory duty to provide "other treatment or care" can be reasonably construed to include the duty to "furnish alternate housing." *Id.* at 199, 347 S.E.2d at 818. Describing the Act as remedial legislation, which should be construed liberally, our Supreme Court ruled that "an employer must furnish alternate, wheelchair-accessible housing to an injured employee where the employee's existing quarters are not satisfactory and for some exceptional reason structural modification is not practicable." *Id.* at 203, 347 S.E.2d at 821.

Dissenting from the majority opinion in *Derebery*, Justice Billings offered the following additional analysis:

> The . . . Act provides disability compensation as a substitute for lost wages. That substitute for wages is the employer's contribution to those things which wages

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5. We have determined that the *Derebery* Court's interpretation of section 97-29 is applicable to section 97-25. *Timmons v. N.C. Dep't of Transp.*, 123 N.C. App. 456, 461, 473 S.E.2d 356, 359 (1996) ("In our view, the words 'and other treatment' contained in [section] 97-25 are susceptible of the same broad construction accorded the similar language of [section] 97-29 by the Supreme Court in *Derebe*ry . . . ."), *affirmed per curiam*, 346 N.C. 173, 484 S.E.2d 551 (1997).

> ordinarily are used to purchase — food, clothing, *shelter*, etc. There is no provision in the . . . Act for the employer, in addition to providing the statutory substitute for wages, to provide the ordinary necessities of life, although in addition to weekly compensation based upon the employee's wages the employer must provide compensation for "reasonable and necessary nursing services, medicines, sick travel, medical, hospital, and other treatment or care or rehabilitative services [under section 97-29[6]]." To construe "other treatment or care" to include basic housing is not a "liberal construction" . . . of the statute; it is clearly a misconstruction. If housing is the kind of "treatment or care" intended by the statute, are not food, clothing and all of the other requirements for day-to-day living equally necessary for the employee's "treatment or care"? In the context of the [Act], the "treatment or care or rehabilitative services" clearly relate to those necessitated by the employee's work-related injury.

Id. at 205–06, 347 S.E.2d at 822 (Billings, J., dissenting) (citations and certain brackets omitted; emphasis in original).

We applied the *Derebery* opinion ten years later in *Timmons*, 123 N.C. App. at 456, 473 S.E.2d at 356. The plaintiff in that case, like the plaintiff in *Derebery*, was a paraplegic who lived with his parents. *Id.* at 458, 473 S.E.2d at 357. After the plaintiff's injury, the defendant paid to modify his parents' home to make it accessible for the plaintiff's use. *Id.* at 458, 473 S.E.2d at 357. The plaintiff later moved to a handicapped-accessible apartment where he lived for approximately eight and a half years. *Id.* When the rent increased, the plaintiff moved back to his parents' home. *Id.* Unlike *Derebery*, the plaintiff in *Timmons* eventually returned to full-time employment with the defendant, purchased land, and requested that the defendant finance the construction of a new, handicapped-accessible home. *Id.* at 458–59, 473 S.E.2d at 357–58. The Commission held that the plaintiff was entitled to financial assistance and ordered the defendant to pay, pursuant to section 97-25, the expense of rendering the plaintiff's new home handicapped accessible. *Id.* at 459, 473 S.E.2d at 358. The defendant appealed. *Id.*

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6. Section 97-29 no longer contains the quoted language. As noted in footnote 6, the controlling language for the purposes of this case can be found *supra* in the version of section 97-25 that was in effect at the time of Plaintiff's injury.

On appeal, this Court determined that "the Commission's finding [—] that the accommodations at [the] plaintiff's parents' home [were] no longer suitable [—] support[ed] its conclusion that [the] plaintiff [was] entitled to have [the] defendant pay for adding to [the] plaintiff's new home those accessories necessary to accommodate [the] plaintiff's disabilities." *Id.* at 461, 473 S.E.2d at 359 (internal quotation marks omitted). "We [did] not agree with [the] plaintiff, however, that *Derebery* require[d the] defendant to pay the *entire cost* of constructing [the plaintiff's] residence." *Id.* (emphasis added). Instead, we concluded that,

> [while] the expense of housing is an ordinary necessity of life, to be paid from the statutory substitute for wages provided by the [Act, t]he costs of modifying such housing . . . to accommodate one with extraordinary needs . . . is not an ordinary expense of life for which the statutory substitute [for] wage is intended as compensation.

Id. at 461–62, 473 S.E.2d at 359. The Supreme Court affirmed that decision *per curiam*. *Timmons v. N.C. Dep't of Transp.*, 346 N.C. 173, 484 S.E.2d 551 (1997).

On appeal in this case, Defendants assert that Plaintiff's adaptive housing is an "ordinary expense[] of life [which] Plaintiff is required to pay out of his weekly benefits." Relying on the language in *Timmon*s, "Defendants contend their only legal obligation under the [Act] regarding housing is to provide Plaintiff with modifications to his housing as required by his disability, which they have done." Plaintiff responds that this is a misreading of the law. At oral argument, Plaintiff asserted that the dissent authored by Justice Billings in *Derebery* and this Court's opinion in *Timmons* should be construed as the general rule in these matters, while the Supreme Court's opinion in *Derebery* should be construed as an exception to that rule. In his brief, Plaintiff articulated his interpretation of those opinions in the following way:

> . . . If an injured worker already owns a dwelling . . . that is capable of being . . . adapted for [handicapped] use, given the nature of the worker's particular injury, the employer . . . is only required to pay for the cost of the handicapped modifications . . . [.] But if the injured worker at the time of injury owns no dwelling . . . or does not own one capable of being . . . adapted [for handicapped use,] the employer . . . must "provide[,]" at its expense, . . . the worker with the entire handicapped-adapted dwelling . . . .

Plaintiff contends that this case falls firmly under the alleged *Derebery* exception and that Defendants must therefore pay the entire rent for his adapted apartment home. We find neither party's argument persuasive and affirm the Commission's *pro rata* determination in its entirety.

As a preliminary point, we note that the parties' arguments assume rules that are rigid and broadly applicable in the cases discussed above. A reading of section 97-25 makes it clear, however, that an award of "other treatment" is in the discretion of the Commission. 2005 N.C. Sess. Laws ch. 448, § 6.2 ("[T]he [Commission] may order such further treatments as may in the discretion of the Commission be necessary."). Section 97-2(19), as written at the time of Plaintiff's injury, further explained that the *type* of medical compensation the employer must pay is "*in the judgment of the Commission*" as long as it is "reasonably . . . required to effect a cure or give relief." 1991 N.C. Sess. Laws Ch. 703, § 1. The Supreme Court's decision in *Derebery* and our own decision in *Timmons* represent the outer limits of the Commission's authority under those statutes, not entirely new rules to be followed in place of or in addition to the statutes created by our legislature.

In this case, the Commission determined that Defendants should pay the *pro rata* difference between the rent required for Plaintiff's new, handicapped-accessible home and the rent Plaintiff had to pay as an ordinary expense of life before his injury. The Commission sensibly reasoned that living arrangements constitute an ordinary expense of life and, thus, should be paid by the employee. The Commission also recognized, however, that a change in such an expense, which is necessitated by a compensable injury, should be compensated for by the employer. Because Plaintiff did not own his own home in this case, he was required to find new rental accommodations that would meet his needs. In this factual circumstance, it was appropriate for the Commission to require the employer to pay the difference between the two.

While circumstances may occur in which an employer is required to pay the entire cost of the employee's adaptive housing, neither the Supreme Court's opinion in *Derebery* nor our holding in *Timmons* support Plaintiff's assertion that such a requirement is necessary *whenever* an injured worker does not own property or a home. Such a ruling would reach too far. For the above reasons, both parties' arguments are overruled, and the Commission's opinion and award as to this issue is affirmed.

B. Retroactive Attendant Care

[2] Relevant to the issue of retroactive attendant care, the Commission found that, as a result of his injury, Plaintiff was not fully independent and required assistance. Specifically, the Commission found that:

> 8. . . . [Plaintiff] is weak in the torso causing trunk balance problems, making him at risk for falls, especially during transfers to the bed, wheelchair, bathtub and toilet, and when engaging in his bowel program[,] which requires the administration of suppositories and leaning forward on the toilet. As a result of his injury, Plaintiff also has pain, leg spasticity, fatigue and shortness of breath due to his lung injury, and depression[,] which was significantly aggravated by his paraplegia.

Shortly after his injury, Plaintiff was cared for in a hospital. He was later moved to a rehabilitation center in Georgia. On 4 February 2011, Plaintiff was discharged from the rehabilitation center. When he inquired about whether he would begin to receive attendant care, he was informed that he would have to get a prescription for treatment from his Georgia-based treating physician, Dr. John Lin.

Plaintiff did not have a consultation with Dr. Lin and was discharged without a provision for attendant care services. Nonetheless, a report from the rehabilitation center "indicated that Plaintiff was not fully independent and that he continued to require assistance . . . with his mobility, specifically assistance with transferring from his wheelchair to his bed, tub, toilet[,] and car and that he continued to require supervision due to his spasticity level."

After Plaintiff was discharged from the rehabilitation center, he moved into a private home in Georgia. He was cared for by his father, who left his job to stay with Plaintiff, and his sister, who came from Mexico to assist her brother. During that time, Plaintiff's father and sister

> continued to provide [Plaintiff] with the same type of daily attendant care services that they had previously provided to him during his stay at the [rehabilitation center], including assisting him with his daily bowel program and internal catheterization program, transferring him to and from his wheelchair to his bed, the tub, toilet, and car, assisting with bathing and dressing, and performing other daily chores such as shopping for household needs and cooking.

These services were provided from approximately 9:00 a.m. to 11:00 p.m. each day.

Plaintiff's sister returned to Mexico on 5 March 2011. Plaintiff's father remained with Plaintiff as his sole caretaker. On 16 March 2011, Dr. Lin ordered professional attendant care for Plaintiff until Plaintiff could get an outpatient therapy evaluation. Defendants began providing attendant care on 17 March 2011 for two hours in the morning and two hours in the evening.

Plaintiff moved to North Carolina a few months later. On 11 July 2011, Dr. Lin issued discharge instructions, ordering that attendant care services be discontinued because "Plaintiff was functioning independently with his activities of daily living and mobility." Though Plaintiff's medical case manager asked Dr. Lin to reconsider that decision, he refused.

On 28 March 2011, Plaintiff presented himself for a medical evaluation concerning the transfer of his care from Georgia to North Carolina. His new, Charlotte-based doctor, Dr. William Bockenek, disagreed with Dr. Lin regarding attendant care and prescribed professional attendant care for eight hours per day, seven days per week.[7] Defendants began providing attendant care for Plaintiff at those requirements, beginning 1 August 2011. Dr. Bockenek also opined that Plaintiff needed eight hours of attendant care per day dating back to his 4 February 2011 discharge from the rehabilitation center.

In its 6 November 2012 opinion and award, the Commission stated that it gave "greater weight to the opinions of Dr. Bockenek over those of Dr. Lin on Plaintiff's attendant care needs." It also concluded that:

> 3. Plaintiff has been entitled to daily retroactive and ongoing attendant care services provided at Defendants' expense for eight hours per day since his discharge from the [rehabilitation center] . . . . Attendant care reimbursement for services previously provided by family members are [sic] recoverable. Although the Court of Appeals issued an opinion that prior approval of attendant care services must be obtained before family members can be reimbursed in *Mehaffey v. Burger King* . . . , __ N.C. App. __, 718 S.E.2d 720

7. Dr. Bockenek also prescribed an additional two hours of attendant care each day for community transport, which the Commission concluded was "in addition to the eight hours of [services] Plaintiff require[d.]"

(2011), the Supreme Court of North Carolina issued a stay of the *Mehaffey* decision in January 2012.

4. Plaintiff's father and his sister provided eight hours of attendant care per day for Plaintiff during the periods when Defendants provided no care. During the periods when Defendants provided some care through a commercial agency, but less than eight hours per day, Plaintiff's father and sister provided the balance of the eight hours of care that Plaintiff required. The attendant care provided to Plaintiff by his father and sister was medically necessary and reasonably required to give relief and lessen his disability. *Plaintiff timely sought reimbursement for these attendant care services*. . . . Defendants are obligated to pay for the attendant care services provided to Plaintiff by his father and sister.

(Emphasis added). Therefore, the Commission ordered Defendants to reimburse Plaintiff's father and sister for the attendant care they had provided to Plaintiff and to continue providing attendant care services for eight hours per day until further notice.

Defendants argue on appeal that the Commission erred in awarding retroactive attendant care to Plaintiff, citing an opinion of this Court from 2011 in *Mehaffey v. Burger King*, __ N.C. App. __, 718 S.E.2d 720 (2011). In that case, the plaintiff's wife provided him with care for approximately nine months. *Id.* at __, 718 S.E.2d at 722. Afterward, a nurse consultant with the Commission recommended that the defendants compensate the plaintiff with eight hours of daily attendant care for five days each week. *Id.* The defendants did not authorize such care beforehand. *Id.* About ten months after the plaintiff's wife stopped attendant care, the plaintiff's family physician recommended sixteen hours of attendant care services per day, retroactive to the date of his original diagnosis. *Id.* In its opinion and award, the Commission gave the most weight to the family physician and awarded compensation for the plaintiff's wife's past and future attendant care. *Id.* at __, 718 S.E.2d at 722–23.

On appeal, we reversed the Commission's award because the attendant care provided by the wife had not been *pre-approved* in accordance with the Commission's medical fee schedule. *Id.* That opinion was reversed by our Supreme Court on 8 November 2013. *Mehaffey v. Burger King*, __ N.C. __, __, __ S.E.2d __, __ (2013), available at 2013

WL 5962846 [hereinafter *Mehaffey II*]. In reversing this Court's opinion, our Supreme Court stated:

> [O]ur [g]eneral [s]tatutes [do] not give the Commission the authority to mandate that certain attendant care service providers may not be compensated unless they first obtain approval from the Commission before rendering their assistance. As a result, we are unable to permit [the medical fee schedule] to prevent the award of retroactive compensation for the attendant care services [the wife] provided her husband.

Id. at __, __ S.E.2d at __ (citation omitted). Instead of affirming the Commission's original award, however, the Court pointed out that "an injured worker is required to obtain approval from the Commission within a reasonable time after he selects a medical provider." *Id.* Accordingly, the Court stated that the plaintiff was only entitled to reimbursement for the attendant care services provided by his wife if he sought approval from the Commission within a reasonable period of time. *Id.* Because it was unclear from the record whether that had occurred, the Court remanded the matter for further findings of fact and conclusions of law by the Commission. *Id.*

Given the opinion of our Supreme Court, Defendants' argument is meritless. *See id.* Unlike *Mehaffey II*, the record in this case reflects the Commission's finding and conclusion that "Plaintiff timely sought reimbursement for [the] attendant care services [provided by his father and sister]." This determination is not disputed by the parties. Accordingly, we affirm the Commission's opinion and award on the issue of retroactive attendant care pursuant to our Supreme Court's opinion in *Mehaffey II*.

C. Cost of Life Care Plan

[4] As noted above, the employer in workers' compensation cases

> is required to provide the injured employee with medical compensation, which includes "medical, surgical, hospital, nursing, and *rehabilitative services* . . . as may reasonably be required to effect a cure or give relief." [1991 N.C. Sess. Laws Ch. 703, § 1] (emphasis [added]); [2005 N.C. Sess. Laws ch. 448, § 6.2]. The . . . Commission has discretion in determining whether a rehabilitative service will effect a cure, give relief, or will lessen a claimant's period of disability.

Scarboro v. Emery Worldwide Freight Corp., 192 N.C. App. 488, 495, 665 S.E.2d 781, 786–87 (2008) (citation, internal quotation marks, and certain ellipses omitted). In addition, when reviewing an opinion and award of the Commission, we are "limited to a consideration of whether there [is] any competent evidence to support the . . . Commission's findings of fact and whether [those] findings . . . support the Commission's conclusions of law." *Ard v. Owens-Illinois*, 182 N.C. App. 493, 496, 642 S.E.2d 257, 259 (2007) (citation, internal quotation marks, and emphasis omitted).

In this case, Defendants assert that the Commission erred in requiring them to pay the costs of Plaintiff's life care plan and contest findings of fact 32, 33, and 34 as insufficient to support its 11th conclusion of law. The Commission's findings state in pertinent part as follows:

> 32. . . . [T]he cost of preparation of the [life care plan] . . . was a reasonable rehabilitative service as it was medically necessary to comprehensively evaluate and identify the essential medical needs of Plaintiff as a result of his catastrophic injuries. The [life care plan] was essential to ensure appropriate treatment, care, transportation[,] and living accommodations [were] provided in order to give needed relief from symptoms associated with Plaintiff's injuries and to prevent further deterioration in his condition[,] which could otherwise become life threatening. Moreover, the majority of the recommendations and items identified . . . in the [life care plan] . . . have been put in place. The [life care plan] . . . is reasonably and medically necessary to provide relief and lessen Plaintiff's disability considering the circumstances of this case, including the Paradigm contract. Defendants are obligated to pay for the preparation of this [p]lan.
>
> 33. [An itemized, numbered table was prepared in the life care plan], listing the current and future needs of Plaintiff as a result of his injury. . . . Except for items 64–66 and 68, the . . . Commission finds that the items listed in the [life care plan] are medically necessary or have the potential to become medically necessary in the future[;] however, [certain items] are projected future needs and may be revised, items . . . related to the power wheelchair are not expected to be needed until 2035 and items . . . related to prescribed

> medications are subject to change periodically. If not already provided, Defendants are obligated to provide Plaintiff with the items listed as 1–63, unless Plaintiff specifically rejects the listed item, a medication or medical service is revised by a treating medical provider, or the item is a future need. . . .
>
> 34. Dr. Bockenek opined and the . . . Commission [finds] as fact that the recommendations he provided . . . to develop Plaintiff's [life care plan] were reasonably necessary.

Given those findings, the Commission concluded as a matter of law that:

> 11. The cost of preparation of the [life care plan] constitutes a reasonably necessary rehabilitative service and Plaintiff is entitled to have the costs associated with the preparation of this [plan] taxed against Defendants. Plaintiff is also entitled to be provided those items listed and found in the above findings of fact to be reasonably or medically necessary from [the life care plan]. . . .

In support of this conclusion, the Commission cited to 1991 N.C. Sess. Laws Ch. 703, then known as N.C. Gen. Stat. § 97-2(19); 2005 N.C. Sess. Laws ch. 448, § 6.2, then known as N.C. Gen. Stat. § 97-25; and *Scarboro*, 192 N.C. App. at 488, 665 S.E.2d at 781.

In *Scarboro*, we affirmed the Commission's tax of the costs of the plaintiff's life care plan as against the defendants because the plaintiff's doctor opined that the life care plan was reasonable and "medically necessary" for the plaintiff. *Id.* at 496, 665 S.E.2d at 787. In so holding, we determined that the doctor's opinion constituted competent evidence sufficient to support the Commission's conclusion that the life care plan was a "reasonable rehabilitative service." *Id.* For that we reason, we affirmed the Commission's opinion and award on that issue. *Id.*

Following the Commission's opinion and award in this case, Commissioner Tammy Nance offered the following dissenting opinion on the issue of the allocation of the costs of Plaintiff's life care plan:

> . . . Dr. Bockenek, the authorized treating physician who specializes in treating patients with spinal cord injuries, is perfectly capable of prescribing Plaintiff's medical needs as they arise, and as they change, which they will. As Dr. Bockenek explained in his deposition, patients with

> spinal cord injuries progress at different levels. There will be variability in what Plaintiff needs as his functional abilities improve with treatment and therapy, or decline with age. Dr. Bockenek testified that he could not say that Plaintiff was going to need everything that was on [the] life care plan. He said that everything that was in the life care plan was reasonable and necessary "for some patient with a spinal cord injury," but with respect to Plaintiff specifically, and what Plaintiff might need over his lifetime, it was "a guess, an estimate." According to Dr. Bockenek, he bases his treatment recommendations on his clinical assessment, not some "[c]onsortium for [s]pinal [c]ord [m]edicine" guidelines.
>
> A life care plan is a useful litigation tool when the parties are trying to settle a catastrophic claim and want a projection and cost analysis of future medical needs. I do not believe it is a component of medical compensation within the meaning of N.C. Gen. Stat. § 97-2(19) or N.C. Gen. Stat. § 97-25, and I do not believe that it was reasonable and necessary in this case to effect a cure, give relief, or lessen the period of Plaintiff's disability. I believe that Dr. Bockenek, with input from Plaintiff, the medical case manager, and the health care workers who attend to Plaintiff on a daily basis, can make recommendations for Plaintiff's care and prescribe for his needs as they arise and change, without resorting or referring to a life care plan.

On appeal, Defendants contest the Commission's findings of fact as not based on competent evidence and request that we adopt Commissioner Nance's dissenting opinion. In response, Plaintiff contends that "the preparation of a life care plan may be considered to be a necessary service in a workers' compensation action . . . when it is deemed 'necessary as a result of the injuries suffered by [the] plaintiff,' " citing an unpublished opinion of this Court.[8] Plaintiff goes on to assert, without citing any authority, that "[w]hether a life care plan is 'necessary as a result of the injuries suffered' is a question of fact for the . . . Commission to decide based on all the competent evidence of record and any reasonable inferences from this evidence." Beyond that, Plaintiff petitions this Court to affirm the Commission's award as

8. Unpublished opinions lack any precedential value and are not controlling on subsequent panels of this Court. N.C.R. App. P. 30(e).

a matter of policy, noting that the costs of preparing a life care plan are expensive and should not be imposed on injured workers who often lack the financial resources of their employers. We find Plaintiff's arguments unpersuasive, reverse the opinion and award of the Commission, and adopt the dissenting opinion of Commissioner Nance.

Plaintiff's argument that a life care plan is a "necessary service" is without merit. Plaintiff relies on no binding authority for that point, and we are unable to find any. If the Commission's conclusion of law is to be upheld on this issue, it must be because that conclusion is adequately supported by its own findings of fact, which must in turn be supported by competent evident. *See Ard*, 182 N.C. App. at 496, 642 S.E.2d at 259. In *Scarboro*, we affirmed the Commission's conclusion that the costs of the life care plan should be imposed on the defendants because its conclusion was supported by the finding that the plaintiff's doctor had deemed the life care plan to be "reasonable and medically necessary." *Scarboro*, 192 N.C. App. at 496, 665 S.E.2d at 787.[9]

In this case, the salient features of findings of fact 32 and 33 are more properly categorized as conclusions of law.

> The classification of a determination as either a finding of fact or a conclusion of law is admittedly difficult. As a general rule, however, any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law. Any determination reached through logical reasoning from the evidentiary facts is more properly classified a finding of fact.

See In re Helms, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (citations, internal quotation marks, and certain commas omitted). By characterizing the life care plan and the items therein as reasonable and "medically necessary," findings 32 and 33 involve "the exercise of judgment [and] the application of legal principles," not a resolution of evidence. *See id.* For that reason, they constitute conclusions of law and, thus, are not competent support for the Commission's 11th identified conclusion. Nevertheless, finding of fact 34 constitutes a finding of fact because it resolves as an evidentiary matter the nature of Dr. Bockenek's opinion, *i.e.*, "that the recommendations he provided . . . to develop Plaintiff's [life care plan] were reasonably necessary." Therefore, we must determine whether finding of fact 34 supports conclusion of law 11. We hold that it does not.

---

9. Because the defendants in *Scarboro* did not contest that finding, we presumed that it was based on competent evidence. *Id.*

While finding of fact 34 might appear to support the Commission's conclusion that the cost of the life care plan is a reasonably necessary rehabilitative service, this is not the case. In *Scarboro*, the doctor opined that the life care plan itself was "reasonable and medically necessary," and we held that this opinion was competent to support the Commission's conclusion that the cost of the plan should be taxed to the defendants as a result. Here, however, the Commission has only determined as a matter of fact that Dr. Bockenek believed *his own* recommendations were reasonable. As Commissioner Nance pointed out in her dissent, those recommendations did not support the Commission's conclusion that the life care plan was, in fact, a reasonably necessary rehabilitative service.[10] Accordingly, we reverse the opinion and award of the Commission, taxing the costs of Plaintiff's life care plan to Defendants.

D. Plaintiff's Attorneys' Fees

[5] Citing N.C. Gen. Stat. § 97-88.1, Plaintiff contends that the Commission erred in failing to award him the entire cost of his attorneys' fees on grounds that Defendants have exhibited "a stubborn and unfounded litigiousness" throughout the case. In support of that contention, Plaintiff briefly repeats his arguments regarding adaptive housing and Paradigm.[11] "If the [D]efendants' position is a correct statement of the applicable law, [Plaintiff contends,] the result in this case would be absurd." We disagree.

Section 88.1 of the Act provides as follows:

> If the . . . Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for [the] defendant's attorney or [the] plaintiff's attorney upon the party who has brought or defended them.

N.C. Gen. Stat. § 97-88.1 (2011).

> The purpose of this section is to prevent stubborn, unfounded litigiousness, which is inharmonious with the primary purpose of the [Act] to provide compensation to injured employees. . . . The reviewing court must

10. Commissioner Nance's dissenting opinion, quoted above, provides an in-depth discussion of why this finding does not support the Commission's conclusion, and we see no reason to quote it again.

11. Plaintiff's arguments regarding Paradigm are discussed *infra*.

> look to the evidence introduced at the hearing in order to determine whether a hearing has been defended without reasonable ground. The test is not whether the defense prevails, but whether it is based in reason rather than in stubborn, unfounded litigiousness. If it is determined that a party lacked reasonable grounds to bring or defend a hearing before the Commission, then the decision of whether to make an award pursuant to [section] 97-88.1 and the amount of the award is in the discretion of the Commission, and its award or denial of an award will not be disturbed absent an abuse of discretion.

Chaisson v. Simpson, 195 N.C. App. 463, 484, 673 S.E.2d 149, 164 (2009) (citations, internal quotation marks, brackets, and certain commas omitted).

Beyond the alleged "absurdity" of Defendants' argument, Plaintiff offers no evidence of a stubborn or unfounded litigiousness. Pursuant to our discussions of Defendants' arguments, *supra* and *infra*, we find no merit in this claim. Even to the extent that Defendants were legally incorrect, we see nothing in the record to suggest that they have provided anything less than a sound and sensible defense for their clients. Therefore, we hold that the Commission lacked the authority to tax Defendants with attorneys' fees under section 97-88.1 and affirm the portion of the Commission's opinion and award that concludes the same.

II. Paradigm's Appeal

In addition to the arguments discussed above, Defendants appeal on grounds that the Commission erred in determining that the assigned nurse case managers were acting as insurance adjusters, concluding that they were not operating within the Commission's Rules for Utilization of Rehabilitation Professionals in Workers' Compensation Claims ("the RP Rules"), and ordering Defendants to assign different nurse case managers under the RP Rules. Further, Plaintiff contends that the Commission erred in failing to remove Paradigm from the case. Finally, Paradigm makes the following arguments in its appeal: (1) the Commission erred by denying Paradigm's motions and failing to advise how it would have ruled; (2) the Commission's opinion and award is void because Paradigm was a necessary party that was never made a party to the matter; (3) the Commission erred in concluding that Paradigm was not providing services under the RP rules; (4) the Commission erred in determining that Paradigm had a conflict of interest; and (5) the Commission erred in finding that Paradigm acted as a co-insurer. We reverse the Commission

on Defendants' appeal, affirm the Commission on Paradigm's first issue, and remand to the Commission for further review regarding Plaintiff's and Paradigm's remaining issues.

A. The Rehabilitation Professionals

[6] Defendants expressly challenge the Commission's findings of fact and conclusions of law regarding the RP Rules and the assigned rehabilitation professionals.[12] Relevant to our decision in this case, the Commission's findings and conclusions are as follows:

FINDINGS OF FACT

45. On or about December 13, 2010, [Defendants] contracted with [Paradigm] to provide case management, rehabilitation[,] and vocational rehabilitation services. In return for consideration paid . . . in the sum of $2,286,953.00, Paradigm agreed to provide not only these services but also accepted, with some exceptions, a significant share of the insurable risk in this matter. . . . Paradigm assumed financial responsibility for payment of compensable medical bills relating to Plaintiff's claim beginning August 13, 2010[,] and continuing until "all outcomes are achieved." Both Arch and Paradigm are presently acting as co-insurers.

46. The [o]utcome [p]lan [c]ontract between Arch and Paradigm outlined specific inclusions and exclusions of medical services to be provided by Paradigm . . . . The contract specifically provided [that:]

    "All medical costs related to the work injury deemed appropriate, necessary, and compensable in accordance with applicable jurisdictional statutes, from the contract start date until the targeted [o]outcome [l]evel is achieved, are included in the [o]outcome [p]lan [c]ontract price."

    . . .

47. Under its contract, Paradigm is compensated in part [for] the difference in the cost of rehabilitation, vocational[,] and case management services it has agreed

12. Specifically, Defendants challenge findings of fact 48–52 and conclusions of law 13–14.

to provide and the amount of the fixed sum payment it received from Arch as consideration for assuming the risk of such services. Ms. Angela Linn was assigned as network manager of the Paradigm contract.

48. . . . Defendants contend that Paradigm has contracted with a third party, Palmetto Rehabilitation, to provide its case management services to Plaintiff and that Paradigm did not directly provide case management services to Plaintiff. Ms. Linn testified that she performed services as an employee of Palmetto Rehabilitation; however, there is no documentation in the record to corroborate her testimony on this issue.

49. Ms. Linn has worked seven years as a contract nurse case manager/network manager for Paradigm. She testified that her primary duties as a nurse case manager/network manager for Paradigm are to coordinate and facilitate medical treatment for patients. In Plaintiff's case, Ms. Linn received a call to see if she would accept Plaintiff's case[. When she did,] she flew to [Plaintiff's location] and assessed his needs and coordinated his care transfer . . . to Atlanta, Georgia. Ms. Linn did not testify specifically [about] whether her assignment to Plaintiff's case came from Paradigm or Palmetto Rehabilitation. Once Plaintiff became a patient at the [rehabilitation center], Ms. Linn coordinated an outcome plan with other Paradigm team members and became the "eyes and ears" of the Paradigm team while Plaintiff was treated at the [rehabilitation center]. She visited Plaintiff once a week . . . , updated the Paradigm team on his progress, *authorized medical treatment and services that she felt were within the* [*o*]*utcome* [*p*]*lan* [*c*]*ontract* [*p*]*rice*[,] and coordinated and authorized housing needs and transportation for Plaintiff's family during his stay at the [rehabilitation center].

50. In terms of authorizing medical treatment and services, *Ms. Linn testified that while working on Plaintiff's claim she had full authority to provide services that she deemed medically necessary for Plaintiff and within the* [*o*]*utcome* [*p*]*lan* [*c*]*ontract price.* In a December 9, 2010 letter, Paradigm directed

Gallagher Bassett Services to forward any communication or requests for authorization of services related to Plaintiff's claim to Ms. Linn. A January 18, 2011 e-mail from [the] claims representative with Gallagher Bassett Services[] responded to a request from a vendor for authorization for medical supplies for Plaintiff, stating that "all medical treatment and authorization need to go through Paradigm. Please contact Angela Linn with Paradigm."

51. Once [Plaintiff's] care was transferred to North Carolina, Ms. Linda Sproat . . . provided case management services to Plaintiff, such as regularly performing home assessments to determine [Plaintiff's] daily needs, [and] coordinating his personal attendant care needs and medical appointments. She also authorized medical treatment, services[,] and cost[s] for Plaintiff, including an additional six weeks of physical and occupational therapy, transportation services to and from medical appointments[,] and wall[ ]mounted lifts and grab bars for Plaintiff's bathroom.

. . .

53. Based upon a preponderance of evidence, the . . . Commission finds that that [sic] the services provided by both Ms. Linn and Ms. Sproat as network managers with Paradigm do not fit within the parameters of medical case management allowed under the [RP Rules]. While they did provide some case management services to Plaintiff, Ms. Linn and Ms. Sproat had full authority to authorize medical treatment and services that they deemed to be medically necessary, which is closer to the authority of insurance claims adjusters. They only sought authorization from the carrier if the services were not within the listed "[o]utcome [p]lan [c]ontract [p]rice."

54. Palmetto Rehabilitation is not providing services to Plaintiff under the authority of the [RP Rules]. Plaintiff would benefit from the assignment of a medical case manager operating under [the RP Rules].

55. The . . . Commission finds that despite its contract with Paradigm, Defendants . . . remained liable for all of the

> compensable consequences of Plaintiff's injury. The . . . Commission further finds that it is within the jurisdiction of the [DOI] to determine whether Paradigm is properly operating in North Carolina on this claim and whether the services performed by Ms. Lin [sic] and Ms. Sproat constituted insurance claims adjusting.
>
> . . .
>
> CONCLUSIONS OF LAW
>
> . . .
>
> 13. No special contract can relieve an employer of his [sic] obligation under the [A]ct. Therefore, despite [Defendants'] contract with Paradigm[,] they remained ultimately liable on this claim. Paradigm then contracted with Palmetto Rehabilitation to provide rehabilitation and medical case management services. *However, since Ms. Lin* [sic] *and Ms. Sproat also have authority to approve or deny medical care, they are not operating under the* [*RP Rules*] *as they, in part, provided claims adjustment type services and their contractual relationship conflicts with the conduct allowed under* [*those*] *rules.*
>
> 14. Whether working for Paradigm or Palmetto Rehabilitation, Ms. Linn and Ms. Sproat are not providing services to Plaintiff under the [RP Rules].

(Emphasis added).

In their brief, Defendants assert that Ms. Linn and Ms. Sproat (collectively, "the nurse case managers") should not be removed as violating the RP Rules because, as employers, Defendants have the authority to direct medical treatment.[13] They go on to claim that the nurse case managers acted within the scope of the RP Rules and contend that the Commission lacked any authority for its conclusion to the contrary. In his brief, Plaintiff asserts that Paradigm is incentivized to minimize its payments to Plaintiff because of its agreement with Defendants. He also alleges that Paradigm and Arch were working together in violation of the RP Rules — citing an e-mail from Defendants to one of

13. This is correct. When an employer has accepted a claim as compensable, it has the right to direct the medical treatment for that injury. *Craven v. VF Corp.*, 167 N.C. App. 612, 616–17, 606 S.E.2d 160, 163 (2004).

the nurse case managers, which instructed her to contact Gallagher Bassett for items not covered in the contract.[14] After a review of the RP Rules and the record in this case, we find that the nurse case managers were not in violation of the rules and reverse the opinion and award of the Commission.

In pertinent part, the RP Rules provide as follows:

> *.0102 PURPOSE OF THE RULES*
>
> (a) The purpose of these Rules is to foster professionalism in the provision of rehabilitation services in Industrial Commission cases, such that in all cases the primary concern and commitment of the [Rehabilitation Professional ("RP")] is to the medical and vocational rehabilitation of the injured worker rather than to the personal or pecuniary interest of the parties.
>
> (b) To this end, these Rules are to be interpreted to promote frank and open cooperation among parties in the rehabilitation process, and to discourage the pursuit of plans or purposes which impede or conflict with the parties' progress toward that goal.

4 N.C. Admin. Code 10C.0102 (2012) (effective 1 January 1996).

> *.0103 APPLICATION OF THE RULES*
>
> . . .
>
> (d) "Medical rehabilitation" refers to the planning and coordination of health care services. The goal of medical rehabilitation is to assist in the restoration of injured workers as nearly as possible to the workers' pre-injury level of physical function. Medical case management may include but is not limited to case assessment, including a personal interview with the injured worker; development, implementation[,] and coordination of a care plan with health care providers and with the worker and family; evaluation of treatment results; planning

14. Plaintiff argues that the e-mail is revelatory of Paradigm's "carte blanch" [sic] authority to grant or deny services under its contract with Arch and through the nurse case managers.

for community re-entry; return to work with the employer of injury and/or referral for further vocational rehabilitation services.

. . .

4 N.C. Admin Code 10C.0103 (2012) (amended effective 1 June 2000).

.0106 PROFESSIONAL RESPONSIBILITY OF THE REHABILITATION PROFESSIONAL IN WORKERS' COMPENSATION CLAIMS

(a) The RP shall exercise independent professional judgment in making and documenting recommendations for medical and vocational rehabilitation for the injured worker, including any alternatives for medical treatment and cost-effective return-to-work options including retraining or retirement. The RP shall realize that the attending physician directs the medical care of an injured worker.

(b) The RP shall inform the parties of his or her assignment and proposed role in the case. At the outset of the case, the RP shall disclose to health care providers and the parties any possible conflict of interest, including[] any compensation carrier's or employer's ownership of or affiliation with the RP.

. . .

[(f)] Prohibited Conduct:

(1) RPs shall not conduct or assist any party in claims negotiation, investigative activities, or perform any other non-rehabilitation activity;

. . .

4 N.C. Admin. Code 10C.0106 (2012) (amended effective 1 June 2000).

.0107 COMMUNICATION

. . .

(f) The RP shall provide copies of all correspondence simultaneously to all parties to the extent possible, making every effort to effect prompt service.

. . .

4 N.C. Admin. Code 10C.0107 (2012) (amended effective 1 June 2000).

In its opinion and award, the Commission determined that the nurse case managers violated the RP Rules for two reasons: (1) they were given the authority to *approve or deny* payment for medical care within the auspices of the contract plan, which constituted unpermitted "claims adjustment type services," and (2) the contractual relationship between Paradigm and Defendants "conflict[ed] with the conduct allowed under [the] Rules." Assuming *arguendo* that the Commission's findings are based on competent evidence, they do not support its conclusion that the nurse case managers violated the RP Rules.[15]

First, to the extent that there is competent evidence to support the Commission's finding regarding the nurse case managers' medical care authority, the Commission has not offered any reason why the existence of this authority is a violation of the RP Rules. The RP Rules cited by Plaintiff only state that rehabilitation professionals must exercise "independent professional judgment" — they do not address medical care authority. Further, accepting for the purposes of argument that such authority constitutes "claims adjustment type services,"[16] as the Commission characterizes it, that type of activity is not specifically barred by the RP Rules.

Rule .0106(f) prohibits RPs from "claims negotiation, investigative activities, or . . . any other non-rehabilitation activity." However, neither the Commission's opinion nor the Plaintiff's brief offers any reason that the nurse case managers' approval of payment for certain medical treatment, which was *already approved under the outcome plan contract*, should constitute "claims negotiation" or "investigative activities," and we see no such reason. Further, the Commission made no finding regarding whether the nurse case managers' actions in approving payment for certain treatments constituted a "non-rehabilitation activity." In our view, approving medical treatment, when the provider requires approval before proceeding with treatment, constitutes "assist[ing] in the restoration of injured workers as nearly as possible to the workers' pre-injury level of physical function[,]" 4 N.C. Admin Code at 10C.0103(d), *particularly when*, as here, the RP is simply and solely communicating the authorization already in effect, and not making an independent judgment about whether the treatment should be approved.

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15. At no point in its opinion and award does the Commission establish what specific language or which specific rules were violated.

16. We do not offer an opinion as to whether it does.

Second, neither Plaintiff nor the Commission provide any support for the Commission's conclusion that the relationship between Paradigm and Defendants "conflict[ed]" with those rules. Indeed, we find none. Accordingly, we reverse the Commission's opinion and award as it relates to the nurse case managers.

B. Paradigm's Motions

[7] As discussed above, Paradigm moved to intervene, to receive additional evidence, and for reconsideration following the Commission's 6 November 2012 opinion and award. The Commission dismissed those motions on 28 November 2012 for lack of jurisdiction because Plaintiff had already filed notice of appeal. Afterward, Paradigm filed a second motion for reconsideration and for an advisory opinion, and the Commission denied those motions as well. On appeal, Paradigm argues that the Commission erred in dismissing those motions. We disagree.

i. Paradigm's Original Motions

It is well established that, as a general rule, "an appeal takes a case out of the jurisdiction of the trial court" and, thereafter, the court is *functus officio*. *Sink v. Easter*, 288 N.C. 183, 197, 217 S.E.2d 532, 541 (1975) (citations omitted). Because Paradigm filed its motions after Plaintiff had already filed his notice of appeal, the Commission lacked jurisdiction to issue a ruling on those motions. As Plaintiff notes in his brief, Paradigm admitted to this fact in its response to Plaintiff's motion to dismiss. We hold that the Commission correctly denied Paradigm's original motions for reconsideration, to present additional evidence, and to intervene, and we affirm its 28 November 2012 order on those grounds.

ii. Paradigm's Second Set of Motions

Alternatively, Paradigm contends that the Commission abused its discretion in denying Paradigm's request for an advisory opinion and second motion for reconsideration. For support, Paradigm cites predominantly to *Talbert v. Mauney*, 80 N.C. App. 477, 343 S.E.2d 5 (1986), where we stated that, when a trial court is divested of jurisdiction because of a pending appeal, it "retains limited jurisdiction to hear and consider a . . . motion to indicate what action it would be inclined to take were an appeal not pending." *Id.* at 478–79, 343 S.E.2d at 7 (citations omitted). As a preliminary matter, we note that the cases cited by Paradigm only support its argument that the Commission had jurisdiction to provide an advisory opinion. None of the cited cases indicate that the Commission could grant Paradigm's second motion

to reconsider. Accordingly, Paradigm's argument regarding its second motion to reconsider is overruled, and we limit our review to its motion for an advisory opinion.

To the extent that the Commission has some limited authority to provide an advisory opinion when jurisdiction has been divested because of a pending appeal, that authority is not mandatory. *See id.* Our opinion in *Talbert* does not state that the Commission is obligated to provide an advisory opinion, and we see nothing to suggest that it is. *See id.* Accordingly, and as Paradigm appears to accept in its brief, consideration of the Commission's failure to exercise such authority must be reviewed for abuse of discretion. Under that standard, the Commission's order can be overturned only where its "ruling is manifestly unsupported by reason or . . . so arbitrary that it could not have been the result of a reasoned decision." *See State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

While the Commission appears to have some limited discretion to provide an advisory opinion in these circumstances under *Talbert*, we see nothing in the record — and Paradigm offers no argument or reason — to suggest that the Commission's decision to refrain from exercising that limited authority was arbitrary or manifestly unsupported by reason. Indeed, given our Supreme Court's repeated declaration that advisory opinions are not proper for the courts, we must hold that the Commission's decision to decline to give one was entirely reasonable. *See Martin v. Piedmont Asphalt & Paving*, 337 N.C. 785, 788, 448 S.E.2d 380, 382 (1994) ("As this Court has previously pointed out, it is not a proper function of courts to give advisory opinions . . . .") (citations omitted). Accordingly, we affirm the Commission's denial of Paradigm's second motion for reconsideration and for an advisory opinion.

C. The Parties' Remaining Issues

[8] In addition to the arguments discussed above, Plaintiff contends on appeal in COA 13-220 that Paradigm should have been removed from this case for "engaging in illegal insurance activities, its conflict of interests[,] and . . . failing to unwind the contract between Paradigm and [Arch]." Paradigm alleges, however, that it was excluded from this case by chicanery on the part of Plaintiff. Specifically, Paradigm has contended that: (1) it was not served with notice of any of the proceedings leading up to the Commission's 6 November 2012 opinion and award in violation of the RP Rules;[17] (2) neither Plaintiff nor the Commission

17. The record on appeal does not contradict this allegation.

sought to join Paradigm in the proceedings below even though it was a necessary party;[18] and (3) "Plaintiff's counsel failed to disclose that the [DOI] has already rejected" the allegations he asserted on appeal regarding Paradigm's status as a co-insurer.[19] Plaintiff responds to these allegations, in part, by asserting that Paradigm intentionally excluded itself from the proceedings before the Commission as a matter of trial strategy because it preferred to make its arguments through Arch.

Given the allegations made by Paradigm and Plaintiff, we conclude that the record is insufficient to address their remaining arguments on appeal. Paradigm's allegations suggest that they were improperly excluded from this case and that the Commission lacked crucial information when making its contested decisions. Plaintiff's response suggests, in part at least, that this is not so. Because the record is not competent on these issues, we cannot resolve them on appeal. For that reason, we return jurisdiction to the Commission and remand for further proceedings on these Paradigm issues, including the taking of additional evidence, if necessary.

AFFIRMED in part; REVERSED in part; REMANDED in part.

Judges BRYANT and DILLON concur.

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18. Paradigm does not explicitly cite to a procedural rule for support. However, in connection with its assertion that Plaintiff did not seek to join Paradigm, Paradigm states in a footnote that "Plaintiff has never provided an explanation why he failed to comply with RP Rule [10C.0110]." Rule 10C.0110 states:

> An RP may be removed from a case upon motion by either party for good cause shown or by the . . . Commission in its own discretion. The motion shall be filed with the Executive Secretary's Office *and served upon all parties and the RP*. Any party or the RP may file a response to the motion within 10 days. The . . . Commission shall then determine whether to remove the RP from the case. . . .

4 N.C. Admin. Code 10C.0110 (2012) (amended effective 1 June 2000) (emphasis added). Pursuant to our discussion *infra*, we do not address the merits of this argument. Nonetheless, we note that the cases cited in Paradigm's brief rely on the application of Rule 19 of the North Carolina Rules of Civil Procedure — not RP Rule 10C.0110.

19. In support of this third point, Paradigm appends documents not included in the record on appeal. Paradigm explains the presence of these documents by alleging that Plaintiff launched an official investigation with the DOI regarding Paradigm's status as an insurer before the Commission's 6 November 2012 opinion and award and "never advised the . . . Commission about the [DOI]'s decision." As a result, Paradigm contends, the documents in the appendix "could not properly be included in the [record]."

GARY v. BRIGHT

[231 N.C. App. 207 (2013)]

ROBERT L. GARY, PLAINTIFF
v.
CRYSTAL D. BRIGHT, DEFENDANT

No. COA13-687

Filed 3 December 2013

Child Custody and Support—modification—temporary custody—no finding of substantial change in circumstances

The trial court erred by finding and concluding that the 15 July 2012 child custody order was temporary in nature and by entering the 13 February 2013 child custody order absent finding a substantial change in circumstances to warrant modification of the prior custody order.

Appeal by defendant from order entered 13 February 2013 by Judge David K. Fox in Rutherford County District Court. Heard in the Court of Appeals 6 November 2013.

No appellee brief filed.

King Law Offices, PLLC, by Brian W. King and Matthew D. Leach, for defendant.

McCULLOUGH, Judge.

Defendant appeals from the entry of a new custody order, finding the prior custody order as temporary in nature and applying a best-interests analysis to warrant modification. Based on the reasoning set forth below, we vacate the new custody order and remand for a new hearing.

I. Background

Plaintiff Robert Louis Gary and defendant Crystal Dawn Bright are not married. The parties are the parents of one minor child born on 13 February 2007.

On 26 May 2010, the trial court entered a child custody order giving defendant custody of the minor child, subject to the visitation of plaintiff. The 26 May 2010 order also gave plaintiff visitation with the minor child, subject to the condition that the visitations not violate a November 2009 Domestic Violence Protection Order ("DVPO") which

the parties consented to and subject to a visitation schedule consisting of four phases.

The 26 May 2010 order was modified by an order entered 28 March 2011 titled "Custody Modification Order and Order of Contempt and Attorney's Fees Against the Plaintiff." The trial court ordered *inter alia* plaintiff to pay defendant's attorney the sum of $5,558.75 to defray legal expenses, held plaintiff to be in willful civil contempt of the 26 May 2010 order, and modified portions of plaintiff's visitation schedule.

On 15 June 2012, the trial court entered a "Judgment & Order to Modify Child Custody Order & Contempt." The trial court found that since the filing of the 26 May 2010 and 28 March 2011 orders, there had been a "substantial change of circumstances that impacts the welfare of the child which justifies a modification in the Order." The trial court found, in pertinent part, that plaintiff had violated the DVPO, failed to enroll in parenting classes as previously ordered, and failed to pay child support and was in arrears in excess of $1,300.00, etc. The trial court also found that

> [t]his change of circumstances warrants a modification of the Order so that the care, custody and control of the minor children should be vested primarily in Defendant and the Plaintiff's visitations be curtailed until such time he complies with the spirit and letter of the previous orders in this case.

Accordingly, the trial concluded that this order was in the best interest of the parties' minor child and ordered that the previous child custody orders remain in effect and modified as follows:

> a. The Plaintiff's every other weekend visitation is hereby modified to being from 8:00 a.m. until 8:00 p.m. every other Saturday and Sunday.
>
> b. The Plaintiff's weekend and holiday visitation is hereby suspended (save [sic] as every other weekend above). The [plaintiff] shall have from 2:00 p.m. to 4:00 p.m. on Father's Day, and from 12:00 p.m. to 4:00 p.m. on Thanksgiving and Christmas Day.
>
> c. That nighttime visitation will not resume without a motion and filing with the Court, included [sic] full performance of all requirements of the Plaintiff from the previous orders (including parenting classes and financial matters).

d. That the Plaintiff father is continued to be barred from the daycare or school of the minor child.

On 19 November 2012, plaintiff filed a "Motion to Change Custody, Motion to Set Aside Previous Order, Motion to Change Venue, Motion to Recuse" arguing that the trial court set aside the 15 June 2012 order and modify custody based on a substantial change in circumstances. Plaintiff argued the following in pertinent part: that defendant had continuously tried to thwart the relationship between plaintiff and the minor child; that the father has continuously asked for additional visitation but that defendant has denied his requests; and that plaintiff had completed the necessary parenting classes sponsored by Family Resources of Rutherford County, Inc.

Following a hearing held on 18 January 2013, the trial court entered an "Order in Custody & Visitation" on 13 February 2013 which included the following pertinent conclusions of law:

> 4. That the prior orders of the court regarding visitation and custody have become obsolete due to myriad occurrences and changed circumstances obtain[ed] since the entry of what the parties maintain is the operative 26 May, 2010 court order in this matter, as amended. That an order *de novo* would best serve not only [the minor child's] best interest but also the best interest of the parties[.]
>
> 5. That the most recent dispositive order in this matter, that filed 15 June, 2012, found there existed "a substantial change of circumstances requiring a modification of the previous order". That the court went on to enter what appears, as a matter of law and of fact, temporary restrictive provisions governing plaintiff's visitations with the parties' minor child . . . to wit: "That nighttime visitation will not resume without a motion and filing with the Court, including full performance of all requirements of the Plaintiff from the previous orders (including parenting classes and financial matters)."
>
> That [t]his language leads the Court to presume conclusively, as a matter of law, that this Court is invited to readdress the issues of custody and visitation, that the 15 June, 2012 order is a temporary one, at least relating to these issues, and that a requisite change of circumstances has already been found in said order.

> 6. That the plaintiff, as a matter of law and of fact, appears to the Court to have meaningfully addressed the primary impediments to resumption of a more liberal visitation with this minor child . . ., as established by the court orders in this matter filed prior to 15 June, 2012, including but not limited to the following, to wit: plaintiff attended and graduated from parenting classes, is properly abiding by the current support orders affecting [the minor child], and is appropriately medicating himself . . . . Further, plaintiff has expressed believably in open court under oath that he is at long last prepared to aggressively abide by the orders of this Court and to be a compliant and appropriate custodian of the parties' minor child, and, further, the [defendant] asserted in open court that she presently believes the best interest of the parties' minor child is served by establishment of a more liberal program of visitation of the child with the plaintiff, a conclusion in which this Court concurs.

The 13 February 2013 order awarded defendant primary legal and physical care, custody, and control of the minor child, subject to the secondary custody of and visitation with plaintiff. Plaintiff was awarded the secondary legal and physical custody of the minor child, with rights of visitation, subject to the primary legal and physical care, custody, and control of the minor child by defendant.

Defendant appeals.

II. Standard of Review

> In a child custody case, the trial court's findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings. . . . The trial court's conclusions of law must be supported by adequate findings of fact. Whether a district court has utilized the proper custody modification standard is a question of law we review *de novo*. Absent an abuse of discretion the trial court's decision in matters of child custody should not be upset on appeal.

Peters v. Pennington, 210 N.C. App. 1, 12-13, 707 S.E.2d 724, 733 (2011) (citations and quotation marks omitted).

III. Discussion

On appeal, defendant argues that the trial court erred by finding and concluding that the 15 July 2012 child custody order was temporary in nature and that consequently, the trial court erred by entering the 13 February 2013 child custody order absent finding a substantial change in circumstances. We agree.

"Custody orders may either be 'temporary' or 'permanent.'" *Woodring v. Woodring*, __ N.C. App. __, __, 745 S.E.2d 13, 17 (2013) (citations omitted). "[A] trial court's designation of an order as "temporary" or as "permanent" is not binding on this Court." *Lamond v. Mahoney*, 159 N.C. App. 400, 403, 583 S.E.2d 656, 658-59 (2003) (citation omitted). "[W]hether an order is temporary or permanent in nature is a question of law, reviewed on appeal de novo." *Smith v. Barbour*, 195 N.C. App. 244, 249, 671 S.E.2d 578, 582 (2009).

We note that

> [t]here is no absolute test for determining whether a custody order is temporary or final. A temporary order is not designed to remain in effect for extensive periods of time or indefinitely . . . . Temporary custody orders resolve the issue of a party's right to custody pending the resolution of a claim for permanent custody.

Miller v. Miller, 201 N.C. App. 577, 579, 686 S.E.2d 909, 911 (2009) (citations omitted). "[A]n order is temporary if either (1) it is entered without prejudice to either party, (2) it states a clear and specific reconvening time in the order and the time interval between the two hearings was reasonably brief; or (3) the order does not determine all the issues." *File v. File*, 195 N.C. App. 562, 568, 673 S.E.2d 405, 410 (2009) (citation omitted).

In the case *sub judice*, the trial court made the following finding of fact in the 13 February 2013 order:

> 12. That by order filed in this matter 15 June, 2012 the now long suffering Judge Pool found plaintiff yet again in contempt of orders in this matter, punished him, yet again, and severely restricted his visitation with the parties' minor child. Plaintiff was not present for the hearing. This Court notes this is the eighth order affecting the custody and visitation of the parties with their minor child.

> That it appears to this court as a matter of fact that, to the degree this 15 June, 2012 order restricts plaintiff's "nighttime visitation" with his child, it is a temporary order. The balance of the order appears to be permanent in nature.

The trial court thereafter concluded that

> 5. [T]he most recent dispositive order in this matter, that filed 15 June, 2012, found there existed "a substantial change of circumstances requiring a modification of the previous order." That the court went on to enter what appears, as a matter of law and of fact, temporary restrictive provisions governing plaintiff's visitations with the parties' minor child . . . to wit: Paragraph 3(c) of the dispositive portion of the 15 June, 2012 order reads: "That nighttime visitation will not resume without a motion and filing with the Court, including full performance of all requirements of the Plaintiff from the previous orders (including parenting classes and financial matters)."
>
> That this language leads the Court to presume conclusively, as a matter of law, that this Court is invited to readdress the issues of custody and visitation, that the 15 June, 2012 order is a temporary one, at least relating to these issues, and that a requisite change of circumstances has already been found in said order.

Although the trial court in the present case made a finding and concluded that the 15 June 2012 order was temporary in part and permanent in part, "[o]ur appellate decisions have consistently considered whether a custody 'order' as a whole was temporary or final rather than breaking down the parts of that order." *Smith*, 195 N.C. App. at 250, 671 S.E.2d at 583 (citation omitted).

Our careful review indicates that the 15 June 2012 order was not entered without prejudice to either party, failed to state a clear and specific reconvening time, and determined all the issues pertaining to custody. *See File*, 195 N.C. App. at 568, 673 S.E.2d at 410. Accordingly, we hold that the 15 June 2012 order was a permanent order and thus, the trial court erred by finding and concluding that the 15 June 2012 order was temporary in nature.

Based on the erroneous finding that the 15 June 2012 order was temporary in nature, the trial court concluded in the 13 February 2013 order

that the "best interest of the parties' minor child . . . is the Polar Star guiding the Court in its dispositions in this matter" and that the trial court's disposition "best serve[d] the best interest of the minor child[.]"

We emphasize that

> [p]ermanent child custody or visitation orders may not be modified unless the trial court finds there has been a substantial change in circumstances affecting the welfare of the child. If there has been a substantial change in circumstances, the court may modify the order if the modification is in the best interests of the child. Conversely, temporary orders may be modified by proceeding directly to the best-interests analysis.

Woodring, __ N.C. App. at __, 745 S.E.2d at 18 (citations omitted). Trial courts should "when memorializing their findings of fact, to pay particular attention in explaining whether any change in circumstances can be deemed substantial, whether that change affected the welfare of the minor child, and, finally, why modification is in the child's best interests." *Shipman v. Shipman*, 357 N.C. 471, 481, 586 S.E.2d 250, 257 (2003). "[A] substantial change in circumstances is unequivocally a conclusion of law. This phrase is a term of art, meaning that a change has occurred among the parties, and that change has affected the welfare of the *children* involved." *Garrett v. Garrett*, 121 N.C. App. 192, 197, 464 S.E.2d 716, 720 (1995), *overruled on other grounds by Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998). "It is not sufficient that there may be evidence in the record sufficient to support findings that could have been made." *Greer v. Greer*, 101 N.C. App. 351, 355, 399 S.E.2d 399, 402 (1991).

Where we find that the trial court applied an improper modification standard, we hold that it erred by solely using a best-interests analysis instead of applying the substantial change in circumstances analysis to warrant modification of the prior custody order. Accordingly, we vacate the 13 February 2013 order and remand with instructions for the trial court to make further findings and conclusions with respect to this issue, consistent with this opinion.

Vacated and remanded.

Judges ELMORE and DAVIS concur.

GE BETZ, INC., PLAINTIFF
v.
R.C. CONRAD, ROBERT DODD, BENJAMIN LUKOWSKI, BARRY OWNINGS, AND ZEE COMPANY, INC., DEFENDANTS

No. COA13-239

Filed 3 December 2013

1. Unfair Trade Practices—other claims subsumed—same conduct

A claim of unfair or deceptive practices subsumed claims for breach of contract, tortious interference, and misappropriation of trade secrets in the damages phase of litigation involving non-compete employment agreements where the same conduct gave rise to all of the claims.

2. Evidence—parol—excluded—unambiguous non-compete agreement

In an action involving non-compete provisions in employment contracts, interpreted under Pennsylvania law, the trial court correctly excluded parol evidence regarding the meaning of "indirect solicitation" because the term was unambiguous.

3. Employer and Employee—non-compete agreements—indirect solicitation

In an action involving non-compete provisions in employment contracts, interpreted under Pennsylvania law, the trial court was permissibly guided by a federal district court decision in finding that defendants solicited former customers through each other as proxy, and thus breached the "indirect solicitation" clauses of their employment contracts.

4. Employer and Employee—non-compete agreement—indirect solicitation clause—no violation of public policy

The indirect solicitation clauses in the individual defendants' employment agreements did not exceed the scope necessary to protect plaintiff's business, and did not violate North Carolina public policy as being overbroad.

5. Employer and Employee—confidentiality agreement—breach—finding supported by evidence

The trial court correctly concluded that the individual defendants breached confidentiality clauses in their employment

contracts. There was competent evidence in the record to support the court's finding that individual defendants worked for plaintiff and were exposed to confidential information as part of their employment, and that they used plaintiff's information in soliciting customers for another company.

6. Employer and Employee—non-compete clauses—interpretation of supervisory responsibility—no consideration—change of title only

In an action involving non-compete clauses in employment contracts, the trial court did not err in its interpretation of the term "supervisory responsibility" in the contracts or in finding the provision effective despite the absence of new consideration when two defendants accepted area manager positions. The trial court correctly applied Pennsylvania law in determining that two defendants had exercised "supervisory responsibility" before taking positions as area managers. The terms of their employment agreements did not change with their titles.

7. Estoppel—employment agreement not found—no relief from duties—no estoppel

Plaintiff was not estopped from seeking to penalize one of the defendants for breaching his non-compete agreement where plaintiff told defendant that it could not locate a copy of the agreement. Plaintiff never told defendant that he had no agreement, only that plaintiff could not find its copy. Defendant was not relieved of the duties imposed by the agreement.

8. Evidence—non-compete agreement—damages from breach—causation

The trial court did not abuse its discretion in an action involving a non-compete agreement by excluding evidence of other potential sources of the loss of customers. Plaintiff needed only to show that the acts of the individual defendants caused some injury, not that the individual defendants' acts were the exclusive reason for the customer loss. Additionally, there was evidence that was independently sufficient to prove causation.

9. Trade Secrets—identification—formulas, pricing, proposals, costs, and sales

The trial court, in an action on a non-compete agreement, correctly identified plaintiff's information as trade secrets. Although the individual defendants contended that plaintiff failed to identify the

trade secrets with sufficient particularity, plaintiff identified chemical formulations, pricing information, customer proposals, historical costs, and sales data that individual defendants were exposed to while working for plaintiff.

10. Trade Secrets—sales reports and proposals—trade secrets

Descending sales reports and customer proposals were correctly identified as trade secrets in North Carolina.

11. Trade Secrets—transmission of information—not a failure to maintain secrecy

Plaintiff's transmission of information to one of the individual defendants after plaintiff determined that defendant was likely to leave the company did not mean that plaintiff had failed to maintain secrecy and that the information was not a trade secret. Defendant was still bound by the confidentiality terms of his employment agreement and plaintiff could not practically employ him without giving him access to trade secret information.

12. Trade Secrets—misappropriation—prima facie case—not rebutted

Plaintiff sufficiently proved misappropriation of trade secrets where the individual defendants did not rebut plaintiff's *prima facie* case by showing that they acquired the trade secrets through independent development, reverse engineering, or from someone who had the right to disclose them.

13. Unfair Trade Practices—misappropriation of trade secrets—violation of employment contracts

The trial court did not err in an action arising from non-compete agreements by holding the individual defendants liable for violating N.C.G.S. § 75-1.1. The misappropriation of trade secrets met the three prongs necessary to find a defendant liable for violating that statute. Additionally, the individual defendants willfully violated the terms of their employment contracts, thus committing egregious activities outside the scope of their assigned duties.

14. Damages and Remedies—joint and several liability—violation of non-compete agreements—single concerted plan

Joint and several liability was appropriate in an action arising from non-compete agreements where the trial court properly found that the individual defendants acted in concert to harm plaintiff, their former employer. There was ample evidence in the record

to support the trial court's finding that each individual furthered a single concerted plan with their new employer to solicit the former employer's customers.

15. Discovery—sanctions—corporate profit and revenue

The trial court did not abuse its discretion when applying discovery sanctions in an action arising from non-compete agreements. Defendant Zee Co., Inc. conceded that its behavior in evading requests for evidence warranted sanctions, and the sanction imposed by the trial court did not impermissibly transform the measure of damages from profit to revenue.

16. Damages and Remedies—punitive—limits—applied to each plaintiff

The trial court erred by entering punitive damages in an action arising from non-compete agreements. N.C.G.S. § 1-25(b) requires the application of the statutory limits to punitive damages to each plaintiff rather than each defendant, as the trial court did here.

17. Damages and Remedies—punitive—similar conduct with non-party considered—erroneous

An award of punitive damages in an action arising from a non-compete agreement was remanded where the trial court found that defendant Zee Co., Inc. had been engaging in similar conduct with a company that was not a party, but it was not clear how much weight the court gave to those findings in entering the maximum amount of punitive damages.

18. Attorney Fees—unreasonably persistent litigation

The trial court did not err in an action arising from non-compete agreements by awarding plaintiff attorney fees related to defendant Zee Co., Inc.'s counterclaims. Zee persisted in litigating the case after the point where it should reasonably have been aware that there was no justiciable issue.

19. Attorney Fees—out-of-state counsel—hourly rate

The trial court abused its discretion in an action arising from non-compete agreements by awarding the entire attorney fee billed by a New York firm without conducting any inquiry into which of the services truly could not have been performed by local counsel at reasonable rates within the community in which the litigation took place.

20. Contempt—indirect criminal—not a discovery sanction under court's inherent authority

The trial court erred when holding an attorney in indirect criminal contempt for violation of a protective order without following the procedures provided by N.C.G.S. § 5A-15. Although plaintiff argued on appeal that the attorney was held in contempt under the trial court's inherent authority to issue contempt as a discovery sanction, plaintiff's trial counsel stated in a hearing that it was seeking criminal contempt.

21. Attorney Fees—attorney not a party to suit

The trial court erred by awarding plaintiff attorney fees in sanction proceedings where the attorney was not a party to the suit under the language of N.C.G.S. § 1A-1, Rule 37(b)(2), which authorized attorney fees.

22. Attorneys—out-of-state admission revoked—contempt erroneous

A trial court decision to revoke an attorney's admission to practice in North Carolina *pro hac vice* was remanded where a decision by that trial court holding the attorney in criminal contempt was set aside. Holding the attorney in contempt likely affected the trial court's decision to revoke his admission.

23. Attorneys—out-of-state admission revoked—failure to disclose discipline

The trial court did not err by revoking the *pro hac vice* admission of an attorney where the attorney had not disclosed a $1,000 fine levied against him in 1997 by a federal court in South Carolina. The plain language of N.C.G.S. § 84-4.1 requires attorneys to disclose discipline administered by both courts and lawyer regulatory organizations.

Appeals by individual defendants and Zee Company, Inc. from judgments entered 25 July 2011 and 23 May 2012 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Appeal by additional appellants from orders entered 18 and 22 June 2012 by Judge Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 11 September 2013.

Ellis & Winters LLP, by Matthew W. Sawchak, Stephen D. Feldman, and Zia C. Oatley, for individual defendants-appellants.

Robinson Bradshaw & Hinson, P.A., by John R. Wester, Jonathan C. Krisko, and Pearlynn G. Houck, for defendant-appellant Zee Company, Inc.

Graebe Hanna & Sullivan, PLLC, by Mark R. Sigmon, for additional appellants.

McGuireWoods, LLP, by Bradley R. Kutrow and Monica E. Webb, and Ward and Smith, P.A., by Jenna Fruechtenicht Butler and John M. Martin, for plaintiff-appellee GE Betz, Inc.

HUNTER, Robert C., Judge.

Three categories of appellants bring distinct issues before us in this case.

First, R.C. Conrad, Robert Dodd, Benjamin Lukowski, and Barry Owings (collectively "individual defendants") appeal from judgment entered 25 July 2011 by Judge Phyllis M. Gorham in New Hanover County Superior Court. On appeal, individual defendants argue that the trial court erred by: (1) misinterpreting various provisions of the employment agreement they had with GE Betz, Inc. ("GE") and concluding that individual defendants breached their contracts, (2) allowing GE to succeed on the merits of its claims without proving causation, and (3) concluding that individual defendants used GE's trade secrets and violated N.C. Gen. Stat. § 75-1.1. After careful review, we affirm the trial court's judgment as to these individual defendants.

Second, Zee Company, Inc. ("Zee") appeals the trial court's award of damages and attorneys' fees. Zee argues that the trial court erred by: (1) as a discovery sanction, allowing GE to use Zee's gross sales as a measure of compensatory damages, (2) entering punitive damages that violated defendants' due process rights and were impermissibly levied on a per-defendant rather than per-plaintiff basis, and (3) awarding unreasonable attorneys' fees and erroneously awarding GE fees incurred as a result of Zee's counterclaims. We affirm the trial court's judgment as to the measure of compensatory damages, but reverse and remand as to punitive damages and attorneys' fees.

Third, Mark A. Dombroff ("Dombroff") and Thomas B. Almy ("Almy") (collectively "additional appellants") appeal from the trial court's orders holding Almy in criminal contempt of court, ordering Almy to pay GE's attorneys' fees in addition to $500.00 as a contempt sanction,

and revoking the *pro hac vice* admissions of both Dombroff and Almy. On appeal, additional appellants claim: (1) the trial court failed to follow statutory and constitutional procedures in holding Almy in criminal contempt of court, (2) the court erred by ordering Almy to pay GE's attorneys' fees because Almy was not a "party" under the language of the statute authorizing the fee award, and (3) the court abused its discretion by revoking additional appellants' *pro hac vice* admissions. We reverse the trial court's orders as to Almy's criminal contempt and attorneys' fees, remand for reconsideration of Almy's *pro hac vice* revocation, and affirm the court's order revoking Dombroff's *pro hac vic*e admission.

I. BACKGROUND

A. Substantive Claims

Individual defendants were employees of Betz Entec or BetzDearborn, alternative names for the same company, which was acquired by GE and renamed GE Betz, Inc. ("GE"). They signed employment agreements before GE acquired the company. The employment agreements contained language restricting individual defendants from "directly or indirectly" soliciting GE's current or prospective customers with whom the individual had "any contact, communication or . . . supervisory responsibility" for eighteen months after employment with GE ended. The agreements also prohibited disclosure or misuse of GE's confidential information, including sales data, formulas, costs, treatment techniques, and customer information. The agreements state that they shall be construed under and governed by Pennsylvania law.

In 2006, GE's restructuring of its water treatment business resulted in the layoffs of defendants Conrad and Dodd. Conrad and Dodd began working for Zee shortly thereafter. During the restructuring, GE created a position of "area manager" and offered the area manager positions to defendants Owings and Lukowski. GE did not increase Owings's or Lukowski's compensation, and the position offers contained no compensation terms. On 18 July 2006, Zee offered Owings a job as a "team leader"; Owings never told GE he had an offer from Zee and was allowed to remain working at GE for two weeks after Zee's offer.

Following the "area manager" offers, GE began to email Owings and Lukowski "descending sales reports," which contained reports of actual sales and sales forecasts of about 175 GE customers. Owings and Lukowski ultimately resigned; Owings never received an offer letter for the area manager position and Lukowski stated via letter that he wanted to evaluate "other opportunities inside and outside" the water treatment industry. Lukowski continued receiving descending sales reports from

GE after he hinted at resignation and was considered to be an "immediate flight risk." Lukowski did not notify GE that he was leaving until two weeks after signing an employment agreement with Zee and did not notify GE he was joining a competitor. Shortly after resigning, Owings and Lukowski started working for Zee. The trial court found as fact that Owings and Lukowski affirmatively misled GE about their post-resignation plans.

Lukowski asked GE for a copy of his employment agreement, but did not receive it until weeks after beginning employment with Zee. In the interim between beginning employment with Zee and receiving his employment agreement, Lukowski contacted customers he previously helped while employed by GE. The trial court found as fact that all individual defendants began contacting former GE customers that they or another team member serviced or supervised while employed by GE and that Zee knew about and encouraged this conduct. GE learned of these tactics and sent cease-and-desist letters enclosed with copies of the employment agreements to Lukowski, Dodd, and Zee's President, Robert Bullard. GE informed Zee that individual defendants were "cross-selling" to each other's former GE customers and directly contacting GE customers. Zee responded that individual defendants were not competing with GE because they were selling products unrelated to the water treatment industry.

GE sued Zee and individual defendants in April 2007. GE sought a preliminary injunction to preclude all defendants from contacting around 175 companies that GE contended were covered by individual defendants' non-solicitation clauses. The trial court granted the injunction except as to ten "carve-out" companies ("carve-outs") with which Zee had already obtained contracts. GE retained its claim for monetary recovery for Zee's sales to the carve-outs, and GE ultimately sought damages for conduct regarding eight of the carve-outs.[1]

The employment agreements forbade individual defendants from "directly or indirectly . . . call[ing] upon, communicat[ing] or attempt[ing] to communicate with any customer . . . for the purpose of selling" competing products, services, or equipment. The trial court determined as a matter of Pennsylvania law that "indirect communication occurs when a member of a sales team contacts a prohibited customer of another team member." The court granted GE's motion *in limine*

1. These eight carve-outs were CMS Generation, DAK, Danaher Controls, Intercontinental Hardwoods, OMI, Shamrock Environmental, Shaw Environmental, and Wayne Memorial Hospital.

to prevent individual defendants from introducing parole evidence as to the meaning of the terms "switching" or "cross-selling" in their employment agreements. The trial court also excluded evidence that GE's customer departures stemmed from causes other than defendants' actions. However, the trial court admitted evidence of a lawsuit filed 12 September 2006 by another water treatment company, Chem-Aqua, in which Chem-Aqua alleged that Zee tortiously interfered with the contracts of Chem-Aqua employees, among other claims. The case settled with Zee admitting no wrongdoing and no money exchanging hands between the parties.

The trial court ultimately ruled that all individual defendants violated their employment agreements by indirectly or directly soliciting GE customers and breaching confidentiality terms and that Owings and Lukowski exercised supervisory responsibility while employed by GE. All defendants were held liable for misappropriating trade secrets, violating N.C. Gen. Stat. § 75-1.1, and Zee was individually held liable for tortiously interfering with individual defendants' employment contracts. The court awarded GE compensatory and punitive damages and attorneys' fees and costs. Zee and individual defendants filed timely notices of appeal.

B. Damages and Attorneys' Fees

Following the trial court's final ruling in its favor, GE had the option of seeking disgorgement of Zee's profits or its own lost profits as damages for its claim of unfair or deceptive practices pursuant to section 75-1.1[2] It sought to ascertain Zee's profits generated from sales to eight of the carve-outs identified in the preliminary injunction. However, over the course of more than two years, Zee failed to produce documentation of its net profits from the carve-outs, in contravention of multiple orders to compel. The trial court also reopened depositions upon motion from GE at which Zee had the opportunity to present evidence of its net profits generated from the carve-outs, but Zee's witnesses declined to do so. Months later, Zee designated defendant Owings to proffer that the industry-wide net profit margin "averages between 10 and 12 percent."

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2. **[1]** The claim of unfair or deceptive practices subsumed the claims for breach of contract, tortious interference, and misappropriation of trade secrets in the damages phase of litigation because the same conduct gave rise to all claims. *See Decker v. Homes, Inc./Constr. Mgmt. & Fin. Grp.*, 187 N.C. App. 658, 666, 654 S.E.2d 495, 501 (2007) ("[W]here the same source of conduct gives rise to a traditionally recognized cause of action, as, for example, an action for breach of contract, and as well gives rise to a cause of action for violation of G.S. 75-1.1, damages may be recovered either for the breach of contract, or for violation of G.S. 75-1.1, but not for both.") (citation and quotation marks omitted).

GE filed a motion on 12 February 2010 seeking discovery sanctions for Zee's refusal to provide net profit data for its sales to the carve-outs. The trial court granted GE's motion and sanctioned Zee by permitting GE to use Zee's gross sales to the carve-outs as the basis for its compensatory damages, as well as prohibiting Zee and Zee's witnesses from offering any evidence regarding GE's damages. GE subsequently elected to use the measure of gross sales to eight of the carve-outs, totaling $288,297.00, as compensatory damages. The trial court entered judgment awarding GE $288,297.00 in compensatory damages against all defendants jointly and severally based on these gross sales.

The trial court conducted a separate hearing to assess GE's requests for punitive damages and attorneys' fees. In its final judgment, the court found that each defendant individually had engaged in acts that warranted the maximum amount of punitive damages allowed by N.C. Gen. Stat. § 1D-25(b). As such, it awarded punitive damages in the amount of $864,891.00, three times the compensatory damages of $288,297.00, against each defendant individually, totaling $4,324,455.00 in punitive damages.

GE also sought reimbursement for attorneys' fees from all defendants, jointly and severally, based on N.C. Gen. Stat. §§ 75-16.1, 66-154(d), and 1D-45. It submitted billing summaries from both Ward and Smith P.A. ("Ward and Smith"), its North Carolina law firm, and Paul Hastings LLP ("Paul Hastings"), its New York law firm. Over $3 million of the $5,769,903.10 requested by GE was billed by Paul Hastings attorneys. Paul Hastings' lead attorney billed GE at rates between $633.25 and $675.75 per hour over the course of the litigation, reduced from her standard rates between $745.00 and $915.00 per hour[3]; its associate attorneys billed GE at rates varying between $289.00 and $552.50 per hour. Ward and Smith's lead attorneys billed GE at rates between $270.00 and $390.00 per hour. The trial court awarded GE the full amount of its fee request jointly and severally against defendants — $5,769,903.10 in attorneys' fees and $69,888.32 in costs. It also awarded GE $188,043.12 in costs against individual defendants, jointly and severally, pursuant to their employment agreements.

In sum, the trial court awarded GE $10,640,586.55.

C. Additional Appellants

Additional appellants are members of Dombroff, Gilmore, Jaques & French, P.A. ("the Dombroff firm"). At the outset of the underlying

3. Prices increased annually over the course of the litigation.

litigation, defendants were represented by the law firm of Williams Mullen Maupin Taylor P.A. ("Williams Mullen"). Defendants released Williams Mullen in April 2010 and retained the Dombroff firm to represent them against GE and in a malpractice case brought in Virginia federal court ("the Virginia action") against Williams Mullen arising out of Williams Mullen's representation of defendants in the underlying case. Additional appellants are licensed to practice law in the Commonwealth of Virginia and the District of Columbia; they were admitted *pro hac vice* to represent defendants in the underlying North Carolina action.

Shortly after GE initiated its case against defendants, two protective orders were entered which governed the treatment of confidential documents. Both orders prohibited the use of confidential information, including any customer list, for any purposes except "in furtherance of the prosecution or defense of this action"; the orders also stated that confidential information "shall not be used or disclosed by any person for any other purpose."

GE filed its first motion to enforce the protective orders on 12 October 2011, claiming that Dombroff had violated the orders on three separate occasions by introducing confidential documents during depositions taken in the Virginia action. Additional appellants claimed that GE had agreed to the use of the documents, marking them as confidential, and separating them from the other exhibits in the Virginia action. The trial court found that the protective order had been violated and warned that further unauthorized disclosure "should not occur again . . . unless the attorney for GE and [additional appellants] have some agreement or have a court order" and that "any further documents . . . will remain confidential documents." The trial court further stated that additional violations may result in the offending attorneys being held in contempt.

On Thursday, 15 March 2012, Almy electronically filed a brief in the Virginia action in opposition to Williams Mullen's motion for summary judgment; attached to the brief was GE's customer list, which had been designated as confidential and maintained under seal in the underlying litigation. The brief and attached customer list were filed via the court's CM/ECF[4] system and were therefore publicly available through PACER[5]. On the afternoon of Friday, 16 March 2012, GE's counsel learned of the public filing of GE's customer list and contacted the Dombroff firm,

4. "CM/ECF" stands for "Case Management/Electronic Case Files."

5. "PACER" stands for "Public Access to Court Electronic Records."

asking that it be taken down. Almy and other attorneys in the Dombroff firm reviewed the matter over that weekend, and on the afternoon of Tuesday, 20 March 2012, they filed a consent motion to remove the customer list from the docket. The court entered the consent order on 21 March 2012 and the customer list was removed. It was available to the public for six days.

On Monday, 19 March 2012, GE filed motions seeking sanctions against both Dombroff and Almy under Rule 37 of the North Carolina Rules of Civil Procedure and an order for them to show cause why they should not be held in contempt of court. These matters were heard on 19 April 2012. Almy argued that he was aware of the protective order on the client list, but he did not think that it was confidential at the time of filing because GE had attempted to offer the list into evidence twice before and had questioned a witness about the list in open court. However, Almy admitted at the hearing that he violated the protective order when he filed the customer list and took full responsibility for doing so.

The trial court ruled on GE's motion for sanctions on 31 May 2012 and entered a written order on 22 June 2012. The court held Almy in criminal contempt of court, ordered him to pay GE $500.00 as a sanction for his "willful violation" of the protective orders, and ordered him to pay the attorneys' fees incurred by GE in its pursuit of sanctions. Additionally, the court revoked the *pro hac vice* admissions of both Dombroff and Almy. Additional appellants filed timely notices of appeal.

II. DISCUSSION OF INDIVIDUAL DEFENDANTS' APPEAL

A. Employment Agreements

1. Indirect Solicitation

Individual defendants first argue that the trial court misinterpreted the term "indirect solicitation" in their employment agreements. They contend that the term was ambiguous, that the trial court overly relied on *Diversey Lever, Inc. v. Hammond*, 1997 WL 28711 (E.D. Pa. Jan. 24, 1997), and that the "indirect solicitation" restriction is against North Carolina public policy. After careful review, we affirm the trial court's judgment as to this issue.

Contract interpretation is a question of law to be reviewed *de novo*. *Harris v. Ray Johnson Constr. Co.*, 139 N.C. App. 827, 829, 534 S.E.2d 653, 654 (2000). "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 County Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009). Issues involving contract interpretation are

analyzed under Pennsylvania law in this case due to the choice of law clause in the employment agreements.

[2] Individual defendants first argue that the term "indirect solicitation" is ambiguous. Under Pennsylvania law, "[w]hen the words of a contract are clear and unambiguous, the intent of the parties must be ascertained from the language employed in the contract, which shall be given its commonly accepted and plain meaning." *TruServ Corp. v. Morgan's Tool & Supply Co.*, 39 A.3d 253, 260 (Pa. 2012). Pennsylvania state courts define ambiguity as "duplicity, indistinctness or uncertainty of meaning of an expression used in a written instrument." *In re Miller's Estate*, 26 Pa. Super. 443, 449 (1904). Pennsylvania state courts have not yet interpreted the word "indirect," but authority from Pennsylvania federal courts shows that a restrictive covenant prohibiting a defendant from "directly or indirectly" engaging in certain conduct was unambiguous, because to rule otherwise would negate the words from the contract. *Plate Fabrication & Machining, Inc. v. Beiler*, 2006 WL 14515, at *5 (E.D. Pa. Jan. 3, 2006). We find this reasoning persuasive. Evidence of individual defendants' direct and indirect cross-selling to former GE customers was presented at trial, and the trial court made detailed factual findings based on that evidence. The trial court properly interpreted "indirect solicitation" to include one individual defendant soliciting a carve-out customer with whom another individual defendant previously had contact at GE. The trial court was therefore correct in excluding parol evidence regarding the meaning of "indirect solicitation," because the term, under Pennsylvania law, was unambiguous. *See Plate Fabrication*, 2006 WL 14515, at *5.

[3] Individual defendants next argue that the trial court relied too heavily on *Diversey*. In *Diversey*, the United States District Court for the Eastern District of Pennsylvania held that employees violated the "indirect solicitation" clause of their employment agreements by contacting each other's former customers, without direct evidence that the employees affirmatively aided each other with the solicitations. *Diversey* at *22. The court found that the defendants used concerted action through a shell company and its employees "to accomplish indirectly what they cannot do directly". *Id.*

Though *Diversey* is not controlling, the logic used by the *Diversey* court is persuasive. On a very similar set of facts, the *Diversey* court noted that allowing the defendants to continue using third-party employees of their new company to solicit former customers of their old company would go wholly against the "indirect solicitation" clause of their contract. *Id.* In the present case, allowing individual defendants to

solicit each other's former customers would nullify the word "indirectly" out of the contract. The trial court found as fact, and we find competent evidence to support the findings, that each individual, in concert, solicited former GE customers through the other individual defendants as proxy. The trial court was not bound by *Diversey*, but was permissibly guided by its reasoning in finding individual defendants liable for breaching the "indirect solicitation" clauses of their employment agreements. We find the trial court did not err by adopting the reasoning set forth by the *Diversey* opinion, given its factual similarity to this case.

[4] Individual defendants also contend that the "indirect solicitation" provision of the employment contracts is against North Carolina public policy for being overbroad. Under North Carolina law, a restrictive covenant can be "no wider in scope than is necessary to protect the business of the employer." *Manpower of Guilford Cnty., Inc. v. Hedgecock*, 42 N.C. App. 515, 521, 257 S.E.2d 109, 114 (1979). Individual defendants argue that the "indirect solicitation" provisions exceed the scope necessary to protect GE's business. They also assert that upholding such a provision would effectively bar employers from hiring former GE employees, since none of the company's other employees would be permitted to solicit GE customers. We disagree with this broad characterization of the "indirect solicitation" provision and its speculative effect on the market.

First, the trial court found as fact, and there is competent evidence to support the finding, that Zee engaged in a concerted effort to exclusively hire former GE employees that would specifically target GE customers. This is distinguishable from a situation where a company hires employees who happened to have worked at GE. Second, GE's share of the North Carolina water treatment market was only 3%, leaving Zee 97% of the market of non-GE customers to solicit. Contrary to individual defendants' theory, protecting GE's own market share hardly threatened to drive Zee out of the North Carolina water treatment market and did not exceed the scope necessary for GE to protect its business. Third, the "indirect solicitation" provision of the employment contracts only lasted for eighteen months after the individuals left GE. Such time constraint was not unreasonable in scope because it allowed GE's other employees to build relationships with and retain its customers that were serviced by individual defendants before those individuals could begin soliciting the customers on behalf of their new company. *See Redlee/SCS, Inc. v. Pieper*, 153 N.C. App. 421, 426, 571 S.E.2d 8, 13 (2002) ("[T]wo to five years has repeatedly been held a reasonable time restriction in a non-competition agreement.") (citation omitted). Because the "indirect

solicitation" clauses in the individual defendants' employment agreements did not exceed the scope necessary to protect GE's business, we find that the "indirect solicitation" clauses do not violate North Carolina public policy.

In sum, we affirm the trial court's conclusion that individual defendants breached the "indirect solicitation" terms of their employment agreements.

2. Confidentiality Provisions

[5] Individual defendants next claim that the trial court erred in analyzing the confidentiality clauses of the employment agreements by relying only on circumstantial evidence and the *Diversey* reasoning, which they argue is flawed. We affirm the trial court's conclusion that individual defendants breached the confidentiality terms of their agreements.

"Conclusions of law drawn by the trial court from its findings of fact are reviewable de novo on appeal." *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004).

This is a question of evidentiary weight and not contract interpretation; as such, we apply North Carolina law rather than Pennsylvania law because the choice of law clause in the employment agreements does not apply. In this state, "[t]he law makes no distinction between the weight to be given to either direct or circumstantial evidence." *State v. Adcock*, 310 N.C. 1, 36, 310 S.E.2d 587, 607 (1984). Circumstantial evidence that a defendant acquired a plaintiff's customer contracts for a competing business was previously held "sufficient circumstantial evidence to sustain a finding that the defendant knew of the confidential information, had the opportunity to acquire it for his own use and did so[,]" and thus violated a confidentiality agreement in the employment contract between the plaintiff and the defendant. *Byrd's Lawn & Landscaping, Inc. v. Smith*, 142 N.C. App. 371, 377, 542 S.E.2d 689, 693 (2001).

There is competent evidence in the record to support the court's findings that individual defendants worked for GE and were exposed to confidential information as part of their employment, and that individual defendants utilized GE pricing formulas and proposals to create the same for Zee in soliciting carve-out customers. Therefore, it can reasonably be inferred through this circumstantial evidence that individual defendants, like the defendant in *Byrd's*, "knew of the confidential information, had the opportunity to acquire it for [their] own use and did so." *Byrd's*, 142 N.C. App. at 377, 542 S.E.2d at 693. Because GE introduced sufficient evidence for the trial court to reasonably find that

each individual defendant acquired confidential information during their employment with GE and that such information was utilized by Zee in its customer proposals, we affirm the trial court's conclusion that individual defendants breached the confidentiality clauses of the employment agreements.

3. Supervisory Responsibility

[6] Individual defendants next claim that the trial court misinterpreted the term "supervisory responsibility" by disregarding its plain meaning. They also argue that the trial court failed to find the provision ineffective for lack of consideration and salary terms when Owings and Lukowski took the area manager positions. We disagree.

As this is a contract interpretation issue, we assess the trial court's application of Pennsylvania law. However, the standard of review for this Court remains based on North Carolina law. *See Sears Roebuck & Co. v. Avery*, 163 N.C. App. 207, 211, 593 S.E.2d 424, 428 (2004) (applying Arizona law to interpret a contract based on a choice of law provision, but reviewing the trial court's order based on a North Carolina standard of review). Contract interpretation is a question of law, which is reviewed *de novo* on appeal. *Harris v. Ray Johnson Constr. Co.*, 139 N.C. App. 827, 829, 534 S.E.2d 653, 654 (2000); *Carolina Power & Light Co.*, 358 N.C. at 517, 597 S.E.2d at 721. Under Pennsylvania law, when a contract does not define a term, that term takes its ordinary meaning. *Kripp v. Kripp*, 849 A.2d 1159, 1163 (Pa. 2004).

The non-solicitation clauses in individual defendants' employment contracts forbade communication with any customer, representative, or prospective customer with whom the employee had "any contact, communication or for which [e]mployee had supervisory responsibility". Owings and Lukowski claim that when they began acting as area managers, the scope of the non-solicitation clauses expanded because they exercised greater supervisory responsibility. Though the trial court found as fact that Owings and Lukowski exercised "supervisory responsibility" prior to taking positions as area managers, individual defendants challenge the court's interpretation of "supervisory responsibility" giving rise to that finding.

Individual defendants first argue that the trial court misapplied the term "supervisory responsibility" and that the term implicitly requires overseeing and being accountable for a customer relationship. Lukowski and Owings managed teams of regional salespeople in North Carolina. Owings managed a team of sales representatives and oversaw customer sales, forecasting, and customer contacts prior to taking the position

as area manager. Lukowski managed a team of sales representatives, participated in personnel review, collected customer information, and developed sales reports prior to taking the position as area manager. In those positions they were responsible for a region of North Carolina sales and supervised a team of salespeople to solicit business for GE. We find that such conduct constitutes "supervisory responsibility" under the plain meaning of the words. *See Profit Wize Mktg. v. Wiest*, 812 A.2d 1270, 1274-75 (Pa. Super. Ct. 2002) ("As the parties have the right to make their own contract, we will not modify the plain meaning of the words under the guise of interpretation or give the language a construction in conflict with the accepted meaning of the language used."). As such, we affirm the trial court's application of Pennsylvania law in its conclusion that Owings and Lukowski exercised "supervisory responsibility" before taking positions as area managers.

Individual defendants also argue that the "supervisory responsibility" provision is invalid for lack of consideration. Individual defendants claim that no Pennsylvania law is on point and therefore cite to a Massachusetts case holding that when a restrictive covenant is greatly expanded, new consideration is necessary for that covenant to be enforceable. *F.A. Bartlett Tree Expert Co. v. Barrington*, 233 N.E.2d 756, 758 (Mass. 1968). Under the rule in *Barrington* proffered by individual defendants, "[t]he question to be decided is whether the change in the duties . . . resulted in a revocation of the previous employment agreement" which would require new consideration, "or in a modification of that agreement" which would not require new consideration. *See Mail-Well Envelope Co. v. Saley*, 497 P.2d 364, 368 (Ore. 1972) (applying the *Barrington* rule to hold that an employment agreement was modified, rather than revoked by implication, and therefore did not require new consideration when an employee obtained supervisory duties). Even applying individual defendants' proffered rule, we find that Owings's and Lukowski's restrictive covenants did not require new consideration when they became area managers. Owings and Lukowski managed sales teams, conducted personnel review, and oversaw customer sales, forecasting, and customer contacts prior to taking positions as area managers. As area managers, they began receiving descending sales reports containing information related to about 175 GE customer accounts but kept performing their key duties as before. We hold, due to the similar duties before and after acquiring area manager status, that Owings's and Lukowski's employment agreements were modified only in title, and therefore did not require new consideration.

Likewise, individual defendants' contention that their oral agreements to area manager positions were ineffective for lack of a salary term also fails. Because Owings and Lukowski exercised supervisory responsibility before their transitions to area managers, the terms of their employment agreements did not change with their titles. Additionally, because we find Owings's and Lukowski's contracts were modified rather than revoked, we conclude that their transition to area managers did not require a new salary term for their employment agreements to be enforceable. *See Saley*, 497 P.2d at 368.

4. Equitable Estoppel

[7] As an additional matter to the terms of the agreement, individual defendants claim that GE was estopped from penalizing Lukowski for breaching his employment agreement because GE told Lukowski that it could not locate a copy of his employment agreement. We disagree.

> The essential elements of estoppel are (1) conduct on the part of the party sought to be estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct will be acted on by the other party; and (3) knowledge, actual or constructive, of the real facts. The party asserting the defense must have (1) a lack of knowledge and the means of knowledge as to the real facts in question; and (2) relied upon the conduct of the party sought to be estopped to his prejudice.

Friedland v. Gales, 131 N.C. App. 802, 807, 509 S.E.2d 793, 796-97 (1998).

GE's failure to immediately present Lukowski with a copy of his employment agreement did not relieve Lukowski of the duties imposed on him by that agreement. GE never informed Lukowski that he had no employment agreement - only that GE could not locate a copy of it, and that he should refer to his personal records since he was provided a copy when he began employment with GE. GE's inability to locate a copy of Lukowski's employment agreement was not the "false representation or concealment of material facts" that equitable estoppel was designed to protect against. *See id.* We therefore affirm the trial court's conclusion that Lukowski was still subject to the obligations of the employment agreement even if GE temporarily could not locate a copy of it.

B. Causation

[8] Individual defendants next claim that the trial court's exclusion of evidence relevant to whether GE's customers left for reasons other than

individual defendants' behavior was in error because GE failed to prove but-for causation. GE claims that the exclusion of such evidence did not negate its burden to prove but-for causation and that causation was proven. We affirm the trial court's exclusion of the evidence.

A trial court's decision to exclude evidence is reviewed for an abuse of discretion. *Media Network, Inc. v. Long Haymes Carr, Inc.*, 197 N.C. App. 433, 458, 678 S.E.2d 671, 687 (2009). "The test for abuse of discretion is whether a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *Little v. Penn Ventilator Co.*, 317 N.C. 206, 218, 345 S.E.2d 204, 212 (1986) (quotation marks and citation omitted). A plaintiff may recover on a claim of unfair or deceptive practices where the plaintiff demonstrates the act of deception proximately caused some adverse impact or injury. *Walker v. Sloan*, 137 N.C. App. 387, 399, 529 S.E.2d 236, 245 (2000) (citation omitted). A motion *in limine* is typically insufficient to preserve for appeal the admissibility of evidence; however, a party may preserve the exclusion of evidence for appellate review by making a specific offer of proof. *Ziong v. Marks*, 193 N.C. App. 644, 647-48, 668 S.E.2d 594, 597 (2008).

The record indicates that individual defendants preserved the issue of excluded evidence for appeal by making offers of proof regarding why GE customers moved their business away from GE. Accordingly, we will address this argument.

Though the trial court excluded evidence that may have shown other reasons GE customers moved their business away from GE, such exclusion does not equate to a ruling that GE did not have to prove causation. GE needed only to show that individual defendants' acts caused GE some injury, not that individual defendants' acts were the exclusive reason for GE's customer loss. *See Walker*, 137 N.C. App. at 399, 529 S.E.2d at 245. Zee conceded at oral argument that revenue that went to Zee would have gone to GE but for Zee's conduct. Additionally, there is sufficient evidence in the record to support the court's findings that the carve-outs were GE customers prior to individual defendants' solicitation and that the carve-outs moved their business to Zee as a result of individual defendants' solicitation. We find that such evidence is independently sufficient to prove causation between Zee's conduct and GE's injury. Even if GE might have lost customers for reasons other than individual defendants' conduct, such evidence would not negate the fact that individual defendants improperly solicited and unjustly profited from the carve-out customers, thus causing some amount of injury to GE and therefore meeting the element of causation in GE's claims.

Therefore, the exclusion of evidence pertaining to other reasons GE's customers may have moved their business was not arbitrary or "manifestly unsupported by reason." *Little v. Penn Ventilator Co.*, 317 N.C. at 218, 345 S.E.2d at 212. Because GE submitted sufficient evidence that individual defendants caused GE injury, we find the trial court did not abuse its discretion by excluding evidence of other potential sources of loss of customers for GE.

C. Trade Secrets and Unfair or Deceptive Practices

1. Trade Secrets

[9] Individual defendants argue that the information GE represented as a trade secret did not meet the statutory definition of a trade secret. GE contends that it established a *prima facie* case that individual defendants misappropriated trade secrets, and individual defendants failed to show the trade secrets were acquired properly. We affirm the trial court's conclusion that individual defendants misappropriated GE's trade secrets.

In North Carolina:

> "Trade secret" means business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that:
>
> a. Derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and
>
> b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

N.C. Gen. Stat. § 66-152(3) (2011). This Court has held that cost history records; pricing policies, formulas, and information; and customer lists constitute trade secrets. *Byrd's*, 142 N.C. App. at 376, 542 S.E.2d at 692; *Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C.*, 174 N.C. App. 49, 59, 620 S.E.2d 222, 230 (2005); *Drouillard v. Keister Williams Newspaper Servs., Inc.*, 108 N.C. App. 169, 173, 423 S.E.2d 324, 327 (1992). To make a *prima facie* case of trade secret misappropriation, a plaintiff must show that a defendant: "(1) [k]nows or should have known of the trade secret; and (2) [h]as had a specific opportunity to acquire it for disclosure or use or has acquired, disclosed, or used it without the express or implied consent or authority of the owner." N.C. Gen. Stat.

§ 66–155 (2011). A claim for misappropriation of trade secrets may be proven through circumstantial evidence. *Byrd's*, 142 N.C. App. at 376, 542 S.E.2d at 692. A trade secret must be alleged "with sufficient particularity . . . to enable a defendant to delineate that which he is accused of misappropriating" and to allow a court to decide whether misappropriation has occurred. *Analog Devices, Inc. v. Michalski*, 157 N.C. App. 462, 468, 579 S.E.2d 449, 453 (2003). Once a plaintiff establishes a *prima facie* case, the burden shifts to the defendant to rebut a presumption that the trade secrets were misappropriated. *Sunbelt*, 174 N.C. App. at 58, 620 S.E.2d at 229.

[10] Individual defendants claim that GE failed to identify what information was a trade secret with sufficient particularity. GE specifically identified chemical formulations, pricing information, customer proposals, historical costs, and sales data that individual defendants were exposed to at GE. Such information has been held to derive independent commercial value from not being generally known. *Byrd's*, 142 N.C. App. at 376, 542 S.E.2d at 692. The documents and contents of GE's evidence listed above were alleged with sufficient particularity for individual defendants to delineate that which they were accused of misappropriating and for the trial court to determine whether a misappropriation occurred. *See Analog Devices*, 157 N.C. App. at 468, 579 S.E.2d at 453. Because GE identified the contents of the misappropriated documents with sufficient particularity, we find the trial court correctly identified the information as trade secrets.

Individual defendants also claim that the GE descending sales reports, customer proposals, and other unidentified trade secrets do not satisfy the definition of a trade secret. We disagree. The descending sales reports, for example, contained history of actual sales and sales forecasts. GE's descending sales reports and customer proposals are analogous to the cost history records, customer lists, and financial projections previously found to be business information that derives independent commercial value. *See Byrd's*, 142 N.C. App. at 376, 542 S.E.2d at 692; *Sunbelt*, 174 N.C. App. at 58, 620 S.E.2d at 229; *Drouillard*, 108 N.C. App. at 173, 423 S.E.2d at 327. The trial court was therefore correct in holding that the information submitted by GE constituted trade secrets as defined in North Carolina.

[11] Additionally, individual defendants contend that GE's transmission of information to Lukowski after they determined he may be likely to leave for another company invalidates the argument that such information was a trade secret, because GE failed to maintain its secrecy. *See* N.C. Gen. Stat. § 66-152(3)(b) (2011) (a trade secret must be "the subject

of efforts that are reasonable under the circumstances to maintain its secrecy"). This contention is unpersuasive, as Lukowski was still bound by the confidentiality terms of his employment agreement and GE could not practically employ Lukowski without giving him access to trade secret information.

[12] We also find that GE sufficiently proved misappropriation of the trade secrets. " 'Misappropriation' means acquisition, disclosure, or use of a trade secret of another without express or implied authority or consent, unless such trade secret was arrived at by independent development, reverse engineering, or was obtained from another person with a right to disclose the trade secret." N.C. Gen. Stat. § 66-152(1) (2011). Individual defendants failed to show that they acquired GE trade secrets through independent development, reverse engineering, or from someone who had the right to disclose them, and therefore they did not rebut GE's *prima facie* case for trade secret misappropriation.

Because GE identified documents containing trade secret information pursuant to section 66-152 with sufficient particularity, and individual defendants failed to rebut GE's *prima facie* case that they misappropriated those trade secrets, we affirm the trial court as to this issue.

2. Unfair or Deceptive Practices

[13] Individual defendants argue that the trial court's error in identifying trade secrets affected the court's analysis of joint and several liability and section 75-1.1 liability. We affirm the trial court's conclusions as to both.

Joint and several liability is allowed when (1) defendants have acted in concert to commit a wrong that caused an injury; or (2) defendants, even without acting in concert, have committed separate wrongs that still produced an indivisible injury. *Bost v. Metcalfe*, 219 N.C. 607, 610, 14 S.E.2d 648, 651 (1941). Concerted action is when "two or more persons unite or intentionally act in concert in committing a wrongful act, or participate therein with common intent." *Garrett v. Garrett*, 228 N.C. 530, 531, 46 S.E.2d 302, 302 (1948). Section 75-1.1 makes unlawful "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce[.]" N.C. Gen. Stat. § 75–1.1 (2011).[6] Employees have been found liable for committing

6. Here, the trial court uses the phrase "unfair or deceptive *trade* practices." Although this language remains common in legal parlance today, the General Assembly omitted the word "trade" from section 75-1.1 in 1977. Ch. 747, sec. 1, 1977 N.C. Sess. Laws 1026.

unfair or deceptive acts when their actions involved egregious activities outside the scope of employment and would otherwise violate section 75-1.1. *See Songwooyarn Trading Co., Ltd. v. Sox Eleven, Inc.*, 213 N.C. App. 49, 56-57, 714 S.E.2d 162, 167-68 (2011).

This Court has held that violations of section 66-152 may also violate section 75-1.1. *See Drouillard*, 108 N.C. App. at 172, 423 S.E.2d at 326.

> [A]ll defendants need to show to maintain a cause of action under [section 75-1.1] is (1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) proximately causing actual injury to defendant or defendant business. *Spartan Leasing v. Pollard*, 101 N.C. App. 450, 400 S.E.2d 476 (1991). If the violation of [section 66-152] satisfies this three prong test, it would be a violation of N.C. Gen. Stat. § 75–1.1.

Id. Here, the trial court found as fact that:

> 25. GE's customer proposals, chemical formulations and products, customer pricing, and other customer-specific sales information are trade secrets under N.C. Gen. Stat. §§ 66-152, *et. seq*. [Individual defendants] misappropriated trade secrets in violation of N.C. Gen. Stat. § 66-152, *et. seq*. The misappropriation of GE's trade secrets by [individual defendants] and Zee was a cause of GE's loss of business from those customers.
>
> 26. GE has introduced substantial evidence that the individual [d]efendants and Zee knew of the trade secrets at issue, had specific opportunities to disclose and use the trade secrets, did use and disclose the trade secrets, which disclosure and use was without the express or implied consent or authority of GE, and that Zee and the individual [d]efendants have been unjustly enriched as a result of the misappropriation of the trade secrets at issue.
>
> 27. The acts of the individual defendants and Zee constitute unfair and deceptive trade [sic.] practices pursuant to [section 75-1.1].

Here, because individual defendants' misappropriation of GE's trade secrets met the three prongs necessary to find a defendant liable for violating section 75-1.1, we hold that the trial court did not err in finding individual defendants liable for violating section 75-1.1. *See id.*

Additionally, our Supreme Court has allowed individual liability for unfair or deceptive practices against employees when the employee's acts "(1) involved egregious activities outside the scope of [their] assigned employment duties, and (2) otherwise qualified as unfair or deceptive practices that were in or affecting commerce." *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 710–11 (2001). Here, individual defendants had ongoing "employment duties" to comply with the terms of their employment contracts, and by willfully violating the terms of those contracts, individual defendants committed "egregious activities outside the scope" of those duties. *See Dalton*, 353 N.C. at 656, 548 S.E.2d at 710-11. Such activity was sufficient to find individual defendants liable for violating section 75-1.1.

[14] Individual defendants also contend that GE failed to provide evidence that all individual defendants acted in concert to each carve-out to allow joint and several liability. Concerted action in a section 75-1.1 violation has previously been held to give rise to joint and several liability. *Pinehurst, Inc. v. O'Leary Bros. Realty, Inc.*, 79 N.C. App. 51, 56-58, 338 S.E.2d 918, 921-22 (1986); *Excel Staffing Serv., Inc. v. HP Reidsville, Inc.*, 172 N.C. App. 281, 288, 616 S.E.2d 349, 354 (2005). Here, there is ample evidence in the record to support the court's finding that each individual furthered a single concerted plan with Zee to solicit GE customers for Zee's enrichment. Though individual defendants contend the Chem-Aqua allegations cannot support a finding of concerted action by individual defendants, there is ample evidence irrespective of Chem-Aqua to show sufficient concerted action to hold individual defendants jointly and severally liable. Because the trial court properly found that individual defendants acted in concert to harm GE, joint and several liability was appropriate. As such, we affirm the trial court's judgment with regard to joint and several liability and section 75-1.1 liability.

III. DISCUSSION OF ZEE COMPANY, INC.'S APPEAL

A. Rule 37 Sanctions and Compensatory Damages

[15] Zee first argues that the trial court erred by allowing GE to use Zee's gross sales to the carve-outs as its measure of compensatory damages rather than Zee's net profits, because the changed measure of damages as a discovery sanction is not authorized by Rule 37 of the North Carolina Rules of Civil Procedure. We disagree.

Rule 37 of the North Carolina Rules of Civil Procedure confers power on trial judges to impose sanctions that "prevent or eliminate dilatory tactics on the part of unscrupulous attorneys or litigants." *Essex Grp., Inc. v. Express Wire Servs., Inc.*, 157 N.C. App. 360, 363, 578 S.E.2d 705,

707 (2003). Sanctions for failing to obey a discovery order are within the sound discretion of the trial court and will not be overturned on appeal absent a showing of abuse of that discretion. *In re Estate of Johnson*, 205 N.C. App. 641, 644, 697 S.E.2d 365, 367 (2010). "A trial court does not abuse its discretion by imposing a severe sanction so long as that sanction is 'among those expressly authorized by statute' and there is no 'specific evidence of injustice.' " *Batlle v. Sabates*, 198 N.C. App. 407, 417, 681 S.E.2d 788, 795 (2009) (citation omitted); *see also Martin v. Solon Automated Servs., Inc.*, 84 N.C. App. 197, 201, 352 S.E.2d 278, 281 (1987) ("Even though the [Rule 37] sanctions imposed were somewhat severe, they were among those expressly authorized by the statute; thus, we cannot hold that they constitute an abuse of discretion absent specific evidence of injustice caused thereby.").

The subsection of Rule 37 which authorized the trial court to sanction Zee reads:

> (b)(2) Sanctions by Court in Which Action Is Pending. If a party . . . fails to obey an order to provide or permit discovery . . . a judge of the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> . . .
>
> b. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the party from introducing designated matters in evidence[.]

N.C. Gen. Stat. § 1A-1, Rule 37(b)(2)(b) (2011).

Zee conceded at oral argument that its behavior during trial warranted sanctions of some kind. Indeed, the record is rife with Zee's efforts to evade GE's requests for evidence of net profits made on sales to the carve-outs, including contravention of three separate orders to compel over a span of two years. Zee's failure to obey these orders justified the trial court's decision to impose sanctions. *See McCraw v. Hamrick*, 88 N.C. App. 391, 394, 363 S.E.2d 201, 202 (1988) (noting that Rule 37 allows trial courts to enter orders to compel and sanction failure to comply with such orders).

GE was entitled to recover as damages either its lost profits or the profits garnered by Zee, and it elected to disgorge Zee of its profits. *See Med. Staffing Network, Inc. v. Ridgway*, 194 N.C. App. 649, 659-61, 670 S.E.2d 321, 329-30 (2009) (setting damages for violation of section 75-1.1

premised on misappropriation of trade secrets as "the greater of the extent to which plaintiff has suffered economic loss or the extent to which the competitor has unjustly benefitted" and remanding for measure of profits where revenue alone was "too speculative to constitute a proper measure of damages"). However, contrary to Zee's characterization, the sanction imposed by the trial court did not impermissibly transform the measure of damages from profit to revenue. Rather, the court availed itself of Rule 37(b)(2)(b) by considering GE's evidence of the unfair benefit Zee generated from these transactions and keeping out any conflicting evidence that may have been offered by Zee. The trial court ordered that:

> 2. Plaintiff shall be permitted to offer evidence of Zee Company, Inc.'s gross sales as the basis of Plaintiff's damages in this action.
>
> 3. Samuel Harper and Barry Owings hereby are prohibited from offering testimonial or other evidence concerning Zee's damages in this action.
>
> 4. Zee hereby is prohibited from offering any evidence in support of its damages in this action . . . .

Although the court allowed GE to submit evidence of revenue as the "basis" of the measure of damages, it did not order that revenue displace profits in general as the target measurement. Profit is "[t]he excess of revenues over expenditures in a business transaction." Black's Law Dictionary 1329 (Ninth ed. 2009). Without evidence of expenditures, the court used what figures it had to determine the improper benefit Zee gained from the transactions with the carve-outs. This sanction was permissible because "the fact finder in [an] unfair and deceptive trade [sic.] practices claim[] has broad discretion in awarding damages to insure that the plaintiff is made whole and the wrongdoer does not profit from its conduct." *TradeWinds Airlines, Inc. v. C-S Aviation Servs.*, __ N.C. App. __, __, 733 S.E.2d 162, 174 (2012). Zee conceded at oral argument that GE incurred loss as a direct result of Zee's sales to the carve-outs. Based on Zee's admitted, obstinate refusal to provide evidence on its net profits, we find that any lesser sanction would not have been sufficient to insure that Zee did not profit from its misconduct.

This sanction was explicitly authorized under Rule 37(b)(2)(b), and because Zee concedes that it was enriched at GE's expense and its behavior during discovery was deviant enough to warrant punishment, we find that there is no evidence of injustice which may otherwise support a finding that the trial court abused its discretion by prohibiting

Zee from submitting evidence of the measure of damages. *See Martin*, 84 N.C. App. at 201, 352 S.E.2d at 281. We therefore affirm the court's sanction and judgment as to this matter.

B. Punitive Damages

[16] Zee next argues that the trial court erred by entering punitive damages that violate N.C. Gen. Stat. § 1D-25, are unconstitutionally excessive, and impermissibly punish Zee for out-of-state conduct. We find that the punitive damages were entered in contravention of North Carolina Supreme Court precedent, and therefore we must reverse and remand.

This Court reviews application of the punitive damages limits in N.C. Gen. Stat. § 1D-25 *de novo*. *Bodine v. Harris Vill. Prop. Owners Ass'n, Inc.*, 207 N.C. App. 52, 59, 699 S.E.2d 129, 134 (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 Appeal of the Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

The statute that imposes limitations on punitive damages awards provides that:

> (b) Punitive damages awarded *against a defendant* shall not exceed three times the amount of compensatory damages or two hundred fifty thousand dollars ($250,000), whichever is greater. If a trier of fact returns a verdict for punitive damages in excess of the maximum amount specified under this subsection, the trial court shall reduce the award and enter judgment for punitive damages in the maximum amount.

N.C. Gen. Stat. § 1D-25(b) (2011) (emphasis added).

On appeal, Zee argues that the entry of punitive damages against each defendant individually was impermissible given our Supreme Court's interpretation of section 1D-25(b) in *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 594 S.E.2d 1 (2004). We agree. The defendant in Rhyne argued, as GE does here, that the plain language of section 1D-25(b) ("[p]unitive damages against *a defendant* shall not exceed . . . ") requires the application of its limits to each defendant, not each plaintiff. *Rhyne*, 358 N.C. at 187-88, 594 S.E.2d at 19. However, by interpreting that provision in the context of the entire statute, our Supreme Court held that the legislature's intent was to "reduce each plaintiff's individual punitive damages award." *Id.* at 188, 594 S.E.2d at 20.

> This construction of section 1D–25(b) is further supported by the operation of other statutes within Chapter 1D. Most significantly, section 1D–15(a) directs the trier of fact to consider an exclusive list of aggravating factors when determining whether to award punitive damages. N.C.G.S. § 1D–15(a). *In the absence of some legislative directive, it is assumed that the trier of fact should, as it did at common law, consider these factors as to each plaintiff's cause of action and not as to each defendant.* It follows that, like section 1D–15(a), section 1D–25(b) applies to the individual jury verdict of each plaintiff.

Id. at 189, S.E.2d at 20 (emphasis added). It is undisputed that the trial court here made factual findings pursuant to the provisions within Chapter 1D as to each individual defendant in analyzing whether punitive damages should be awarded. The trial court then concluded that each defendant had engaged in conduct sufficient to warrant punitive damages and entered $864,891.00 (three times the compensatory damages amount of $288,297.00) against each defendant individually. Based on the Supreme Court's holding in *Rhyne*, this was an erroneous application of sections 1D-25(b), because the trial court as the finder of fact considered factors not as to "each plaintiff's cause of action" but as to each defendant. *Id.* We must therefore reverse the trial court's judgment and remand for reentry of punitive damages in light of that and now this decision. *See Musi v. Town of Shallotte*, 200 N.C. App. 379, 383, 684 S.E.2d 892, 896 (2009) ("[T]his Court has no authority to overrule decisions of our Supreme Court and we have the responsibility to follow those decisions until otherwise ordered by the Supreme Court.") (citation and quotation marks omitted).

[17] Zee also argues that the trial court violated its due process rights by awarding punitive damages against Zee for harm that it allegedly caused to Chem-Aqua, an out-of-state company which was not a party to this case. The United States Supreme Court has held "the Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts on nonparties." *Philip Morris USA v. Williams*, 549 U.S. 346, 353, 166 L. Ed. 2d 940, 948 (2007). Furthermore, the Supreme Court has noted "as a general rule, a [s]tate [does not] have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the [s]tate's jurisdiction." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421, 155 L. Ed. 2d 585, 600 (2003). In assessing punitive damages, the trial court found as fact that "[t]he acts of Zee pertaining to the Chem-Aqua incident

demonstrate that Zee was engaging in similar if not identical conduct that it engaged in against GE." It is unclear from the court's conclusions how much weight, if any, it gave to the Chem-Aqua allegations in entering the maximum amount of punitive damages. However, to ensure that Zee's constitutional rights were not violated, we remand to the trial court for new findings of fact and conclusions of law relating to punitive damages that give no consideration to Zee's out-of-state conduct toward Chem-Aqua, a nonparty to the suit.

Finally, Zee argues that the aggregate amount of punitive damages in this case was unconstitutionally excessive. Because the court initially awarded punitive damages on a per-defendant rather than per-plaintiff basis and improperly conducted its statutory inquiry into whether punitive damages were warranted, we decline to reach this issue, as it involves matters which may not recur following the court's actions on remand. *See Few v. Hammack Enterprises, Inc.*, 132 N.C. App. 291, 299, 511 S.E.2d 665, 671 (1999) (declining to consider the remaining contentions "as they may not recur on remand").

C. Attorneys' Fees

[18] Zee's final argument on appeal is that the $5.77 million award of attorneys' fees was unreasonable and the court abused its discretion by awarding GE fees related to Zee's counterclaims. We affirm the award of fees based on Zee's counterclaims, but remand for new findings as to the reasonableness of the award.

This Court reviews an award of attorneys' fees for abuse of discretion. *Blankenship v. Town & Country Ford, Inc.*, 174 N.C. App. 764, 771, 622 S.E.2d 638, 643 (2005). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision." *Stilwell v. Gust*, 148 N.C. App. 128, 130, 557 S.E.2d 627, 629 (2001) (citation omitted). In order to determine whether the trial court has abused its discretion, we consider whether there is competent evidence to support the court's findings and whether those findings support the court's conclusions. *Dyer v. State*, 331 N.C. 374, 376, 416 S.E.2d 1, 2 (1992).

Generally, a successful litigant may not recover attorneys' fees unless such recovery is expressly authorized by statute. *Hicks v. Albertson*, 284 N.C. 236, 238, 200 S.E.2d 40, 42 (1973). Here, the court awarded attorneys' fees incurred on GE's claims pursuant to N.C. Gen. Stat. §§ 75-16.1(1), 66-154(d), and 1D-45; it also awarded attorneys' fees on Zee's counterclaims pursuant to N.C. Gen. Stat. §§ 75-16.1(2) and 6-21.5. Zee does not argue that the trial court erred by awarding fees to

GE based on GE's claims; rather, it argues that the court erred by awarding fees based on Zee's counterclaims and that the total attorneys' fees amount was unreasonable. We hold that the court did not err by awarding fees on Zee's counterclaims, but we remand to the trial court for a redetermination of the reasonableness of the total fee award.

Under section 75-16.1(2), a trial court may award attorneys' fees to a defending party where "the party instituting the action knew, or should have known, the action was frivolous and malicious." N.C. Gen. Stat. § 75-16.1(2) (2011). Section 6-21.5 requires a finding that there was "a complete absence of a justiciable issue of either law or fact raised by the losing party." N.C. Gen. Stat. § 6-21.5 (2011). Zee argues that its counterclaims were not "frivolous and malicious" and contained justiciable issues of law, and therefore the court could not meet the requirements of awarding fees under these statutes.

Zee cites *Free Spirit Aviation, Inc. v. Rutherford Airport Auth.*, 206 N.C. App. 192, 200, 696 S.E.2d 559, 565 (2010) for the proposition that "a claim that survives a motion for summary judgment, by definition, does not lack justiciability." However, Zee overlooks the actual holding of *Free Spirit*: "We need not address whether fees are always precluded after a denial of summary judgment because . . . the trial court did not err in denying defendants' motion for attorneys' fees under N.C. Gen. Stat. § 6–21.5." *Id.* at 201, 696 S.E.2d at 565. Here, the trial court granted summary judgment in favor of GE on all of Zee's counterclaims for tortious interference except as to one customer – Global Nuclear Fuels ("GNF") – as to which GE did not seek summary judgment.

Zee contended that GE tortiously interfered with contracts or prospective economic advantages it may have had with two carve-outs, GNF and Shamrock, and by doing so violated the unfair or deceptive practices act. However, the trial court correctly concluded that: (1) Zee had no right to conduct business with those companies in the first place, because doing so would breach individual defendants' employment contracts, but in the alternative, (2) Zee put forth no evidence which tended to show that any behavior on GE's part interfered with any relationship Zee may have had with GNF or Shamrock, and therefore (3) Zee presented no evidence which supported the conclusion that GE participated in unfair or deceptive practices. Because Zee "persisted in litigating the case after a point where [it] should reasonably have become aware that the pleading [Zee] filed no longer contained a justiciable issue," *Sunamerica Financial Corp. v. Bonham*, 328 N.C. 254, 258, 400 S.E.2d 435, 438 (1991), due to the lack of credible evidence implicating GE, we affirm the court's fee awards under section 6-21.5. Therefore,

we need not address the court's alternate conclusion that Zee's counterclaims were frivolous and malicious under section 75-16.1 or 1D-45.

[19] After concluding that it is statutorily authorized to award attorneys' fees, the trial court must make findings regarding the reasonableness of the award. *United Laboratories, Inc. v. Kuykendall*, 335 N.C. 183, 195, 437 S.E.2d 374, 381-82 (1993). Among the aspects of representation that the trial court may consider in assessing reasonableness are:

> the time and labor expended, the skill required, the customary fee for like work, [] the experience or ability of the attorney . . . the novelty and difficulty of the questions of law[,] the adequacy of the representation[,] the difficulty of the problems faced by the attorney[,] especially any unusual difficulties[,] and the kind of case for which fees are sought and the result obtained.

Id. (citation and quotation marks omitted).

We find no relevant North Carolina statute that guides our assessment of "customary fees for like work," and our appellate courts have not had occasion to decide whether fees must be awarded in light of the rates typically charged in the geographic region where the litigation takes place. However, this Court has previously recognized the general principle that community rates in the geographic area of the litigation are relevant to the reasonableness determination. *See Okwara v. Dillard Dep't Stores, Inc.*, 136 N.C. App. 587, 594, 525 S.E.2d 481, 486 (2000) (allowing the Court to look at "the customary fee for similar work in the community" in a civil rights case) (citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974)); *see also Whiteside Estates, Inc., v. Highlands Cove, L.L.C.*, 146 N.C. App. 449, 468, 553 S.E.2d 431, 444 (2001) (affirming rates as reasonable where the record showed they were "within the range of such fees and charges customarily charged in the community," among other things). The Fourth Circuit has also held that the community where the court sits is "the appropriate starting point for selecting the proper rate." *Nat'l Wildlife Fed'n v. Hanson*, 859 F.2d 313, 317 (4th Cir. 1988). The *Hanson* court held that although community rates may be the starting point, the trial court must conduct further inquiry when local counsel do not have the expertise to adequately represent a client. *Id.* In assessing reasonableness of fees incurred by more expensive out-of-state counsel, the court asks two questions as to reasonableness: (1) "are services of like quality truly available in the locality where the services are rendered"; and (2) "did the party choosing the attorney from elsewhere act reasonably in making that choice [to

hire non-local counsel]?" *Id.* (quoting *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760, 768 (7th Cir. 1982)).

We are not bound by the *Hanson* court's ruling, but we find its analysis addressing the reasonableness of awarding unusually high fees in the community where the litigation took place to be persuasive. *See Soderlund v. Kuch*, 143 N.C. App. 361, 370, 546 S.E.2d 632, 638 (2001) ("[W]ith the exception of the United States Supreme Court, federal appellate decisions are not binding upon either the appellate or trial courts of this State.") (citation and quotation marks omitted); *Shepard v. Ocwen Fed. Bank, FSB*, 172 N.C. App. 475, 479, 617 S.E.2d 61, 64 (2005) ("Although we are not bound by federal case law, we may find their analysis and holdings persuasive.") However, we decline to adopt a test that forces courts to assess the reasonableness of a litigant's decision to hire counsel generally. Parties, including GE, are free to hire as counsel whomever they wish at whatever rates they are willing to pay. The issue is whether the fees awarded against an adverse party are reasonable, not whether it was reasonable for those fees to be incurred by the prevailing party. *See Cotton v. Stanley*, 94 N.C. App. 367, 369, 380 S.E.2d 419, 421 (1989) ("Once the court decides to award attorneys' fees, however, it must award reasonable attorneys' fees.").

Here, the trial court set out detailed findings of fact regarding the reasonableness of awarding the attorneys' fee, including the customary fees for like work. However, the court declined to consider whether Paul Hastings' fees should be adjusted in light of those typically charged in North Carolina.[7] The court made the following relevant findings of fact regarding the reasonableness of Paul Hastings' fees:

> 45. Here, the circumstances, complexity and nature of the case support GE's decision to utilize Paul Hastings as its legal counsel. Ward and Smith is a highly capable and qualified law firm. However, Ward and Smith had no prior working relationship with GE and no prior familiarity with the Employment Agreements at issue.
>
> 46. Paul Hastings has represented GE and its affiliates and subsidiaries for approximately 30 years and maintains a GE client service team, of which Victoria Cundiff is a member. When this dispute first arose, GE enlisted the

7. Specifically, the trial court stated: "Defendants contend the hourly rates charged by Paul Hastings must be reduced to the rates customarily charged by North Carolina attorneys in the community in which this case has been litigated and tried. The [c]ourt disagrees."

> assistance of its longstanding counsel, Paul Hastings, and Ms. Cundiff and other members of her team reviewed and analyzed the Employment Agreements and became familiar with the structure, business, and business challenges then facing GE. Ms. Cundiff also was personally involved in GE's efforts over the course of several months to avoid litigation prior to the institution of this lawsuit.
>
> 47. Members of Paul Hastings' team prepared drafts of the initial pleadings and initial discovery requests based on their prior knowledge and experience. Paul Hastings also utilized this knowledge and its longstanding relationship with GE to work with Ward and Smith[.]
>
> . . .
>
> 49. In the Fall of 2009, when the case was set for trial, Paul Hastings worked with Ward and Smith to prepare for the multitude of depositions scheduled during the month of October 2009. Thereafter, while the Ward and Smith attorneys prepared for, appeared and argued in Court, Paul Hastings worked with witnesses and engaged in other trial preparation activities. The Court finds that both firms' involvement was appropriate in order to prepare for the February 2010 trial.

We agree that GE's hiring of Paul Hastings to perform work related to this litigation was reasonable, but that does not complete our inquiry. In assessing the reasonableness of awarding Paul Hastings' fees against Zee, we will consider whether "services of like quality [were] truly available in the locality where the services are rendered." *Hanson*, 859 F.2d at 317. It appears that much of the work performed by Paul Hastings' attorneys could have just as effectively been performed by local counsel at local rates. The trial court did not attempt to make this distinction. The record reveals that Paul Hastings' attorneys billed at rates typical of New York firms, which were significantly higher than their North Carolina counterparts at Ward and Smith. For example, the rates billed by Paul Hastings' and Ward and Smith's lead attorneys at the outset of the litigation were $633.25 and $270.00 per hour, respectively. Because of that disparity, over $3 million of the $5,769,903.10 attorneys' fee award against Zee was billed by Paul Hastings, despite the fact that no counsel for Paul Hastings ever appeared before a court in North Carolina throughout the entirety of the litigation. Furthermore, in April 2007, associate attorneys at Paul Hastings charged $500.00 per hour

– double the $250.00 fee charged by attorneys at Ward and Smith – for "factual investigation and development; obtaining and analyzing [c]lient documents; [and] interview[ing] witnesses". These duties clearly did not require a prior relationship or intimate knowledge of GE's employment contracts, because GE paid the attorneys at Ward and Smith to perform almost identical work during the same time period.

We find it unreasonable to force Zee to pay a fee that includes rates double those billed in the community where the litigation took place for work that seemingly did not require such a premium. Ultimately, GE's willingness to pay significantly higher rates for work that they could have procured for much less does not necessitate a finding that those fees are reasonable when awarded against Zee. Rather, the court must make additional findings which demonstrate why awarding such unusually high fees in the community where the litigation took place is reasonable. *See Inst. Food House, Inc. v. Circus Hall of Cream, Inc.*, 107 N.C. App. 552, 558, 421 S.E.2d 370, 374 (1992) ("[R]easonableness is the key factor under all attorney's fees statutes.").

Accordingly, we find that the trial court abused its discretion by awarding the entire fee billed by Paul Hastings against Zee without conducting any inquiry as to which of the services rendered by Paul Hastings' attorneys truly could not have been performed by local counsel at reasonable rates within the community in which the litigation took place. Therefore, we remand for further findings as to this distinction.

IV. DISCUSSION OF ADDITIONAL APPELLANTS' APPEAL

A. Criminal Contempt

[20] Additional appellants' first argument on appeal is that the trial court erred by failing to follow the proper safeguards in finding Almy in criminal contempt of court. We agree.

"The standard of review for contempt proceedings is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Watson v. Watson*, 187 N.C. App. 55, 64, 652 S.E.2d 310, 317 (2007). "Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment." *Hartsell v. Hartsell*, 99 N.C. App. 380, 385, 393 S.E.2d 570, 573 (1990), *disc. review denied*, 362 N.C. 373, 662 S.E.2d 551 (2008); *see also State v. Simon*, 185 N.C. App. 247, 250, 648 S.E.2d 853, 855, (applying a similar standard of review for review of criminal contempt).

There are two kinds of contempt — civil and criminal. *O'Briant v. O'Briant*, 313 N.C. 432, 434, 329 S.E.2d 370, 372 (1985). "A major factor in determining whether contempt is civil or criminal is the purpose for which the power is exercised." *Id.*

> Criminal contempt is generally applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice. Civil contempt is a term applied where the proceeding is had to preserve the rights of private parties and to compel obedience to orders and decrees made for the benefit of such parties.

Id. (citation and quotation marks omitted).

Criminal contempt is further categorized as either direct or indirect criminal contempt. Criminal contempt is direct when the act: (1) is committed within the sight or hearing of the presiding judge, (2) is committed in or near the room where proceedings are being held before the judge, or (3) is likely to interfere with matters before the court. *Id.* at 435-36, 329 S.E.2d at 373; N.C. Gen. Stat. § 5A-13(a) (2011). "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 [N.C. Gen. Stat. §] 5A-15." N.C. Gen. Stat. § 5A-13(b) (2011). Because criminal contempt is a crime, constitutional safeguards are triggered and proper procedure must be followed. *Watson*, 187 N.C. App. at 61, 652 S.E.2d at 315. The procedural requirements of section 5A-15 include, *inter alia*, (1) the trial court giving notice to the accused in the form of "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"; and (2) establishing facts "beyond a reasonable doubt" that support a judgment of guilt. N.C. Gen. Stat. § 5A-15(a), (f) (2011).

GE tries to dispute that Almy was held in criminal contempt. It argues that the trial court did not avail itself of N.C. Gen. Stat. § 5A-1, which prescribes rules and procedures for criminal contempt, but rather utilized its "inherent authority" to issue contempt as a discovery sanction beyond the express language of Rule 37.

However, during the hearing on GE's motion to sanction additional appellants and hold them in contempt, GE's counsel stated "in this case, Your Honor, it would not be civil contempt, it would have to be criminal contempt . . . ." GE's counsel then stated that GE was seeking "statutory criminal contempt" under "North Carolina General Statute 5A-11." GE

was seeking to hold additional appellants in contempt based on their previous bad acts – the disclosures of confidential documents. Because "[a] major factor in determining whether contempt is criminal or civil is the purpose for which the power is exercised," and "[c]riminal contempt is generally applied where the judgment is in punishment of an act already accomplished," *O'Briant*, 313 N.C. at 434, 319 S.E.2d at 372, it follows that GE must have necessarily been seeking criminal contempt by punishing Almy and Dombroff for their violations of the protective order. Furthermore, the order itself stated that "publication of Exhibit 20 by Almy in violation of [the protective order] constitutes criminal contempt." In light of the above, it is clear that Almy was held in indirect criminal contempt based on his prior actions. *See* N.C. Gen. Stat. § 5A-13(b) (2011) ("Any criminal contempt other than direct criminal contempt is indirect criminal contempt . . . .").

Because Almy was held in indirect criminal contempt, the trial court was required to follow the procedures set out in section 5A-15, which it failed to do. The trial court did not provide Almy with "an order directing [him] 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). The only communication between the trial court and Almy after GE's motion and before the hearing was an email setting a date for the hearing.

Furthermore, the order did not set out facts established "beyond a reasonable doubt," nor did it indicate that a reasonable doubt standard was applied. N.C. Gen. Stat. § 5A-15(f) (2011). "Failure to make such an indication is fatally deficient, unless the proceeding is of a limited instance where there were no factual determinations for the court to make." *State v. Ford*, 164 N.C. App. 566, 571, 596 S.E.2d 846, 850 (2004); *see also In re Contempt Proceedings Against Cogdell*, 183 N.C. App. 286, 289, 644 S.E.2d 261, 263 (2007) (reversing a court order without remand where the trial court failed to indicate that the reasonable doubt standard was used in a criminal contempt proceeding). Here, because a hearing was held for the court to make factual determinations, the failure to indicate that the reasonable doubt standard was used renders the order fatally deficient.

Therefore, because Almy was held in indirect criminal contempt and the trial court failed to follow the procedures provided by section 5A-15, we reverse the trial court's judgment without remand. Accordingly, we need not address whether the $500.00 imposed on Almy as part of the criminal contempt sanction was permissible.

B. Attorneys' Fees

[21] Additional appellants' second argument on appeal is that the trial court erred in ordering that Almy pay GE's attorneys' fees incurred in the sanction proceedings under Rule 37(b)(2).[8] We agree.

"A trial court's award of sanctions under Rule 37 will not be overturned on appeal absent an abuse of discretion." *Graham v. Rogers*, 121 N.C. App. 460, 465, 466 S.E.2d 290, 294 (1996). Rule 37(b)(2) states that "[i]n lieu of any of the foregoing orders or in addition thereto, the court shall require *the party failing to obey the order* to pay the reasonable expenses, including attorney's fees, caused by the failure . . . ." N.C. Gen. Stat. § 1A-1 Rule 37(b)(2) (2011) (emphasis added).

At issue here is whether an attorney constitutes a "party" for the purposes of awarding attorneys' fees under Rule 37(b)(2). An often-applied rule of construction is that "where a statute is intelligible without any additional words, no additional words may be supplied." *State v. Camp*, 286 N.C. 148, 151, 209 S.E.2d 754, 756 (1974). Although this Court has not analyzed whether the word "party" in Rule 37(b)(2) includes attorneys, we held in *First Mt. Vernon Indus. Loan Ass'n v. ProDev XXII, LLC*, 209 N.C. App. 126, 134, 703 S.E.2d 836, 841 (2011) that "Rule 37(a) demonstrates . . . that the General Assembly has purposefully distinguished between parties and non-parties." The *First Mt. Vernon* Court held that a non-party could not be subject to sanctions under Rule 37(d), and therefore, the trial court erred by taxing attorneys' fees and costs on the non-party where the statute explicitly applied to "the *party* failing to act." *Id.* at 134, 703 S.E.2d at 841. Rules 37(b)(2) and 37(d) contain almost identical provisions setting out the individuals who are bound by them. Both apply to "a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party." N.C. Gen. Stat. §§ 1A-1, Rule 37(b)(2), (d) (2011). Here, Almy was not a party to the underlying actions, nor was he an officer, director, managing agent, or designee to testify on behalf of a party.

Because the language of Rule 37(b)(2) is intelligible without adding anything further, and because the reasoning of the *First Mt. Vernon* Court applies to Rule 37(b)(2) given its similarity to Rule 37(d), we find that it was error for the court to award GE attorneys' fees against Almy because he was not a "party" to the suit under the language of the Rule authorizing fees. Accordingly, we reverse the award of attorneys' fees against Almy.

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8. The trial court did not award GE attorneys' fees against Dombroff.

C. Revocation of *Pro Hac Vice* Admissions

[22] Additional appellants' final argument on appeal is that the trial court erred by revoking their admissions *pro hac vice* to represent defendants in the action against GE. The court's order revoking additional appellants' admissions reads in its entirety, "The Court summarily revokes the pro hac vice admissions of Attorney Mark A. Dombroff and Attorney Thomas B Almy." The court made no independent findings of fact or conclusions of law supporting its order, but it did enter the order after conducting a hearing on GE's motion for sanctions.

Permission to practice in this state *pro hac vice* may be revoked by the trial court "on its own motion and in its discretion." N.C. Gen. Stat. § 84-4.2 (2011). "This status is . . . not a right but a discretionary privilege." *Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 178-79, 695 S.E.2d 429, 434 (2010) (citation and quotation marks omitted).

First, as to Almy, we find that our decision setting aside his being held in criminal contempt is significant enough to remand to the trial court for a new determination as to whether his admission *pro hac vice* should have been revoked. Conviction for a crime showing "professional unfitness" is a statutory ground for disbarment in North Carolina. N.C. Gen. Stat. § 84-28(b)(1), (c) (2011). As such, Almy's being held in criminal contempt likely affected the trial court's decision to revoke his admission. Because we reverse the order holding Almy in criminal contempt, we remand with instruction that the trial court afford no weight to that crime when reconsidering whether to revoke his *pro hac vice* admission.

[23] As to Dombroff, additional appellants argue that the trial court abused its discretion by revoking his admission because the $1,000 fine imposed by a federal court in 1997 was not the type of "discipline" that needed to be disclosed under N.C. Gen. Stat. § 84-4.1 (2011). Section 84-4.1(6) requires any attorney seeking admission to practice in this state *pro hac vice* to provide "[a] statement accurately disclosing a record of all that attorney's disciplinary history. Discipline shall include (i) public discipline by any court or lawyer regulatory organization, and (ii) revocation of any pro hac vice admission." N.C. Gen. Stat. § 84-4.1 (2011). Additional appellants cite to a public announcement on the North Carolina State Bar website, wherein it defines the types of "disciplinary" proceeding that it prosecutes, and explains that it deals with disciplinary matters which implicate a lawyer's license to practice law. However, based on the plain language of section 84-4.1, attorneys are required to disclose discipline administered by both courts and lawyer

regulatory organizations such as the State Bar. We hold that the court did not abuse its discretion by revoking the *pro hac vice* admission of Dombroff because he violated section 84-4.1 by failing to disclose a $1,000 disciplinary fine levied against him by the United States District Court for the District of South Carolina, and the court's decision was therefore supported by reason. *See 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.")

V. CONCLUSION

Because the trial court correctly interpreted "indirect solicitation" and "supervisory responsibility" in individual defendants' employment contracts, GE presented sufficient evidence to show individual defendants breached the confidentiality provisions in the employment contracts, and GE was not equitably estopped from penalizing Lukowski for breaching his contract, we affirm the trial court's judgment as to individual defendants' employment agreements. Additionally, because GE sufficiently established causation independent of evidence that GE lost customers for other reasons, we affirm the trial court's exclusion of that evidence. Finally, because GE sufficiently identified the misappropriated trade secrets, and individual defendants acted in concert, we affirm the trial court's ruling that joint and several liability and section 75-1.1 liability were appropriate. Thus, we affirm the trial court as to all issues on individual defendants' appeal.

As to Zee's appeal, we find that the trial court did not impermissibly change the measure of damages as a Rule 37 sanction. However, we do find that the entry of punitive damages against each defendant individually was in error given the Supreme Court's ruling in *Rhyne*, and that the trial court's assessment of attorneys' fees did not consider whether the fees billed by Paul Hastings attorneys were reasonable in the context of the community in which the action was litigated. Therefore, we affirm the trial court's measure of compensatory damages and remand as to the issues of punitive damages and attorneys' fees.

Finally, because the trial court did not follow the proper statutory procedures in holding Almy in criminal contempt of court, that order must be reversed and will not be remanded for further proceedings. *See Cogdell*, 183 N.C. App. at 290, 644 S.E.2d at 264 (reversing the court's judgment without remand where it failed to indicate that the reasonable doubt standard was used in a criminal contempt proceeding).

Accordingly, we remand for a redetermination as to Almy's *pro hac vice* revocation in light of this decision. We find that the court did not abuse its discretion in revoking the admission *pro hac vice* of Dombroff, because the discipline that he withheld from the trial court fell under the definition of the term as it is used in section 84-4.1.

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

Judges BRYANT and STEELMAN concur.

KENNETH HALSTEAD, PETITIONER
v.
JENNIFER PLYMALE, EXECUTRIX OF THE ESTATE OF
ANITA RAE HALSTEAD, RESPONDENT

No. COA13-375

Filed 3 December 2013

1. Jurisdiction—declaratory judgment—disposition of estate—standard of review

An appeal from the superior court's declaratory judgment concerning the proper disposition of an estate was an appeal of right to the Court of Appeals pursuant to N.C.G.S. § 7A-27(b). Moreover, review was *de novo* because the interpretation of the will turned solely on the language of the will and thus presented a question of law.

2. Wills—residuary estate—patent ambiguity—intent of testator

Where there was a patent ambiguity on the face of a will, the trial court correctly found that the entire residuary estate of testator (Ms. Halstead) passed under the terms of her will to her relative (Ms. Plymale) and not to petitioner, her estranged husband.

Appeal by petitioner from judgment entered 10 October 2012 by Judge W. David Lee in Union County Superior Court. Heard in the Court of Appeals 10 October 2013.

Law Office of Shawna Collins, by Shawna D. Collins, for petitioner-appellant.

Helms Robison & Lee, P.A., by James Allen Lee and Emily B. Harp, for respondent-appellee.

HUNTER, JR., Robert N., Judge.

Petitioner Kenneth Halstead ("Petitioner") appeals from a judgment finding that decedent Anita Rae Halstead ("Ms. Halstead") bequeathed and devised all of her tangible personal property, as well as her entire residuary estate, to Jennifer Plymale ("Ms. Plymale"). Petitioner contends that Ms. Halstead's will is unambiguous and that the residuary clause fails to devise Ms. Halstead's intangible and real property. Accordingly, Petitioner contends that Ms. Halstead's intangible and real property should pass by intestacy. We disagree and affirm the trial court's judgment.

I. Factual & Procedural History

Petitioner filed a complaint on 6 January 2012 seeking a declaration that the residuary clause contained in Ms. Halstead's will failed to devise her intangible and real property and that such property is therefore to pass by intestacy. The facts as alleged in the complaint are as follows.

Petitioner is the widower of Ms. Halstead, who died testate on 17 October 2011. Ms. Halstead's will, which was attached and incorporated into the complaint by reference, indicated that Petitioner and Ms. Halstead were separated and estranged at the time of her death. Indeed, at the beginning of Ms. Halstead's will, she specifically states:

> I hereby declare that I am separated from my estranged spouse, KENNETH F. HALSTEAD, and that I have no children. I further hereby declare that I specifically wish to disinherit and disqualify my estranged spounst [sic], KENNETH F. HALSTEAD for his misconduct toward me, including but not limited to his willful abandonment of me and the marriage, and our separation, due to his cohabitation and adultery, which I have not and do not condone.

On 18 October 2011, Ms. Plymale, the executrix of Ms. Halstead's estate, presented Ms. Halstead's will to the Clerk of Superior Court of Union County, who admitted the will to probate. The will disposes of Ms. Halstead's property as follows:

> 1. Gift of Tangible Personal Property. All of my tangible personal property that was not held by me solely for investment purposes, including, but not limited to,

my automobiles, household furniture and furnishings, clothing, jewelry, collectibles and personal effects, shall be disposed of as follows:

1. I give all such tangible personal property to my relative,[1] JENNIFER PLYMALE, . . . if she survives me.

. . . .

B. Gift of Residuary Estate. My residuary estate, being all my real and personal property, wherever located, not otherwise effectively disposed of, but excluding any property over which I may have a power of appointment, shall be disposed of as follows:

1. I give all such tangible personal property to my relative, JENNIFER PLYMALE, if she survives me.

Based on these provisions, Ms. Plymale indicated in the application for probate that she was the only person entitled to share in Ms. Halstead's estate. Petitioner then filed this action to obtain a declaration regarding the proper distribution of the residuary estate.

After a hearing on the matter, the trial court entered a judgment on 10 October 2012 finding a patent ambiguity on the face of the will and construing the will to devise the entire residuary estate in favor of Ms. Plymale. Specifically, because the trial court concluded that "[t]he bequest under 'A' effectively disposed of all of [Ms. Halstead's] tangible personal property so that none remained for disposition under 'B,' " the trial court considered the repeated reference to "tangible personal property" in the residuary clause to be patently ambiguous. Accordingly, because the trial court concluded that it was Ms. Halstead's express intention to disinherit and disqualify Petitioner, the reference to tangible personal property in the residuary clause was disregarded and the residue was deemed to have been devised in its entirety to Ms. Plymale. Petitioner filed timely notice of appeal.

II. Jurisdiction & Standard of Review

[1] "Courts of record within their respective jurisdictions shall have power to declare rights . . . and such declarations shall have the force

1. Notwithstanding this language, Ms. Plymale described her relationship with Ms. Halstead as a "close friend" in the application for probate.

and effect of a final judgment or decree." N.C. Gen. Stat. § 1-253 (2011). Accordingly, because Petitioner appeals the superior court's declaratory judgment concerning the proper disposition of Ms. Halstead's estate, Petitioner's appeal lies of right to this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2011).

"The interpretation of a will's language is a matter of law. When the parties place nothing before the court to prove the intention of the testator, other than the will itself, they are simply disputing the interpretation of the language which is a question of law." *Cummings v. Snyder*, 91 N.C. App. 565, 568, 372 S.E.2d 724, 725 (1988) (internal citations omitted). Here, both parties stipulated at the hearing that no extrinsic evidence would be considered. Accordingly, because the interpretation of Ms. Halstead's will turns solely on the language of the will, Petitioner's appeal presents a question of law. "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). "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).

III. Analysis

[2] The only question presented by Petitioner's appeal is the proper disposition of Ms. Halstead's residuary estate.[2] For the following reasons, we affirm the trial court's judgment finding that the entire residuary estate passed under the terms of the will to Ms. Plymale.

"The intent of the testator is the polar star that must guide the courts in the interpretation of a will." *Coppedge v. Coppedge*, 234 N.C. 173, 174, 66 S.E.2d 777, 778 (1951); *see also Collier v. Bryant*, ___ N.C. App. ___, ___, 719 S.E.2d 70, 76 (2011) ("When reading a will, the testator's intent guides the trial court's interpretation of the will."). "This intent is to be gathered from a consideration of the will from its four corners, and such intent should be given effect unless contrary to some rule of law or at variance with public policy." *Coppedge*, 234 N.C. at 174, 66 S.E.2d at 778.

Naturally, "[w]here the language employed by the testator is plain and its import is obvious, the judicial chore is light work; for, in such event, the words of the testator must be taken to mean exactly what

2. Petitioner's brief does not challenge the trial court's finding that all of Ms. Halstead's tangible personal property passed to Ms. Plymale under the section of the will entitled "A. Gift of Tangible Personal Property."

they say." *McCain v. Womble*, 265 N.C. 640, 644, 144 S.E.2d 857, 860 (1965) (quotation marks and citation omitted). However, "where provisions are inconsistent, it is a general rule in the interpretation of wills, to recognize the general prevailing purpose of the testator and to subordinate the inconsistent provisions found in it." *Coppedge*, 234 N.C. at 176, 66 S.E.2d at 779. Indeed, "[e]ven words, phrases, or clauses will be supplied in the construction of a will when the sense of the phrase or clause in question as collected from the context manifestly requires it." *Entwistle v. Covington*, 250 N.C. 315, 319, 108 S.E.2d 603, 606 (1959); *see also Gordon v. Ehringhaus*, 190 N.C. 147, 150, 129 S.E. 187, 189 (1925) ("[I]n performing the office of construction, the Court may reject, supply or transpose words and phrases in order to ascertain the correct meaning and to prevent the real intention of the testator from being rendered abortive by his inapt use of language.").

Here, we agree with the trial court's conclusion that a patent ambiguity appears on the face of Ms. Halstead's will. *See Wachovia Bank & Trust Co. v. Wolfe*, 243 N.C. 469, 478, 91 S.E.2d 246, 253 (1956) (stating that "a patent ambiguity occurs when doubt arises from conflicting provisions or provisions alleged to be repugnant"). Specifically, a plain reading of Ms. Halstead's residuary clause reveals a clear inconsistency. Ms. Halstead's residuary clause reads as follows:

> B. Gift of Residuary Estate. My residuary estate, being all my real and personal property, wherever located, not otherwise effectively disposed of, but excluding any property over which I may have a power of appointment, shall be disposed of as follows:
>
> > 1. I give all such tangible personal property to my relative, JENNIFER PLYMALE, if she survives me.

Plainly, section B indicates an intention to dispose of "all . . . real and personal property, wherever located, not otherwise effectively disposed of" in preceding portions of the will. Yet, when alluding back to the contents of the residuary estate in subsection B(1), the will refers only to "tangible personal property." Tangible personal property would necessarily exclude all intangible personal property and all real property in Ms. Halstead's estate.

The inconsistency inherent in this provision is further revealed by the fact that Ms. Halstead had already disposed of her tangible personal property:

> A. Gift of Tangible Personal Property. All of my tangible personal property that was not held by me solely for investment purposes, including, but not limited to, my automobiles, household furniture and furnishings, clothing, jewelry, collectibles and personal effects, shall be disposed of as follows:
>
> > 1. I give all such tangible personal property to my relative, JENNIFER PLYMALE, . . . if she survives me.

Accordingly, given that Ms. Halstead had already devised her tangible personal property to Ms. Plymale in section A, and because section B purports to devise the entire residuary estate, the repeated reference to "tangible personal property" in subsection B(1) creates a patent ambiguity on the face of the will. Thus, our task is to construe this inconsistent provision to effectuate Ms. Halstead's intent as revealed by the four corners of the will.

"[T]he intent of the testator must be ascertained from a consideration of the will as a whole and not merely from consideration of specific items or phrases of the will taken in isolation." *Adcock v. Perry*, 305 N.C. 625, 629, 290 S.E.2d 608, 611 (1982). "[T]he use of particular words, clauses or sentences must yield to the purpose and intent of the testator as found in the whole will." *Kale v. Forrest*, 278 N.C. 1, 6, 178 S.E.2d 622, 625 (1971). Accordingly, "[i]n interpreting the different provisions of a will, the courts are not confined to the literal meaning of a single phrase." *Cannon v. Cannon*, 225 N.C. 611, 617, 36 S.E.2d 17, 20 (1945). Courts may even supply a gift by implication "[i]f a reading of the whole will produces a conviction that the testator must necessarily have intended an interest to be given which is not bequeathed by express or formal words." *First Charter Bank v. Am. Children's Home*, 203 N.C. App. 574, 587, 692 S.E.2d 457, 467 (2010) (quotation marks and citation omitted) (alteration in original).

Moreover, there is a general presumption that a testator did not intend to die intestate as to any part of his property, unless there is such an intent plainly and unequivocally expressed in the will. *McKinney v. Mosteller*, 321 N.C. 730, 732—33, 365 S.E.2d 612, 614 (1988). Furthermore, "the presumption against intestacy is strengthened by the presence of a residuary clause in a will." *Id.* at 732, 365 S.E.2d at 614; *see also Gordon*, 190 N.C. at 150, 129 S.E. at 189 ("In dealing with the residuary clause of a will which is ambiguous, it is required, by the general rule of construction, that a liberal, rather than a restricted, interpretation be placed upon its terms; for a partial intestacy may thereby be prevented, which, it is reasonable to suppose, the testator did not contemplate.").

Here, an application of the foregoing principles leads us to the conclusion that Ms. Halstead specifically intended to disinherit Petitioner and to devise her entire residuary estate in section B to Ms. Plymale.

First, Ms. Halstead states at the beginning of her will that "I specifically wish to disinherit and disqualify my estranged spounst [sic], KENNETH F. HALSTEAD for his misconduct toward me." Thus, the remainder of the will's provisions must be read in light of the fact that Ms. Halstead did not want Petitioner to share in her estate. Second, before the residuary clause appears in the will, Ms. Halstead effectively disposed of all her tangible personal property in section A of the will in favor of Ms. Plymale. Accordingly, her intent in subsection B(1) could not have been to re-gift the same property to the same person. Third, the introductory language of the residuary clause, section B, purports to dispose of all of Ms. Halstead's remaining real and personal property. Given this intent, the reference to "all such tangible personal property" in subsection B(1) is more aptly translated "all such property." *See Wing v. Wachovia Bank & Trust Co., N. A.*, 301 N.C. 456, 464, 272 S.E.2d 90, 96 (1980) ("When the language following an introductory phrase which purports to dispose of all of testator's property can be interpreted to result in complete disposition or partial intestacy, the introductory statement, pointing to a complete disposition, ought to be considered, and that sense adopted which will result in a disposition of the whole estate." (quotation marks and citation omitted)).

In summary, Ms. Halstead's intent as garnered from the four corners of the will was to specifically disinherit Petitioner, to avoid intestacy, and to pass her entire estate to Ms. Plymale. Furthermore, the reference to "tangible personal property" in subsection B(1) of the residuary clause was not intended to limit the contents of the residuary estate to tangible personal property. Accordingly, the proper interpretation of subsection B(1) is that Ms. Halstead intended to pass all of her residue, including all remaining real and personal property, to Ms. Plymale.

IV. Conclusion

For the foregoing reasons, we affirm the judgment of the trial court finding that all of Ms. Halstead's tangible personal property, together with her entire residuary estate, were bequeathed and devised in their entirety to Ms. Plymale.

Affirmed.

Judges ERVIN and DAVIS concur.

HOMETRUST BANK, PLAINTIFF
v.
RICHARD H. GREEN AND JUDY L. GREEN, DEFENDANTS

No. COA13-511

Filed 3 December 2013

Process and Service—notice of foreclosure proceedings—actual notice

The superior court properly granted plaintiff's motion for summary judgment in a foreclosure proceeding as to defendant Richard Green, despite the fact that he was not individually served with notice of either foreclosure hearing. Richard Green had actual notice of the foreclosure hearings where the notices were mailed to Advantage Development, in care of Richard Green, and signed for by Richard Green. However, the superior court erred by granting plaintiff's motion for summary judgment as to defendant Judy Green where there was an issue of material fact as to whether Judy Green had actual notice of the foreclosure hearings.

Appeal by defendants from an order and a judgment entered 11 January 2013 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 4 November 2013.

The Dungan Law Firm, P.A., by James W. Kilbourne, Jr., for plaintiff-appellee.

Matney & Associates, P.A., by David E. Matney, III and Amy P. Mody, for defendants-appellants.

MARTIN, Chief Judge.

Defendants Richard H. Green and Judy L. Green appeal from the entry of summary judgment in favor of plaintiff HomeTrust Bank awarding plaintiff a judgment against them in the amount of $1,441,000 plus interest, costs, and attorney's fees.

The record established the following undisputed facts: in April 2007, Advantage Development Company, through its president, Richard H. Green, and its secretary, Judy L. Green, entered into a mortgage agreement with plaintiff. The mortgage was for $712,000 and was secured by Lot 27 in the King Heights subdivision located in Buncombe County,

North Carolina. Mr. and Mrs. Green also individually signed a Mortgage Loan Guaranty of Payment and Completion agreement.

In May 2007, Advantage Development entered into another mortgage agreement with plaintiff. The second mortgage was for $729,000 and was secured by Lot 15 in the King Heights subdivision located in Buncombe County, North Carolina. Mr. and Mrs. Green again individually signed a Mortgage Loan Guaranty of Payment and Completion agreement.

Advantage Development defaulted on both mortgages, and plaintiff commenced foreclosure proceedings on both Lots 27 and 15 on 30 December 2011. Notices of the foreclosure hearings were sent to Advantage Development in care of Richard Green, as registered agent, and were received by him on 3 January 2012, as evidenced by the registry receipt. Neither Mr. Green nor Mrs. Green were served with any other notices of the foreclosure hearings. On 19 January 2012, the clerk of superior court entered two orders allowing the foreclosure sales, and both properties were sold for less than the outstanding balance due.

On 30 December 2011, plaintiff also filed a verified complaint in the present action to recover the outstanding balance of both mortgages from Mr. and Mrs. Green pursuant to the guaranty agreements. Plaintiff and defendants moved for summary judgment. The superior court denied defendants' motion and granted plaintiff's motion for summary judgment, entering a judgment against both defendants for a total of $1,441,000, plus $139,778.94 in interest, with interest to accrue at a rate of 8% until both mortgages are paid in full. The superior court also awarded plaintiff $2,816 in attorney's fees and $330.84 in costs. Mr. and Mrs. Green appeal.

The issue before us on appeal is whether the superior court properly granted plaintiff's motion for summary judgment, which thereby granted plaintiff a deficiency judgment against both Mr. and Mrs. Green, despite the fact that they were not individually served with notice of either foreclosure hearing.

"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)).

Mr. and Mrs. Green contend that because they were not individually given notice of either foreclosure hearing, they are not liable for any mortgage deficiency remaining after the sale of the two lots. *See* N.C. Gen. Stat. § 45-21.16(b)(2) (2011).

N.C.G.S. § 45-21.16(b)(2) requires notice of a foreclosure hearing to be served on "[a]ny person obligated to repay the indebtedness against whom the holder thereof intends to assert liability therefor, and any such person not notified shall not be liable for any deficiency remaining after the sale." N.C. Gen. Stat. § 45-21.16(b)(2) (2011). North Carolina's "previous foreclosure statute was declared unconstitutional because it did not provide adequate notice of foreclosure and did not provide a foreclosure hearing." *Fleet Nat'l Bank v. Raleigh Oaks Joint Venture*, 117 N.C. App. 387, 390, 451 S.E.2d 325, 327 (1994) (citing *Turner v. Blackburn*, 389 F. Supp. 1250, 1254 (W.D.N.C. 1975) (concluding that "North Carolina's foreclosure procedure is unconstitutional under the fourteenth amendment")). As a result, section 45-21.16 "was enacted to meet the minimum due process requirements of personal notice and a hearing." *Fed. Land Bank of Columbia v. Lackey*, 94 N.C. App. 553, 556, 380 S.E.2d 538, 539 (1989), *aff'd per curiam*, 326 N.C. 478, 390 S.E.2d 138 (1990).

This Court considered an issue similar to the issue in this case in *Fleet National Bank*, 117 N.C. App. 387, 451 S.E.2d 325. In *Fleet National Bank*, the trustee mailed notice of the foreclosure hearing to the defendant individually, which he never received, and also mailed notice to the joint venture in care of the defendant, which was accepted by an agent for the joint venture. *Fleet Nat'l Bank*, 117 N.C. App. at 388–89, 451 S.E.2d at 327. Based on these facts, this Court stated, "[defendant] may not assert the defense in G.S. § 45-21.16(b)(2) since he had *actual knowledge* of the foreclosure hearing" through notice on the joint venture. *Id.* at 389–90, 451 S.E.2d at 327 (emphasis added). Furthermore, this Court stated that the defendant cannot argue that "service on him was inadequate" because he had actual notice of the foreclosure hearing. *Id.* at 390, 451 S.E.2d at 328.

In this case, the notices of the foreclosure hearings were mailed to Advantage Development, in care of Richard Green, and signed for by Richard Green. As a result, Mr. Green had actual notice of the foreclosure hearings, and it is of no material consequence that notices of the hearings were not mailed to him individually. *See id.* at 389–90, 451 S.E.2d at 327. Thus, plaintiff has established that it is entitled to summary judgment against Mr. Green for any deficiency.

As to Mrs. Green, however, the analysis is different. *Fleet National Bank* established that "[d]eciding whether or not the trustee used reasonable and diligent efforts to personally serve [defendant] is unnecessary, because [defendant] . . . had actual knowledge of the foreclosure hearing." *Id.* In this case, there is evidence in the record that the notices for the foreclosure sales were published in the Black Mountain Newspaper; however, there is no evidence that there was an attempt to personally serve Mrs. Green. North Carolina Rule of Civil Procedure 4(j1) allows for service of process by publication only when a party "cannot with due diligence be served by personal delivery, registered or certified mail, or by a designated delivery service." N.C. Gen. Stat. §1A-1, Rule 4(j1) (2011). Therefore, to find that Mrs. Green had notice of the foreclosure hearings, she must have actual knowledge of the foreclosure hearings because there was no attempt to personally serve her.

The plaintiff has failed to establish a presumption of actual notice because the foreclosure notices were addressed to and served on Advantage Development in care of Richard Green and were not addressed to Mrs. Green. *But see Fleet Nat'l Bank*, 117 N.C. App. at 389–90, 451 S.E.2d at 327 (holding that defendant had actual notice when plaintiff sent notice to the joint venture, in care of defendant). Therefore, plaintiff has failed to demonstrate that it is entitled, as a matter of law, to a judgment against Mrs. Green for any deficiency. There is a genuine issue of material fact as to whether Mrs. Green had actual notice of the foreclosure hearings because of her role as secretary of Advantage Development, or because the foreclosure notices, though not addressed to her, were mailed to the same address where she received the summons and complaint in this matter. Summary judgment as to Mrs. Green is, therefore, reversed and remanded for trial.

Affirmed in part, reversed in part, and remanded.

Judges STEELMAN and DILLON concur.

JOHN WM. BROWN CO., INC., PLAINTIFF
v.
STATE EMPLOYEES' CREDIT UNION, DEFENDANT

No. COA13-388

Filed 3 December 2013

1. Laches—bar to enforcement of settlement agreement—separate lawsuit—not applicable

The doctrine of laches was not applicable and did not bar enforcement of the settlement agreement by defendant (SECU) where plaintiff (JWBC) asserted laches not as a bar to the lawsuit, which JWBC itself filed against SECU, but as a bar to the enforcement of the agreement settling the lawsuit entered into between SECU and Great American Insurance Company (GAIC), which had supplied labor and material bonds. Moreover, the delay that JWBC claims resulted in prejudice was not the result of any act by SECU, but the failure of GAIC to exercise its assignment rights under the indemnity agreement. Nevertheless, assuming the doctrine of laches was applicable, the result in this case would not be different under the language in the agreement.

2. Estoppel—equitable—enforcement of settlement agreement—act of third party

The doctrine of equitable estoppel did not bar the enforcement of a settlement agreement where the act complained of was not that of defendant (SECU), but the delay of Great American Insurance Company (GAIC), the bonding company, in asserting its right of assignment under an indemnity agreement. Moreover, the non-waiver provision in the Agreement of Indemnity explicitly reserved GAIC's right of assignment.

Appeal by plaintiff from order entered 11 January 2013 by Judge Paul Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 10 September 2013.

Safran Law Offices, by Lindsey E. Powell, for plaintiff.

Bailey & Dixon, L.L.P., by David S. Wisz, for defendant.

McCULLOUGH, Judge.

Plaintiff John Wm. Brown Co., Inc. ("JWBC") appeals from an order granting defendant State Employees' Credit Union's ("SECU") Motion to Approve and Enforce Settlement Agreement and Release. For the following reasons, we affirm.

I. Background

This case arises out of JWBC's service as the general contractor for the construction of the SECU branch office on Poole Road in Raleigh, an LEED project.

JWBC and SECU entered into a Standard Form of Agreement Between Owner and Contractor (the "Contract") for JWBC to serve as the general contractor for the project on 18 January 2008. In accordance with the terms of the Contract and in connection with a preexisting Agreement of Indemnity under which JWBC and individuals agreed to indemnify Great American Insurance Company ("GAIC"), JWBC obtained both a Labor and Material Payment Bond and a Performance Bond from GAIC on 18 March 2008. Each bond covered the contract amount of $2,374,000.

After significant delays, a notice to proceed was issued and the project commenced in December 2008. Pursuant to the terms of the Contract, JWBC was required to achieve substantial completion of the project within 270 days of commencement. The project, however, was not completed on time.[1]

In January 2010, GAIC began receiving bond claims from subcontractors on the project who alleged they had not been paid by JWBC. GAIC made payments on these bond claims in excess of $900,000.

When JWBC and the individual indemnitors failed to indemnify GAIC in accordance with the Agreement of Indemnity, GAIC filed suit against JWBC and individual indemnitors for breach of Agreement of Indemnity in the Middle District of North Carolina on 2 September 2010 (the "Federal Court Action"). In the Federal Court Action, GAIC sought reimbursement of over $600,000 paid to subcontractors on the bond claims.[2]

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1. JWBC and SECU dispute why the project was not timely completed.

2. The difference in the amount paid by GAIC on the bond claims and the amount sought in the Federal Court Action is the result of payments by SECU directly to GAIC.

On 28 April 2011, JWBC and SECU began communications regarding close-out of the project. In the course of these communications, JWBC submitted claims to SECU alleging SECU owed additional funds for change order work. By email on 21 July 2011, SECU acknowledged that it owed JWBC the remaining contract balance of $195,637 that it was holding as a retainage on the project; however, SECU denied that it owed any additional funds for change order work and advised JWBC that it felt it "already went above and beyond being fair" by not asserting over $60,000 in liquidated damages against JWBC for delays in completion of the project, paying over $200,000 in additional funds for change order work when JWBC substituted subcontractors, and by not seeking to back charge JWBC for extra work required for LEED certification. Thereafter, in accordance with the terms of a Non-Waiver and Preservation Agreement entered into by the parties in late August 2011, SECU paid the remaining contract balance of $197,637 directly to GAIC to reduce JWBC's liability under the Agreement of Indemnity. The parties' remaining claims and defenses were preserved.

Prior to the filing of the present action, SECU, JWBC, and GAIC met on several occasions to discuss resolution of all disputes amongst the parties. During the course of these meetings, SECU offered $100,000 to JWBC to settle all claims between them. JWBC, however, rejected the offer and filed this breach of contract action against SECU in Wake County Superior Court on 31 October 2011. In the complaint, JWBC sought compensation for "completed extra and/or change order work[,]" alleging that SECU had not remitted full payment for the project. SECU answered the complaint denying liability, asserting affirmative defenses, and counterclaiming for liquidated and compensatory damages in excess of $100,000.

After a year of discovery, continued settlement negotiations, and court-ordered mediation, SECU renewed its offer to settle the dispute for $100,000. At that time, GAIC exercised its assignment rights under the Agreement of Indemnity and unilaterally accepted the $100,000 settlement offer over JWBC's objection.

A written Settlement Agreement and Release (the "Agreement") was entered into by SECU and GAIC on 3 December 2012. On the same day, SECU filed a Motion to Approve and Enforce Settlement Agreement and Release in Wake County Superior Court. SECU's motion came on for hearing on 7 January 2013 before the Honorable Paul Ridgeway. On 11 January 2013, an order granting SECU's motion was entered. JWBC filed notice of appeal on 29 January 2012.

II. Discussion

On appeal, JWBC contends the trial court erred in granting SECU's motion to approve and enforce the Agreement because the doctrines of laches and equitable estoppel bar the enforcement of the Agreement over its objection. We disagree.

Standard of Review

A motion to approve and enforce a settlement agreement is treated as a motion for summary judgment when reviewed by this Court. *See Hardin v. KCS International, Inc.*, 199 N.C. App. 687, 695, 682 S.E.2d 726, 733 (2009). Therefore, we review the trial court's order *de novo* to determine if there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law. *Litvak v. Smith*, 180 N.C. App. 202, 205-06, 636 S.E.2d 327, 329 (2006).

Laches

[1] "Laches" is defined as "[t]he equitable doctrine by which a court denies relief to a claimant who has unreasonably delayed or been negligent in asserting the claim, when that delay or negligence has prejudiced the party against whom relief is sought." *Black's Law Dictionary* 879 7th ed. 1999). As this Court has repeatedly stated,

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

MMR Holdings, LLC v. City of Charlotte, 148 N.C. App. 208, 209–10, 558 S.E.2d 197, 198 (2001).

In this case, JWBC argues the doctrine of laches applies to bar enforcement of the Agreement because GAIC, with SECU's express knowledge, sat on its right of assignment under the Agreement of Indemnity for over a year while litigation commenced. JWBC further

claims it was prejudiced as a result of GAIC's delay because it spent substantial amounts of time and money pursuing the litigation.

In support of its position, JWBC cites numerous cases to explain the doctrine of laches. Yet, we find the cases cited by JWBC distinguishable from the present case in two respects. First, in each of the cases cited by JWBC, the doctrine of laches was asserted as an affirmative defense to the filing of a lawsuit. *See e.g. Teachey v. Gurley*, 214 N.C. 288, 199 S.E. 83 (1938). In the present case, however, JWBC asserts the doctrine of laches not as a bar to the lawsuit, which JWBC itself filed against SECU, but as a bar to the enforcement of the Agreement settling the lawsuit entered into between SECU and GAIC. Second, the delay that JWBC claims resulted in prejudice was not the result of any act by SECU, but the failure of GAIC to exercise its assignment rights under the Agreement of Indemnity for over a year.

We have been unable to find any case where the doctrine of laches has been applied in a scenario similar to the one now before this Court. Given the unique posture in which the doctrine of laches arises and the fact that SECU was not the cause of the delay, we hold the doctrine of laches has no applicability in the present case and does not bar enforcement of the Agreement by SECU.

Nevertheless, assuming arguendo the doctrine of laches may be applied to preclude the exercise of a right of assignment by a third party in order to bar the enforcement of a settlement, the result in the present case would not be different. The language in the Agreement of Indemnity is clear, "[n]o failure or delay by [GAIC] to exercise any right, power or remedy provided pursuant to this Agreement shall impair or be construed to be a waiver of [GAIC's] ability or entitlement to exercise any other right, power, or remedy."

Equitable Estoppel

[2] "Equitable estoppel" is defined as "[a] defensive doctrine preventing one party from taking unfair advantage of another when, through false language or conduct, the person to be estopped has induced another person to act in a certain way, with the result that the other person has been injured in some way." *Black's Law Dictionary* 571 (7th ed. 1999). As this Court has recognized,

> [t]he essential elements of estoppel are (1) conduct on the part of the party sought to be estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct will be acted on by the

> other party; and (3) knowledge, actual or constructive, of the real facts. The party asserting the defense must have (1) a lack of knowledge and the means of knowledge as to the real facts in question; and (2) relied upon the conduct of the party sought to be estopped to his prejudice.

Parker v. Thompson-Arthur Paving Co., 100 N.C. App. 367, 370, 396 S.E.2d 626, 628-29 (1990).

Similar to its laches argument, JWBC argues the doctrine of equitable estoppel bars the enforcement of the Agreement between SECU and GAIC because GAIC was aware of SECU's settlement offer to JWBC but waited for over a year before it exercised its right of assignment and unilaterally accepted the offer. In the meantime, JWBC incurred the expenses of litigation. JWBC further argues SECU acquiesced and facilitated GAIC's shift in position to the detriment of JWBC and should not be able to benefit from GAIC's wrongful conduct.

For the same reasons the doctrine of laches is of no consequence in the present case, we hold the doctrine of equitable estoppel does not bar the enforcement of the Agreement by SECU. As noted above, the act complained of is not that of SECU, but the delay of GAIC in asserting its right of assignment under the Agreement of Indemnity. Moreover, the non-waiver provision in the Agreement of Indemnity explicitly reserves GAIC's right of assignment.

III. Conclusion

For the reasons discussed above, we affirm the trial court's order granting SECU's motion to approve and enforce the Agreement. As the trial court held "[t]he proper forum for JWBC's arguments [concerning the exercise of GAIC's right to assignment under the Agreement of Indemnity] is in the [Federal Court Action.]" *See e.g. Bell BCI Co. v. Old Dominion Demolition Corp.*, 294 F. Supp. 2d 807, 814-15 (E.D. Va. 2003) (providing claims of a surety's bad faith in settlement should be asserted as a defense in the surety's action for indemnification).[3]

Affirmed.

Judges McGEE and DILLON concur.

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3. We note the trial court explicitly reserved "the rights, claims, and and/or defenses of any party, including but not limited to JWBC, GAIC, and/or the individual [i]ndemnitors, in the Federal Court Action." Moreover, following entry of the trial court's order in this action, JWBC amended its pleadings in the Federal Court Action to assert claims against GAIC for breach of contract and breach of fiduciary duty.

NORTH CAROLINA STATE BOARD OF EDUCATION, PETITIONER, AND NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, ET AL., INTERVENORS

v.

NORTH CAROLINA LEARNS, INC., D/B/A NORTH CAROLINA VIRTUAL ACADEMY, RESPONDENT

No. COA13-179

Filed 3 December 2013

1. Schools and Education—State Board of Education—completion of virtual learning study—not ban on virtual charter school applications

The State Board of Education (SBOE) did not institute an illegal moratorium on virtual charter schools. The SBOE's actions did not constitute a shift in policy to ban virtual charter school applications permanently but rather reflected a general policy of the SBOE to not proceed with evaluating applications for virtual charter schools until the e-Learning Commission had concluded its study on the matter.

2. Schools and Education—State Board of Education—virtual charter school application—jurisdiction not waived

The State Board of Education (SBOE) was not required to act on respondent's virtual charter school application before its 15 March deadline. The applicable statutes were directory rather than mandatory, and therefore, the SBOE did not waive its jurisdiction by failing to respond to respondent's application by 15 March.

3. Parties—intervention—aggrieved parties

The trial court did not err in a case involving a virtual charter school application by allowing the intervention of persons who were not parties aggrieved where the ruling of the administrative law judge had a direct impact on the intervenors.

4. Schools and Education—State Board of Elections—no duty to act—no contested case—no authority for hearing in Office of Administrative Hearings

The Office of Administrative Hearings was not the appropriate forum for hearing respondent's claim involving a virtual charter school application. Where an agency, such as the State Board of Elections in this case, has not acted and is under no direction to act, there exists no contested case and no authority for a hearing in the Office of Administrative Hearings.

5. Pleadings—amendment to record—preservation of record—no prejudice

The trial court did not err in a case involving an application for a virtual charter school by allowing an amendment to the record to include respondent's virtual charter school application. The trial court noted that the application was admitted into evidence in order to preserve a complete record of all relevant evidence for purposes of appeal, pursuant to N.C.G.S. § 150B-47. Furthermore, the admission of this evidence was not prejudicial.

Appeal by respondent from order entered 29 June 2012 by Judge Abraham Penn Jones in Wake County Superior Court. Heard in the Court of Appeals 14 August 2013.

Attorney General Roy Cooper, by Assistant Attorneys General Laura E. Crumpler and Tiffany Y. Lucas, for State Board of Education.

Tharrington Smith, L.L.P, by Deborah R. Stagner; and Poyner Spruill, LLP, by Edwin M. Speas, Jr., and Robert F. Orr, for intervenors-appellees.

Hartsell & Williams, P.A., by Christy E. Wilhelm and Fletcher L. Hartsell, Jr., for respondent-appellant.

North Carolina Justice Center, North Carolina Rural Education Working Group, and Parents Supporting Parents, by Christine Bischoff and Carlene McNulty; Advocates for Children's Services of Legal Aid of North Carolina, by Lewis Pitts; Children's Law Clinic at Duke Law School, by Jane Wettach; North Carolina Association of Educators, by Ann McColl; Southern Coalition for Social Justice, by Anita S. Earls; UNC Center for Civil Rights, by Mark Dorosin; and UNC Center on Poverty, Work and Opportunity, by Mary Irvine, for amici curiae.

BRYANT, Judge.

The orders of the trial court finding: (I) that petitioner was not required to act on respondent's virtual charter school application before the March 15 deadline; (II) that the Office of Administrative Hearings was not the appropriate forum for hearing respondent's claim; and (III) that the State Board of Education, not the Office of Administrative

Hearings, has sole authority to grant or deny respondent's application to operate a virtual charter school, are affirmed. Because the trial court did not err in allowing the (IV) intervention of parties and (V) amendment of the record, we affirm.

In 1996, the North Carolina General Assembly adopted the Charter School Law, N.C. Gen. Stat. § 115C-238.29A (2011), governing the process for establishing and overseeing charter schools. Authority for the handling of charter schools was vested in the State Board of Education ("SBOE"). Pursuant to N.C. Gen. Stat. § 115C-238.29B, a local school board may give preliminary approval to an application for a charter school but final approval of said application must be given by the SBOE.

At the 6 October 2011 monthly meeting of the SBOE, Chairman Harrison announced that no applications for virtual charter schools would be considered for the 2012—2013 school year "because the e-Learning Commission [was] examining all aspects of virtual education in North Carolina (pre-K—16) . . . ."

On 1 November 2011, respondent North Carolina Learns, Inc., doing business as North Carolina Virtual Academy ("NCVA"), submitted a "fast track" application for preliminary approval of a virtual charter school to the Cabarrus County Board of Education. The Cabarrus County Board of Education reviewed the application and granted preliminary approval on 23 January 2012 to respondent for the creation of a virtual charter school. On 13 February 2012, NCVA forwarded the application to the SBOE; the SBOE received the application on 14 February 2012. Although the SBOE had a 15 March deadline to accept NCVA's application pursuant to N.C. Gen. Stat. § 115-238.29D(a), the SBOE took no action on NCVA's application because of its earlier decision not to review applications for virtual charter schools for the 2012—2013 school year.

On 21 March 2012, NCVA filed a petition for a contested case hearing with the Office of Administrative Hearings, citing the SBOE's failure to respond to NCVA's application by the 15 March deadline. Thereafter, NCVA amended its pleadings. The SBOE answered by filing a motion to dismiss, followed by a motion for summary judgment. NCVA then filed a cross-motion for summary judgment.

A hearing was conducted on 8 May 2012 in the Office of Administrative Hearings, and on 18 May 2012 the administrative law judge (or "ALJ") issued a decision granting summary judgment to NCVA. The administrative law judge found that the SBOE failed to act in a timely manner upon NCVA's application and had therefore lost jurisdiction over final approval or any other action related to the application.

The administrative law judge held that NCVA's application for a virtual charter school was deemed approved as a matter of law.

On 23 May 2012, the SBOE filed a petition for judicial review in Wake County Superior Court. On 15 June 2012, the North Carolina School Boards Association and 89 local boards of education ("intervenors") then sought to intervene in the matter as parties aggrieved.

On 25 June 2012, the matter was heard in Wake County Superior Court, the Honorable Abraham Penn Jones presiding. On 29 June 2012, the trial court granted the motion allowing the intervenors to join the lawsuit and reversed the decision of the administrative law judge.

NCVA appeals.

On appeal, NCVA argues that: (I) the SBOE instituted an illegal moratorium on virtual charter schools that did not relieve the SBOE of its legal duties; (II) the SBOE was required to act before the 15 March deadline and thus lost its ability to act by failing to meet the deadline; (III) the trial court erred in allowing the intervention of persons who were not parties aggrieved; (IV) the Office of Administrative Hearings was the appropriate forum for hearing NCVA's claim; and (V) the trial court allowed the amendment of the record in contravention of the law.

I.

[1] NCVA argues that the SBOE instituted an illegal moratorium on virtual charter schools that did not relieve it of its legal duties. We disagree.

A *de novo* standard of review is appropriate when reviewing decisions by a trial court based upon judicial review of an administrative agency decision. *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 895 (2004).

NCVA first argues that the SBOE, in declaring a moratorium on virtual charter schools during its 6 October 2011 meeting, violated Robert's Rules of Order. The minutes of the 6 October 2011 public meeting recorded SBOE Chairman Harrison's comments as follows:

> Chairman Harrison announced that the newly formed NC Public Charter School Advisory Council will convene for the first time on October 19. The purpose of this meeting is to begin reviewing the 'fast-track' charter applications in November. He explained that the 'fast-track' process is being targeted to charter schools that were considered

> last year and for conversion schools. Other schools that might be ready to open their doors are welcome to apply, but it is probably more appropriate for these to apply in February (for a FY 2013-14 opening). Further, he explained that *because the e-Learning Commission is examining all aspects of virtual education in North Carolina (pre-K-16), the [SBOE] will not be considering any virtual applications in the 'fast track' pool.*

NCVA contends that this announcement by Chairman Harrison is not authoritative because the SBOE has not demonstrated that it has adopted the latest edition of Robert's Rules of Order for conducting business. NCVA's argument on these grounds is without merit. North Carolina General Statutes, section 115C-12 states that "[t]he general supervision and administration of the free public school system shall be vested in the [SBOE]. The [SBOE] shall establish policy for the system of . . . public schools, subject to laws enacted by the General Assembly." N.C.G.S. § 115C-12 (2011); *see also* N.C. Const. art. IX, §§ 4, 5 ("The [SBOE] shall supervise and administer the . . . public school system and the educational funds provided for its support . . . and shall make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly.").

Under section 115C-238.29B, the SBOE is vested with sole authority regarding charter schools in North Carolina, including all decisions regarding the formation and operation of such schools. *See* N.C.G.S. § 115C-238.29B(c)(3) (2011) ("Regardless of which chartering entity receives the application for preliminary approval, the [SBOE] shall have final approval of the charter school."); *see also* N.C.G.S. § 115C-238.29A, Editor's Note ("Session Laws 2011-164, s. 6, provides: 'The [SBOE] shall submit a preliminary report and a final report to the General Assembly on the implementation of this act, including (i) the creation, composition, and function of an advisory committee; (ii) the charter school application process; (iii) a profile of applicants and the basis for acceptance or rejection; and (iv) resources required at the State level for implementation of the charter school laws in Part 6A of Article 16 of Chapter 115C of the North Carolina General Statutes. The preliminary report shall be submitted by May 10, 2012, and the final report shall be submitted by June 11, 2012.' ").[1]

The rules regarding meetings and other actions by the SBOE are governed by Robert's Rules of Order: "Robert's Rules of Order (latest

1. Session law 2011-164 became effective on 1 July 2011.

edition) shall constitute the rules of parliamentary procedure applicable to all meetings of the Board and its committees." N.C. STATE BD. OF EDUC., POLICY MANUAL, POLICY OUTLINING STATE BD. OF EDUC. RULES OF PROCEDURE, TCS-C-006, Rule 1.1 (2005).

NCVA also claims that the SBOE's announcement on virtual charter schools was invalid due to a violation of Robert's Rules of Order requiring a motion and a vote. We disagree, as Chairman Harrison and the SBOE have the legal obligation to decide the application and approval process for charter schools. *See* N.C.G.S. §§ 115C-238.29A, 29B. The comments made by Chairman Harrison constituted a general announcement of already decided-upon policy, rather than a shift in policy as NCVA asserts.

Chairman Harrison clearly began his announcement by stating that the SBOE's decision not to review applications for virtual charter schools was based on deference to the e-Learning Commission which was then studying the issue of virtual charter schools and developing standards for the SBOE to use in their review and assessment of virtual charter school applications.[2] Accordingly, the comments made by Chairman Harrison reflected a general policy of the SBOE to not proceed with evaluating applications for virtual charter schools until the e-Learning Commission had concluded its study on the matter. Therefore, we reject NCVA's contention that the SBOE's actions constituted a shift in policy to ban virtual charter school applications permanently. NCVA's argument is overruled.

II.

[2] NCVA next argues that the SBOE was required to act before the 15 March deadline and thus, lost its ability to act by failing to meet the deadline. We disagree. Based on our analysis in Issue I, it is clear that the SBOE had no duty to review or otherwise further act on NCVA's virtual charter school application[3] Nevertheless, we address NCVA's argument.

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2. The e-Learning Commission was created by the SBOE and the Business Education Technology Alliance to assist the SBOE and other groups in developing standards and infrastructure for virtual learning opportunities, and to assist the SBOE in developing a virtual high school. *See State E-Learning Commission formed to Develop Virtual High School and Other Learning Opportunities*, N.C. DEP'T. OF PUB. INSTRUCTION (Apr. 12, 2005), http://www.ncpublicschools.org/newsroom/news/2004-05/20050412.

3. We note for the record that the e-Learning Commission was in the process of analyzing substantial concerns regarding virtual schools including, but not limited to, academic quality and effectiveness and quality of teaching and delivery of instruction, as well as sources of funding. These concerns had not been resolved at the time NCVA submitted its application in 2011—2012; the SBOE addressed these concerns with TCS-U-015, adopted

North Carolina General Statutes, section 115C-238.29D(a) provides that:

> The [SBOE] may grant final approval of an application if it finds that the application meets the requirements set out in this Part or adopted by the [SBOE] and that granting the application would achieve one or more of the purposes set out in G.S. 115C-238.29A. The [SBOE] shall act by March 15 of a calendar year on all applications and appeals it receives prior to February 15 of that calendar year.

N.C.G.S. § 115C-238.29D(a) (2011).

In addition, section 115C-238.29I(e) provides that:

> Notwithstanding the dates set forth in this Part, the [SBOE] may establish an alternative time line for the submission of applications, preliminary approvals, criminal record checks, appeals, and final approvals so long as the [SBOE] grants final approval by March 15 of each calendar year.

N.C.G.S. § 115C-238.29I(e) (2011).

In the order appealed, the trial court found that the administrative law judge erroneously relied on *HCA Crossroads Residential Ctrs., Inc. v. N.C. Dep't of Human Res.*, 327 N.C. 573, 398 S.E.2d 466 (1990), in reaching the conclusion that the SBOE waived jurisdiction by failing to respond to NCVA's application in a timely manner by its 15 March deadline, and thus, NCVA was entitled to a charter by operation of law.

In *HCA Crossroads*, the statute in question mandated a 90-day time limit for review of applications for certificates of need and allowed an additional 60-day extension which resulted in a mandatory maximum time limit of 150 days within which the applications were required to be reviewed. *See* N.C. Gen. Stat. §§ 131E-185(a)(1), (c). Another section of that statute required that a certificate of need be issued or rejected within the review period. *See id.* § 131E-185(b). In reviewing the statute, our Supreme Court found that a state agency waived its jurisdiction by not acting within the review period expressly stated in the applicable statute:

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10 January 2013. *See* TCS-U-015, *Policy on the establishment of virtual charter schools in North Carolina*, N.C. State Bd. of Educ., Policy Manual, Policy on the establishment of virtual charter schools in N.C., TCS-U-015 (Jan. 10, 2013), *available at* http://sbepolicy.dpi.state.nc.us/policies/TCS-U-015.asp?pri=04&cat=U&pol=015&acr=TCS.

> The limiting phrase 'within the review period' modifies only the phrase 'rejects the application,' and, therefore, the Department loses subject matter jurisdiction to reject an application when the review period ends. Once the review period expires without action by the Department, it retains jurisdiction only for the purpose of issuing certificates of need.

HCA Crossroads, 327 N.C. at 577, 398 S.E.2d at 469.

This Court has interpreted the holding of *HCA Crossroads* to apply to statutes which contain specific language requiring express action to be taken during a statutory review period. In contrast, where a statute lacks specific language requiring an agency to take express action during a statutory review period, our Court has held that such statutory language is merely directory, rather than mandatory. *See State v. Empire Power Co.*, 112 N.C. App. 265, 435 S.E.2d 553 (1993).

In *Empire Power*, the petitioner argued that the Utilities Commission's failure to hold a hearing within a statutory three month period of review constituted a waiver of jurisdiction. This Court disagreed, holding that

> [w]hether the time provisions [of section 62-82(a)] are jurisdictional in nature depends upon whether the legislature intended the language to be mandatory or directory. Many courts have observed that statutory time periods are generally considered to be directory rather than mandatory unless the legislature expresses a consequence for failure to comply within the time period. If the provisions are mandatory, they are jurisdictional; if directory, they are not.
>
> [Section 62-82] clearly specifies that one provision is mandatory, and that is the one that *requires* that a certificate be issued if the Commission does not order a hearing at all and there is no complaint filed within ten days of the last date of publication. However, the statute is silent as to the consequences, if any, which would result from the Commission's failure to commence a hearing within the three-month time period. When the General Assembly, in the same statute, expressly provides for the automatic issuance of a certificate under different circumstances (the Commission does not order a hearing

> and no complaint is filed), the only logical conclusion is that the General Assembly only intended for an automatic issuance to occur in that specific situation.

Id. at 277, 435 S.E.2d at 559—60 (citations omitted). This Court, "find[ing] the language in [the statute] to be directory and, thus, not jurisdictional," concluded that:

> *HCA Crossroads* is inapplicable to the case at hand because the Court addressed a statute (N.C.G.S. § 131E-185) which contains specific language stating that the 'Department shall issue . . . a certificate of need with or without conditions *or reject the application within the review period.* The absence of any such explicit language in [section 62-82(a)] distinguishes this case from *HCA Crossroads*.

Id. at 278, 435 S.E.2d at 560 (citations omitted).

NCVA contends the trial court erred in reversing the decision of the administrative law judge because *HCA Crossroads* was controlling as to the interpretation of the SBOE's applicable statutes. However, neither §§ 115C-238.29D(a) nor 29I(e) expressly state that the SBOE will face consequences or waive its jurisdiction if an application is not approved by 15 March. Rather, these statutes in light of *Empire Power* provide for discretionary periods of review which only require that the SBOE issue its final approval of an application by 15 March. As in *Empire Power*, these statutes contain a provision that requires final approval by 15 March if the application indeed meets the requirements. However, unlike in *HCA Crossroads*, these statutes contain no specific language regarding the consequences of a failure to act. *See Comm'r of Labor v. House of Raeford Farms*, 124 N.C. App. 349, 477 S.E.2d 230 (1996) (distinguishing *HCA Crossroads* as applicable only to statutes which specify consequences for an agency's failure to act and thus are mandatory, from *Empire Power* as applicable to statutes which do not specify consequences for an agency's failure to act and thus are merely directory). Accordingly, we hold that the applicable statutes are directory rather than mandatory, and therefore, the SBOE did not waive its jurisdiction by failing to respond to NCVA's application by 15 March.[4]

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4. We note that a better practice would have been for the SBOE to acknowledge receipt of the application by NCVA for a virtual charter school and explain that such applications were not yet being reviewed by the SBOE. However, we further note that, under these facts, the SBOE was under no statutory obligation to do so.

III.

[3] NCVA's third argument on appeal is that the trial court erred in allowing the intervention of persons who were not parties aggrieved. We disagree.

> An appellate court reviewing a superior court order regarding an agency decision 'examines the trial court's order for error of law. The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.' When, as here, 'a petitioner contends the [agency's] decision was based on an error of law, de novo review is proper.'

Holly Ridge Assocs., LLC, v. N.C. Dep't of Env't & Natural Res., 361 N.C. 531, 535, 648 S.E.2d 830, 834 (2007).

Intervening parties are governed by N.C. Gen. Stat. § 150B-46 (2011), which states that "[a]ny person aggrieved may petition to become a party by filing a motion to intervene as provided in G.S. 1A-1, Rule 24." An aggrieved party is defined as "any person or group of persons of common interest directly or indirectly affected substantially in his or its person, property, or employment by an administrative decision." N.C. Gen. Stat. § 150B-2(6) (2011). " 'Person' means any natural person, partnership, corporation, body politic and any unincorporated association, organization, or society which may sue or be sued under a common name." *Id.* § 150B-2(7). "[W]hether a party is a 'person aggrieved' must be determined based on the circumstances of each individual case." *Empire Power*, 337 N.C. at 588, 447 S.E.2d at 779.

NCVA argues that the intervenors are not aggrieved parties per N.C.G.S. § 150B-46 et al. NCVA further cites *Diggs v. N.C. Dep't of Health & Human Servs.*, 157 N.C. App. 344, 578 S.E.2d 666 (2003), as holding that the intervenors are not aggrieved because they have presented only speculative harms regarding potential losses in funding.

In *Diggs*, the petitioner sought a declaratory judgment based solely upon possible future payments made to adult caretakers. Our Court held that the petitioner could not be aggrieved where her claimed harm was not imminently threatened or likely to occur. *Id.* at 348, 578 S.E.2d at 668-69. *Diggs* can be distinguished from the instant case because here the intervenors share a common, immediate interest with the SBOE which has been affected substantially by the ruling of the administrative

law judge. NCVA's charter application projected receiving $6,753.00 per student from state and local school funds, with an estimated $1,854.00 per student coming from local funds. As such, the intervenors are faced with an imminent economic injury via loss of school funding based on the ruling of the administrative law judge.

The administrative law judge's decision could further have a significant impact on all school boards across the state, thus creating a present and substantial matter of concern for both the SBOE and the intervenors regarding issues of management, oversight, and regulation as well.[5] As the trial court considered these matters in its decision to

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5. On 10 January 2013, the SBOE approved TCS-U-015, *Policy on the establishment of virtual charter schools in North Carolina.* N.C. State Bd. of Educ., Policy Manual, Policy on the establishment of virtual charter schools in N.C., TCS-U-015 (Jan. 10, 2013), available at http://sbepolicy.dpi.state.nc.us/policies/TCS-U-015.asp?pri=04&cat=U&pol=015&acr=TCS. This policy addresses several of the reasons cited by intervenors as aggrieving factors in the present matter. As policy TCS-U-015 was not in effect at the time of this appeal, it is presented here only to show the SBOE's policy decisions reached in the wake of the e-Learning commission's findings on virtual charter schools.

> A virtual charter school is defined as a nonsectarian and nondiscriminatory public charter school open to all eligible North Carolina students who are enrolled full-time at the virtual charter school. Students enrolled at a virtual charter school receive their education predominantly through the utilization of online instructional methods. For purposes of initial operation in North Carolina, virtual charter schools may only serve grades 6 through 12.
>
> 1. Parties wishing to establish a virtual charter school shall establish a non-profit corporation and apply to one of the three chartering entities in North Carolina, but must receive final approval by the [SBOE]. A separate application created specifically for virtual applicants will include plans detailing how the virtual charter school proposes to provide technology hardware and internet connectivity to enrolled students.
>
> 2. The process of application review for final approval by the [SBOE] shall follow the same timelines and procedures established for all other charter applicants.
>
> 3. The virtual charter applicant shall submit a copy of the application to every Local Education Agency (LEA) in North Carolina from which the virtual charter school may attract students. Each LEA will have the ability to provide an Impact Statement related to the proposed virtual charter school.
>
> 4. Those designated to review virtual charter applications on behalf of the [SBOE] are under no obligation to recommend that the [SBOE] grant a preliminary charter to any applicant group. The focus of any recommendation must be solidly based upon the quality of the application and historical achievement attained by the intended provider.

permit the intervenors to join the instant proceeding, no error of law has been committed.

NCVA also cites *In re Complaint*, 146 N.C. App. 258, 552 S.E.2d 230 (2001), in support of its contention that the trial court committed error by allowing the intervenors to join the proceeding. However, *In re Complaint* is not applicable to the present matter.

In *In re Complaint*, the petitioner's claim was dismissed after our Court found that the petitioner was not personally aggrieved by the decision of the North Carolina Veterinary Medical Board to discipline one of its licensees who harmed the petitioner's pet. Our Court found

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5. Should a virtual charter school applicant receive preliminary approval, the board members that will have statutory responsibility for all operating procedures of the charter school shall complete the mandatory planning year established in [SBOE] policy.

6. Any virtual applicant group that receives a charter from the [SBOE] will receive a charter term no longer than three years for the initial charter, no virtual charter will receive a renewal charter term longer than five years.

7. The virtual charter school shall have an actual, physical location within the geographic boundaries of the state of North Carolina.

8. Should a virtual applicant receive final approval from the [SBOE], the charter agreement will be tailored to virtual charter schools with the inclusion of additional standards related to overall performance. Failure to meet any of these standards may result in the revocation and/or nonrenewal of the charter:

a) The virtual charter school must test at least 95% of its students during any academic year for purposes of the State's accountability system.

b) The virtual charter school's graduation rate must be no less than 10% below the overall state average for any two out of three consecutive years.

c) The virtual charter school cannot have a student withdrawal rate any higher than 15% for any two out of three consecutive years. This rate will be calculated by comparing the first and ninth month Principal's Monthly Report.

d) The virtual charter school's student-to-teacher ratio cannot exceed 50 to 1 per class. This calculation excludes academic coaches, learning partners, parents, or other non-teachers of record.

9. The virtual charter school will be funded as follows: the proposed virtual charter school shall receive the same rate as a full-year course in the NC Virtual Public School for eight courses per student. The virtual charter school will not receive local funds. Federal funding for which the virtual charter schools are eligible can be received provided the charter school completes the appropriate documentation.

that the petitioner was not aggrieved because the only actions taken were against the veterinarian and thus, the petitioner was not directly affected by the decision. Here, the ruling of the administrative law judge had a direct impact on the intervenors, as the granting of a license to a virtual charter school would have an immediate impact upon school boards across the state. Accordingly, the intervenors are aggrieved parties who were properly joined.

IV.

[4] The fourth argument by NCVA is that the Office of Administrative Hearings was the appropriate forum for hearing its claim. We disagree.

Assuming that a party is in fact aggrieved, a party aggrieved by a state agency can seek relief under N.C. Gen. Stat. § 150B-44 (2011).

> Unreasonable delay on the part of any agency or [ALJ] in taking any required action shall be justification for any person whose rights, duties, or privileges are adversely affected by such delay to seek a court order compelling action by the agency or [ALJ]. Failure of an [ALJ] subject to Article 3 of this Chapter or failure of an agency subject to Article 3A of this Chapter to make a final decision within 120 days of the close of the contested case hearing is justification for a person whose rights, duties, or privileges are adversely affected by the delay to seek a court order compelling action by the agency or by the [ALJ].

NCVA argues that this statute does not require an aggrieved party to follow its procedure, and that had NCVA followed the statute, a waiting period of 120 days would have precluded it from enjoying the relief sought. However, N.C.G.S. § 150B-44 clearly states that an agency's delay for 120 days in making a decision allows a party who is adversely affected by the delay to bring an action to compel the agency to make a decision.

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10. The virtual charter school must offer "regular educational opportunities" to its students through meetings with teachers, educational field trips, virtual field trips attended synchronously, virtual conferencing sessions, or asynchronous offline work assigned by the teacher of record.

11. The virtual charter school shall comply with all statutory requirements and [SBOE] policies that apply to charter schools unless specifically excluded herein.

The requirements for a virtual charter school are embodied in the application (attached with this policy); and both become effective the date of this policy.

This is "a statutory provision for mandamus—*i.e.*, if an agency fails to act within the applicable period, the applicant may bring an action in *state* court to compel a decision on the application." *HCA Crossroads*, 327 N.C. at 583, 398 S.E.2d at 473 (citation omitted) (emphasis added). Where, however, an agency has not acted and is under no direction to act, there exists no contested case and no authority for a hearing in the Office of Administrative Hearings.

Here, NCVA filed a petition for a contested case hearing in the Office of Administrative Hearings on 21 March 2012, only six days after the 15 March deadline, citing the SBOE's lack of response to NCVA's application. NCVA contends it could not wait 120 days before filing for the relief available to it in N.C.G.S. § 150B-44. However, as discussed above, NCVA could only obtain relief from the SBOE's purported refusal to grant final approval to NCVA's application by the 15 March deadline by waiting 120 days before filing judicial relief. Accordingly, NCVA has failed to follow the appropriate path to seek judicial relief from an agency's purported failure to respond to an application.

NCVA further argues that it followed proper procedure pursuant to N.C. Gen. Stat. § 150B-23(a)(5). N.C.G.S. § 150B-23(a)(5) (2011) states that

> [a] contested case shall be commenced by paying a fee in an amount established in G.S. 150B-23.2 and by filing a petition with the [OAH] and, except as provided in Article 3A of this Chapter, shall be conducted by [the OAH]. . . . A petition shall be signed by a party or a representative of the party and . . . shall state facts tending to establish that the agency named as the respondent has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner's rights and that *the agency . . . [f]ailed to act as required by law or rule.*

Although NCVA is correct that N.C.G.S. § 150B-23(a)(5) sets forth the proper procedure for filing a petition for a contested case proceeding, it must be noted that the statute also clearly requires that in order for a petition for a contested case proceeding to be filed, an agency must "fail[] to act as required by law or rule." We see nothing in N.C.G.S. § 150B-23(a)(5) that permits a petition for a contested case proceeding to be filed where an agency has not acted when the agency is under no statutory direction to act.

As discussed previously under NCVA's first and second arguments on appeal, the SBOE's applicable statutes are directory rather than jurisdictional and thus, contain no specific language regarding the consequences of a failure to act. By not responding to NCVA's application, the SBOE has not "[f]ailed to act as required by law or rule," and thus, N.C.G.S. § 150B-23(a)(5) is not applicable because it requires that an agency "fail[] to act as required by law or rule" before a petition for a contested case proceeding can be filed. We acknowledge with approval the trial court's conclusion that

> [i]naction can constitute "action" sufficient to trigger jurisdiction in OAH pursuant to G.S. § 150B-23, provided there is an obligation to act. Failure to do so is actionable; however, in this case the [SBOE] was not obligated to act further having done so through the previously cited policy stated at the October 2011 meeting.

Therefore, where an agency such as the SBOE has declined to make a decision regarding a petitioner because the agency is not required by statute to do so, a petitioner's only available form of relief must come pursuant to N.C.G.S. § 150B-44 on grounds that the agency's decision is unreasonably delayed for more than 120 days.

V.

[5] NCVA's final argument is that the trial court allowed the amendment of the record in contravention of the law. We disagree.

> Within 30 days after receipt of the copy of the petition for review, or within such additional time as the court may allow, the Office of Administrative Hearings shall transmit to the reviewing court the original or a certified copy of the official record in the contested case under review. With the permission of the court, the record may be shortened by stipulation of all parties to the review proceedings. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for such additional costs as may be occasioned by the refusal. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

N.C. Gen. Stat. § 150B-47 (2011).

> A party or person aggrieved who files a petition in the superior court may apply to the court to present additional evidence. If the court is satisfied that the evidence

> is material to the issues, is not merely cumulative, and could not reasonably have been presented at the administrative hearing, the court may remand the case so that additional evidence can be taken. If an administrative law judge did not make a final decision in the case, the court shall remand the case to the agency that conducted the administrative hearing under Article 3A of this Chapter. After hearing the evidence, the agency may affirm or modify its previous findings of fact and final decision. If an administrative law judge made a final decision in the case, the court shall remand the case to the administrative law judge. After hearing the evidence, the administrative law judge may affirm or modify his previous findings of fact and final decision. The additional evidence and any affirmation or modification of a final decision shall be made part of the official record.

N.C. Gen. Stat. § 150B-49 (2011).

NCVA argues that the trial court erred in amending the record and allowing evidence because it failed to abide by N.C.G.S. § 150B-49 when it accepted NCVA's application into evidence. NCVA further argues that even if N.C.G.S. § 150B-49 was not violated, § 150B-47 was violated because the trial court did not properly follow the requirements for the admission of new evidence.

The record before this Court indicates that the trial court admitted NCVA's application into evidence because it was relevant to the matter at hand, despite not being admitted into evidence during the administrative hearing. "The court may require or permit subsequent corrections or additions to the record when deemed desirable." *High Rock Lake Partners, LLC, v. N.C. Dep't of Transp.*, ___ N.C. App. ___, ___, 720 S.E.2d 706, 713 (2011), *rev'd on other grounds by High Rock Lake Partners, LLC, v. N.C. Dep't of Transp.*, 366 N.C. 315, 735 S.E.2d 300 (2012) (citing N.C.G.S. § 150B-47 (2009) (amended by Section 24 of Session Law 2011-398 and applying to contested cases commenced on or after 1 January 2012) (holding the superior court did not abuse its discretion under N.C.G.S. § 150B-47 in granting a motion to supplement the record)). The trial court also noted that the application was admitted into evidence in order to preserve a complete record of all relevant evidence for purposes of appeal. This permitting of subsequent additional evidence is within the language of N.C.G.S. § 150B-47, as "[t]he court may require or permit subsequent corrections or additions to the record when deemed desirable."

NCVA further argues that the admission of the application was prejudicial. We disagree, as nothing in the trial court's findings indicate that the admission of NCVA's application was erroneous or prejudicial to NCVA. The trial court, in its findings of fact and conclusions of law, does not discuss NCVA's application at any point, instead focusing on evidence which was presented during the administrative hearing. As such, the admission of NCVA's application was not prejudicial. Accordingly, the trial court did not err in permitting the amendment of the record.

Affirmed.

Judges STEPHENS and DILLON concur.

STAINLESS VALVE CO., PLAINTIFF
v.
SAFEFRESH TECHNOLOGIES, LLC, DEFENDANT

No. COA13-144

Filed 3 December 2013

Agency—contract to purchase equipment—limited liability company—actual authority

The trial court erred in granting summary judgment in favor of defendant Safefresh in an action to collect on an invoice for valves manufactured by plaintiff and sold to Mr. Garwood, who held positions with both Safefresh and American Beef Processing LLC. There was sufficient evidence forecasted to create a genuine issue of material fact as to whether Mr. Garwood was acting with actual authority on behalf of Safefresh during 2008 negotiations, which resulted in the production of the valves.

Judge McCULLOUGH concurring.

Appeal by plaintiff from order entered 20 September 2012 by Judge W. David Lee in Union County Superior Court. Heard in the Court of Appeals 14 August 2013.

Weaver, Bennett & Bland, P.A., by Trent M. Grissom, for plaintiff-appellant.

Caldwell, Helder, Helms, & Robison, P.A., by Aimee E. Bennington n/k/a Aimee E. Brockington and R. Kenneth Helms, for defendant-appellee.

HUNTER, Robert C., Judge.

Plaintiff Stainless Valve Company ("plaintiff" or "Stainless Valve") appeals the order granting defendant Safefresh Technologies, LLC's ("defendant's" or "Safefresh's") motion for summary judgment. After careful review, we reverse the trial court's order and remand for proceedings consistent with this opinion.

Background

At some point in the early 2000's, Anthony Garwood ("Mr. Garwood"), the president of Safefresh, began communicating with Dirk Lindenbeck, the president of Stainless Valve, regarding a specific type of valve for a food processing application being developed by defendant. During these initial communications, Mr. Garwood identified himself as president of Safefresh. However, these discussions did not result in a contract because, according to Mr. Garwood, the quoted cost to manufacture the valves was "too expensive."

Between those initial discussions and 2008, there was no communication between Mr. Garwood and Dirk Lindenbeck. In 2008, Mr. Garwood contacted plaintiff regarding the production of two specific types of Stargate-O-Port-Valves (the "valves"). Dirk Lindenbeck had retired at this point, but his son, Axel Lindenbeck, was the president of Stainless Valve. Defendant contends that, although Mr. Garwood remained a manager of Safefresh, during these later communications, he contacted plaintiff only in his capacity as the president and chief executive officer of American Beef Processing, LLC ("ABP") and not on behalf of Safefresh. In an affidavit filed in support of defendant's motion for summary judgment, defendant stated that ABP and Safefresh are two different entities that are not affiliated with each other except that ABP has been granted an exclusive license for meat processing technologies invented and developed by Safefresh. However, he admits to being both a manager of Safefresh and of ABP. In support of its contention, defendant relies on the fact that, in all the communications included in the record from the 2008 negotiations, Mr. Garwood either identified himself individually or as the president and CEO of ABP.

In the midst of numerous discussions regarding the type of valves Mr. Garwood wanted manufactured, Stainless Valve provided price

quotations for each type of valve. All of Stainless Valve's price quotes were addressed to Safefresh. At no time during these communications did Mr. Garwood inform Stainless Valve that ABP, and not Safefresh, was the principal on whose behalf he was working. On 25 June 2008, Mr. Garwood, as an agent, and plaintiff entered into an agreement for the production of both types of valves via email. On the email accepting Stainless Valve's offer to manufacture the valves, Mr. Garwood does not identify himself as the agent of either Safefresh or ABP; instead, he simply signs it "Tony." At some point between 25 and 30 June 2008, Stainless Valve received purchase orders from Mr. Garwood to manufacture the valves. However, these purchase orders are not included in the record on appeal but are only referenced in a 30 June 2008 email from Stainless Valve to Mr. Garwood. Plaintiff required a total down payment of $48,400, which Mr. Garwood wired from ABP's account. On 18 November 2008, the valves were then shipped to Mr. Garwood; the packing slip indicates that they were shipped to Mr. Garwood at Safefresh in Washington state. After delivery, plaintiff issued a final invoice for payment and sent it to Mr. Garwood at Safefresh. On 19 November 2008, Mr. Garwood contacted Nora Lindenbeck, vice president and chief financial officer of Stainless Valve, via email and requested she reissue these invoices to ABP. He also informed her that the purchase order and deposits were both issued by ABP. These final invoices were reissued to Mr. Garwood at ABP. Dirk Lindenbeck testified during his deposition that it was customary for a customer to send an invoice to a third party or bank for payment. Plaintiff never received any payment on the final invoices.

Plaintiff filed a complaint against Safefresh based on claims of breach of contract and unjust enrichment. On 19 April 2010, defendant filed a motion to dismiss for failure to state a claim upon which relief could be granted and lack of personal jurisdiction.[1] On 24 January 2011, defendant filed another motion to dismiss pursuant to Rule 12(b)(7). Specifically, defendant contended that plaintiff improperly brought a cause of action against defendant when the real party in interest was ABP. The matters came on for hearing on 7 February 2011. The trial court denied both motions to dismiss.

After discovery, defendant moved for summary judgment, arguing that no issues of material fact existed as to whether Safefresh

1. In this motion to dismiss, defendant also alleged that plaintiff's complaint should be dismissed for failing to name the real party in interest pursuant to Rule 17 of the North Carolina Rules of Civil Procedure. However, defendant later withdrew the Rule 17 motion to dismiss.

and Stainless Valve entered into a contract and that it was entitled to judgment as a matter of law. The matter came on for hearing on 17 September 2012. The trial court concluded that plaintiff failed to forecast any evidence that Safefresh authorized any acts done by its agent Mr. Garwood or that, after the acts were completed, Safefresh ratified them. Accordingly, the trial court granted defendant's motion for summary judgment and dismissed the complaint with prejudice. Plaintiff appealed.

Arguments

Plaintiff's sole argument on appeal is that the trial court erred in granting summary judgment because there is a genuine issue of material fact as to whether Safefresh is liable to plaintiff for the balance due under the contract based on the acts by Mr. Garwood. Specifically, plaintiff contends that it has "presented testimony and evidence that demonstrate that it was more than reasonable for it to believe it was working with [Safefresh] in the production of the requested valves, and not [ABP][,]" citing the numerous correspondence it sent to Mr. Garwood in his capacity as the president of Safefresh including the quotes, order confirmations, and initial final invoices. Consequently, plaintiff alleges that this issue should have been decided by a jury.

"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) (internal quotation marks omitted). "Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *Craig ex rel. Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 353 (2009) (quoting N.C. Gen. Stat. § 1A–1, Rule 56(c) (2007)). The burden is on the moving party to show the lack of any "triable issue," and "[a]ll inferences of fact must be drawn against the movant and in favor of the nonmovant." *Lord v. Beerman*, 191 N.C. App. 290, 293, 664 S.E.2d 331, 334 (2008).

In order to hold an alleged principal liable to a third party for the acts of his agent,

> [t]he plaintiff has the burden of proving that a particular person was at the time acting as a servant or agent of the defendant. An agent's authority to bind his principal cannot

> be shown by the agent's acts or declarations. This can be shown only by proof that the principal authorized the acts to be done or that, after they were done, he ratified them. One who seeks to enforce against an alleged principal a contract made by an alleged agent has the burden of proving the existence of the agency and the authority of the agent to bind the principal by such contract.

Simmons v. Morton, 1 N.C. App. 308, 310, 161 S.E.2d 222, 223 (1968). Accordingly, plaintiff has the burden of showing that Mr. Garwood was acting as an agent for Safefresh at the time the parties entered into negotiations in 2008. This Court has stated that:

> There are three situations in which a principal is liable upon a contract duly made by its agents: when the agent acts within the scope of his or her actual authority; when the agent acts within the scope of his or her apparent authority, and the third person is without notice that the agent is exceeding actual authority; and when a contract, although unauthorized, has been ratified.

Wachovia Bank of N.C., N.A. v. Bob Dunn Jaguar, Inc., 117 N.C. App. 165, 170, 450 S.E.2d 527, 531 (1994). Thus, if Stainless Valve forecasted any evidence to create a genuine issue of material fact whether Mr. Garwood was acting within the scope of his actual authority, that he was acting within the scope of his apparent authority, or that Safefresh ratified the contract, the trial court would have been precluded from entering summary judgment in favor of Safefresh.

"Actual authority is that authority which the agent reasonably thinks he possesses, conferred either intentionally or by want of ordinary care by the principal." *Harris v. Ray Johnson Const. Co., Inc.*, 139 N.C. App. 827, 830, 534 S.E.2d 653, 655 (2000). It "may be implied from the words and conduct of the parties and the facts and circumstances attending the transaction in question." *Id.*

Plaintiff argues that Mr. Garwood had actual authority to bind defendant because it reasonably believed that Mr. Garwood was acting on behalf of Safefresh. In support of its contention, plaintiff relies on the fact that it directed almost all of its correspondence, including the purchase order and quotes, to Mr. Garwood at Safefresh. In contrast, defendant argues that Mr. Garwood did not have actual authority because he was acting on behalf of ABP when he re-established communications with Safefresh in 2008.

Based on the evidence in the record, we conclude that there exists a genuine issue of material fact as to whether Mr. Garwood, as the manager of Safefresh, an LLC, was acting within the scope of his actual authority when he contracted with Stainless Valve.

> The [LLC] Act contains numerous "default" provisions or rules that will govern an LLC only in the absence of an explicitly different arrangement in the LLC's articles of organization or written operating agreement. Because these default provisions can be changed in virtually any way the parties wish, an LLC is primarily a creature of contract.

Russell M. Robinson, II, Robinson on North Carolina Corporation Law § 34.01 (7th ed. 2012). Pursuant to N.C. Gen. Stat. § 57C-3-23,

> [e]very manager is an agent of the limited liability company for the purpose of its business, and the act of every manager, including execution in the name of the limited liability company of any instrument, for apparently carrying on in the usual way the business of the limited liability company of which he is a manager, binds the limited liability company, unless the manager so acting has in fact no authority to act for the limited liability company in the particular matter and the person with whom the manager is dealing has knowledge of the fact that the manager has no authority.

Consequently, by default, as manager of Safefresh, Mr. Garwood had authority to bind Safefresh to Stainless Valve unless the articles of organization or operating manual provided otherwise.

Here, the record contains evidence that Mr. Garwood did have actual authority given that he had initially contacted Stainless Valve previously in his capacity as the president of Safefresh for the purpose of entering into a contract with it to manufacture certain valves. Moreover, while it appears that in every written communication included in the record on appeal in which Mr. Garwood identified himself as acting on behalf of any entity, he did so only as the president and CEO of ABP, that fact alone is not controlling. In the 25 June 2008 acceptance email in which Mr. Garwood accepted Stainless Valve's offer to manufacture the valves, he simply signed the email as "Tony" without indicating whether he was doing so on behalf of Safefresh or ABP. Viewing this evidence in a light most favorable to Stainless Valve, Mr. Garwood's silence on that email in conjunction with the fact that he had originally contacted Stainless

Valve in his capacity as the president of Safefresh creates a genuine issue of material fact whether he acted within the scope of his actual authority an as an agent of Safefresh in 2008. In addition, the fact that Mr. Garwood requested Stainless Valve reissue the final invoices to ABP is not conclusive. At no time prior to the goods being shipped did Mr. Garwood contact Stainless Valve to request they reissue any other correspondence to ABP. In fact, until the 19 November email, months after the parties began negotiating, Mr. Garwood never informed Stainless Valve that ABP was the client despite numerous quotes and other correspondence Stainless Valve sent to him addressed to Safefresh. In other words, it is undeniable that Mr. Garwood remained silent for months even though it was apparent that Stainless Valve believed that Safefresh was the client, not ABP.

In totality, although the record is not devoid of evidence suggesting that Mr. Garwood was acting in his capacity as the manager of ABP, there was sufficient evidence forecasted to create a genuine issue of material fact as to whether Mr. Garwood was acting with actual authority on behalf of Safefresh during the 2008 negotiations. Thus, the trial court erred in granting summary judgment in favor of Safefresh. Because there was a genuine issue of material fact whether Mr. Garwood had actual authority, it is not necessary to address the other situations in which a principal can be bound to a third party for the acts of its agent.

Conclusion

Because Stainless Valve produced sufficient evidence that Mr. Garwood had actual authority from Safefresh during the 2008 negotiations between the parties that resulted in a contract, we reverse the trial court's order granting summary judgment in favor of defendant.

REVERSED AND REMANDED.

McCULLOUGH, Judge, concurring.

I concur in the majority opinion but write separately as I believe some basic principles of contract law also dictate that this case is one that should not be decided on summary judgment. In their treatise on North Carolina Contract Law, Hutson & Miskimon state:

> Acceptance by conduct is a well-recognized rule in North Carolina, and the formation of implied-in-fact contracts has already been discussed. Although there are many decisions implying a promise to pay where one party

silently – but knowingly and voluntarily – accepts services rendered by another with the expectation of payment, and the recipient enjoys the benefit of those services, these decisions allow a recovery based on quantum merit or a contract implied in law. The more difficult involves the issue of when does one party's silence and inaction give rise to a valid contract that is considered by the product of actual agreement? As a general rule, mere silence by an offeree is not sufficient to manifest assent to an offer, and in fact at least one court has emphatically declared that "[s]ilence and inaction do not amount to an acceptance of an offer." However, that is an overstatement because, under some circumstances, a party may be required to speak when to remain silent would justifiably permit an offeror to infer that silence is a manifestation of assent. Whether an offeree's silence manifests assent to an offer is a question of fact that may depend upon industry custom to determine when an offer is normally accepted or rejected.

In *Anderson Chevrolet/Olds, Inc. v. Higgins* the court of appeals essentially – albeit without acknowledgment – approved of the *Restatement of Contracts* approach to acceptance occurring either by the offeree's silence or exercise of dominion over the offeror's property. Under this approach, silence and inaction in the face of an offer communicated to the intended recipient will operate as an acceptance:

> (1)(a) "Where the offeree with reasonable opportunity to reject offered goods or services takes the benefit of them under circumstance which would indicate to a reasonable man that they were offered with the expectation of compensation . . . .
>
> (c) Where because of previous dealings or otherwise, the offeree has given the offeror reason to understand that the silence or inaction was intended by the offeree as a manifestation of assent, and the offeror does so understand.
>
> (2) Where the offeree [exercises dominion over things which are] offered to him, such [exercise of dominion] in the absence of other circumstances is an acceptance.

> The *Anderson* court's approval of this language appears consistent with North Carolina law and the majority of other jurisdictions.

John N Hutson, Jr. & Scott A. Miskimon, North Carolina Contract Law 82-84 (LexisNexis 2001).

The acceptance by silence or conduct principles are well-settled, although not encountered often. In the case of *The T.C. May Company v. The Menzies Shoe Company*, 184 N.C. 150; 113 S.E. 593 (1922), our Supreme Court stated:

> The definition of a contract as an agreement to which the law attaches obligation implies, among other essential elements, the mutual assent of the parties, which generally results from an offer on the one side and acceptance on the other. The offer, when communicated is a mere proposal to enter into the agreement, and must be accepted before it can become a binding promise; but when it is communicated, and shows an intent to assume liability, and is understood and accepted by the party to whom it is made, it becomes at once equally binding upon the promisor and the promise. 1 Page on Contracts (2 ed.), sed. 74 *et seq.*; 1 Elliott on Contracts, sec. 27 *et seq*. Such acceptance may be manifested by words or conduct showing that the offeree means to accept; for, while it is generally held that the intention to accept is a necessary element of acceptance, the question of intent may usually be resolved by what the offeree did or said. As a general rule, his mere silence will not amount to assent; but if he declines to speak when speech is admonished at the peril of an inference from silence, his silence may justify an inference that he admits the truth of the circumstance relied on or asserted.

Id. at 152, 113 S.E. at 593 (citations omitted).

In the case *sub judice* I believe that Garwood had this duty to speak and his failure to come forward when he sent the acceptance email where he signed as "Tony" makes this a classic case where a jury should decide for which of his LLC's did he act when that email was sent to Plaintiff.

Therefore, I believe the majority opinion has correctly decided that summary judgment is inappropriate. I concur separately because I believe the case law and the summary of contract law set forth above further our understanding of why this is so.

STATE OF NORTH CAROLINA
v.
GLENN EDWARD BENTERS, DEFENDANT

No. COA13-305

Filed 3 December 2013

Search and Seizure—motion to suppress drugs—affidavit supporting search warrant not supported by probable cause

The trial court did not err in a drug possession case by suppressing the evidence against defendant. The trial court's findings of fact, both challenged and unchallenged, were supported by competent evidence. Further, the trial court's conclusions of law that the affidavit supporting the search warrant was not supported by probable cause was based on competent findings of fact.

Judge HUNTER, Robert C., dissenting in separate opinion.

Appeal by the State from order entered 21 September 2012 by Judge Carl R. Fox in Vance County Superior Court. Heard in the Court of Appeals 11 September 2013.

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

Brock, Payne & Meece, P.A., by C. Scott Holmes, for defendant-appellee.

BRYANT, Judge.

A motion to suppress evidence should be granted where the information presented in the search warrant has not been independently verified or corroborated by the requesting officer. Where a trial court makes competent findings of fact and conclusions of law in granting a motion to suppress evidence, we will not disturb those findings on appeal.

On 29 September 2011, Detective Justin Hastings, a narcotics detective with the Franklin County Sheriff's Office, contacted Lieutenant Joseph Ferguson of the Vance County Sheriff's Office regarding a drug investigation that began in Franklin County. A confidential informant had informed Det. Hastings that defendant Glenn Edward Benters ("defendant") was running an indoor marijuana growing operation on

defendant's property. The informant further stated that defendant "also maintained a residence in Myrtle Beach, South Carolina." When shown a driver's license photograph of defendant by Det. Hastings, the informant positively identified the person in the photograph as defendant.

Det. Hastings contacted Lt. Ferguson and Special Agent Lynn Gay of the State Bureau of Investigation and relayed the information learned from the informant. Det. Hastings also subpoenaed information on 29 September 2011 regarding power usage for defendant's property from Progress Energy. The report from Progress Energy provided the kilowatt usage and current subscriber information for the property. Det. Hastings testified that the Progress Energy report was "indicative of [a] marijuana grow operation[] base[d] on [the] extreme high kilowatt usage" at defendant's property because "the lows and the highs [were] not consistent of that with any type of weather patterns."

Based on the information from Progress Energy regarding defendant's property's energy use, Det. Hastings travelled to Vance County to meet with Lt. Ferguson regarding the investigation. The officers were acting in accordance with a mutual aid agreement between the Franklin and Vance County Sheriffs' Offices. It was determined that a surveillance of defendant's property should be conducted from an open field near the residence.

Upon arriving at defendant's property, Lt. Ferguson and the other accompanying officers observed a locked and posted gate across the drive leading to defendant's residence. Lt. Ferguson testified that he had been to defendant's residence for a prior incident and that the gate had been unlocked and open at that time.

Lt. Ferguson and the officers decided to use a "well-worn path for foot traffic" on the adjoining property to reach an open field from which defendant's property could be observed. The path led the officers to an open field on the adjoining lot where they could see the rear of defendant's residence, a building adjacent to the residence, a greenhouse, and other outbuildings. The officers observed a red pick-up truck parked near a shed on the residence; Lt. Ferguson testified that he had never observed defendant driving that particular vehicle. Music was also heard emanating from the property. Lt. Ferguson used binoculars to observe "old potting soil bags, cups, trays, fertilizer bags, pump sprayers, [and] a greenhouse, but no fields were in cultivation." Lt. Ferguson testified that the greenhouse appeared to be unused and was in a general state of disrepair. Lt. Ferguson noted that defendant's property did not contain any evidence of a garden plot, potted plants, or

fields in cultivation. Det. Hastings testified that, based on his experience with prior growing operations, the gardening supplies observed were used by marijuana growers.

The officers then returned to the entrance of defendant's property and entered the property through a farm gate at the driveway entrance. Lt. Ferguson decided to speak with defendant through a "knock and talk" approach. Lt. Ferguson knocked on the rear side door of defendant's premises, but received no answer. The officers then approached a white outbuilding from which music was emanating. While knocking on the door of the building, officers smelled a strong odor of growing marijuana. The building was padlocked and no one responded to the officers' knocks. Officers also observed "thick mil plastic," which is used to shield grow lighting from observation, around the door of the building.

Upon exiting the property, several officers were left at the entrance of the property to secure the premises while Lt. Ferguson and other officers went to the Sheriff's Office to obtain a search warrant for the property. In the Search Warrant Affidavit, Lt. Ferguson stated that:

> On September 29, 2011 Lt. Ferguson, hereby known as your affiant, received information from Detective J. Hastings of the Franklin County Sheriff's Office Narcotics Division about a residence in Vance County that is currently being used as an indoor marijuana growing operation. Detective Hastings has extensive training and experience with indoor marijuana growing investigations on the state and federal level. Within the past week Hastings met with a confidential and reliable source of information that told him an indoor marijuana growing operation was located at 527 Currin Road in Henderson, North Carolina. The informant said that the growing operation was housed in the main house and other buildings on the property. The informant also knew that the owner of the property was a white male by the name of Glenn Benters. Benters is not currently living at the residence, however [he] is using it to house an indoor marijuana growing operation. Benters and the Currin Road property is also known by your affiant from a criminal case involving a stolen flatbed trailer with a load of wood that was taken from Burlington, North Carolina. Detective Hastings obtained a subpoena for current subscriber information. [sic] Kilowatt usage, account notes, and billing information for the past twenty-four months in association with the

527 Currin Road Henderson NC property from [the] Progress Energy Legal Department. Information provided in said subpoena indicated that Glenn Benters is the current subscriber and the kilowatt usage hours are indicative of a marijuana grow operation based on the extreme high and low kilowatt usage.

Also on 9-29-2011 Detective Hastings and your affiant along with narcotics detectives from the Vance and Franklin County Sheriffs' Office as well as special agents with the North Carolina S.B.I. traveled to the residence at 527 Currin Road Henderson NC and observed from outside of the curtilage multiple items in plain view that were indicative of an indoor marijuana growing operation. The items mentioned above are as followed; [sic] potting soil, starting fertilizer, seed starting trays, plastic cups, metal storage racks, and portable pump type sprayers. Detectives did not observe any gardens or potted plants located around the residence. Detectives observed a red Dodge full size pickup truck parked by a building located on the curtilage of the residence and heard music coming from the area of the residence.

After observing the above listed circumstances, detectives attempted to conduct a knock and talk interview with anyone present at the residence. After knocking on the back door, which your affiant knows Benters commonly uses based on previous encounters, your affiant waited a few minutes for someone to come to the door. When no one came to the door, your affiant walked to a building behind the residence that music was coming from in an attempt to find someone. Upon reaching the rear door of the building, your affiant instantly noticed the strong odor of marijuana emanating from the building. Your affiant walked over to a set of double doors on the other side of the building and observed two locked double doors that had been covered from the inside of the building with thick mil black plastic commonly used in marijuana grows to hide light emanated by halogen light[s] typically used in indoor marijuana growing operations. Thick mil plastic was also present on windows inside the residence as well.

A search warrant was obtained and executed on 29 September 2011, resulting in the seizure of 91.25 pounds of marijuana, a variety of supplies used for growing marijuana, drug packaging items and paraphernalia, and multiple firearms from the property.

On 30 September 2011, defendant was charged with manufacturing marijuana, trafficking marijuana by manufacture, trafficking marijuana by possession, possession with intent to sell or deliver fifty-five marijuana plants, maintaining a residence for keeping and selling a controlled substance, maintaining a building for keeping and selling a controlled substance, and possession of drug paraphernalia. On 28 November 2011, defendant was indicted by the Vance County Grand Jury on all charges. Defendant filed a pretrial motion to suppress the evidence discovered during a search of his property pursuant to a search warrant. The matter was heard 11 June 2012. The trial court filed a written order on 24 September 2012 granting the motion.

The State appeals.

On appeal, the State argues that the trial court erred in suppressing the evidence against defendant. We disagree.

> In evaluating the denial of a motion to suppress, the reviewing court must determine whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law. The trial court's findings of fact on a motion to suppress are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. Indeed, an appellate court accords great deference to the trial court in this respect because it is entrusted with the duty to hear testimony, weigh [the evidence,] and resolve any conflicts in the evidence . . . . Conclusions of law are reviewed de novo and are fully reviewable on appeal.

State v. Williams, 366 N.C. 110, 114, 726 S.E.2d 161, 165 (2012) (citations and internal quotations omitted).

The State concedes that the "knock and talk" entry onto defendant's property was an illegal search, but argues that the search warrant remained valid because it was supported by probable cause through the informant and the utility bill. As such, we must consider whether the warrant, based on the statements of the informant, the utility bill,

and the officers' " open fields" observations of defendant's property, was sufficient to establish probable cause.

"In determining . . . whether probable cause exists for the issuance of a search warrant, our Supreme Court has provided that the 'totality of the circumstances' test . . . is to be applied." *State v. Witherspoon*, 110 N.C. App. 413, 417, 429 S.E.2d 783, 785 (1993) (citations omitted). Under the "totality of the circumstances" test,

> [t]he task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.

State v. Arrington, 311 N.C. 633, 638, 319 S.E.2d 254, 257-58 (1984) (citation omitted). "Under our statutes a magistrate issuing a warrant can base a finding of probable cause only on statements of fact confirmed by oath or affirmation of the party making the statement, or on information which the magistrate records or contemporaneously summarizes in the record [pursuant to] G.S. 15A-244; G.S. 15A-245(a)." *State v. Teasley*, 82 N.C. App. 150, 156-57, 346 S.E.2d 227, 231 (1986) (citation omitted).

Here, the State contests the trial court's Finding of Fact 2 and Conclusion of Law 1. In its Finding of Fact 2, the trial court found that "[p]rior to September 29, 2011, Detective Hastings received information from a confidential informant that the Defendant, Glenn Benters, was growing marijuana on his farm on Currin Road in Vance County. This confidential informant had not previously provided information to Detective Hastings that had later proven to be reliable." In its Conclusion of Law 1, the trial court stated that

> [i]nformation provided by a confidential informant who has not proven to be reliable by providing information which later proved to be truthful or resulted in arrests and convictions in the past, together with the power usage records for the Defendant's residence from Progress Energy, lacked sufficient "indicia of reliability" to establish probable cause for the issuance of a search warrant for the Defendant's property.

The State contends that the trial court's Finding of Fact 2 and Conclusion of Law 1 were erroneous because the trial court found that the informant "has not proven to be reliable by providing information which later proved to be truthful or resulted in arrests and convictions in the past . . . ." Det. Hastings testified at the suppression hearing that the informant was "used multiple times in the past, ha[d] always provided reliable information, who ha[d] [sic] conducted numerous controlled purchases, had been able to identify both marijuana, cocaine hydrochloride, cocaine base, on site and interact with those persons selling and using illegal substances." However, this Court has held that statements made after the issuance of a warrant regarding the reliability of the informant cannot be considered in determining whether the warrant was properly based on probable cause. *See State v. Newcomb*, 84 N.C. App. 92, 351 S.E.2d 565 (1987) (holding that in determining the validity of a warrant, only information presented at the time the warrant was issued can be considered, despite the requesting officer later testifying at a suppression hearing that he had "unintentionally and inadvertently" failed to provide information regarding the reliability of the informant in the warrant affidavit); *see also State v. Styles*, 116 N.C. App. 479, 483, 448 S.E.2d 385, 387 (1994) ("[P]ursuant to North Carolina General Statutes § 15A-245 . . . information other than that contained in the affidavit may not be considered by the issuing official in determining whether probable cause exists for the issuance of the warrant unless the information is either recorded or contemporaneously summarized in the record or on the face of the warrant by the issuing official."). As such, the testimony of Det. Hastings at the suppression hearing cannot be considered in evaluating whether the warrant was based on probable cause.

The trial court, in reviewing the sufficiency of the search warrant, was limited to the information presented to the magistrate at the time the warrant was requested. "The police officer making the affidavit [to accompany the search warrant] may do so in reliance upon information reported to him by other officers in the performance of their duties." *State v. Vestal*, 278 N.C. 561, 576, 180 S.E.2d 755, 765 (1971) (citation omitted). However,

> [p]robable cause cannot be shown by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the underlying circumstances upon which that belief is based. . . . Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely

> as a rubber stamp for the police. The issuing officer must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion. . . .

State v. Edwards, 286 N.C. 162, 167, 209 S.E.2d 758, 761-62 (1974) (citations and internal quotations omitted).

Here, Lt. Ferguson stated in the affidavit that Det. Hastings had met with a confidential informant who said that defendant was growing marijuana on his property. Lt. Ferguson described the informant as a "confidential and reliable source of information," but did not state on what prior occasions the informant's information had proved reliable, whether informant had personally witnessed defendant's grow operation, or that informant had purchased marijuana from defendant. Although the threshold for establishing an informant's reliability is low, that threshold must be met. *See State v. McKoy*, 16 N.C. App. 349, 351-52, 191 S.E.2d 897, 899 (1972) (holding that an "affiant's statement that [a] confidential informant has proven reliable and credible *in the past*" is sufficient to sustain a warrant through probable cause); *see also State v. Beam*, 325 N.C. 217, 381 S.E.2d 327 (1989) (discussing how a defendant's prior history of involvement with drugs and evidence from a controlled purchase involving defendant allowed for probable cause); *Arrington*, 311 N.C. 633, 319 S.E.2d 254 (affidavit allowed for probable cause where the officer personally knew one informant, a second informant acknowledged buying drugs from defendant, and both informants had previously provided information which had led to arrests); *State v. McLeod*, 36 N.C. App. 469, 244 S.E.2d 716 (1978) (information in the affidavit regarding an informant's controlled purchase of drugs from defendant was sufficient for probable cause); *Edwards*, 286 N.C. 162, 209 S.E.2d 758 (discussing how proof of an informant's firsthand knowledge of defendant's drug dealing, such as purchasing drugs from defendant or seeing defendant producing and selling drugs, is needed to show the informant's reliability). As the affidavit failed to provide sufficient information showing that the confidential informant was reliable, the trial court's findings of fact support its conclusions of law that the evidence was insufficient to establish probable cause.

The State also contends that the presence of gardening supplies outside of defendant's buildings and the utility report from Progress Energy provided sufficient probable cause for execution of a warrant. Citing *State v. O'Kelly*, 98 N.C. App. 265, 390 S.E.2d 717 (1990), the State argues that an informant's tip, considered in conjunction with an officer's

observations of suspicious equipment outside of defendant's home, permits a finding of probable cause for issuance of a warrant.

In *O'Kelly*, officers received information from the defendant's neighbor and an informant that the defendant was engaged in the manufacture and sale of methamphetamine. *Id.* at 267, 390 S.E.2d at 718. Officers obtained the defendant's criminal records which reflected prior convictions for methamphetamine manufacture, sale, and distribution. *Id.* Outdoor "open fields" observations of the defendant's property were also conducted during which officers noticed a strong chemical odor emanating from the property and saw equipment suspiciously placed around the residence. *Id.* at 267-68, 390 S.E.2d at 718. Our Court held that the trial court properly denied the defendant's motion to suppress evidence gathered under the search warrant, finding that under a "totality of the circumstances" test, the search warrant affidavit presented sufficiently corroborated and reliable information to establish probable cause. *Id.* at 270-71, 390 S.E.2d at 720-21.

O'Kelly is relevant to our present matter, as the search warrant affidavit stated that the officers had observed gardening supplies and a greenhouse in disrepair on defendant's property during an "open fields" observation of defendant's property. However, under *O'Kelly*'s "totality of the circumstances" test such observations of gardening supplies are insufficient by themselves to permit the issuance of a search warrant. Lt. Ferguson stated in the search warrant affidavit that he saw gardening supplies which were indicative of an indoor marijuana grow operation during his open fields observation of defendant's property. However, as defendant lived in a farming community and had a greenhouse, even though in disrepair, on his property, there is insufficient evidence simply based upon viewing used gardening supplies such as pots and bags of soil to conclude that a marijuana growing operation existed there. Unlike in *O'Kelly*, where officers noticed a strong chemical odor emanating from the property and saw oddly placed equipment next to the house during their open fields observation, here officers noticed a marijuana smell and saw thick mil plastic covering the building doors from the inside only after they had entered the property. As previously acknowledged by the State, this entry was illegal and thus the marijuana smell and plastic coverings could not be properly considered in seeking a search warrant.

Lt. Ferguson also appears to have relied upon Det. Hastings' review of the utility report from Progress Energy for the search warrant as there is no evidence to indicate that the magistrate was presented with a copy of the utility report or that Lt. Ferguson himself reviewed the utility report. In the suppression hearing, Det. Hastings testified that

the allegation that the utility report indicated an indoor marijuana growing operation was based solely on his own belief. Det. Hastings also acknowledged that the utility report was not compared to other utility reports for neighboring residences to show a discrepancy in defendant's power usage and an expert opinion was not provided as to how likely it was that the utility report indicated the presence of an indoor marijuana growing operation on defendant's property. As already noted, to establish probable cause for a search warrant, the requesting officer must demonstrate that the information contained in the affidavit in support of the search warrant is sufficiently reliable and not conclusory. The trial court, in its Conclusion of Law 5, determined that

> [i]t was only after illegally entering onto the Defendant's property and making observations while illegally on the premises that "thick mil plastic" was [observed] around some of the doors of the white outbuilding and there was a "strong smell of growing marijuana" emanating from the same outbuilding that Lieutenant Ferguson decided to seek to obtain a search warrant. *Clearly, Lieutenant Ferguson did not feel he had sufficient evidence gathered through the officers' prior personal observations to provide the requisite "indicia of reliability" to corroborate the confidential informant and the power usage records from Progress Energy to establish probable cause for the issuance of a lawful search warrant for the Defendant's premises* because he included their observations after illegally entering onto the Defendant's property in his sworn "Search Warrant Affidavit" for the search warrant which was submitted to and later issued by the magistrate on September 29, 2011 for a search of the Defendant's property in this case.

Based on the record before us, the trial court's findings of fact, both challenged and unchallenged, are supported by competent evidence. Likewise, the trial court's conclusions of law that the affidavit supporting the search warrant was not supported by probable cause is based on competent findings of fact.

We affirm the trial court's order granting defendant's motion to suppress.

Affirmed.

Judge STEELMAN concurs.

HUNTER, Robert C., Judge, dissenting.

The majority concludes that the trial court was correct in granting defendant's motion to suppress evidence obtained from the search because the search warrant affidavit lacked sufficient "indicia of reliability" to establish probable cause. I agree that the affidavit did not contain a sufficient factual basis to establish probable cause under the confidential informant standard because the affiant did not detail why the source was reliable. However, I would find that under the anonymous tip standard, the affidavit contained detailed information provided by the source which was independently corroborated by experienced officers and therefore established probable cause for the search warrant's issuance. For the following reasons, I respectfully dissent.

This Court has traditionally used two standards to assess whether information provided by a third party may establish probable cause to support the issuance of a search warrant: the confidential informant standard and the anonymous tip standard. Under the confidential informant standard, a search warrant affidavit that states the affiant's belief that the confidential informant is reliable and contains some factual circumstance on which that belief is based is sufficient on its own to establish probable cause. *State v. Campbell*, 282 N.C. 125, 130-31, 191 S.E.2d 752, 756 (1972). However, "[p]robable cause cannot be shown by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the underlying circumstances upon which that belief is based." *Id.* (internal quotation marks omitted). Under the anonymous tip standard, sufficient "indicia of reliability" to establish probable cause can be found if the source provided detailed information and that information was independently verified by the police. *State v. Lemonds*, 160 N.C. App. 172, 179-80, 584 S.E.2d 841, 846 (2003); *see also State v. Trapp*, 110 N.C. App. 584, 589–90, 430 S.E.2d 484, 488 (1993) (anonymous source's tip may provide probable cause if the details can be independently verified). This Court has adopted a "totality of the circumstances" approach in determining whether probable cause exists in support of the issuance of a search warrant. *State v. Edwards*, 185 N.C. App. 701, 704, 649 S.E.2d 646, 649 (2007).

I agree with the majority that the trial court correctly concluded that Lt. Ferguson's description of the source's reliability was merely conclusory, and therefore was insufficient to establish probable cause under the confidential informant standard. However, I believe the search warrant affidavit contained sufficient "indicia of reliability" for the

magistrate to find there was probable cause to issue the warrant under the anonymous tip standard.

In *Lemonds*, this Court applied the anonymous tip standard and held that there was probable cause where a source alleged that the defendant was growing marijuana, and evidence gathered by the police independently corroborated the tip. *Lemonds*, 160 N.C. App. at 179-80, 584 S.E.2d at 846. Prior to seeking a search warrant, the police discovered power bills for the defendant's residence that revealed electricity consumption patterns consistent with indoor marijuana-growing operations. *Id.* They also recovered equipment commonly used to grow marijuana from the defendant's garbage, saw the defendant put this equipment in the garbage, and found marijuana residue on the equipment. *Id.* The *Lemonds* Court concluded, "[b]ased on the totality of the circumstances . . . the information before the magistrate . . . provided a 'substantial basis' for finding probable cause that defendant was maintaining an indoor marijuana-growing operation." *Lemonds*, 160 N.C. App. at 180, 584 S.E.2d at 846.

I consider the facts as found by the trial court here analogous to those in *Lemonds*, and as such I believe there was sufficient evidence to establish probable cause for issuance of the search warrant under the anonymous tip standard. Here, the court made the following findings of fact. Det. Hastings and Lt. Ferguson began an investigation based on a source's tip that defendant was growing marijuana in an indoor operation on his farm. Det. Hastings had been employed by the Franklin County Sheriff's Department for approximately seven years at this time. Based on the source's information, Det. Hastings subpoenaed the power records for defendant's property. The records revealed excessive kilowatt usage, which Det. Hastings concluded was indicative of a marijuana-growing operation based on his extensive experience as a narcotics officer. The officers then went to a lot adjacent to defendant's property to conduct surveillance based on the source's tip and the power records. Before committing the illegal "knock and talk" entry onto defendant's property, the officers identified a plethora of physical evidence indicating a growing operation, including potting soil, starting fertilizer, seed starting trays, plastic cups, metal storage racks, and pump sprayers. No fields were in cultivation at the time the officers identified these materials, and the greenhouse on the property appeared to be in disrepair based on tears in the exterior and knee-deep weeds surrounding it.

All of this information found as fact by the trial court was included in the affidavit before the magistrate. The affidavit also contained the statement by Lt. Ferguson that, based on his experience and training as

a narcotics officer, the physical evidence identified on defendant's property was indicative of an indoor marijuana-growing operation. I would find that the source's tip that defendant was growing marijuana in an indoor facility on his farm was independently verified by experienced officers through their analysis of defendant's power records and observation of physical evidence indicative of a marijuana-growing operation that necessarily must have been occurring indoors, as the source indicated. As such, based on the anonymous tip standard and the precedent set in *Lemonds*, I would find that there was a substantial basis to establish probable cause for the issuance of the warrant here.

I conclude that the combination of the officers' years of training, knowledge, and experience regarding narcotic and drug enforcement, as well as the independently verified utility records and personal observations of cultivation equipment at defendant's farm, sufficiently corroborated the source's tip and established probable cause to believe that there would be drugs and related paraphernalia at defendant's address under an anonymous tip standard. *See State v. Bone*, 354 N.C. 1, 10, 550 S.E.2d 482, 488 (2001) (holding that an officer may rely upon information received through a source "so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge") (citation omitted), *cert. denied*, 535 U.S. 940, 152 L. Ed. 2d 231 (2002); *see also Edwards*, 185 N.C. App. at 705, 649 S.E.2d at 650 (holding that the affiant officer's extensive experience weighed in favor of finding the magistrate had a substantial basis to conclude probable cause existed to issue a search warrant). Thus, under the totality of the circumstances, the search warrant affidavit provided to the magistrate set forth sufficient facts for a reasonably discreet and prudent person to rely upon in determining that probable cause existed in support of the issuance of the search warrant. *See Edwards*, 185 N.C. App. at 704, 649 S.E.2d at 649 ("To establish probable cause, an affidavit for a search warrant must set forth such facts that a reasonably discreet and prudent person would rely upon[.]") (citation and internal quotation marks omitted). Accordingly, I would find the trial court erred in granting defendant's motion to suppress evidence, and I would reverse the trial court's order.

STATE OF NORTH CAROLINA
v.
JOHN OMAR LALINDE, DEFENDANT

No. COA13-115

Filed 3 December 2013

1. Jurisdiction—special instruction denied—no factual dispute

The trial court properly declined to give the jury a special instruction regarding jurisdiction in a prosecution for child abduction where the evidence showed, and defendant did not dispute, that the child was either abducted or that defendant's final act of inducing her to leave her parents occurred in North Carolina. A special jury instruction on jurisdiction is only proper when a defendant challenges the factual basis for jurisdiction.

2. Felonious Restraint—restraint by fraud—evidence sufficient

The trial court properly denied defendant's motion to dismiss the charge of felonious restraint arising from the abduction of a child where the State's evidence was sufficient to show that defendant restrained the victim by defrauding her into entering his car and driving to Florida with him. While defendant argued that the child was not deceived because she knew he wanted to have sex with her, this argument viewed the evidence in the light most favorable to defendant, contrary to the well-established standard of review for motions to dismiss.

Appeal by defendant from judgments entered 1 October 2012 by Judge W. Douglas Parsons in Pender County Superior Court. Heard in the Court of Appeals 28 August 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General V. Lori Fuller, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Emily H. Davis, for defendant-appellant.

GEER, Judge.

Defendant John Omar Lalinde appeals from his convictions of child abduction and felonious restraint. On appeal, defendant primarily argues that the trial court erred in denying his request for a special

instruction regarding whether North Carolina had jurisdiction over the child abduction charge. Because defendant does not dispute the facts relevant to the jurisdiction question and those facts establish that one element of the crime occurred in North Carolina, there was no issue for the jury to resolve, and the trial court properly declined to instruct the jury regarding jurisdiction.

With respect to the charge of felonious restraint, defendant argues that the State failed to prove that he restrained the alleged victim. We hold, however, that the State's evidence was sufficient to show that defendant restrained the victim by defrauding her into entering his car and driving to Florida with him. The trial court, therefore, properly denied defendant's motion to dismiss the charge of felonious restraint.

Facts

The State's evidence tends to show the following facts. When "Anna"[1] was nine years old, she lived across the street from defendant in Orlando, Florida. She and her neighbor Jessica got to know defendant when they played with his dog in the yard. Anna began regularly talking to defendant on the phone when she was 10 years old after her family had moved to a different house a few miles away and defendant gave her his phone number. She would also see defendant when she went to Jessica's house. When Anna was 11 or 12 years old, defendant persuaded Anna to sneak out of her house in the middle of the night so that he could give her a cell phone that she could use to call him. Her parents confiscated the phone a couple days later, but they did not know that the phone came from defendant, and Anna continued calling him. Anna's parents did not know about the phone calls or that Anna would see defendant when she went to Jessica's house.

In 2009, when Anna was 13 years old, she moved to North Carolina. She continued to telephone defendant, and in August 2010, defendant sent her a teddy bear, a two-piece bathing suit, and a cell phone on defendant's cell phone plan that had a camera feature. At defendant's request, Anna sent defendant photos of herself in the bathing suit and photos of herself naked. During their conversations, defendant and Anna told each other they loved one another. Defendant told Anna that if she left North Carolina, she could stay with him in Orlando and complete online classes. He also told her that he wanted to have sex with her.

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1. The pseudonym "Anna" is used throughout this opinion to protect the minor's privacy and for ease of reading.

Shortly after moving to North Carolina, Anna confided to defendant that while living in Orlando, her brother Anthony had raped and sexually molested her. Anthony initially did not move with the family to North Carolina, but instead decided to remain in Florida with his aunt.

In late September 2010, Anna's parents told her that Anthony, who was 19 years old at the time, was on a flight from Florida to North Carolina and was going to move back in with the family. At that point, Anna told her parents about the sexual abuse for the first time. Nevertheless, her parents still allowed Anthony to move back into the house.

At 3:00 in the morning on 2 October 2010, Anthony tried to enter Anna's locked bedroom. Anna escaped through her bedroom window and spent the night in the playhouse in the back yard. She called defendant to tell him what had happened, and he suggested that she come with him to Florida and stay at his house. Anna agreed to leave with defendant, and he drove from Florida to North Carolina to pick her up. Defendant arranged to meet Anna at the end of her street so that no one would see him. Anna snuck out of the house and her 19-year-old cousin Charles helped her carry a laundry basket full of her clothes to the end of the road. When defendant arrived, he greeted Anna with a kiss on the cheek. He asked Anna why Charles was there and said, "Nobody was supposed to see me." Anna got into the truck with defendant and drove with him back to his house in Florida. Anna's parents did not know she was leaving.

When Anna and defendant arrived at his house in Florida, she unpacked and took a shower. While she was in the shower, defendant hid her clothes, and when she got out of the shower, she found defendant sitting on his bed naked. Defendant laid Anna down on the bed, pinned her arms above her head, and, without her consent, had sexual intercourse with her.

The following day, defendant left for work, and defendant's mother took Anna to her house a few minutes away. When defendant returned to his mother's house for lunch, he removed the SIM card from Anna's phone and destroyed it. After defendant came home from work, police came by his mother's house looking for Anna. Defendant and his mother told Anna to go out the window and hide in the backyard. At that time, defendant was interviewed by phone by Detective John Leatherwood from the Pender County Sheriff's Office who suspected that he had Anna. Defendant denied knowing where Anna was or having talked to her in the previous two weeks. Police returned again later in the evening, and Detective Leatherwood informed defendant by phone that the police

had tracked defendant's and Anna's cell phones from North Carolina to Florida. Defendant continued to deny having seen or heard from Anna and claimed he had lost his phone.

At some point that evening, Anna was able to call her grandfather, and he and her aunt came to pick her up from defendant's mother's house. Afterwards, defendant called Detective Leatherwood and told him that Anna had tried to come to his house but was unable to get in, so she came to his mother's house, where she was picked up by her aunt.

Defendant was indicted for child abduction, felonious restraint, second-degree rape, statutory rape, and kidnapping. The rape charges were dismissed for lack of jurisdiction. After a jury trial, the jury acquitted defendant of first and second degree kidnapping, but found him guilty of child abduction and felonious restraint. The trial court imposed a presumptive-range term of 16 to 20 months imprisonment for abduction of a child, followed by a consecutive presumptive-range term of 16 to 20 months imprisonment for felonious restraint. Defendant timely appealed to this Court.

I

[1] Defendant first argues that the trial court erred in denying his request for a jury instruction and special verdict as to North Carolina's jurisdiction over the child abduction charge. Generally, when a crime occurs in more than one state, "any state in which an essential element of a crime occurred may exercise jurisdiction to try the perpetrator." *State v. First Resort Properties*, 81 N.C. App. 499, 500, 344 S.E.2d 354, 356 (1986).

Jurisdiction over interstate criminal cases in North Carolina is governed by N.C. Gen. Stat. § 15A-134 (2011), which provides "[i]f a charged offense occurred in part in North Carolina and in part outside North Carolina, a person charged with that offense may be tried in this State if he has not been placed in jeopardy for the identical offense in another state." This statute confers jurisdiction "where *any part of the crime occurred.*" *First Resort Properties*, 81 N.C. App. at 501, 344 S.E.2d at 356.

A special jury instruction on jurisdiction is only proper when a defendant challenges the factual basis for jurisdiction. *State v. Tucker*, 227 N.C. App.627, 637, 743 S.E.2d 55, 61 (2013) ("Where the facts upon which the assertion of jurisdiction is based are contested, the trial court is required to instruct the jury that (1) the State has the burden of proving jurisdiction beyond a reasonable doubt; and (2) if the jury is not satisfied, it should return a special verdict indicating a lack of jurisdiction.").

See, *e.g.*, *State v. Holden*, 160 N.C. App. 503, 508, 586 S.E.2d 513, 517 (2003) (holding trial court erred by failing to instruct jury on jurisdiction when defendant disputed whether rapes occurred in Virginia or North Carolina), *aff'd per curiam by an equally divided court*, 359 N.C. 60, 602 S.E.2d 360 (2004).

When the defendant challenges whether any offense occurred or whether he was the perpetrator, but he does not dispute the facts upon which jurisdiction is based, then the trial court properly refuses to instruct the jury on the issue of jurisdiction. *See*, *e.g.*, *State v. White*, 134 N.C. App. 338, 341, 517 S.E.2d 664, 667 (1999) (holding that trial court properly refused to instruct on jurisdiction when there was no dispute that offense occurred in North Carolina and only issue was whether defendant committed that offense); *State v. Callahan*, 77 N.C. App. 164, 169, 334 S.E.2d 424, 428 (1985) ("[A]lthough the facts supporting defendant's commission of the offenses were in dispute, the fact upon which jurisdiction was based, i.e., the location where the offenses were committed, was not in issue. Therefore, the requested instruction was properly denied.").

Similarly, when "a defendant's challenge is not to the factual basis for jurisdiction but rather to 'the theory of jurisdiction relied upon by the State,' the trial court is not required to give these instructions since the issue regarding '[w]hether the theory supports jurisdiction is a legal question' for the court." *Tucker*, 227 N.C. App. at 637, 743 S.E.2d at 61-62 (quoting *State v. Darroch*, 305 N.C. 196, 212, 287 S.E.2d 856, 866 (1982)). In *Tucker*, the defendant was charged with embezzlement. *Id.* at 628, 743 S.E.2d at 56. He did not dispute the underlying facts but argued that "jurisdiction lies solely in the state where defendant either (1) lawfully obtained possession of his principal's property with fraudulent intent; or (2) misapplied or converted the funds for his own use." *Id*. at 637-38, 743 S.E.2d at 62. This Court concluded that the defendant's jurisdictional challenge addressed only the State's legal theory of jurisdiction. *Id.* at 638, 743 S.E.2d at 62. It was thus a legal question for the court and a jury instruction was not required. *Id.*

Here, a person is guilty of child abduction if he or she "abducts or induces any minor child who is at least four years younger than the person to leave any person, agency, or institution lawfully entitled to the child's custody, placement, or care . . . ." N.C. Gen. Stat. § 14-41(a) (2011). It is "not necessary for the State to show she was carried away by force, but evidence of fraud, persuasion, or other inducement exercising controlling influence upon the child's conduct would be sufficient to sustain a conviction" for this offense. *State v. Ashburn*, 230 N.C. 722,

723, 55 S.E.2d 333, 333-34 (1949) (holding evidence that 11-year-old girl consented to defendant's marriage proposal, defendant drove to girl's school during recess, "said to her, 'Come on, let's go,' and she got in the car with him and he drove away" and "[t]his was without the knowledge or consent of her mother" was sufficient to sustain conviction for child abduction).

In this case, the evidence shows, and defendant does not dispute, that Anna was either abducted or defendant's final act of inducing her to leave her parents occurred when defendant picked Anna up down the street from her parents' home in Rocky Point, North Carolina. Therefore, the child abduction occurred, at least in part, in North Carolina. Further, since defendant did not contend that he had "been placed in jeopardy for the identical offense" in Florida, jurisdiction in North Carolina was proper. *See* N.C. Gen. Stat. § 15A-134.

Defendant, however, focuses on the element of inducement and argues that any inducement occurred with his telephone calls to Anna made from Florida. Defendant further argues that a disputed issue of fact exists regarding whether any of the 10 phone calls from defendant to Anna on the day he drove to pick her up were placed while he was in North Carolina.

In support of his argument that this factual dispute draws into question North Carolina's jurisdiction, defendant cites *State v. Kirk*, 221 N.C. App. 245, 725 S.E.2d 923, 2012 WL 1995293, at *10, 2012 N.C. App. LEXIS 674, at *26 (unpublished), *disc. review denied*, 366 N.C. 233, 731 S.E.2d 413 (2012), another child abduction case. In *Kirk*, this Court held that emails sent by the defendant from a North Carolina computer to the victim saying " 'I think I love you' " and " 'I'm coming to get you' " were sufficient to show that the essential act of inducement took place in North Carolina. *Id.* While *Kirk*, as an unpublished opinion, is not controlling, its reasoning does not suggest a different result in this case. *Kirk* simply holds that jurisdiction in North Carolina may be based on acts of inducement prior to the victim's actually leaving the custody of her parents. *Kirk* does not -- as it could not -- hold that only the element of inducement and no other element may be the basis for jurisdiction in North Carolina with respect to a charge of child abduction.

In this case, therefore, any dispute over where the acts of inducement took place are immaterial to the question of North Carolina's jurisdiction because defendant does not dispute that he picked Anna up -- and Anna left her parents' custody -- in Rocky Point. Since there was no factual dispute regarding the basis for jurisdiction, the issue was a

question of law to be decided by the trial court. The trial court properly found that an essential act of the crime of child abduction took place in North Carolina and did not err in denying defendant's request for a jury instruction on jurisdiction.

II

[2] Defendant next argues that the trial court should have granted his motion to dismiss the charge of felonious restraint. "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).

It is well established that " '[u]pon 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). When reviewing motions to dismiss, " 'we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences.' " *Fritsch*, 351 N.C. at 378-79, 526 S.E.2d at 455 (quoting *Barnes*, 334 N.C. at 75, 430 S.E.2d at 914).

A defendant may be found guilty of felonious restraint "if he unlawfully restrains another person without that person's consent, or the consent of the person's parent or legal custodian if the person is less than 16 years old, and moves the person from the place of the initial restraint by transporting him in a motor vehicle or other conveyance." N.C. Gen. Stat. § 14-43.3 (2011). Defendant argues that there was insufficient evidence that he "restrained" Anna.

N.C. Gen. Stat. § 14-43.3 specifies that "[f]elonious restraint is considered a lesser included offense of kidnapping." Consequently, the requirement for "restraint" for a charge of kidnapping is the same as the requirement of "restraint" for a charge of felonious restraint.

Defendant argues that his motion to dismiss should have been allowed because he did not prevent Anna from leaving his truck, he did not physically restrain her, he did not force her out of her house, and he did not make any threats to her. Our courts have, however, explained that "[t]he term 'restrain,' while broad enough to include a restriction upon freedom of movement by confinement, connotes also such a restriction,

by force, threat *or fraud*, without a confinement." *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978) (emphasis added). Specifically, "restraint" can also occur when "one person's freedom of movement is restricted due to another's fraud or trickery." *State v. Sturdivant*, 304 N.C. 293, 307, 283 S.E.2d 719, 729 (1981).

In *Sturdivant*, the Supreme Court held that the evidence was sufficient to show "an effective restraint of the victim in her automobile" when, after helping the victim who was experiencing car trouble on her way home to South Carolina, the defendant entered the victim's car "under the fraudulent pretext of seeking a ride to the home of a crippled friend." *Id.* at 306, 283 S.E.2d at 728. The Court explained that "[t]his constraint of the victim continued as defendant directed her to turn off the highway onto a dirt road, whereupon he cut off the car engine, made physical advances upon her, refused her repeated requests for him to leave the vehicle and later, while persisting in the pretense of going to the home of a crippled friend, made her drive still further along that deserted road." *Id.*, 283 S.E.2d at 728-29. In concluding that this restraint was sufficient to support the charge of kidnapping, the Court noted: "A kidnapping can be just as effectively accomplished by fraudulent means as by the use of force, threats or intimidation." *Id.* at 307, 283 S.E.2d at 729.

Applying these principles, this Court held in *State v. Williams*, 201 N.C. App. 161, 172, 689 S.E.2d 412, 417, 418 (2009), that there was sufficient evidence that the defendant "confined, restrained, or removed" the victim when he "induced [the victim] to enter his car on the pretext of paying her money in return for a sexual act" when in reality his intent was to assault and rob the victim. This Court concluded that "a reasonable mind could conclude from the evidence that had [the victim] known of such intent, she would not have consented to have been moved by defendant from the place where she first encountered him." *Id.*, 689 S.E.2d at 418.

In this case, as in *Sturdivant* and *Williams*, the evidence, when viewed in the light most favorable to the State, is sufficient to allow a reasonable jury to find that defendant restrained Anna in his truck through fraud. The evidence shows that defendant, a man in this thirties, had formed an inappropriate relationship with a nine-year-old girl and gained her trust and strengthened the secret relationship over the following five-year period. Anna confided in him that she had been sexually abused by her older brother and that she feared he would rape her again when he moved back to North Carolina. When her brother tried to break into her room, Anna called defendant, and he offered to come get her

and bring her to Florida to live with him -- in other words, he offered to rescue her from her brother. When Anna met him at the end of her street, he did not greet her in a sexual way, but rather gave her a deceptively innocent kiss on the cheek. Then, shortly after they arrived at his house in Florida, he took away Anna's clothes, pinned her to the bed, and had non-consensual sex with her.

A reasonable juror could conclude from this evidence that defendant duped Anna into getting into his car and traveling to Florida by assuring her that his intent was to rescue her from further sexual assaults by her brother when instead his intent was to isolate her so that he could sexually assault her himself. A reasonable juror could further conclude that defendant's failure to tell Anna that he intended to have sex with her and his kiss on her cheek were each intended to conceal from her his true intentions and that she would not have gone with him had he been honest with her.

Defendant, however, argues that there is no evidence of fraud because representations that he promised to help Anna escape from her brother were not false. It is well established, however, that fraud may be based upon an omission.

> Fraud has no all-embracing definition. Because of the multifarious means by which human ingenuity is able to devise means to gain advantages by false suggestions and concealment of the truth, and in order that each case may be determined on its own facts, it has been wisely stated that fraud is better left undefined, lest, as *Lord Hardwicke* put it, the craft of men should find a way of committing fraud which might escape a rule or definition. However, in general terms fraud may be said to embrace all acts, *omissions*, and *concealments* involving a breach of legal or equitable duty and resulting in damage to another, or *the taking of undue or unconscientious advantage of another*.

Vail v. Vail, 233 N.C. 109, 113, 63 S.E.2d 202, 205 (1951) (emphasis added) (internal citations and quotation marks omitted). Thus, fraud may be based upon defendant's failure to make clear to Anna his intentions to have sex with her when he knew she thought she was being rescued.

Defendant argues further that, in any event, Anna was not deceived because she knew he wanted to have sex with her, and there is no evidence that Anna would not have gone to Orlando with him had he told her of his actual intentions. He points to evidence that he had told Anna

on prior occasions that he wanted to have sex with her and that, when asked whether she would have gone with defendant if he had told her that they were going to have sex, she responded, "I'm not sure." This argument, however, views the evidence in the light most favorable to the defendant, contrary to the well-established standard of review for motions to dismiss. A reasonable juror could have concluded from all the evidence that Anna did not understand that she would be forced to have sex with defendant and that she would not have left with defendant if she had known that she would have no choice.

We, therefore, conclude that the State presented substantial evidence that defendant restrained Anna in his truck by inducing her through fraud to enter his truck and drive to Florida. Accordingly, the trial court properly denied defendant's motion to dismiss the charge of felonious restraint.

No error.

Judges ROBERT C. HUNTER and McCULLOUGH concur.

BLAIR INVESTMENTS, LLC, PETITIONER
v.
ROANOKE RAPIDS CITY COUNCIL AND CITY OF ROANOKE RAPIDS, RESPONDENTS

No. COA13-690

Filed 17 December 2013

Zoning—erroneous denial of special use permit—cell tower

The trial court erred by affirming the city council's decision to deny petitioner's application for a special use permit. Petitioner made a *prima facie* case that it was entitled to a special use permit to construct a cell tower and the city council's denial of petitioner's application was not supported by competent, material, and substantial evidence.

Appeal by Petitioner from order entered 25 February 2012 by Judge Alma L. Hinton in Halifax County Superior Court. Heard in the Court of Appeals 4 November 2013.

Richard E. Jester for petitioner-appellant.

Chichester Law Office, by Geoffrey P. Davis, and Gilbert W. Chichester, for respondent-appellees.

STEELMAN, Judge.

Where petitioner made a *prima facie* case that it was entitled to a special use permit to construct a cell tower and the city council's denial of petitioner's application was not supported by competent, material, and substantial evidence, the trial court erred by affirming the city council's decision.

I. Factual and Procedural Background

Blair Investors, LLC, (petitioner), a North Carolina limited liability corporation, leased a 100 square foot site in Roanoke Rapids to U.S. Cellular, which planned to install a cell phone tower. The property is zoned I-1 Industrial by the City of Roanoke Rapids, a zoning category that allows placement of a cellular phone tower upon granting of a special use permit.

Petitioner submitted an application to the Roanoke Rapids Planning and Development Department (the planning department) for a special use permit to construct the cell tower, and on 8 August 2012 the planning

department submitted a report to the mayor of Roanoke Rapids and to the Roanoke Rapids City Council (the council) (respondent, with City of Roanoke Rapids, respondents) recommending approval of the application. On 14 August 2012 the council held a public hearing on petitioner's application. Sworn testimony was offered by the director of the planning department, who introduced the department's report, and by several area residents who commented on petitioner's application. At a subsequent meeting on 9 October 2012 the council denied the special use permit on the grounds that "more probably than not" the proposed tower would "endanger the public health or safety" and would "not be in harmony with the surrounding area."

On 14 November 2012, petitioner filed a petition for writ of *certiorari* in Superior Court, seeking review of respondent's decision. On 25 February 2012, the trial court entered an order affirming respondent's denial of petitioner's application for a special use permit.

Petitioner appealed.

II. Evidentiary Support for Denial of Special Use Permit

In its first argument, petitioner contends that the trial court erred in affirming the decision of the council, on the grounds that the council's ruling was "not supported by any relevant evidence." We agree.

A. Standard of Review

"[T]he terms 'special use' and 'conditional use' are used interchangeably[.] . . . [A] conditional use or a special use permit 'is one issued for a use which the ordinance expressly permits in a designated zone upon proof that certain facts and conditions detailed in the ordinance exist.' " *Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 623, 265 S.E.2d 379, 381 (1980) (quoting *Refining Co. v. Board of Aldermen*, 284 N.C. 458, 467, 202 S.E. 2d 129, 135 (1974) (other citation omitted).

"A particular standard of review applies at each of the three levels of this proceeding - the [council], the superior court, and this Court. First, the [council] is the finder of fact in its consideration of the application for a special use permit. The [council] is required, as the finder of fact, to

> "follow a two-step decision-making process in granting or denying an application for a special use permit. If an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, *prima facie* he is entitled to

> it. If a *prima facie* case is established, [a] denial of the permit [then] should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record."

Davidson Cty. Broadcasting Inc. v. Rowan Cty. Bd. of Comm'rs, 186 N.C. App. 81, 86, 649 S.E.2d 904, 909 (2007) (quoting *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 12, 565 S.E.2d 9, 16-17 (2002) (internal quotation omitted), *disc. review denied*, 362 N.C. 470, 666 S.E.2d 119 (2008).

"Judicial review of town decisions to grant or deny conditional use permits is provided for in G.S. 160A-388(e) which states, *inter alia*, 'Every decision of the board shall be subject to review by the superior court by proceedings in the nature of *certiorari*.' " *Concrete Co.*, 299 N.C. at 623, 265 S.E.2d at 381. "[T]he task of a court reviewing a decision on an application for a conditional use permit made by a town board sitting as a quasi-judicial body includes: (1) [r]eviewing the record for errors in law, (2) [i]nsuring that procedures specified by law in both statute and ordinance are followed, (3) [i]nsuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents, (4) [i]nsuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and (5) [i]nsuring that decisions are not arbitrary and capricious." *Concrete Co.* at 626, 265 S.E.2d at 383.

"When this Court reviews a superior court's order regarding a zoning decision by a Board of Commissioners, we examine the order to: '(1) determin[e] whether the [superior] court exercised the appropriate scope of review and, if appropriate, (2) decid[e] whether the court did so properly.' " *Davidson Cty.*, 186 N.C. App. at 87, 649 S.E.2d at 910 (quoting *Mann Media*, 356 N.C. at 14, 565 S.E.2d at 18 (citations and quotations omitted).

"There are two standards of review that may apply to special use permit decisions. Whole record review, a deferential standard, applies where we must determine if a decision was supported by the evidence or if it was arbitrary or capricious. However, errors of law are reviewed *de novo*." *American Towers v. Town of Morrisville*, __ N.C. App. __, __, 731 S.E.2d 698, 701 (2012) (citing *Mann Media* at 13, 565 S.E.2d at 17), *disc. review denied*, __ N.C. __, 743 S.E.2d 189 (2013)).

B. Analysis

"When an applicant for a conditional use permit 'produces competent, material, and substantial evidence of compliance with all ordinance

requirements, the applicant has made a *prima facie* showing of entitlement to a permit.' " *Howard v. City of Kinston*, 148 N.C. App. 238, 246, 558 S.E.2d 221, 227 (2002) (quoting *SBA, Inc. v. City of Asheville City Council*, 141 N.C. App. 19, 27, 539 S.E.2d 18, 22 (2000) (internal citation omitted). "Substantial evidence is defined as 'that which a reasonable mind would regard as sufficiently supporting a specific result.' " *Baker v. Town of Rose Hill*, 126 N.C. App. 338, 341, 485 S.E.2d 78, 80 (1997) (quoting *CG&T Corp. v. Bd. of Adjustment of Wilmington*, 105 N.C. App. 32, 40, 411 S.E.2d 655, 660 (1992) (internal citation omitted). Material evidence is evidence "[h]aving some logical connection with the consequential facts," BLACK'S LAW DICTIONARY 998 (8th ed. 2004), and competent evidence is generally defined as synonymous with admissible evidence, BLACK'S LAW DICTIONARY 595 (8th ed. 2004). Thus, substantial, competent, material evidence is evidence that is admissible, relevant to the issues in dispute, and sufficient to support the decision of a reasonable fact-finder. "[W]e review de novo the initial issue of whether the evidence presented by petitioner met the requirement of being competent, material, and substantial." *American Towers*, __ N.C. App. at __, 731 S.E.2d at 701 (citing SBA, 141 N.C. App. at 23-29, 539 S.E.2d at 20-24).

We first consider whether petitioner made a *prima facie* case of entitlement to a special use permit. According to the minutes of the public hearing, the director of the planning department, Ms. Lasky, offered sworn testimony and introduced the planning department's report finding in part that (1) a wireless communication tower is "a use that is permitted with the approval of a Special Use Permit"; (2) the tower had been "designed by a North Carolina Professional Engineer" and its design and construction "will comply with all applicable structural engineering requirements"; (3) the permit was within the planning department's jurisdiction; (4) the application was complete; and (5) the tower would "comply with all of the requirements of The Land Use Ordinance if completed as proposed in the application."

The planning department's report also concluded that it was "probably true" that ingress and egress to the lot was safe and convenient; that the effect of signs, lights, parking, noise, and refuse disposal on neighboring properties would be similar to other uses permitted in the zoning district; that utilities were available; and that the tower would be appropriately screened and would preserve the natural features of the property.

Petitioner's application for a special use permit, which is over 100 pages, included the sworn affidavit of radiofrequency engineer Xiyang Liu averring that the tower would "comply with FCC and FAA rules

concerning construction requirements, safety standards, interference protection, power and height limitations, and radio frequency standards," and that it would "not interfere with any other radio devices such as TV's, radios or other cellular phones" and would "not interfere with any household products such as microwave ovens." Other documents in the application established that the tower met the requirements of the National Environmental Policy Act in that it would not adversely affect any endangered species, critical habitats, or historic properties; would not affect American Indian religious sites; would not involve any significant change in wetland fill, deforestation, or water diversion; was not located in a 100 year flood plain; and would not threaten human exposure to levels of radiofrequency radiation. Based on its assessment of these and other relevant factors, the planning department's report concluded that if completed as proposed the tower "more probably than not"

> (a) *Will not materially endanger the public health or safety[.]*
>
> The staff has determined that this is probably true: the proposed use will be located within an existing industrial facility [and] . . . will be required to meet all governmental and industry safety guidelines. . . . An assessment of the previously referenced seven items . . . indicates no specific endangerment to the public health or safety that is not adequately addressed.
>
> (b) *Will not substantially injure the value of the adjoining or abutting property[.]*
>
> The staff has determined that this is probably true. . . .
>
> (c) *Will be in harmony with the area in which it is to be located[.]*
>
> The staff has determined that this is probably true: its use as proposed will be in harmony with the existing surrounding uses in the area based on [the] previously referenced seven items[.] . . .
>
> (d) *The use will be in general conformity with the Comprehensive Development Plan, Thoroughfare Plan, or other plan officially adopted by the City Council.*
>
> The staff has determined that this is probably true.

The planning department's report also stated that petitioner had "addressed the requisite questions, which must be answered by the

City Council in the application" and that "it is the Staff's opinion that the request satisfactorily meets the requirements of . . . [the] Land Use Ordinance."

We hold that the information in the planning department's report in conjunction with the director's testimony, constituted "competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit." *Mann Media*, 356 N.C. at 12, 565 S.E.2d at 16. We agree with petitioner that it made a *prima facie* showing that it was entitled to a special use permit.

Once an applicant makes a *prima facie* showing of entitlement to a special use permit, "the burden of establishing that the approval of a conditional use permit would endanger the public health, safety, and welfare falls upon those who oppose the issuance of the permit. Denial of a conditional use permit must be based upon findings which are supported by competent, material, and substantial evidence appearing in the record." *Howard*, 148 N.C. App. at 246, 558 S.E.2d at 227 (citing *Woodhouse v. Board of Commissioners*, 299 N.C. 211, 219, 261 S.E.2d 882, 888 (1980) (internal quotation omitted).

> Moreover, a city council's denial of a conditional use permit based solely upon the generalized objections and concerns of neighboring community members is impermissible. Speculative assertions, mere expression of opinion, and generalized fears "about the possible effects of granting a permit are insufficient to support the findings of a quasi-judicial body." In other words, the denial of a conditional use permit may not be based on conclusions which are speculative, sentimental, personal, vague, or merely an excuse to prohibit the requested use.

Howard at 246, 558 S.E.2d at 227 (citing *Gregory v. County of Harnett*, 128 N.C. App. 161, 165, 493 S.E.2d 786, 789 (1997), quoting *Sun Suites Holdings, LLC v. Board of Aldermen of Town of Garner*, 139 N.C. App. 269, 276, 533 S.E.2d 525, 530 (internal citation omitted), *disc. review denied*, 353 N.C. 280, 546 S.E.2d 397 (2000), and citing *Woodhouse*, 299 N.C. at 220, 261 S.E.2d at 888).

We next consider whether the record contains substantial, competent, and material evidence to support denial of petitioner's application for a permit. The only evidence offered in opposition to issuance of the special use permit consisted of comments by several local residents:

1. Mr. Steve Hill stated that his "main concerns" were with David King's maintenance of the lot which, in his opinion, had been "an eyesore to the City and neighborhood for many years[.] He said that the tower would be visible from his house and that he did "not believe this would be good for his property value."

2. Mrs. Connie Hill stated that her "concerns" were "the same as her husband's" and that when she looked outside she saw "a building falling down[.]" Mrs. Hill said that she is not opposed to a cell tower but "does not want to look at one."

3. Mr. Jessie Bass stated "one of his major concerns is whether or not the cell tower will interfere with the wireless devices he has in his home" and that the city should have taken action to address maintenance of the property before now.

4. Dr. Hashmat Chaudhry stated his office was "across the street from this property," that some of his patients had complained about an unpleasant smell from the lot, and that "Mr. King's garbage blows onto his property during storms." He asked whether items stored on the property constituted a fire hazard, and stated that he was "concerned about the danger to the public" from the property. He also said that he did "not see a need for the cell tower."

5. Mr. Craig Moseley "stated this proposed tower will almost be in his backyard" and "asked if Mr. King would maintain the tower as he does the rest of the property."

6. Mr. Dennis Blackmon "stated his main concern is with the existing building."

7. Ms. Evelyn Dawson "stated she would like to know the possible negative health and environmental side effects of such a structure" and that "she feels the tower might be a blight on a well-traveled area of the community."[1]

The comments from area residents were primarily concerned with the condition of a building on the property. To the extent that these

1. According to the minutes of the public hearing, these comments constitute the entire extent of evidence in opposition to the proposed cell tower. No transcript was made of the hearing.

speakers addressed the cell tower, their comments consisted entirely of speculative opinions, unsupported by any documentary or testimonial evidence, or of statements informing the council that the speaker had a question or a "concern" about a particular issue.

Respondent denied petitioner's application for a special use permit on the grounds that the tower would more probably than not "materially endanger the public health or safety" and that it was "not in harmony with the area in which it is to be located." However, no evidence was introduced that was competent or material on either the health and safety implications of the tower or whether it would be in harmony with the surrounding area. "The inclusion of the particular use in the ordinance as one which is permitted under certain conditions, is equivalent to a legislative finding that the prescribed use is one which is in harmony with the other uses permitted in the district." *Woodhouse*, 299 N.C. at 216, 261 S.E.2d at 886. Respondents cite no evidence that the tower would not be in harmony with the area, nor any evidence about health or safety issues. We hold that respondents' denial of petitioner's application was not supported by substantial, material, and competent evidence.

Respondents allege on appeal that the "concerns" of local residents constituted substantial, material, and competent evidence. However, respondents neither acknowledge nor attempt to distinguish precedent holding that a board's decision to deny a permit request may not be based on speculative opinions:

> The evidence relied upon by the respondent Board to support its finding is incompetent as opinion testimony and is highly speculative in nature. "The denial of a special exception permit may not be founded upon conclusions which are speculative, sentimental, personal, vague or merely an excuse to prohibit the use requested."

Woodhouse, 299 N.C. at 220-21, 261 S.E.2d at 888 (quoting *Baxter v. Gillispie*, 60 Misc. 2d 349, 354, 303 N.Y.S. 2d 290, 296 (1969).

We hold that the council's denial of petitioner's application for a special use permit was not supported by substantial, competent, and material evidence. "When a Board action is unsupported by competent substantial evidence, such action must be set aside for it is arbitrary." *MCC Outdoor, LLC v. Town of Franklinton Bd. of Comm'rs*, 169 N.C. App. 809, 811, 610 S.E.2d 794, 796 (citing *Refining Co.*, 284 N.C. at 468, 202 S.E.2d at 135-36), *disc. review denied*, 359 N.C. 634, 616 S.E.2d 540 (2005). Where the trial court affirms the denial of a permit application when the denial was not based on sufficient evidence, the trial court

must be reversed. *MCC Outdoor*, 169 N.C. App. at 815, 610 S.E.2d at 798. We hold that the trial court's order must be reversed.

Petitioner has also argued that the trial court's order should be reversed on the grounds that the council's decision was internally inconsistent because it found both that the proposed cell tower complied with the town's planning ordinance and also that it was not in harmony with the surrounding area, and because the council's ruling violated the federal Telecommunications Act. However, having reversed the trial court on the grounds discussed above, we need not address these alternative bases for reversal.

Conclusion

We conclude that the trial court erred by affirming the decision of the council to deny petitioner's application for a special use permit and that its order should be reversed and the case remanded to Halifax County Superior Court for remand to the city council with instructions to grant petitioner's application for a special use permit.

REVERSED.

Chief Judge MARTIN and Judge DILLON concur.

CAPITAL BANK, N.A., PLAINTIFF
v.
JULIAN E. CAMERON AND ALFRED B. COOPER, JR., DEFENDANTS

No. COA13-696

Filed 17 December 2013

1. Appeal and Error—interlocutory orders and appeals—venue selection clause—substantial right

Defendants appeal was interlocutory but a substantial right was affected because the appeal involved a venue selection clause.

2. Venue—selection clause—not exclusive

The trial court did not abuse its discretion by finding that venue was proper in Wake County, where plaintiff had its principal place of business, rather than exclusively in Alamance County, as specified in a clause in loan documents. The plain and unambiguous language of the guaranty agreement contained a mandatory forum selection

clause with respect to personal jurisdiction and a permissive consent to jurisdiction clause with respect to venue. While both clauses appeared together in the same sentence, "exclusive" modified the parties' agreement as to personal jurisdiction, not venue.

Appeal by defendant from order entered 29 November 2012 by Judge G. Wayne Abernathy in Wake County Superior Court. Heard in the Court of Appeals 6 November 2013.

Williams Mullen, by Gilbert C. Laite, III and Kelly Colquette Hanley, for plaintiff-appellee.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Defendant Alfred B. Cooper, Jr. ("Defendant") appeals from an order denying his motion to dismiss under Rule 12(b)(3) of the North Carolina Rules of Civil Procedure for improper venue.[1] Defendant contends that contractual language effective between the parties limits venue exclusively to Alamance County. Thus, because the instant action was filed in Wake County, Defendant contends that the trial court erred in denying his Rule 12(b)(3) motion. We disagree and affirm the trial court's order.

I. Factual & Procedural History

On 24 May 2012, Plaintiff Capital Bank, N.A. ("Plaintiff") filed a complaint in Wake County Superior Court seeking to collect on an alleged deficiency owed by Defendants after a foreclosure sale failed to satisfy the underlying debt. The facts as alleged in the complaint are as follows.

Plaintiff is a national association organized under the laws of the United States with a principal place of business in Wake County, North Carolina. Defendants are residents of Carteret County, North Carolina.

On 3 September 2009, Plaintiff executed a loan agreement with an entity known as "Ocean King, LLC" ("Ocean King") whereby Plaintiff agreed to loan Ocean King $3,150,000 in exchange for repayment with interest. The loan agreement, which was attached and incorporated into

1. There are two defendants identified in this case—Defendant Alfred B. Cooper, Jr. and Defendant Julian E. Cameron. Defendant Julian E. Cameron took no part in this appeal. When Defendants Cameron and Cooper are referred to collectively, "Defendants" will be used.

the complaint by reference, shows that Defendants signed for Ocean King in their official capacities as managers of the company. Defendants also executed a promissory note on behalf of Ocean King in favor of Plaintiff, which was secured by a deed of trust on real property and fixtures owned by Ocean King. Additionally, Defendants executed a personal guaranty agreement whereby Defendants unconditionally guaranteed Ocean King's performance and payment under the loan agreement and the promissory note.

Plaintiff alleges that beginning on 5 March 2011, Ocean King defaulted on its obligations under the loan agreement and promissory note. Subsequently, Plaintiff foreclosed on the deed of trust, which resulted in a deficiency balance on the promissory note. Plaintiff now seeks to collect the outstanding deficiency from Defendants as guarantors of the note.

After Plaintiff filed its complaint, Defendant filed a pre-answer motion to dismiss pursuant to Rule 12(b)(3) of the North Carolina Rules of Civil Procedure for improper venue. Specifically, Defendant asserted that the loan agreement and the guaranty agreement, by their terms, limit venue exclusively to Alamance County. Paragraph 14.7 of the loan agreement provides that "[b]y their signatures below, the parties consent to the exclusive, personal jurisdiction by the courts of North Carolina and to venue in Alamance County, North Carolina and waive any objection thereto." Likewise, Paragraph 16 of the guaranty agreement provides that "[b]y its signature below, Guarantor consents to the exclusive, personal jurisdiction by the courts of North Carolina and to venue in Alamance County, North Carolina and waives any objection thereto." Defendant Cameron filed an answer and consented to venue in Wake County.

Following a hearing on 6 November 2012, the trial court entered an order denying Defendant's Rule 12(b)(3) motion. Specifically, the trial court concluded that venue was not exclusive to Alamance County and that venue is proper in Wake County. Defendant filed timely notice of appeal.

II. Jurisdiction & Standard of Review

[1] Defendant's appeal from the trial court's order denying Defendant's Rule 12(b)(3) motion to dismiss is interlocutory. *See Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) ("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."). "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, 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).

Here, the trial court's order denying Defendant's Rule 12(b)(3) motion affects a substantial right. *See Cable Tel Servs., Inc. v. Overland Contracting, Inc.*, 154 N.C. App. 639, 641, 574 S.E.2d 31, 33 (2002) ("[A]lthough an appeal from the denial of a motion to dismiss . . . is ordinarily not appealable, this matter is properly before this Court because North Carolina case law establishes firmly that an appeal from a motion to dismiss for improper venue based upon a jurisdiction or venue selection clause dispute deprives the appellant of a substantial right that would be lost." (quotation marks and citation omitted)). Accordingly, this Court has jurisdiction to hear Defendant's appeal pursuant to N.C. Gen. Stat. §§ 1-277(a), 7A-27(d).

[2] "On review of the denial of the motion to dismiss based on a venue selection clause, we apply an abuse of discretion standard." *Cable Tel Servs.*, 154 N.C. App. at 644, 574 S.E.2d at 34. "Under the abuse-of-discretion standard, we review to determine whether a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision. *Mark Grp. Int'l, Inc. v. Still*, 151 N.C. App. 565, 566, 566 S.E.2d 160, 161 (2002).

III. Analysis

In civil actions where both the plaintiff and the defendant are North Carolina residents, our venue statute provides that the action "must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement." N.C. Gen. Stat. § 1-82 (2011). The unchallenged findings of fact before this Court establish that Plaintiff has a registered office and maintains its principal place of business in Wake County and that Defendants are residents of Carteret County. Accordingly, because Plaintiff is a resident of Wake County pursuant to N.C. Gen. Stat. § 1-79(a) (2011), venue is proper in Wake County under our default venue rule.[2]

Even so, "a contractual forum selection clause can modify this default venue rule." *LendingTree, LLC v. Anderson*, ___ N.C. App. ___,

2. Venue would also be proper under the default rule in Carteret County, where Defendants reside.

___, 747 S.E.2d 292, 296–97 (2013). Defendant contends that Paragraph 14.7 of the loan agreement and Paragraph 16 of the guaranty agreement contain a mandatory forum selection clause that limits venue in the present action to Alamance County.[3] Paragraph 16 of the guaranty agreement provides that "[b]y its signature below, Guarantor consents to the exclusive, personal jurisdiction by the courts of North Carolina and to venue in Alamance County, North Carolina and waives any objection thereto." For the following reasons, we hold that venue is not exclusive to Alamance County under a plain reading of this contractual language.

Generally, there are three types of contractual provisions that parties use to avoid litigation concerning jurisdiction and governing law: (1) choice of law clauses, (2) consent to jurisdiction clauses, and (3) forum selection clauses. *Gary L. Davis, CPA, P.A. v. Hall*, ___ N.C. App. ___, ___, 733 S.E.2d 878, 880 (2012).

> Choice of law clauses specify which state's substantive laws will apply to any arising disputes. Consent to jurisdiction clauses grant a particular state or court personal jurisdiction over those consenting to it, authoriz[ing] that court or state to act against him. . . . [A] true forum selection provision[] goes one step further than a consent to jurisdiction provision. A forum selection provision designates a particular state or court as the jurisdiction in which the parties will litigate disputes arising out of the contract and their contractual relationship.

Id. (quotation marks and citations omitted) (first alteration in original). In summary, "a forum selection clause designates the venue, a consent to jurisdiction clause waives personal jurisdiction and venue, and a choice of law clause designates the law to be applied." *Corbin Russwin, Inc. v. Alexander's Hardware, Inc.*, 147 N.C. App. 722, 726–27, 556 S.E.2d 592, 596 (2001).

Importantly, "when a jurisdiction is specified in a provision of contract, the provision generally will not be enforced as a mandatory selection clause without some further language that indicates the parties' intent to make jurisdiction exclusive." *Mark Grp. Int'l*, 151 N.C. App. at 568, 566 S.E.2d at 162. "[M]andatory forum selection clauses recognized by our appellate courts have contained words such as 'exclusive' or 'sole'

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3. Because the contractual language at issue is substantially the same in both the loan agreement and the guaranty agreement, and because Defendants are being sued as guarantors, Paragraph 16 of the guaranty agreement will be the focus of our analysis.

or 'only' which indicate that the contracting parties intended to make jurisdiction exclusive." *Id. See, e.g.*, *Internet E., Inc. v. Duro Commc'ns, Inc.*, 146 N.C. App. 401, 403, 553 S.E.2d 84, 85–86 (2001) (finding that an agreement contained a mandatory forum selection clause where the agreement provided that "the State courts of North Carolina shall have sole jurisdiction . . . and that venue shall be proper and shall lie exclusively in the Superior Court of Pitt County, North Carolina"); *Appliance Sales & Serv., Inc. v. Command Elecs. Corp.*, 115 N.C. App. 14, 23, 443 S.E.2d 784, 790 (1994) (finding contractual language providing that "the Courts in Charleston County, South Carolina shall have exclusive jurisdiction and venue" to be a mandatory forum selection clause). "In the absence of such language, the clause is viewed as permissive, consistent with a consent to jurisdiction clause." *Gary L. Davis, CPA*, ___ N.C. App. at ___, 733 S.E.2d at 880.

Here, the plain and unambiguous language of the guaranty agreement contains a mandatory forum selection clause with respect to personal jurisdiction and a permissive consent to jurisdiction clause with respect to venue. While both clauses appear together in the same sentence, "exclusive" modifies the parties' agreement as to personal jurisdiction, not venue. This distinction is illustrated by the addition of a numerical marker before each clause: "Guarantor consents [1] to the exclusive, personal jurisdiction by the courts of North Carolina and [2] to venue in Alamance County, North Carolina and waives any objection thereto." Without additional evidence that the parties intended to make venue exclusive to Alamance County, the clause must be interpreted as a permissive consent to jurisdiction clause. *See id.*; *see also Johnston Cnty. v. R.N. Rouse & Co., Inc.*, 331 N.C. 88, 95, 414 S.E.2d 30, 34 (1992) ("[T]he most fundamental principle of contract construction [is] that the courts must give effect to the plain and unambiguous language of a contract.").

Accordingly, because venue is not exclusive to Alamance County under the plain language of the guaranty agreement, and because venue is proper in Wake County under N.C. Gen. Stat. § 1-82, we find no error in the trial court's order.

IV. Conclusion

For the foregoing reasons, we affirm the order of the trial court denying Defendant's Rule 12(b)(3) motion to dismiss for improper venue.

Affirmed.

Judges ROBERT C. HUNTER and CALABRIA concur.

MARK ELLIOTT, TOR AND MICHELLE GABRIELSON, MICHIHIRO AND YOKO KASHIMA, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS
v.
KB HOME NORTH CAROLINA, INC. AND KB HOME RALEIGH-DURHAM, INC., DEFENDANTS, AND KB HOME RALEIGH-DURHAM, INC., THIRD-PARTY PLAINTIFF
v.
STOCK BUILDING SUPPLY, LLC, THIRD-PARTY DEFENDANT

No. COA13-352

Filed 17 December 2013

1. Appeal and Error—interlocutory orders and appeals—denial of arbitration—substantial right

An order denying arbitration is immediately appealable because it involves a substantial right which might be lost if appeal is delayed.

2. Arbitration and Mediation—waiver—federal act inapplicable in state court

The trial court did not err by failing to determine, prior to deciding the issue of waiver, whether the Federal Arbitration Act (FAA) or the North Carolina Revised Uniform Arbitration Act controlled. Section 3 of the FAA only applies in federal district court, not in state court.

3. Arbitration and Mediation—waiver—inconsistency—asserting right to arbitrate

The trial court did not err by determining that that defendant's actions were inconsistent with its right to arbitration, and thus, constituted waiver with respect to plaintiffs. Competent evidence supported the trial court's findings that defendant, over more than a three-year period in which it participated in the litigation of this action, did nothing to assert any right to arbitrate. Further, the approximately $100,000.00 in fees incurred by plaintiffs in litigating the claims constituted significant expenditures of time and expenses.

4. Arbitration and Mediation—waiver—unnamed class members

The trial court did not err by ruling that defendant had waived any right to arbitrate with respect to the unnamed class members. More than three years and four months passed between the initiation of this class action and defendant's motion to compel arbitration. Defendant litigated this case that entire time while sitting on any contractual rights it had to arbitrate. Further, plaintiffs and their attorneys invested significant amounts of time

and sums of money prosecuting this case on behalf of themselves and the purported class.

5. Arbitration and Mediation—waiver—obligation to arbitrate

The trial court did not err by failing to rule on Stock's obligation to arbitrate. Having held that the trial court did not err in ruling that defendant had waived its rights in this regard, defendant's argument concerning Stock necessarily failed.

Appeal by Defendant KB Home Raleigh-Durham, Inc. from order entered 2 November 2012 by Judge John R. Jolly, Jr., in Superior Court, Wake County. Heard in the Court of Appeals 8 October 2013.

Whitfield Bryson & Mason LLP, by Daniel K. Bryson, Scott C. Harris, Gary E. Mason, pro hac vice, Nicholas A. Migliaccio, pro hac vice, and Jason S. Rathod, pro hac vice, for Plaintiffs-Appellees.

Bradley Arant Boult Cummings LLP, by Michael W. Knapp and Brian M. Rowlson, for Defendant/Third-Party Plaintiff-Appellant KB Home Raleigh-Durham, Inc.

Hunton & Williams LLP, by A. Todd Brown and Ryan G. Rich, for Third-Party Defendant-Appellee Stock Building Supply, LLC.

McGEE, Judge.

KB Home Raleigh-Durham, Inc. ("Defendant") is a general contractor in the business of building homes. Defendant has contracted with many people over the years to build homes, including Mark Elliott, Tor Gabrielson, Michelle Gabrielson, Michihiro Kashima, and Yoko Kashima ("Plaintiffs"). According to Defendant, each homeowner who purchased a home directly from Defendant "entered into two separate written contracts with [Defendant]: a New Home Purchase Agreement . . . and a New Home Limited Warranty Agreement[.]" Defendant alleged that both of these agreements included enforceable arbitration clauses.

Plaintiffs filed a class action complaint, "on behalf of themselves and all other[s] . . . similarly situated," against Defendant and KB Home North Carolina, Inc. on 5 December 2008, alleging breach of contract, breach of express warranties, breach of implied warranties, negligence, negligence *per se*, unfair and deceptive trade practices, and negligent misrepresentation. Plaintiffs' complaint was based upon their contentions that their homes, and those of the purported class members, were

improperly constructed in a manner allowing water and moisture to penetrate the exteriors of the houses, causing damage. Specifically, Plaintiffs alleged that the HardiPlank concrete siding on their homes had been improperly installed, and that this improper installation was the cause of the water and moisture intrusion into their homes. Defendant and KB Home North Carolina, Inc. filed a motion to dismiss on 6 February 2009. The matter was heard on 22 April 2009. By order filed 17 July 2009, the trial court dismissed KB Home North Carolina, Inc. from this action.

Defendant answered Plaintiffs' complaint on 5 August 2009, denying the majority of the allegations in Plaintiffs' complaint, and pleading twenty affirmative defenses. Defendant requested that the trial court deny Plaintiffs' request for class certification, and that "all issues of fact be tried by a jury[.]" Defendant did not move to compel arbitration in response to Plaintiff's complaint. Defendant and Plaintiffs began the discovery process, and Defendant served its first set of interrogatories on Plaintiffs on 13 October 2009. In this first set of interrogatories, Defendant defined "Plaintiffs" as the named Plaintiffs along with "any other known members of the Class as asserted in Plaintiffs' Complaint[.]" Defendant filed a third-party complaint against Stock Building Supply, LLC ("Stock") on 19 January 2010. Stock was the subcontractor hired by Defendant to install the HardiPlank siding. Defendant alleged that Stock "explicitly agreed to participate in binding arbitration regarding all claims arising from the construction of Plaintiffs' homes." However, Defendant did not demand arbitration at the time it filed its third-party complaint.

This action was designated a complex business case on 17 June 2010. Defendant, Plaintiffs, and Stock jointly filed a case management report with the North Carolina Business Court on 14 September 2010, in which Defendant and Plaintiffs agreed "that pretrial proceedings and trial will take place at the North Carolina Business Court sitting in Wake County, N.C., unless otherwise agreed to by the parties and the Court[,]" and that "no controversies exist with respect to . . . venue."

It appears that Defendant's first mention of arbitration with respect to Plaintiffs is contained in a supplemental response to Plaintiffs' third set of interrogatories, dated 28 March 2011. Plaintiffs asked: "Identify any contractual obligations that Plaintiffs have failed to perform which is the basis for your [affirmative defense that 'Plaintiffs have failed to perform Plaintiffs' own contractual obligations']." Defendant responded in part: "Plaintiffs, including any unnamed potential class members, have failed to timely mediate and then arbitrate the claims as provided by the terms of the New Home Purchase Agreement and Limited Warranty

Agreement." Defendant did not, however, move to compel arbitration at that time. The action proceeded, and the trial court entered an order on 27 February 2012 certifying the class as "[a]ll persons in the State of North Carolina who own a home constructed by Defendant . . . without a weather-restrictive barrier behind the exterior veneer of HardiPlank cement fiber lap siding" (excluding certain potential class members for reasons irrelevant to this appeal). Defendant appealed the order certifying the class on 28 March 2012. Defendant, on 12 April 2012, filed a motion to stay the class certification pending appeal. Defendant's motion to stay was denied by order entered 13 April 2012. Defendant then petitioned this Court for a writ of *supersedeas*, asking this Court to stay the proceedings below. Defendant's petition was denied on 27 August 2012. Defendant also filed a petition for writ of *certiorari* with this Court on 11 July 2012.

In its notice of appeal, Defendant argued the order certifying the class was immediately appealable because it affected a substantial right. Specifically, and for the first time, Defendant contended that the order certifying the class was an "order denying arbitration" because it denied Defendant "its substantial right to bilateral arbitration with the absent class members." However, Defendant still had not attempted to enforce any right to arbitration at the time it appealed the class certification order. Defendant finally filed a motion to compel arbitration on 12 April 2012. This was Defendant's first assertion of its rights pursuant to the arbitration clauses in the two agreements.

Plaintiffs moved this Court to dismiss Defendant's appeal on 10 July 2012, and argued that Defendant's petition for writ of *certiorari* should be denied. In response, Defendant argued that the class certification order "did more than just grant class certification. It inherently and simultaneously denied [Defendant's] substantial right to arbitration. For that separate and independent reason, it is immediately appealable[.]" Plaintiffs' motion was granted and Defendant's appeal was dismissed by order entered 28 August 2012. Defendant's petition for writ of *certiorari* was denied by order entered 30 August 2012.

The trial court denied Defendant's motion to compel arbitration by order filed 2 November 2012. Defendant appeals.

I.

[1] The present appeal is from an interlocutory order. However, the order denying arbitration "is immediately appealable because it involves a substantial right which might be lost if appeal is delayed." *Prime South*

Homes v. Byrd, 102 N.C. App. 255, 258, 401 S.E.2d 822, 825 (1991) (citations omitted).

II.

[2] Initially, Defendant argues that the trial court erred in failing to determine, prior to deciding the issue of waiver, whether the Federal Arbitration Act (FAA) or the North Carolina Revised Uniform Arbitration Act (NCRUAA) controlled, because the requirements to prove waiver differ under the two acts. The "waiver" provision in the FAA argued by Defendant is contained in Section 3 of that act, but is referred to as "default" rather than "waiver." 9 USCS § 3 (a party may apply for a stay in court proceedings in order to enforce an agreement to arbitrate "providing the applicant for the stay is not in default in proceeding with such arbitration"). Defendant cites *Maxum Foundations, Inc. v. Salus Corp.*, 779 F.2d 974, 981 (4th Cir. 1985) for the proposition that: "Although this principle of 'default' is akin to waiver, the circumstances giving rise to a statutory default are limited and, in light of the federal policy favoring arbitration, are not to be lightly inferred." *Id.*

However, Section 3 of the FAA only applies in federal district court, not in state court. *See Southland Corp. v. Keating*, 465 U.S. 1, 16 n. 10, 79 L. Ed. 2d 1, 15 n. 10 (1984) ("In holding that the [FAA] preempts a state law that withdraws the power to enforce arbitration agreements, we do not hold that §§ 3 and 4 of the [FAA] apply to proceedings in state courts. Section 4, for example, provides that the Federal Rules of Civil Procedure apply in proceedings to compel arbitration. The Federal Rules do not apply in such state-court proceedings."); *Carter v. TD Ameritrade Holding Corp.*, __ N.C. App. __, __, 721 S.E.2d 256, 260 (2012); *Blow v. Shaughnessy*, 68 N.C. App. 1, 17, 313 S.E.2d 868, 877 (1984). Defendant's argument that the trial court should have determined whether the federal standard in Section 3 applies in the present case fails.

III.

[3] Public policy favors arbitration because it represents "an expedited, efficient, relatively uncomplicated, alternative means of dispute resolution, with limited judicial intervention or participation, and without the primary expense of litigation — attorneys' fees." *Nucor Corp. v. General Bearing Corp.*, 333 N.C. 148, 154, 423 S.E.2d 747, 750 (1992) (citations omitted). " '[T]he purpose of arbitration is to reach a final settlement of disputed matters without litigation . . . .' " *Gemini Drilling & Found., LLC v. National Fire Ins. Co. of Hartford*, 192 N.C. App. 376, 383, 665 S.E.2d 505, 509 (2008) (citation omitted). The seminal case in North Carolina involving waiver of a contractual right to arbitrate is

Cyclone Roofing Co. v. LaFave Co., 312 N.C. 224, 321 S.E.2d 872 (1984). In *Cyclone*, our Supreme Court discussed waiver of arbitration, holding:

> *Waiver* of a contractual right to arbitration *is a question of fact.* Because of the strong public policy in North Carolina favoring arbitration, *see* N.C. Gen. Stat. § 1-567.3 (1983), courts must closely scrutinize any allegation of waiver of such a favored right. ("[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."). Because of the reluctance to find waiver, we hold that a party has impliedly waived its contractual right to arbitration if by its delay or by actions it takes which are inconsistent with arbitration, another party to the contract is prejudiced by the order compelling arbitration.
>
> A party may be prejudiced if, for example, it is forced to bear the expenses of a lengthy trial; evidence helpful to a party is lost because of delay in the seeking of arbitration; a party's opponent takes advantage of judicial discovery procedures not available in arbitration; or, by reason of delay, a party has taken steps in litigation to its detriment or expended significant amounts of money thereupon.

Cyclone, 312 N.C. at 229-30, 321 S.E.2d at 876-77 (citations omitted) (emphasis added). The length of delay in asserting the right to arbitrate has been a factor considered in determining if waiver has occurred. *See HCW Retirement & Fin. Servs. v. HCW Employee Ben.* ___ N.C. ___, ___,747 S.E.2d 236, 239 (2013) ("In *Cyclone Roofing* this Court determined that the filing of pleadings and a month's delay before moving to compel arbitration did not constitute waiver when no discovery was conducted during the delay and no evidence was lost."); *Cyclone*, 312 N.C. at 233, 321 S.E.2d at 878; *Estate of Sykes v. Marcaccio*, 213 N.C. App. 563, 569, 713 S.E.2d 531, 536, *disc. review denied*, 365 N.C. 353, 717 S.E.2d 746 (2011); *Gemini*, 192 N.C. App. at 382, 665 S.E.2d at 509.

Despite the language of *Cyclone*, our Supreme Court has not addressed the weight to be given a trial court's finding of waiver as a fact, in relation to the strong public policy favoring arbitration. However, this Court has applied the general presumption of correctness accorded to a trial court's findings of fact to its waiver determinations. *See Sykes*, 213 N.C. App. at 567, 713 S.E.2d at 535 ("[w]hether a party has waived

[arbitration] is a question of fact, and the trial court's findings of fact are binding on appeal when supported by competent evidence") (citation omitted); *Moose v. Versailles Condo. Ass'n*, 171 N.C. App. 377, 382, 614 S.E.2d 418, 422 (2005); *Prime South Homes*, 102 N.C. App. at 258, 401 S.E.2d at 825.[1] Further, when a party has allowed significant time to pass, participated in litigation involving judicial intervention and participation, and thereby caused the expenditure of significant expense, including attorneys' fees, the strong public policy in favor of arbitration is thereby diminished. *See Nucor*, 333 N.C. at 154, 423 S.E.2d at 750.

We review the evidence considered by the trial court in making its factual determination on the issue of waiver. The trial court's 2 November 2012 order included findings that: (1) Plaintiff initiated this class action on 5 December 2008, (2) Defendant filed a third-party complaint against Stock on 7 January 2010, (3) this case was designated a complex business case on 17 June 2010, (4) the class was certified by order entered 27 February 2012, and (5) Defendant appealed the certification order on 28 March 2012. The trial court included the following additional relevant findings in its 2 November 2012 order:[2]

> [8] On July 30, 2012, the unnamed class members filed the Motion to Intervene, seeking to intervene in this civil action as named plaintiffs to preserve their rights in the event the Order on Class Certification was overturned as a result of the Appeal.
>
> [9] On August 22, 2012, KB Home filed the Second Motion to Stay, seeking to compel arbitration with respect to the unnamed class members in the event the court granted the Motion to Intervene.
>
> [10] On August 28, 2012, the North Carolina Court of Appeals dismissed the Appeal.

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1. We acknowledge that this Court has also treated a determination of waiver as a conclusion of law, sometimes in the same opinion stating that it is a finding of fact. *See, e.g.*, *Prime*, 102 N.C. App. 255, 401 S.E.2d 822. Our Supreme Court has also used language which may be interpreted as treating determination of waiver as a conclusion of law. *See HCW*, __ N.C. at __, 747 S.E.2d at 241 ("We conclude that plaintiffs have failed to prove prejudicial actions and therefore, that the trial court and Court of Appeals erred in finding waiver of contractual arbitration rights."). We do not find the language in *HCW* to contain sufficient certainty to overrule the clear statement in *Cyclone* that "[w]aiver of a contractual right to arbitration is a question of fact." *Cyclone*, 312 N.C. at 229, 321 S.E.2d at 876. This is an issue to be resolved by our Supreme Court.

2. The trial court included numerous footnotes. We have omitted some footnotes, and included others as parentheticals within the body of the trial court's findings included herein.

[11] As a result of the dismissal of the Appeal, on September 10, 2012, the unnamed class members filed the Motion to Voluntarily Dismiss, seeking to voluntarily dismiss the Motion to Intervene without prejudice.

[12] The Motions have been fully briefed and are ripe for determination.

. . . .

[33] In opposition to the First Motion to Stay, Plaintiffs argue that KB Home waived its right to arbitrate . . . by failing to assert its contractual right to arbitration earlier. KB Home argues that it has timely asserted its right to arbitrate against all Plaintiffs. However, in the alternative, KB Home seeks to persuade the court that even if waiver is found with respect to the named Plaintiffs, waiver should not be found with respect to the unnamed class members because KB Home could not have compelled arbitration against the unnamed class members at any time before the court certified the class.

. . . .

[36] . . . Plaintiffs have neither been forced to bear the expense of long trial, nor have Plaintiffs lost helpful evidence. Consequently, Plaintiffs' principal argument for waiver is that they have been prejudiced by incurring significant litigation expenses to date and that KB Home has engaged in discovery procedures not available in arbitration.

. . . .

[38] Here, Plaintiffs argue that KB Home's right to arbitrate this dispute arose in December 2008 when the named Plaintiffs filed their Complaint. KB Home did not file the First Motion to Stay until April 12, 2012. That was more than three years after this action was filed and after substantial effort, time and money had been expended by the parties in discovery, motion practice and related procedural pre-trial initiatives. (Although neither required nor determinative, KB Home did not specifically assert its right to arbitration in either its Answer as an affirmative defense, filed on August 5, 2009, or in its response to Plaintiffs' Third Set of Interrogatories and Request for Production

of Documents.) KB Home could have asserted its arbitration rights much sooner in this dispute, but chose not to do so. The court finds and concludes that by such delay KB Home acted inconsistently with its arbitration rights. Notwithstanding this conclusion, Plaintiffs must still show that they have been prejudiced by KB Home's delay.

[39] To show prejudicial effect, Plaintiffs have submitted evidence of fees and other expenses incurred by Plaintiffs. In totality, Plaintiffs have incurred approximately $100,000 in fees and other expenses litigating the Claims. (These fees and expenses accrued from preparing for and attending negotiation conferences, depositions, motions and hearings, as well as fees spent on expert testimony.)[.] The costs that have been incurred are the result of the parties participating in four hearings, (The four hearings held have been on KB Home's Motion to Dismiss, Plaintiffs' Motion to Compel Discovery of KB Home, Plaintiffs' Motion for Class Certification and KB Home's Motion to Stay Pending Appeal.)[,] taking or defending twenty depositions across the country, obtaining and working with expert witnesses and engaging in other discovery. These costs have been incurred by the named Plaintiffs while litigating the Claims on their own behalf and also while litigating the Claims on behalf of the unnamed class members. KB Home's delayed attempt to enforce the arbitration provisions only after Plaintiffs have expended material amounts of time and resources in pursuing their Claims would be prejudicial to Plaintiffs. Such time and resources were expended after KB Home's right to arbitrate accrued and could have been avoided through an earlier demand for arbitration. KB Home could have demanded arbitration as early as 2008, well before the named Plaintiffs actively litigated the Claims. Permitting KB Home to enforce its arbitration rights now would be inconsistent with the principles of waiver outlined in *Servomation*. Accordingly, the court CONCLUDES that KB Home has waived its right to compel the named Plaintiffs to arbitrate their Claims.

The trial court then ruled on whether Defendant had waived its right to arbitration with respect to the unnamed class members:

[40] The court must also consider whether KB Home has waived its right to compel arbitration with respect to the

unnamed class members. KB Home argues that it could not have asserted its arbitration rights against the unnamed class members at any time before the court certified the class on February 27, 2012. The court is not persuaded by KB Home's argument.

[41] Permitting KB Home to compel arbitration with regard to the unnamed class members would be prejudicial to the named Plaintiffs. The reality of class-action litigation requires the named Plaintiffs to incur expenses litigating the Claims on behalf of the entire class, which the named Plaintiffs in this case have done for more than three years. Allowing KB Home to compel arbitration with respect to the unnamed class members would render the named Plaintiffs' efforts pursuing the class Claims meaningless. KB Home had knowledge that the named Plaintiffs were litigating the Claims as a class action from the outset and were incurring substantial costs while doing so. (KB Home was on notice no later than December 5, 2008, that the named Plaintiffs were bringing their Claims as a class action when the Complaint was filed. Moreover, evidence suggests that KB Home had notice of Plaintiffs' class action Claims, even before the Complaint was filed, during informal negotiations to resolve the dispute. . . . . ("Throughout the [negotiation] process, Plaintiffs represented that they were acting on their behalf and on behalf of similarly situated homeowners.").) Simply put, KB Home sat on its rights to arbitrate for too long. (The court is also concerned by KB Home's attempt to compel arbitration as to the unnamed class members, thereby effectively "undoing" this court's Order on Class Certification and getting the proverbial "second bite at the apple" for class certification. . . . . For the same considerations of fairness and the efficient administration of justice outlined by the court in *Kingsbury*, this court cannot accept KB Home's argument that it has not waived its right to arbitrate with respect to the unnamed class members.)[.] Therefore, KB Home is barred from exercising any alleged arbitration rights now, even as to the unnamed class members. For the foregoing reasons, the court further CONCLUDES that KB Home has waived its right to compel the unnamed class members to arbitrate the Claims. Accordingly, the First Motion to Stay should be DENIED with respect to all Plaintiffs. (Citations omitted).

We hold that competent evidence supports the trial court's findings that Defendant, over more than a three-year period in which it participated in the litigation of this action, did nothing to assert any right to arbitrate. We affirm the trial court's determination that Defendant's actions were inconsistent with its right to arbitration. *Cyclone*, 312 N.C. at 229, 321 S.E.2d at 876.

Concerning prejudice, the trial court found in the present case that Plaintiffs had incurred substantial costs preparing for litigation in this class action suit:

> To show prejudicial effect, Plaintiffs have submitted evidence of fees and other expenses incurred by Plaintiffs. In totality, Plaintiffs have incurred approximately $100,000 in fees and other expenses litigating the Claims. (These fees and expenses accrued from preparing for and attending negotiation conferences, depositions, motions and hearings, as well as fees spent on expert testimony.)[.] The costs that have been incurred are the result of the parties participating in four hearings, . . . taking or defending twenty depositions across the country, obtaining and working with expert witnesses and engaging in other discovery. These costs have been incurred by the named Plaintiffs while litigating the Claims on their own behalf and also while litigating the Claims on behalf of the unnamed class members. KB Home's delayed attempt to enforce the arbitration provisions only after Plaintiffs have expended material amounts of time and resources in pursuing their Claims would be prejudicial to Plaintiffs. Such time and resources were expended after KB Home's right to arbitrate accrued and could have been avoided through an earlier demand for arbitration. KB Home could have demanded arbitration as early as 2008, well before the named Plaintiffs actively litigated the Claims. Permitting KB Home to enforce its arbitration rights now would be inconsistent with the principles of waiver outlined in *Servomation*. Accordingly, the court CONCLUDES that KB Home has waived its right to compel the named Plaintiffs to arbitrate their Claims.

This Court, in analyzing whether a party has incurred substantial expense, has required:

> [W]hen considering whether a delay in requesting arbitration resulted in significant expense for the party opposing arbitration, the trial court must make findings (1) whether the expenses occurred after the right to arbitration accrued, and (2) whether the expenses could have been avoided through an earlier demand for arbitration.

Sykes, 213 N.C. App. at 568, 713 S.E.2d at 536 (citations omitted). We hold that the more than three-year delay in requesting arbitration, and the approximately $100,000.00 in fees found by the trial court to have been incurred by Plaintiffs in litigating the claims thus far, constitute significant expenditures of time and expenses.

Defendant argues that the trial court's findings fail to show how much of the approximately $100,000.00 constitutes expenses that could have been avoided had Defendant sought to compel arbitration at an earlier date. This Court addressed a similar argument in *Sykes*. In *Sykes*, the attorney for Farm Bureau –the party opposing arbitration –filed the following affidavit:

> "Farm Bureau took significant steps in this litigation to its detriment and expended a significant amount of money on the litigation, through appearance by the undersigned at numerous hearings in both Halifax County Superior Court and Nash County Superior Court, on multiple motions filed by multiple parties."

Sykes, 213 N.C. App. at 569, 713 S.E.2d at 536. This Court held that, though the trial court could have been more specific in its determination that Farm Bureau incurred significant expenses in litigation before arbitration was demanded, its findings were minimally sufficient.

> While [the affidavit] did not quantify the expenses, the trial court's specific findings regarding what occurred during the superior court proceedings and the . . . affidavit are sufficient to support the ultimate finding that Farm Bureau expended "significant resources," sufficient to constitute prejudice. We can conclude without specific dollar amounts that attendance by counsel at multiple hearings and defense of a litigation over a two-year period (with the case being twice calendared for trial as well as other hearings) involves "significant resources." As our Supreme Court has stated, "[J]ustice does not require that courts profess to be more ignorant than the rest of mankind."

. . . .

> Here, we have specific legal proceedings over a two-year period that entailed legal expenses and effort that would have been unnecessary had a demand for arbitration been made earlier. This case is factually similar to *Big Valley Home Ctr., Inc. v. Mullican*, 774 So.2d 558, 562 (Ala.2000), in which the plaintiff filed a complaint on 24 October 1996, and one of the defendants waited for more than two years before filing a motion to compel arbitration. During that time, the co-defendant had answered the complaint, the plaintiff was deposed, the trial was continued five times, two judges were recused, and a settlement offer was made to the plaintiff.
>
> . . . .
>
> We find the reasoning in *Big Valley* persuasive. We hold that the trial court properly concluded that plaintiff waived the right to arbitrate by waiting until the eve of the second trial date to file a motion to compel arbitration, causing Farm Bureau, over more than two years, to prepare for and attend three court hearings and engage in other defense activities, resulting in an expenditure of resources (including time and expense) that would have been unnecessary had plaintiff moved to compel arbitration earlier. While the better practice would be for [Farm Bureau] to provide specific information about the time and expense incurred and for the trial court to make findings of fact based on that information, the findings of fact in this case are minimally sufficient to establish waiver.

Sykes, 213 N.C. App. at 569-70, 713 S.E.2d at 536-37 (citations omitted). We hold that the evidence before the trial court in the present case, and the findings of fact based upon that evidence, are at least as compelling as those in *Sykes*. We affirm the trial court's finding of waiver with respect to Plaintiffs.

IV.

[4] Defendant further argues that it did not waive its right to arbitration with respect to the unnamed class members because: "(1) the right to compel arbitration with unnamed class members did not accrue until they became parties, and (2) there is no evidence in the record that

named Plaintiffs or absent class members incurred any expenses after the right to arbitration with the unnamed class members accrued."

Defendant cites to certain federal opinions for the proposition that it had no right to compel arbitration against unnamed class members before the class was certified. We do not find these cases persuasive, as we do not hold that Defendant could have, or should have, moved to compel arbitration with respect to the unnamed class members before the class was certified. The specific question before us is whether, in an action initiated as a class action, a defendant's actions constituting waiver of its right to compel arbitration against named plaintiffs can be imputed to the entire class once certification occurs.

Defendant cites an unpublished Northern District of California opinion, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2011 WL 1753784 (N.D. Cal., May 9, 2011), for the proposition that "litigation conduct with named plaintiffs prior to class certification could not waive arbitration rights as to unnamed class members[.]" However, we find the reasoning in *Edwards v. First American Corp.*, 289 F.R.D. 296, 307-08 (C.D. Cal. 2012), more persuasive. In *Edwards*, the federal district court discussed its reasoning for holding that the defendants had waived their rights to arbitration to the unnamed as well as the named plaintiffs.

> The Court does not find the reasoning of TFT–LCD to be persuasive. It is true that Defendants likely could not have moved to compel arbitration of the Tower City class members' claims until after the class was certified. Nevertheless, Defendants could have asserted their intention to raise arbitration as a defense at a much earlier stage in the proceeding. Indeed, even after the Ninth Circuit ordered the class certified in June 2010, Defendants[] delayed bringing this motion until April 2011, after this Court denied Defendants' application for a stay. This conduct appears to be highly calculated — Defendants would obviously prefer that Plaintiff's claims be dismissed on the merits, as any such ruling may be used for the purposes of issue preclusion and precedential effect in subsequent actions. Defendants' conduct thus evinced "a conscious decision to continue judicial judgment on the merits." Only after it appeared to Defendants that this would not be possible did they file the instant motion. The Court cannot sanction such behavior; to do so would only encourage gamesmanship of this type in the future, resulting in further waste of judicial resources.

> The Court finds the reasoning in *Kingsbury v. U.S. Greenfiber, LLC*, No. CF 08–00151–AHM (AGRx), 2012 WL 2775022 (C.D. Cal. Jun. 29, 2012), instructive. There the court held that the defendant waived his right to arbitrate when he actively litigated the case "for over four years." This litigation included discovery, a motion to remand, and four motions to certify a class. The court reasoned that asserting a right to arbitrate was "an argument [defendant] was fully capable of raising in the context of the four motions for class certification. Yet [defendant] did not pursue its defense of arbitration. Its failure to do so was inconsistent with its arbitration rights."
>
> Just as in *Kingsbury*, Defendants here could have asserted their right, or at the very least their intention, to arbitrate at any number of points in the past five years. Their failure to do so is patently inconsistent with their attempt to exercise that right at this late juncture.

Edwards, 289 F.R.D. at 307 (citations omitted). The Court in *Edwards* also determined that the plaintiffs were prejudiced, holding:

> Finally, it is also not disputed that Defendants' failure to assert their right to arbitrate until now has prejudiced Plaintiff. First and most obviously, granting Defendants' Motion to Compel Arbitration would eliminate the class members' opportunity to pursue these claims as a class action. Further, Defendants' delay in asserting their right to arbitrate has resulted in the expenditure of enormous costs by Edwards and class counsel in litigating this matter at every level of the federal judiciary over the past five years, as well as thousands of hours of attorney time. Forcing the class to arbitrate now would result in those costs being stranded. In short, there is no question that Plaintiff has "relied to [her] detriment on [Defendants'] failure" to assert their right to arbitration before now.

Id. at 307-08 (citation omitted).

While recognizing that the facts in the present case are not identical with those in *Edwards*, we hold that Defendant waived its right to compel the unnamed class members to arbitration. More than three years and four months passed between the initiation of this class action and Defendant's motion to compel arbitration. Defendant litigated this case that entire time while sitting on any contractual rights it had to arbitrate.

Plaintiffs and their attorneys invested significant amounts of time and sums of money prosecuting this case on behalf of themselves and the purported class. The fact that much of this expenditure occurred before the class was certified does not negate the fact that, upon certification, the class became tangible beneficiaries of that expenditure. We agree with the court in *Edwards* that "gamesmanship" of this kind should not be encouraged. *Edwards*, 289 F.R.D. at 307-08. Holding otherwise would defeat, rather than promote, the public policy behind the favor with which the courts of this state generally view arbitration – expediting an efficient and relatively simple means of resolving disputes without the multitude of costs, in both time and money, generally associated with litigation. *See Nucor*, 333 N.C. at 154, 423 S.E.2d at 750; *Gemini*, 192 N.C. App. at 383, 665 S.E.2d at 509. The trial court did not err in ruling that Defendant had waived any right to arbitrate with respect to the unnamed class members.

V.

[5] Defendant further argues that the trial court erred in "failing to rule on Stock's obligation to arbitrate." Defendant's argument in this regard is entirely premised upon its arguments that the trial court erred in its rulings on the arbitrability of the disputes involving Plaintiffs and the class. Having held that the trial court did not err in ruling that Defendant had waived its rights in this regard, Defendant's argument concerning Stock necessarily fails.

VI.

We affirm the ruling of the trial court. We note that our holding remains the same in this case regardless of whether we treat the trial court's decision on waiver as a finding of fact or conclusion of law.

Affirmed.

Judges McCULLOUGH and DILLON concur.

IN RE A.F.

[231 N.C. App. 348 (2013)]

IN THE MATTER OF A.F.

No. COA13-610

Filed 17 December 2013

Juveniles—delinquency—modification of disposition—delinquency history level

The trial court erred in a juvenile delinquency case by denying juvenile's motion to modify a Level 3 disposition order. The juvenile was not, contrary to the trial court's calculation of his delinquency history level, on probation on the date upon which he committed the felonious breaking or entering which led to the entry of the challenged disposition order. In the absence of the assignment of these additional delinquency history points, juvenile would not have been subject to the imposition of a Level 3 disposition.

Appeal by juvenile from order entered 26 November 2012 by Judge Regan A. Miller in Mecklenburg County District Court. Heard in the Court of Appeals 24 October 2013.

Attorney General Roy Cooper, by Assistant Attorney General Adam M. Shestak, for the State.

Geeta N. Kapur, for juvenile-appellant.

ERVIN, Judge.

Juvenile A.F.[1] appeals from an order denying his motion to modify adjudication and disposition orders entered on 8 October 2012. On appeal, Aaron argues that the trial court should have granted his modification motion on the grounds that the trial court erroneously assigned him two additional delinquency history points based upon the incorrect assumption that he was still on probation at the time that he committed the offense underlying the challenged disposition order and, in the absence of the assignment of these additional delinquency history points, he would not have been subject to the imposition of a Level 3 disposition.[2] After careful consideration of Aaron's challenges

1. A.F. will be referred to throughout the remainder of this opinion as "Aaron," a pseudonym used for ease of reading and to protect the juvenile's privacy.

2. Although Aaron challenges the trial court's disposition order in addition to the order denying his modification motion in his brief, he did not make any reference to

to the trial court's order in light of the record and the applicable law, we conclude that the trial court's order should be reversed and that this case should be remanded to the Mecklenburg County District Court for further proceedings not inconsistent with this opinion.

I. Factual Background

On 14 September 2010, Aaron was adjudicated to be a delinquent juvenile based upon a determination that he had committed the offense of misdemeanor breaking and entering. In view of the fact that Aaron had not been previously adjudicated to be a delinquent juvenile, Judge Kimberly Best-Staton imposed a Level 1 disposition, placed Aaron on juvenile probation for a period of nine months, and ordered Aaron to comply with certain specific conditions of probation, such as attending school regularly.

On 31 March 2011, Aaron's juvenile court counselor filed a motion for review asserting that Aaron had violated the conditions of his probation as a result of the fact that he had been suspended from school. On 9 May 2011, a juvenile petition was filed alleging that Aaron should be adjudicated to be a delinquent juvenile for committing the offense of possessing a knife on school property. On 13 June 2011, after Aaron admitted the allegations contained in the motion for review and to having committed the offense of possessing a weapon on school property, Judge Best-Staton imposed a Level 2 disposition, extending Aaron's probationary period for an additional six months.

On 24 August 2011, Aaron's juvenile court counselor filed a second motion for review alleging that Aaron had violated certain conditions of his probation by failing to comply with his curfew, failing to complete required community service hours, and failing to appropriately participate in court-ordered rehabilitation programs. After Aaron admitted to these alleged probation violations, Judge Best-Staton entered a disposition order on 16 December 2011 in which the period during which Aaron was required to remain on juvenile probation was extended for an additional six months ending on 13 June 2012.

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the disposition order in his notice of appeal. According to N.C.R. App. P. 3(d), a notice of appeal "shall designate the judgment or order from which appeal is taken." "Proper notice of appeal is a jurisdictional requirement that may not be waived." *Chee v. Estes*, 117 N.C. App. 450, 452, 451 S.E.2d 349, 350 (1994). For that reason, "the appellate court obtains jurisdiction only over the rulings specifically designated in the notice of appeal as the ones from which the appeal is being taken." *Id.* As a result, the only order that is properly before this Court in light of the wording of Aaron's notice of appeal is the order denying his modification motion.

On 21 March 2012, Aaron's juvenile court counselor filed another motion for review in which she alleged that Aaron had violated the terms and conditions of his probation by being suspended from school and failing to comply with his curfew. Although a hearing concerning the merits of the 21 March 2012 motion for review was calendared for 10 April 2012, the record contains no indication that either Aaron or his parents were served with notice of that hearing.

After his failure to attend the 10 April 2012 hearing, the trial court entered an order directing that Aaron be placed in secure custody pending a hearing on the motion for review and issued an order requiring Aaron's father to show cause why he should not be held in contempt. Although another hearing was held on 1 June 2012, neither Aaron nor his father attended this proceeding. On 10 August 2012, Aaron was located and placed in secure custody.

A juvenile petition alleging that Aaron should be adjudicated delinquent for committing the offenses of felonious breaking and entering and felonious larceny on 9 August 2012 was filed on 30 August 2012. An adjudicatory hearing was held on 8 October 2012, at which Aaron admitted that he had violated the terms of his probation as alleged in the 21 March 2012 motion for review and that he had committed the offense of felonious breaking and entering on 9 August 2012. In exchange for Aaron's admissions, the State voluntarily dismissed the allegation that Aaron should be adjudicated a delinquent juvenile for committing the offense of felonious larceny. After accepting these admissions, the trial court calculated Aaron's delinquency history pursuant to N.C. Gen. Stat. § 7B-2507 by assigning him one point for the delinquency adjudication based upon the commission of the offense of misdemeanor breaking and entering, one point for the delinquency adjudication based upon the commission of the offense of possessing a weapon on school property, and two points based upon a determination that Aaron was on probation at the time that he committed the felonious breaking and entering for which disposition was being entered. In light of this delinquency history calculation, the trial court had the authority to classify Aaron as either a Level 2 or a Level 3 offender. At the conclusion of the 8 October 2012 hearing, the trial court determined that a Level 3 disposition order should be entered and ordered that Aaron be committed to the custody of the Department of Juvenile Justice and Delinquency Prevention for placement in a youth development center for an indefinite period not to extend past his eighteenth birthday.

On 13 November 2012, Aaron filed a motion for modification of the 8 October 2012 adjudication and disposition orders in which he asserted

that, in light of the fact that he was not on probation when he committed the offense of felonious breaking or entering on 9 August 2012, the trial court had erroneously assigned the two additional points associated with the commission of an offense while on probation in calculating his delinquency history level. For that reason, Aaron further contended that he only should have been assigned two delinquency history points and that the trial court lacked the authority to impose a Level 3 disposition or order that he be placed in a youth development center. After a hearing held on 26 November 2012, the trial court entered an order denying Aaron's modification motion. Aaron noted an appeal to this Court from the trial court's order.

II. Substantive Legal Analysis

In his brief, Aaron argues that the trial court erred by denying his modification motion. More specifically, Aaron contends that the record reflects that he was not, contrary to the trial court's calculation of his delinquency history level, on probation on the date upon which he committed the felonious breaking or entering which led to the entry of the challenged disposition order and that, except for the erroneous assignment of these two delinquency history points, he was not subject to the imposition of a Level 3 disposition. Aaron's argument has merit.

A. Modification Motions

Upon a motion or petition and "after notice, the court may conduct a review hearing to determine whether the order of the court is in the best interests of the juvenile, and the court may modify or vacate the order in light of changes in circumstances or the needs of the juvenile." *In re J.S.W.*, 211 N.C. App. 620, 623-24, 711 S.E.2d 471, 473 (2011) (quoting N.C. Gen. Stat. § 7B-2600(a)(2009)). In juvenile delinquency proceedings, a trial court "may reduce the nature or the duration of the disposition on the basis that it was imposed in an illegal manner or is unduly severe with reference to the seriousness of the offense, the culpability of the juvenile, or the dispositions given to juveniles convicted of similar offenses." N.C. Gen. Stat. § 7B-2600(b). As a result, a trial court has the authority to modify an earlier disposition order pursuant to N.C. Gen. Stat. § 7B-2600 in the event that the disposition reflected in that order was inconsistent with applicable legal requirements.

B. Standard of Review

As we have already noted, N.C. Gen. Stat. § 7B-2600(a) provides that "the court may conduct a review hearing . . . and may modify or vacate the order. . . ." "[T]he use of [the word] 'may' generally connotes permissive

or discretionary action and does not mandate or compel a particular act." *Campbell v. First Baptist Church of the City of Durham*, 298 N.C. 476, 483, 259 S.E.2d 558, 563 (1979). In the event that the result reached with respect to a particular issue is committed to the sound discretion of the trial court, appellate review is limited to determining whether the trial court abused that discretion. *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). "A [trial] court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100, 116 S. Ct. 2035, 2047, 135 L. Ed. 2d 392, 414 (1996) (cited with approval in *State v. Rhodes*, __ N.C. __, __, 743 S.E.2d 37, 39 (2013)). As a result, although N.C. Gen. Stat. § 7B-2600(a) is couched in discretionary language and although many decisions that a trial court is authorized to make in ruling upon a modification motion made pursuant to N.C. Gen. Stat. § 7B-2600 would be analyzed by this Court on the basis of an abuse of discretion standard of review, the extent to which the trial court exercised its discretion on the basis of an incorrect understanding of the applicable law raises an issue of law subject to *de novo* review on appeal. *Falk Integrated Technologies, Inc. v. Stack*, 132 N.C. App. 807, 809, 513 S.E.2d 572, 574 (1999) (stating that "[a]lleged errors of law are subject to *de novo* review"). Thus, given that Aaron's challenge to the denial of his modification motion rests upon a contention that the trial court lacked the statutory authority to impose a Level 3 disposition or to order that he be placed in a youth development center for an indefinite term not to exceed his eighteenth birthday, we will review his challenge to the trial court's order using a *de novo* standard of review.

C. Delinquency History Calculation

According to N.C. Gen. Stat. § 7B-2508, a trial court must establish the disposition to be imposed following an adjudication of delinquency based upon the juvenile's delinquency history level and the level at which the offense upon which the adjudication of delinquency is based.

> The delinquency history level for a delinquent juvenile is determined by calculating the sum of the points assigned to each of the juvenile's prior adjudications and to the juvenile's probation status, if any, that the court finds to have been proved in accordance with this section.

N.C. Gen. Stat. § 7B-2507(a)(2012). Delinquency history points are assigned on the following basis:

> (1) For each prior adjudication of a Class A through E felony offense, 4 points.

(2) For each prior adjudication of a Class F through I felony offense or Class A1 misdemeanor offense, 2 points.

(3) For each prior adjudication of a Class 1, 2, or 3 misdemeanor offense, 1 point.

(4) If the juvenile was on probation at the time of offense, 2 points.

N.C. Gen. Stat. § 7B-2507(b). After the number of delinquency history points has been determined, a juvenile who has been adjudicated delinquent is assigned a particular delinquency history level depending on the number of points which he or she has accumulated, with a juvenile having a low delinquency history level if he or she has no more than one point, a medium delinquency history level if he or she has either two or three points, and a high delinquency history level if he or she has at least four points. N.C. Gen. Stat. § 7B-2507(c). In light of the delinquency history level which the trial court determines to be appropriate pursuant to N.C. Gen. Stat. § 7B-2507(a) and the extent to which the offense for the commission of which the juvenile has been adjudicated to be a delinquent juvenile is determined to be "violent," "serious," or "minor," as those categories are defined in N.C. Gen. Stat. § 7B-2508(a), the trial court must then determine whether the juvenile should be subject to a Level 1, or community, disposition; a Level 2, or intermediate, disposition; or a Level 3, or commitment level, disposition using the dispositional chart set out in N.C. Gen. Stat. § 7B-2508(f). *In re Allison*, 143 N.C. App. 586, 597, 547 S.E.2d 169, 175-76 (2001). A juvenile adjudicated delinquent for committing felonious breaking or entering, such as Aaron, is only subject to a Level 3 disposition in the event that he or she has a "high" delinquency history. N.C. Gen. Stat. § 7B-2508(f).

At the 8 October 2012 dispositional hearing, the trial court properly assigned Aaron one delinquency history point based on the commission of a prior misdemeanor breaking and entering and another delinquency history point for possessing a weapon on school grounds. In addition, the trial court assigned Aaron two delinquency history points on the basis of a determination that Aaron was on probation on 9 August 2012, the date upon which he committed the felonious breaking or entering offense which led to the entry of the trial court's dispositional decision. As a result, the trial court awarded Aaron a total of four delinquency history points, giving Aaron a high delinquency history as that term is defined in N.C. Gen. Stat. § 7B-2507(c). In light of the trial court's determination that Aaron had a high delinquency history level and the fact

that felonious breaking or entering, which is a Class H felony, is classified as a serious offense for purposes of N.C. Gen. Stat. § 7B-2508(a)(2), the trial court concluded that it was authorized to impose a Level 3 disposition and to order that Aaron be committed to a youth development center for an indefinite period not to exceed his eighteenth birthday pursuant to N.C. Gen. Stat. § 7B-2508(f).

According to Aaron, the trial court erred by awarding him two delinquency history points for committing an offense while on probation on the grounds that his probation had expired on 13 June 2012 and had never been extended by the trial court, a fact which precluded the assignment of the two additional delinquency history points in question. After the removal of these erroneously assigned points from his delinquency history calculation, Aaron had only two prior delinquency history points, giving him a medium delinquency history level for purposes of N.C. Gen. Stat. § 7B-2507(c). As a result of the fact that juveniles with a medium delinquency history level who commit a "serious" offense are only subject to a Level 2 disposition, Aaron contends that the trial court lacked the authority to impose a Level 3 disposition and to order his placement in a youth development center and erred by failing to correct this error in the course of ruling on his modification motion.

Although the State does not deny the validity of Aaron's contention that the record is completely devoid of any explicit indication that Aaron's probation was ever extended past 13 June 2012 or that Aaron's challenge to the trial court's dispositional decision would be meritorious in the event that his probation had expired prior to the date upon which he committed the felonious breaking or entering upon which the trial court's dispositional order rested, it argues that the trial court did not err by denying Aaron's motion on the grounds that the trial court extended Aaron's probation on 8 October 2012 immediately prior to the making of the determination that the two disputed delinquency history points should be assigned to Aaron. In support of this argument, the State directs our attention to *In re T.J.*, in which this Court held that a trial court has the authority to modify a juvenile's probation within a reasonable amount of time after its expiration pursuant to N.C. Gen. Stat. § 7B-2510, *In re T.J.*, 146 N.C. App. 605, 607, 553 S.E.2d 418, 419 (2001), with the determination of what constitutes a "reasonable amount of time" dependent on the amount of time necessary for the court to schedule and for the parties to prepare for such a hearing. *Id.* Although we acknowledged in *T.J.* that a trial judge had the discretion to modify a juvenile's probation within a reasonable time after expiration, *T.J.*, 146 N.C. App. at 608, 553 S.E.2d at 420, we reached that conclusion in a

context in which the trial court clearly exercised the extension authority that we recognized in that decision and in which the authority in question was for the purpose of extending the juvenile's probation in response to a probation violation which had been the subject of a motion for review filed prior to the expiration of the juvenile's initial probationary period.

In spite of the fact that the trial court had limited authority under *T.J.* to extend Aaron's probation after the expiration of his probationary period, the extension argument upon which the State relies fails because the trial court never actually extended Aaron's probation in this case. At the hearing held for the purpose of considering Aaron's modification motion, the trial court acknowledged that it had awarded the challenged delinquency history points to Aaron without having specifically extended his probation. Instead, the trial court stated that "the assumption here is that I [extended the probationary period] at the October hearing by assigning him the additional two points," explaining that:

> I know what we did do, and I have to level with that . . . . that I signed from the two points thinking that that was necessary because he was still on probation[.] And so, therefore, inherently . . . I had ruled that the probationary period had extended and the two points should have been assigned. 'Cause otherwise . . . I couldn't have assigned those two points without making that determination. So I'm stuck with that. I guess, I'm stuck with that.

Although the State asserts that these explanatory comments demonstrate that, since the trial court decided to assign Aaron two additional delinquency history points based on a determination that Aaron's probation had been extended, the trial court must have extended his probation, we do not find this argument persuasive. Aside from the fact that the extension of Aaron's probation upon which the State relies was, at best, implicit, the State has not cited, and we have not during our own research identified, any authority supporting a conclusion that a trial judge has the authority to determine on a retroactive basis that it had extended a juvenile's probation and, based upon that determination, to assign additional delinquency history points for the commission of an offense during the retroactively extended probationary period. As a result of the obvious risk of injustice which would inhere in allowing the assignment of additional delinquency history points based upon such an implied retroactive extension of probation and the complete absence of any statutory support for such a practice, we decline to accept the State's argument to the effect that the trial court was authorized to add two additional points to Aaron's delinquency history calculation on the

theory that the trial court implicitly and retroactively extended Aaron's probationary period to include the date upon which he committed the offense underlying the challenged dispositional order.

In addition to advancing this implicit extension argument, the State also contends that the trial court did, in fact, expressly extend Aaron's probation. In support of this assertion, the State directs our attention to the fact that Aaron acknowledged in his transcript of admission that he understood that his delinquency history could subject him to the imposition of a Level 3 disposition, a disposition level that was only made possible by the assignment of the additional two delinquency points which he now challenges as having been erroneously utilized to determine his delinquency history level. In addition, the State notes that the parties stipulated to Aaron's prior delinquency history at the 8 October 2012 disposition hearing. We do not believe that either of these facts establish that the trial court actually extended Aaron's probationary period.

According to N.C. Gen. Stat. § 7B-2510(d), "[t]he conditions or duration of probation may be modified only as provided in this Subchapter and only after notice and a hearing." N.C. Gen. Stat. § 7B-2510(d). The fact that Aaron acknowledged that he was subject to the imposition of a Level 3 disposition or the fact that Aaron conceded the existence of the challenged delinquency history points prior to the entry of the challenged disposition order does not satisfy the statutory requirements for the extension of his probation set out in N.C. Gen. Stat. § 7B-2510 given that no hearing was ever held concerning the extent, if any, to which Aaron's probation should be extended. Simply put, we cannot accept the State's assertion that Aaron's "understanding" of the disposition level to which he might be subject or the content of his prior delinquency history constituted sufficient compliance with the statutory requirements applicable to the extension of a juvenile's probationary period. Thus, we do not find this aspect of the State's defense of the trial court's order persuasive either.

The ultimate difficulty with the defense of the trial court's decision which the State has mounted on appeal in this case is simply that, without having ever extended Aaron's probation, the trial court assigned an additional two points in calculating Aaron's delinquency history. In the absence of the assignment of those delinquency history points, the trial court had no authority to impose a Level 3 disposition and order that Aaron be placed in a youth development center. In denying the modification motion, the trial court appears to have acknowledged the fact that Aaron's probation was never extended, stating that:

> [I]f you had asked me then, I would have probably specifically made a ruling not to extend the probationary period, not to have signed the two additional points, and we would be . . . stuck with a Level Two. . . . 'Cause I might have said, well, that doesn't seem fair that he wasn't on notice at the time of the August offense that he was still on probation 'cause we hadn't made that determination.

In spite of its acknowledgement that Aaron's probation had not been extended, that Aaron was not actually on probation at the time that he committed the felonious breaking or entering for which disposition was being entered, and that it had had no authority to impose a Level 3 disposition in the absence of the assignment of the challenged delinquency history points, the trial court denied Aaron's modification motion. In making this determination, the trial court failed to correct an error of law embodied in the 8 October 2012 dispositional order. As a result, given that the trial court failed to correct an unlawfully entered disposition order, we hold that the trial court erred by denying Aaron's modification motion.

III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court erred by denying Aaron's modification motion. As a result, the trial court's order should be, and hereby is, reversed, and this case should be, and hereby is, remanded to the Mecklenburg County District Court for further proceedings not inconsistent with this opinion, including the entry of a new disposition order which is based upon a correct delinquency history calculation and which imposes a Level 2, rather than a Level 3, disposition.

REVERSED AND REMANDED.

Judges GEER and STEPHENS concur.

VANESSA B. JOYNER, PETITIONER
v.
PERQUIMANS COUNTY BOARD OF EDUCATION; A/K/A SCHOOL DISTRICT OF PERQUIMANS COUNTY NORTH CAROLINA, RESPONDENT

No. COA13-446

Filed 17 December 2013

1. Schools and Education—teacher—denial of career status—right to seek judicial review

A probationary teacher who has been denied career status had the right to seek judicial review of the board of education's decision in accordance with the standards set forth in N.C.G.S. § 150B-51.

2. Schools and Education—teacher—denial of tenure—judicial review—whole record test

The superior court was correct in applying the "whole record test" in reviewing a board of education decision to deny a teacher career status (tenure). The appeal concerned whether the record evidence supported the board's decision and whether the board's decision was arbitrary or capricious.

3. Schools and Education—teacher—denial of tenure—arbitrary

The superior court properly reversed a board of education's decision to deny tenure to a teacher where there was not a rational basis in the record for the board's decision. The teacher's evaluations were replete with statements extolling her performance, while any signs or indicia of negative performance were far more difficult to glean from the record, aside from vague and unsubstantiated concerns from a board member with a possible conflict of interest who was not present at the hearing that followed the denial of tenure.

Appeal by Respondent from order entered 16 November 2012 by Judge William R. Pittman in Perquimans County Superior Court. Heard in the Court of Appeals 10 September 2013.

The Leon Law Firm, P.C., by Mary-Ann Leon, for Petitioner.

Tharrington Smith, L.L.P., by Deborah R. Stagner, and Hornthal, Riley, Ellis & Maland, L.L.P., by John D. Leidy, for Respondent.

DILLON, Judge.

The Perquimans County Board of Education (the Board) appeals from an order of the superior court reversing the Board's decision to deny Vanessa B. Joyner (Petitioner) career status. For the following reasons, we affirm.

I. Factual & Procedural Background

In August 2008, Petitioner was employed by the Board to teach first grade at Perquimans Central School (PCS). After teaching first grade for two years, Petitioner spent the following two years as an Exceptional Children's (EC) teacher. Petitioner became eligible for "career status," i.e., tenure, at the close of the 2011-2012 school year. N.C. Gen. Stat. § 115C-325(c)(1) (2011).

A. The Board's Closed Session Meeting

On 14 May 2012, the Board met in a closed session to determine whether to grant career status to Petitioner and twelve other eligible probationary teachers, each of whom had received positive recommendations from Perquimans County Superintendent of Schools Dr. Dwayne Stallings. The minutes from the meeting are included in the record.

Aside from one question concerning one other candidate, the Board focused its discussion on Petitioner. Board member Ralph Hollowell stated that "he had heard from teachers, teacher assistants, parents and grandparents questionable information about [Petitioner]" and that "from the accounts he had heard, he was not sure if EC students at [PCS] were getting what they needed." Mr. Hollowell did not elaborate further with respect to his sources or the nature of the "questionable information" that he had heard. He also described an incident in which he "substituted" at PCS for three days, during which time he observed Petitioner meet with three students, individually, for less than ten minutes each, and thus he "questioned the quality of services the students were receiving in such a short length of time." The minutes do not reflect that Mr. Hollowell cited any basis for his belief that Petitioner's meetings were inadequate or that he has any background or training in EC education upon which to base such a belief. Further, the minutes do not reflect that Mr. Hollowell notified anyone at PCS of his concerns about Petitioner's meetings with her students at the time of his observations.

The Board spoke with Superintendent Stallings, current PCS Principal Melissa Fields, and former PCS Principal Linda White concerning Petitioner, as discussed further *infra*. At the conclusion of the meeting, the Board voted to grant career status to all the candidates, except Petitioner.

B. The Board Hearing

By letter dated 15 May 2012, Superintendent Stallings notified Petitioner of the Board's decision to deny her career status. Consequently, Petitioner would no longer be employed as a teacher at PCS beyond the end of the current academic year.[1]

Upon receiving notice that her contract would not be renewed, Petitioner requested a formal hearing before the Board. The Board granted Petitioner's request, and a hearing on the matter was held on 29 May 2012. Mr. Hollowell was not present at the hearing.

Petitioner advocated on her own behalf at the hearing, citing the many positive evaluations that she had received while at PCS, in addition to the favorable recommendations of Superintendent Stallings and Principal Fields. Petitioner questioned the motive of Mr. Hollowell's opposition to granting her career status. She described the incident in which Mr. Hollowell had "substituted" at PCS and "observed" her teaching performance for several days. Petitioner explained that this incident occurred, coincidentally, shortly after she had reported Mr. Hollowell's wife, who was also a teacher at PCS, "for misadministration of the third nine weeks writing test." Petitioner then responded to a number of questions from the Board and, finally, from the Board's attorney.

By letter dated 1 June 2012, the Board informed Petitioner that she would not be granted career status. Attached to the letter was a copy of the Board's final decision, which included the following findings:

> 1. The Board has concerns about [Petitioner's] performance; and
>
> 2. The Board can and should find a teacher to do a better job than [Petitioner].

Petitioner timely petitioned for judicial review of the Board's decision in Perquimans County Superior Court.

C. Judicial Review of the Board's Decision

The superior court heard the matter on 5 November 2012, and, upon considering the parties' arguments and conducting a review of the whole record of the Board proceedings, the court entered an order reversing the Board's decision and ordering that Petitioner "be immediately reinstated to her teaching position as a career status teacher with all of the

1. N.C. Gen. Stat. § 115C-325 (c)(1) provides that "[i]f a majority of the board votes against granting career status, the teacher shall not teach beyond the current school term."

rights and benefits that would have accrued to her as of May 29, 2012." The superior court included detailed findings of fact in its order, including the following findings concerning Mr. Hollowell:

> 5. Board member [Hollowell] spoke against the Superintendent's recommendation that the Petitioner be given career status.
>
> 6. Hollowell said that he had "heard from teachers, teaching assistants, parents and grandparents questionable information about this teacher" without individually identifying any person from whom he had heard or providing any other specific details about what "questionable information" he claimed to have received.
>
> . . . .
>
> 9. Board member Hollowell, whose wife is a teacher at the same school as Petitioner, reported that he had personally "substituted" at Petitioner's school, and had timed [Petitioner] walking students from their regular classrooms to her classroom on three occasions.
>
> 10. Without any apparent information about the purpose of these interactions or the educational or scientific basis for his conclusions, Hollowell apparently concluded from these "observations" that Petitioner was not providing quality services to the students based upon the "short length of time" Petitioner spent with the observed students.
>
> . . . .
>
> 19. The [Board] hearing was held on 29 March 2012. Hollowell was not present. . . .

The court then concluded as a matter of law that Mr. Hollowell's "bias" had "tainted" the Board's decision:

> 4. While one might argue that the spouse of a teacher who himself "substitutes" in the same school has an inherent and overriding conflict of interest which should preclude service on the school board altogether, such conflict of interest is more noticeable in matters of teacher retention.
>
> 5. Matters of teacher retention at the same school Hollowell's spouse worked, where Hollowell "substituted", where Hollowell specifically made untrained,

unscientific "observations" of the teacher in question, where the teacher in question had reported to the principal an allegation of Hollowell's spouse's misadministration of a test make Hollowell's conflict of interest and bias impossible to ignore.

6. In view of the whole record, Hollowell had a conflict of interest and was biased against Petitioner.

7. The "evidence" which supports the Board's May 14 decision, essentially unsupported, undocumented hearsay presented by one biased member, was neither competent nor substantial.

8. The competent, admissible evidence at the May 14 closed session supported the recommendations of the Superintendent and others.

9. The Board's May 14 decision was arbitrary and capricious, made for personal reasons, and infected by the premeeting bias of one Board member.

10. The Board's May 29 decision to uphold the May 14 decision was tainted by the same bias which tainted the earlier decision.

11. The Board's May 29 decision was based upon selective evidence, much of it incompetent or inadmissible, designed to support its initial decision rather than provide a full and fair consideration of the matter.

12. The Board's May 29 decision was not supported by substantial admissible evidence.

13. The Board's May 29 decision was arbitrary and capricious, made for personal reasons, and infected by the prehearing of one Board member even though he was absent for the May 29 hearing.

14. The final decision of the [Board] should be reversed.

The superior court entered its order reversing the Board's decision on 16 November 2012. From this order, the Board appeals.

II. Analysis

Prior to 1972, "the contracts of public school teachers were terminable at the end of each school year. A county board of education had full

authority to refuse to renew a teacher's contract for any reason it considered appropriate." *Taylor v. Crisp*, 21 N.C. App. 359, 361, 205 S.E.2d 102, 103 (1974). As this Court stated in *Taylor*,

> Tenure in employment has long been a laudable objective of the teaching profession, and [Chapter 115C] provides teachers with much greater security than they [had prior to 1972]. It classifies all teachers into two groups: career teachers and probationary teachers.

Id.

N.C. Gen. Stat. § 115C-325 provides that a "career teacher," meaning a teacher who has obtained "career status," may not be discharged or suspended other than for the reasons and by the procedures specifically set forth therein. Likewise, a "probationary teacher" may not be discharged *during a school year* except for the reasons and through the procedures applicable to career teachers. N.C. Gen. Stat. § 115C-325(m)(1) (2011). A school board may, however, refuse to renew the contract of a probationary teacher *at the end of a school year* "for any cause it deems sufficient: Provided, however, that the cause may not be arbitrary, capricious, discriminatory or for personal or political reasons." N.C. Gen. Stat. § 115C-325(m)(2) (2011). Probationary teachers facing non-renewal of their teaching contracts are not entitled to present evidence or to have a hearing before the board. *Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 185 N.C. App. 566, 578, 649 S.E.2d 410, 418 (2007). Notwithstanding, a probationary teacher whose contract has not been renewed by the board may appeal the decision to the superior court. N.C. Gen. Stat. § 115C-325(n) (2011).

For a probationary teacher who is about to complete the fourth consecutive year of employment, N.C. Gen. Stat. § 115C-325(c)(1) provides that "the board . . . shall vote upon whether to grant the teacher career status." *Id.* The teacher "has a right to notice and hearing prior to the board's vote[.]" *Id.* Moreover, if the board votes not to grant a probationary teacher career status, "the teacher shall not teach beyond the current school term." *Id.* A decision by a county board of education not to grant a probationary teacher career status is subject to judicial review under N.C. Gen. Stat. § 150B-51. *Moore*, 185 N.C. App. at 572, 649 S.E.2d at 414.[2]

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2. **[1]** The Board argues that the superior court lacks jurisdiction to review its decision to deny career status. The Board contends that "G.S. § 115C-325(n) [which provides for judicial review of a school board's decision not to renew the contract of a probationary teacher pursuant to G.S. § 115C-325(m)(2)], does not explicitly provide for a right to

In the present case, the superior court reversed the Board's decision to deny Petitioner career status. "When this Court reviews appeals from superior court either affirming or reversing the decision of an administrative agency, our scope of review is twofold, and is limited to determining: (1) whether the superior court applied the appropriate standard of review and, if so, (2) whether the superior court properly applied this standard." *Mayo v. N.C. State Univ.*, 168 N.C. App. 503, 507, 608 S.E.2d 116, 120 (2005).

A. The Appropriate Standard of Review

[2] We must first determine whether the superior court applied the appropriate standard of review. *Id.* N.C. Gen. Stat. § 150B-51(b) provides that a court reviewing a "final decision" of the Board

> may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> . . . .
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b)(5)-(6) (2011). Alleged errors relating to subsections (5) and (6) of N.C. Gen. Stat. § 150B-51(b) are reviewed under the "whole record test." N.C. Gen. Stat. § 150B-51(c) (2011). The present appeal concerns (1) whether the record evidence supports the Board's decision; and (2) whether the Board's decision was arbitrary or capricious. We hold, therefore, that the superior court was correct in applying the "whole record test" in undertaking its review of the Board's decision.

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appeal from a board of education's decision not to grant career status pursuant to G.S. § 115(c)(1)." In other words, the Board points out that "the judicial review in this matter has proceeded under the assumption that a denial of career status is the same, for purposes of the right to appeal, as a contract nonrenewal under subsection (m)(2)." However, N.C. Gen. Stat. § 115C-325(n) does not expressly prohibit a probationary teacher from seeking judicial review of a board's decision to deny career status, and we do not believe that our Legislature intended to limit a probationary teacher's ability to seek judicial review in this context. We thus conclude that a probationary teacher who has been denied career status has the right to seek judicial review of the board's decision in accordance with the standards set forth in N.C. Gen. Stat. § 150B-51.

B. Proper Application of the "Whole Record Test"

[3] Having determined that the superior court applied the correct standard of review, we must next determine whether the superior court applied this standard *properly*. *Mayo*, 168 N.C. App. at 507, 608 S.E.2d at 120.

We have "distinguished [the whole record test] from the 'any competent evidence' test and a *de novo* review[.]" *Bennett v. Hertford County Board of Education*, 69 N.C. App. 615, 618, 317 S.E.2d 912, 915 (1984). "In applying the whole record test, the reviewing court must examine all the competent evidence of record, including evidence that detracts from the Board's conclusions, to determine whether the Board's decision has a rational basis in the evidence." *Beauchesne v. Univ. of N.C. at Chapel Hill*, 125 N.C. App. 457, 465, 481 S.E.2d 685, 691 (1997). " 'The whole record test' does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*." *Baxter v. Poe*, 42 N.C. App. 404, 411, 257 S.E.2d 71, 76 (1979) (citation omitted).

Petitioner bore the burden of showing that the Board erred in its decision to deny her tenure. N.C. Gen. Stat. § 115C-44(b) (2011) (providing that "[i]n all actions brought in any court against a local board of education, the order or action of the board shall be presumed to be correct and the burden of proof shall be on the complaining party to show to the contrary"). It was thus Petitioner's burden to show that the Board's decision was arbitrary, in that it was not supported by substantial evidence, *Godfrey v. Zoning Bd. of Adjust.*, 317 N.C. 51, 60, 344 S.E.2d 272, 278 (1986), or because the reasons for the Board's decision were "without any rational basis in the record, such that a decision made thereon amount[ed] to an abuse of discretion[,]" *Abell v. Nash Cnty. Bd. of Educ.*, 71 N.C. App. 48, 52-53, 321 S.E.2d 502, 506 (1984).

Upon careful examination of the whole record, we are unable to discern a rational basis in the evidence for the Board's decision. Both Superintendent Stallings and Principal Fields recommended that Petitioner be granted career status; and Petitioner's summative evaluations consistently designated her performance as *at least* equal to that of her peers.[3] Indeed, Petitioner's evaluations are replete with statements

3. Petitioner received performance reviews ranging from "proficient," indicating standard performance in the evaluated area, to "accomplished" and "distinguished," indicating above standard performance, in evaluations completed by more than a dozen educational professionals, including three principals at PCS.

extolling her performance, describing her, for instance, as an "engaging" teacher and one who has made "commendable" progress at PCS.

Any signs or indicia of Petitioner's negative performance at PCS are far more difficult to glean from the record before us. At its closed session meeting, the Board questioned both Principal Fields and Linda White, a former principal at PCS, concerning Petitioner's placement on a "plan of action." Ms. White clarified that Petitioner did not have an "action plan" – which a struggling teacher might be placed on in order to improve certain areas of performance – but rather a more informal "plan of action" to address "areas of communication to parents and insubordination." Regardless, Principal Fields informed the Board that the informal plan of action had been discontinued. We note Ms. Field's statements that Petitioner had not always followed her directions, that she had not always turned in her lesson plan on time, and that she needed to work on her pedagogical skills; but we also note Principal Field's statement that Petitioner's lessons plans had improved and that Principal Fields did, in fact, recommend Petitioner for career status, a point which Principal Fields reiterated to the Board at the closed session meeting.

From what we are able to discern from the minutes taken at the Board's closed session meeting, it appears that, aside from Mr. Hollowell's vague and unsubstantiated concerns, the only reason articulated for denying Petitioner career status was that a Board member was "unsure if [Petitioner] had contributed to the growth of the EC students at [her school]." However, there is no evidence in the record from the meeting upon which the Board member could base this reason except for the opinion stated by Mr. Hollowell based on his unsubstantiated concerns. Another Board member stated that the Board should not grant tenure *if* "it was thought that the system could do better." There is no indication, however, that the Board members applied this "could do better" standard to any of the other twelve candidates for career status.

With respect to the 29 May 2012 hearing, the Board did not seek to elicit testimony from any individual other than Petitioner, who introduced evidence of her positive impact as a teacher at PCS. Mr. Hollowell's absence from the hearing rendered his vague allegations unexplained and precluded Petitioner from questioning Mr. Hollowell directly to counter his "concerns" with her side of the story.

The Board insists that its decision to deny Petitioner tenure was "amply supported by evidence in the record." Because Mr. Hollowell lacks a basis in knowledge and educational training, his remarks do not constitute substantial evidence supporting the Board's decision. Further,

we do not believe the other evidence in record which might support the Board's decision – *e.g.*, testimony that Petitioner had not always turned her lessons in on time – in light of the overwhelming evidence favorable to Petitioner, constitutes substantial evidence to support the Board's decision. *See ACT-UP, Inc. v. Comm'n for Health Servs.*, 345 N.C. 699, 707-08, 483 S.E.2d 388, 393 (1997). As such, we do not believe that the superior court erred by concluding that, in view of the whole record, the Board's decision lacks a rational basis in the evidence. *See id.*

The Board also points to the findings included in its written decision, which, according to the Board, "explains the basis for" its decision. Though we have held, as the Board points out, that "a school board need not 'make exhaustive inquiries or formal findings of fact,'" *Davis v. Macon Cnty. Bd. of Educ.*, 178 N.C. App. 646, 655, 632 S.E.2d 590, 596 (2006) (quoting *Abell v. Nash Cnty. Bd. of Educ.*, 71 N.C. App. 48, 53, 321 S.E.2d 502, 506 (1984)), the underlying notion is that such findings are not necessary because "the personnel file, board minutes or recommendation memoranda, *should disclose the basis for the board's action*." *Davis*, 178 N.C. App. at 656, 632 S.E.2d at 596 (2006) (quoting *Abell*, 71 N.C. App. at 53, 321 S.E.2d at 506–07) (emphasis added). However, given that the record fails to disclose a rational basis for the Board's decision in the present case, the scant nature of the Board's two findings – that the Board had "concerns" about Petitioner's performance and that the Board could find a teacher "to do a better job" than Petitioner – serve only to bolster the superior court's conclusion that the Board's decision was arbitrary and capricious. To accept the Board's "findings" as explaining a valid basis for its decision – or, put another way, as indicative of the standard for attaining tenure status, without being accompanied by an articulation of a specific concern supported by substantial evidence in the record – would be to grant the Board unfettered discretion to act arbitrarily toward a particular candidate, as there will always be some candidate, somewhere, who could "do a better job." Thus, while we acknowledge that the Board is to be accorded broad discretion in deciding whether career status is appropriate for a given candidate, we cannot ignore the limitations placed on this discretion by our General Statutes, which, as relevant for purposes of the present case, expressly provide that arbitrary decisions or decisions not supported by substantial admissible evidence, in view of the entire record, will not be upheld. N.C. Gen. Stat. § 150B-51(b)(5)-(6).

III. Conclusion

The superior court properly applied the appropriate standard of review in determining that the Board's decision lacked a rational basis

in the evidence. Further, the superior court acted within its authority pursuant to N.C. Gen. Stat. § 150B-51 when it "modified" the Board's decision by directing that Petitioner be reinstated with career status. Accordingly, we affirm the superior court's 16 November 2012 order.

AFFIRMED.

Judge McGEE and Judge McCULLOUGH concur.

JAMES C. LLOYD, III, PLAINTIFF
v.
NORFOLK SOUTHERN RAILWAY COMPANY, ERGON TRUCKING, INC. AND JEREMY RYAN TUCKER, DEFENDANTS

No. COA13-379

Filed 17 December 2013

1. Negligence—mitigation of damages—no unreasonable failure

The trial court did not err in a negligence case involving an accident between a tanker truck and a train by denying defendants' motion for judgment notwithstanding the verdict. Defendants failed to show that plaintiff unreasonably failed to mitigate his damages.

2. Negligence—motion for new trial—no timely objection—damages awarded not excessive

The trial court did not err in a negligence case involving an accident between a tanker truck and a train by denying defendants' motion for a new trial. Defendants failed to make a timely objection to the evidence now complained of, and based upon the evidence presented, the damages awarded by the jury to the plaintiff were not excessive.

3. Appeal and Error—issue moot—negligence—indemnity

The trial court did not err in a negligence case involving an accident between a tanker truck and a train by dismissing defendants' claims for indemnity and contribution against co-defendant and granting co-defendant's claim for indemnity as to defendants. Where the jury found defendants to be negligent, and co-defendant not negligent, defendant's appeal of the trial court's ruling granting directed verdicts for co-defendant was moot.

Appeal by defendants Ergon Trucking, Inc., and Jeremy Ryan Tucker from judgment entered 19 April 2012 and orders entered 11 June 2012 by Judge Jesse B. Caldwell, III in Mecklenburg County Superior Court. Heard in the Court of Appeals on 26 September 2013.

Twiggs, Strickland & Rabenau, P.A., by Jerome P. Trehy, Jr., for plaintiff-appellee.

Millberg Gordon Stewart PLLC, by Frank J. Gordon and B. Tyler Brooks, for defendant-appellee.

Parker Poe Adams & Bernstein LLP, by Jason R. Benton, for defendant-appellants.

STEELMAN, Judge.

Where defendants Ergon and Tucker failed to show that plaintiff unreasonably failed to mitigate his damages, the trial court correctly decided their motion for judgment notwithstanding the verdict. Where Ergon and Tucker failed to make a timely objection to the evidence now complained of, and based upon the evidence presented, the damages awarded by the jury to the plaintiff were not excessive; the trial court correctly denied their motion for a new trial. Finally, where the jury found Ergon and Tucker to be negligent, and that Norfolk Southern was not negligent, Ergon and Tucker's appeal of the trial court's ruling granting directed verdicts for Norfolk Southern is moot.

I. Factual and Procedural History

On 11 July 2008, James C. Lloyd (Lloyd) was an engineer on a Norfolk Southern Railroad Company (Norfolk Southern) train traveling from Greenville, South Carolina to the Linwood Yard near Salisbury, North Carolina. Jeremy Ryan Tucker (Tucker) was operating a truck for his employer, Ergon Trucking, Inc. (Ergon). This truck was towing a tanker filled with mineral oil to the Duke Energy substation in Charlotte, North Carolina.

Tucker drove his tractor and tanker onto a private road owned by Duke Energy. This road crossed railroad tracks owned, constructed, and maintained by Norfolk Southern.

While Tucker's vehicle was crossing the railroad tracks, the vehicle ran off of the paved portion of the road and became stuck on the railroad track. After attempting for several minutes to get the vehicle free,

Tucker heard the whistle of an oncoming train. He tried frantically to free his tractor from the tracks, but was unsuccessful. He was still in the tractor when it was struck by the train.

Lloyd attempted to stop the train but was unable to do so because Tucker's vehicle was not visible from a distance that would have allowed him to stop the train. The resulting collision caused an explosion and a large fire. The train eventually came to a stop one mile beyond the crossing. Lloyd suffered serious injuries from the collision.

On 27 June 2011, Lloyd filed a complaint against Norfolk Southern, Tucker, and Ergon seeking damages for personal injuries. He also sued Norfolk Southern, pursuant to the Federal Employers Liability Act, 45 U.S.C. § 51 *et seq*, for not providing a safe place to work.

Lloyd also alleged that he was injured as a result of the negligence of Tucker, which was imputed to Ergon.

Norfolk Southern filed a crossclaim against Ergon and Tucker seeking monetary compensation for damage to its equipment and tracks, and for indemnity or contribution as to Lloyd's claims. Ergon and Tucker crossclaimed against Norfolk Southern seeking damages for the loss of Ergon's vehicle as well as for indemnity or contribution as to Lloyd's claim.

The case was tried before Judge Caldwell and a jury in the Superior Court of Mecklenburg County from 9 April 2012 through 19 April 2012. The motions of Ergon and Tucker to dismiss at the close of plaintiff's evidence and the close of all of the evidence were denied. The trial court granted Norfolk Southern's motions for a directed verdict as to: (1) crossclaims of Ergon and Tucker for indemnity and contribution against Norfolk Southern, and 2) Norfolk Southern's claim for indemnity against Ergon and Tucker.

On 19 April 2012, the jury returned the following verdict: (1) Lloyd was injured by the negligence of Ergon and Tucker; (2) Lloyd was not injured by the negligence of Norfolk Southern; (3) Lloyd was entitled to recover $865,175 for personal injury; (4) Norfolk Southern was damaged by the negligence of Ergon and Tucker; (5) Norfolk Southern was entitled to recover $177,600 in damages; (6) Ergon was not damaged by the negligence of Norfolk Southern.

On 30 April 2012, Ergon and Tucker filed a Motion for Judgment Notwithstanding the Verdict (JNOV) and a motion for a new trial. On 11 June 2012, the trial court denied both of these motions.

II. Denial of Motion for Judgment Notwithstanding the Verdict

[1] In their first argument, Ergon and Tucker contend that the trial court erred in denying their motion for judgment notwithstanding the verdict. We disagree.

A. Standard of Review

The standard of review in North Carolina on motions for JNOV is *de novo*. *See Hodgson Constr., Inc. v. Howard*, 187 N.C. App. 408, 412, 654 S.E.2d 7, 11 (2007). "On appeal the standard of review for a JNOV is the same as that for a directed verdict, that is whether the evidence was sufficient to go to the jury." *Tomika Invs., Inc. v. Macedonia True Vine Pentecostal Holiness Church of God, Inc.*, 136 N.C. App. 493, 498-99, 524 S.E.2d 591, 595 (2000).

B. Analysis

Ergon and Tucker's main argument is that Lloyd failed to adequately prove his damages and failed to mitigate his damages following the accident. Ergon and Tucker argue that Lloyd, at the time of trial, had not gone back to work since the accident even though he had been given the opportunity. They contend that Norfolk Southern had offered to assist Lloyd with his vocational rehabilitation in order to help find him new employment. Ergon and Tucker assert that because Lloyd had not taken reasonable steps to mitigate his damages, the trial court improperly denied its JNOV motion.

Under the law in North Carolina, an injured plaintiff must exercise reasonable care and diligence to avoid or lessen the consequences of the defendant's wrong. If plaintiff fails to mitigate his damages, "for any part of the loss incident to such failure, no recovery can be had." *Miller v. Miller*, 273 N.C. 228, 239, 160 S.E.2d 65, 73-74 (1968); *see also Snead v. Hollman*, 101 N.C. App. 462, 466, 400 S.E.2d 91, 94 (1991). The burden was on Ergon and Tucker to demonstrate that Lloyd breached his duty to mitigate his damages. *See First Nat'l Pictures Distrib. Corp. v. Sewell*, 205 N.C. 359, 360, 171 S.E. 354, 355 (1933); *Thermal Design, Inc. v. M&M Builders, Inc.*, 207 N.C. App. 79, 89, 698 S.E.2d 516, 523–24 (2010).

Ergon and Tucker were required to demonstrate that Lloyd unreasonably failed to mitigate his damages. Ergon and Tucker have contended that Lloyd refused to consider educational or employment opportunities offered by Norfolk Southern that were not in his current line of work, and that he did not attempt to find any work after the accident.

However, as of the time of trial, Lloyd had not been medically cleared to return to work because he was suffering from posttraumatic stress

disorder (PTSD) caused by the accident. At trial, Lloyd testified that he had not pursued other employment opportunities because he had not been medically cleared to return to work. All of the medical experts, including Ergon and Tucker's expert witness, acknowledged at trial that Lloyd may never be able to return to work because of his injuries. The evidence at trial showed that Lloyd was participating in his prescribed rehabilitation and had followed all of his personal doctors' orders in an effort to expedite his recovery.

The evidence shows that plaintiff acted reasonably concerning the medical advice that he was given. *See Radford v. Norris*, 63 N.C. App. 501, 502–03, 305 S.E.2d 64, 65 (1983), *disc. rev. denied*, 314 N.C. 117, 332 S.E.2d 483 (1985); *see also Snead v. Holloman*, 101 N.C. App. 462, 400 S.E.2d 91 (1991). There was evidence that Lloyd took reasonable steps to return to work presented at trial. Ergon and Tucker's expert witness acknowledged that Lloyd had done everything that he was asked to do by his doctors. Therefore, Ergon and Tucker have not met their burden demonstrating that Lloyd acted unreasonably in mitigating his damages. The evidence presented at trial shows that the issue of mitigation was properly left for the jury.

This argument is without merit.

III. Denial of Motion for a New Trial

[2] On their second argument, Ergon and Tucker contend that the trial court erred in denying their motion for a new trial. We disagree.

A. Standard of Review

"[A]n appellate court's review of a trial judge's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge." *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982). "[A]n appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *Worthington*, 305 N.C. at 487, 290 S.E.2d at 605. We review this issue for abuse of discretion.

B. Analysis

Ergon and Tucker moved for a new trial on the ground that the damages awarded were excessive pursuant to N.C. R. Civ. P. 59(a)(6), and on the ground that they were prejudiced by the improper admission of evidence pursuant to N.C. R. Civ. P. 59(a)(8).

Ergon and Tucker contend that the trial court improperly admitted into evidence an investigative report concerning the accident that was prepared by Crawford and Company for either Ergon or Ergon's liability insurance carrier. Ergon called Michael Andrew Sutton as an expert witness in accident reconstruction. On cross-examination, counsel for Norfolk Southern questioned Sutton as follows:

> Q: Let me ask you about Norfolk Southern Exhibit 18-1. It's a page out of the investigator's report. You relied on his report in doing your work in this case; right?
>
> A: Yes, I did review it....
>
> Q: Let me direct you to another page in his report.... Norfolk Southern Exhibit 18-2, where he states plainly in his report based on his investigation on behalf of Ergon Trucking--
>
> Mr. Wettermark (counsel for Lloyd): If I may interpose--
>
> The Court: Yes, sir.
>
> Mr. Wettermark: -- an objection.
>
> The Court: What's the basis for your objection?
>
> Mr. Wettermark: It contains hearsay opinions by a third party that haven't been qualified.
>
> The Court: Do you want to be heard?
>
> Mr. Gordon (Counsel for Norfolk Southern): He relied on this man's report for his opinions in this case.
>
> The Court: Your objection is overruled.
>
> Q: This man says right there in his report, "This is the investigator for Ergon Trucking. Based on our investigation to date, we find no negligence on the part of Norfolk Southern." That's what he wrote; right?
>
> A: Yes, that was the conclusion or that's what he wrote in his report based on his investigation.

The two exhibits were not offered as evidence at this time.

On the next day of trial, counsel for Ergon and Tucker objected to the admission of these exhibits into evidence. The basis of this objection by Ergon was that under Rule 403 of the North Carolina Rules of Evidence, the "prejudicial qualities" of the two documents "far exceeds

any probative value." In arguing this objection, counsel noted that "certainly Mr. Sutton said that they were not the basis for the action, the claims towards Ergon in this case nor of the plaintiff in this case." Counsel for plaintiff objected under Rule 702. The trial court held that Sutton "considered it in formulating his opinion" and that "the probative value of this evidence is not substantially outweighed by prejudice" and overruled the objection of Ergon, Tucker, and Lloyd. Norfolk Southern's Exhibits 18-1 and 18-2 were subsequently received into evidence.

On appeal, Ergon and Tucker couch their argument in terms of the alleged erroneous admission of the reports. However, their only complaint about the report is limited to the statement involving the lack of evidence concerning the negligence of Norfolk Southern. This testimony was originally elicited during the cross-examination of Sutton by Norfolk Southern. While Lloyd objected to this testimony, Ergon and Tucker did not. Where one party objects to testimony at trial, that objection does not inure to the benefit of another party for purposes of preserving that objection for appellate review. *State v. Bell*, 359 N.C. 1, 27, 603 S.E.2d 93, 111 (2004), *cert. denied* 544 U.S. 1052, 125 S. Ct. 2299, 161 L. Ed. 2d 1094 (2005). In *Bell*, the defendant was tried capitally for murder, along with his codefendant, Sims. At trial, Sims objected to certain evidence, but Bell did not. On appeal, Bell sought to assign error to the admission of this evidence. The Supreme Court cited Rule 10(b)(1) of the Rule of Appellate Procedure:

> in order to preserve a question 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.[1]

Bell at 27, 603 S.E.2d at 111, citing N.C. R. App. P. 10(b)(1). *Bell* held that:

> Codefendant Sims made an objection to the testimony, arguing that it was repetitive and noncorroborative. Defendant never separately objected or joined in codefendant Sims' objection, thereby waiving his right to appellate review.

Bell at 27, 603 S.E.2d at 111.

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1. We note that effective 1 October 2009, Rule 10 was amended, making the former section (b)(1), now (a)(1) and substituting "an issue" for "a question" in section (a)(1). Neither of these changes affects our analysis.

We hold that Ergon and Tucker waived any objection to Sutton's testimony by failing to raise their own objection, or not joining in Lloyd's objection.

This holding is also dispositive of Ergon and Tucker's appeal of the overruling of their objection to Norfolk Southern's Exhibits 18-1 and 18-2. Their sole complaint on appeal is the language elicited during Sutton's cross-examination. "[I]t is the well-established rule that the admission of evidence without objection waives any prior or subsequent objection to the admission of evidence of a similar character." *J.T. Russell & Sons, Inc. v. Silver Birch Pond L.L.C.*, __ N.C. App. __, __, 721 S.E.2d 699, 702 (2011) (quoting *Venters v. Albritton*, 184 N.C. App. 230, 240, 645 S.E.2d 839, 846 (2007); *see also* Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 22 (7th ed. 2011).

We further note that even assuming Ergon and Lloyd preserved this issue for appellate review, we discern no abuse of discretion in the trial court's overruling of the objections under either Rule 403 or 702.

As to Ergon and Tucker's argument that the damages awarded by the jury to Lloyd were excessive, we find no merit in that argument. The total economic loss claimed by Lloyd was $765,206. This figure consisted of the amount of damages sustained by Lloyd from the date of the accident through the date of trial ($224,410) which consisted of medical bills and lost wages, as well as the amount of Lloyd's projected future lost wages ($441,643) and future lost health insurance ($99,153). The jury awarded Lloyd $865,175. We have already held that Lloyd did not fail to mitigate his damages. The jury was thus not obliged to reduce Lloyd's damages. The jury's award of damages was not excessive and does not warrant a new trial. The trial court did not abuse its discretion in denying the motion of Ergon and Tucker for a new trial based upon the amount of damages awarded.

IV. Directed Verdict Issues as to Crossclaims

[3] On their third argument on appeal, Ergon and Tucker argue that the trial court improperly dismissed Ergon and Tucker's claims for indemnity and contribution against Norfolk Southern, and improperly granted Norfolk Southern's claim for indemnity as to Ergon and Tucker. We disagree.

A. Standard of Review

The standard of review for a directed verdict is *de novo*. *See Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991) (citing *Kelly v. Int'l Harvester Co.*, 278 N.C. 153, 179 S.E.2d 396 (1971))("The

standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury.").

B. Analysis

Ergon and Tucker argue that the trial court erroneously ruled that any negligence of Norfolk Southern was passive and that Ergon and Tucker's negligence was active. Ergon and Tucker intend that this issue should have been decided by the jury and not by the trial court.

Because of the verdicts returned by the jury, this question is moot. The jury found that Ergon and Tucker were negligent, and that Norfolk Southern was not negligent. Thus, the authority for prorating the issue of negligence is moot. *See Hendricks v. Leslie Fay, Inc.*, 273 N.C. 59, 62, 159 S.E.2d 362, 365 (1968) (holding that primary and secondary liability between defendants exists only when: (1) they are jointly and severally liable to the plaintiff; and (2) either (a) one has been passively negligent but is exposed to liability through the active negligence of the other or (b) one alone has done the act which produced the injury but the other is derivatively liable for the negligence of the former); *see also Simpson v. Hatteras Island Gallery Restaurant, Inc.*, 109 N.C. App. 314, 322, 427 S.E.2d 131, 136 (1993). The jury determined Norfolk Southern was not negligent which eliminates any issue concerning passive or active negligence. This issue is without merit, and the trial court's decision is affirmed.

NO ERROR.

Judges HUNTER, ROBERT C., and BRYANT concur.

MORGAN v. MORGAN MOTOR CO. OF ALBEMARLE

[231 N.C. App. 377 (2013)]

DAVID M. MORGAN, EMPLOYEE, PLAINTIFF
v.
MORGAN MOTOR COMPANY OF ALBEMARLE, EMPLOYER, AND BRENTWOOD SERVICES, INC., SERVICING AGENT FOR THE NORTH CAROLINA AUTO DEALERS ASSOCIATION SELF-INSURER'S FUND, DEFENDANTS

No. COA12-1485

Filed 17 December 2013

1. Workers' Compensation—injury by accident—arising out of employment—occurred in the course of employment—sufficient findings—supported by the evidence

The Industrial Commission did not err in a workers' compensation case by denying plaintiff's claim for benefits. The Commission's conclusion that plaintiff's accident did not arise out of, or occur in the course of, his employment with defendant employer was supported by findings of fact that were supported by competent evidence of record.

2. Workers' Compensation—injury by accident—findings of fact—supported by the evidence

The Industrial Commission's challenged finding of fact in a workers' compensation case were supported by competent evidence and supported the Commission's ultimate conclusion that plaintiff's injury was not compensable.

3. Workers' Compensation—findings of fact—duties based on lease—unambiguous

The Industrial Commission did not err in a workers' compensation case in its findings regarding the parties' duties based on a lease or fail to make a finding expressly determining Paragraph 6 of the lease to be unambiguous.

4. Workers' Compensation—findings of fact—offers of proof—not basis of award

The Industrial Commission did not err in a workers' compensation case by failing to make express findings regarding various offers of proof during the hearing before the deputy commissioner. There was no evidence that these offers of proof formed the basis for the Full Commission's opinion and award.

Judge DILLON dissenting.

Appeal by plaintiff from opinion and award entered 27 August 2012 by the North Carolina Industrial Commission. Heard in the Court of Appeals 6 June 2013.

Poisson, Poisson & Bower, PLLC, by E. Stewart Poisson and Fred D. Poisson, Jr., for plaintiff-appellant.

Teague, Campbell, Dennis & Gorham, L.L.P., by Bruce A. Hamilton and Carla M. Cobb, for defendants-appellees.

DAVIS, Judge.

David M. Morgan ("Plaintiff") appeals from the Opinion and Award of the North Carolina Industrial Commission ("the Full Commission" or "the Commission") denying his workers' compensation claim against Morgan Motor Company of Albemarle, Inc. ("Morgan Motors"). The issue before us is whether the Commission erred in concluding that Plaintiff's accident did not arise out of — or occur in the course of — his employment with Morgan Motors. After careful review, we affirm the Full Commission's opinion.

Factual Background

Plaintiff is a 55-year-old man who was the Secretary-Treasurer, Sales and Financial Manager, and 45.5% owner of Morgan Motors, a family-owned car dealership in Albemarle, North Carolina. Morgan Motors was initially located at 304 East Main Street in Albemarle but relocated in 1992 to a larger location on Highway 52. It continued to own the building at 304 East Main Street after its move to the Highway 52 location.

In 1998 or 1999, Plaintiff and his father had an architect draw up plans to remodel the old dealership building at 304 East Main Street into a restaurant. In 2003, Morgan Motors took out a $2.1 million dollar loan to pay off the mortgage on the Highway 52 building and also to renovate the building at 304 East Main Street. Approximately $1.3 million of the loan proceeds was used to renovate and remodel the old dealership building.

By virtue of a lease signed on 20 October 2004, Morgan Motors leased the old dealership building to Pontiac Pointe, a limited liability company formed by Plaintiff and his business partner, John Williams. Plaintiff's brother, Robert T. Morgan, signed the lease on behalf of Morgan Motors as the landlord along with Plaintiff, Mellanie M. Morgan, and Pamela C. Morgan. Plaintiff also signed the lease on behalf of the tenant, Pontiac

Pointe. Paragraph 6 of the lease — entitled Maintenance, Repairs and Replacements — provided that

> [d]uring the term of this Lease, Landlord [Morgan Motors] shall be responsible for maintenance of the roof and structure of the building and for replacements of heating and air-conditioning equipment and facilities. Tenant [Pontiac Pointe] shall be responsible for all other maintenance and replacements, which do not result by fire or other casualty, and for all normal and routine maintenance, cleaning and repairs to the building, doors, windows and plumbing, air-conditioning and heating and mechanical systems. Tenant shall keep the leased premises in a neat, clean and businesslike condition.

In December 2004, Pontiac Pointe began operating a restaurant at the old dealership building. Plaintiff continued in his roles with Morgan Motors while also acting as the financial manager of Pontiac Pointe. Plaintiff would usually go to Pontiac Pointe each morning to pick up the restaurant's receipts and reports and then make a deposit at the bank.

On 15 January 2008, Plaintiff drove from Morgan Motors to the bank. He then went to Pontiac Pointe to retrieve its cash receipts and daily reports. Plaintiff testified that as he was speaking with Jay Koral, the restaurant's general manager, he heard a noise that sounded like "a bearing that was going bad" in the air-conditioning unit on the roof. Plaintiff explained that after they "had an experience of already replacing part of that unit up there, [he] thought [he] needed to look at it and try to determine whether we needed somebody to come look at the system or not . . . ." Plaintiff accessed the roof via an internal ladder. He was found shortly thereafter lying on the ground in the back patio area of the restaurant. Plaintiff did not remember falling but did testify that there was black ice on the roof. Plaintiff suffered a C7 spinal cord injury, leaving him paralyzed from the waist down. He also broke his collarbone and several ribs and had to have his spleen removed.

Defendants Morgan Motors and Brentwood Services, Inc., the third-party administrator for the North Carolina Auto Dealers Association Self-Insurer's Fund, denied Plaintiff's workers' compensation claim on the basis that his injury did not arise out of — or occur in the course of — Plaintiff's employment with Morgan Motors. The matter was heard by Deputy Commissioner George T. Glenn, II on 7 March 2011 and 23 May 2011. Deputy Commissioner Glenn filed an opinion and award on 23 January 2012 finding that Plaintiff "sustained a compensable injury

by accident arising out of and in the course and scope of his employment with Employer Defendant [Morgan Motors]." He determined that Plaintiff was therefore entitled to medical expenses, attendant care expenses, and compensation in the amount of $786.00 per week until further order or until Plaintiff returned to suitable employment at his pre-injury average weekly wage.

Defendants appealed to the Full Commission. On 27 August 2012, the Full Commission issued an opinion reversing Deputy Commissioner Glenn's opinion and award, concluding that Plaintiff's injury did not arise out of, or occur within the course and scope of, his employment with Morgan Motors. Plaintiff gave timely notice of appeal to this Court.

Analysis

Our 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). With regard to review of the Commission's findings of fact, this Court's "duty goes no further than to determine whether the record contains any evidence tending to support the finding[s]." *Id.* (citation and quotation marks omitted). The findings of fact made by the Commission are conclusive on appeal if supported by competent evidence even if there is also evidence that would support a contrary finding. *Nale v. Ethan Allen*, 199 N.C. App. 511, 514, 682 S.E.2d 231, 234, *disc. review denied*, 363 N.C. 745, 688 S.E.2d 454 (2009). The Commission's conclusions of law, however, are reviewed *de novo*. *Gregory v. W.A. Brown & Sons*, 212 N.C. App. 287, 295, 713 S.E.2d 68, 74, *disc. review denied*, ___ N.C. ___, 719 S.E.2d 26 (2011).

I. "Arising Out Of" and "In The Course Of" Elements

[1] "Under the Workers' Compensation Act, an injury is compensable only if it is the result of an accident arising out of and in the course of the employment." *Chavis v. TLC Home Health Care*, 172 N.C. App. 366, 370, 616 S.E.2d 403, 408 (2005) (citation and quotation marks omitted), *appeal dismissed*, 360 N.C. 288, 627 S.E.2d 464 (2006). "The phrases 'arising out of' and 'in the course of' one's employment are not synonymous but rather are two separate and distinct elements[,] both of which a claimant must prove to bring a case within the Act." *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977).

"Arising out of employment relates to the origin or cause of the accident." *Hedges v. Wake Cty. Pub. Sch. Sys.*, 206 N.C. App. 732, 735, 699 S.E.2d 124, 126 (2010) (citation and quotation marks omitted), *disc. review denied*, ___ N.C. ___, 705 S.E.2d 746 (2011). "The controlling test of whether an injury arises out of the employment is whether the injury is a natural and probable consequence of the nature of the employment." *Dildy v. MBW Inv., Inc.*, 152 N.C. App. 65, 69, 566 S.E.2d 759, 763 (2002) (citation and quotation marks omitted). "In other words, the employment must be a contributing cause or bear a reasonable relationship to the employee's injuries." *Rivera v. Trapp*, 135 N.C. App. 296, 301, 519 S.E.2d 777, 780 (1999). Thus, an injury is compensable under the Workers' Compensation Act if "it is fairly traceable to the employment or any reasonable relationship to the employment exists." *Id.* (citations and quotation marks omitted).

"The words 'in the course of' refer to the time, place, and circumstances under which an accident occurred. The accident must occur during the period and place of employment." *Chavis*, 172 N.C. App. at 370, 616 S.E.2d at 408 (citation and quotation marks omitted). "An employee is injured in the course of his employment when the injury occurs 'under circumstances in which the employee is engaged in an activity which he is authorized to undertake and which is calculated to further, directly or indirectly, the employer's business.' " *Shaw v. Smith & Jennings, Inc.*, 130 N.C. App. 442, 446, 503 S.E.2d 113, 116 (1998) (quoting *Powers v. Lady's Funeral Home*, 306 N.C. 728, 730, 295 S.E.2d 473, 475 (1982)).

In discussing the respective roles of the Industrial Commission and a reviewing court, our Supreme Court has made clear that

> (1) the Full Commission is sole judge of the weight and credibility of the evidence, and (2) appellate courts reviewing Commission decisions are limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law.

Deese v. Champion Int'l Corp., 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). When making determinations of credibility, the Industrial Commission is not obligated to explain why it deemed certain evidence credible or not credible. *Id.* This is so because

> [r]equiring the Commission to explain its credibility determinations and allowing the Court of Appeals to review the Commission's explanation of those credibility determinations would be inconsistent with our legal system's

> tradition of not requiring the fact finder to explain why he or she believes one witness over another or believes one piece of evidence is more credible than another.

Id.

In its Opinion and Award, the Full Commission based its conclusion that Plaintiff's injury was not compensable on the following findings of fact:

> 11. Pursuant to the terms of the Lease, Pontiac Pointe was to pay $13,000 per month in rent to the dealership. The rent amount was based on the $1.3 million loan that the dealership incurred to refurbish the 304 East Main Building. Pontiac Pointe never paid any rent money to Morgan Motors during the entire time it leased the premises.
>
> 12. The lease between the restaurant and dealership also provided the following in Paragraph 6:
>
> > Maintenance, Repairs, and Replacements. During the term of this lease, Landlord shall be responsible for maintenance of the roof and structure of the building and for replacements of heating and air-conditioning equipment and facilities. Tenant shall be responsible for all other maintenance and replacements, which do not result by fire or other casualty, and for all normal and routine maintenance, cleaning and repairs to the building, doors, windows and plumbing, air-conditioning and heating and mechanical systems. Tenant[] shall keep the leased premises in a neat, clean and business like condition.
>
> . . . .
>
> 14. In addition to being part owner of the restaurant, plaintiff served as the financial manager of the restaurant, with tasks consisting of paying bills, keeping the financial books, and doing payroll. Plaintiff was in charge of supervising the operation of the restaurant, including the hiring and supervision of the General Manager, Jay Koral, hired to manage and handle the day-to-day affairs of the restaurant. Mr. Koral had contact with plaintiff on a daily basis pertaining to the restaurant's finances and operations, and plaintiff would usually eat dinner at the restaurant on Wednesday, Friday and Saturday nights.

15. Plaintiff's brothers, including Terry [Robert T. Morgan], majority co-owner of the dealership, had no input with regard to the renovations of [the] 304 East Main building and had no financial or managerial involvement with Pontiac Pointe. Plaintiff's brothers did not perform any maintenance at the restaurant nor were they ever asked to help with any maintenance or repairs or asked to inspect anything at Pontiac Pointe.

16. Pursuant to the lease agreement, Pontiac Pointe paid for maintenance and repairs, including maintenance and repair to the HVAC system. On occasion, employees of Pontiac Pointe would attempt to maintain or repair equipment at Pontiac Pointe "in house" prior to contacting outside contractors.

17. Pontiac Pointe's responsibility for the maintenance and repair of all of the equipment at 304 East Main Street is corroborated by the financial records documenting payments made by Pontiac Pointe for routine maintenance contracts, repairs and maintenance to the HVAC system, plumbing, and mechanical systems.

18. No dealership operations occurred at the 304 East Main Street property following the move to Highway 52 in 1992. Morgan Motors hired no employees to provide any maintenance work or inspections at Pontiac Pointe or to assist in the restaurant operations. Based upon a preponderance of the evidence of record, the Full Commission finds that Pontiac Pointe and Morgan Motors were two entirely separate entities.

19. Pontiac Pointe obtained a separate workers' compensation policy for Pontiac Pointe through Travelers. Plaintiff excluded himself from coverage under the restaurant's workers' compensation policy with Travelers.

20. Plaintiff's usual practice was to go to Pontiac Pointe first thing every morning to pick up the previous day's receipts and reports and then make a deposit. While picking up the receipts and reports, plaintiff would discuss the restaurant operations with the restaurant General Manager, Jay Koral. On January 15, 2008, plaintiff first went by Morgan Motors to get money out of the safe and then made a deposit at the Bank of Stanley. Plaintiff then

performed his usual routine of going to Pontiac Pointe to pick up the previous night's receipts and operating report.

21. On January 15, 2008, plaintiff arrived at Pontiac Pointe at approximately 8:00 a.m. to 9:00 a.m. and met with the restaurant's General Manager, Jay Koral, in the third floor office to discuss the previous night's specials at the restaurant and whether the specials had sold. In addition, plaintiff was obtaining financial information about Pontiac Pointe's previous night's operations.

22. While speaking with Jay Koral in the restaurant's third floor office, plaintiff stated that he heard a noise on the roof. Mr. Koral testified at his deposition that he did not hear any noise.

23. Plaintiff testified that he went up on the roof because he was concerned that a "bearing" might be going bad; however, plaintiff had no general mechanical training or specific training in the repair or maintenance of HVAC systems, admitted that he did not know the source of the alleged noise, no noise was heard by Mr. Koral at all, although he was standing next to the plaintiff, and no subsequent repairs or maintenance were done on the HVAC system.

. . . .

27. Following plaintiff's accident, neither Morgan Motors Company nor the new dealership owner had to repair or replace any part of the heating or air conditioning equipment at the restaurant, nor were there any problems with the HVAC system when the Pontiac Pointe building was eventually sold.

28. Based upon a preponderance of the evidence of record, the Full Commission finds that plaintiff was acting solely on behalf of and for the benefit of Pontiac Pointe as the owner of Pontiac Pointe at all times relevant to this action. The Full Commission further finds that plaintiff's decision to go on the roof of 304 East Main Street was not in furtherance or related in any way to his employment with Morgan Motors. The Full Commission finds plaintiff's contention that his intent was to benefit Morgan Motors, not credible.

29. Furthermore, to the extent that plaintiff's contention that he was worried about a "bearing going bad" or some other problem with the HVAC system is deemed credible, there was still no benefit to Morgan Motors, since the obligation for repair and maintenance of the HVAC system was the responsibility of Pontiac Pointe per the lease. Any alleged benefit which plaintiff now contends was conferred upon Morgan Motors is speculative at best and is not credible based upon the following facts: plaintiff excluded himself from the workers' compensation coverage for Pontiac Pointe through Travelers, plaintiff has an incentive for now contending that his actions were on behalf of Morgan Motors and not Pontiac Pointe, and since Pontiac Pointe paid no rent to Morgan Motors despite the $1.3 million loan liability the dealership incurred.

. . . .

31. Based on a preponderance of the evidence of record, the Full Commission finds that plaintiff's action in going up on the roof of 304 East Main Street had no reasonable relationship to his employment with Morgan Motors. Plaintiff did not know the source of the noise, the noise was not heard by Jay Koral standing next to the plaintiff, plaintiff had no intention of replacing the HVAC system, and no repairs or maintenance needed to be done to the HVAC system following the accident on January 15, 2008.

32. Based upon the lease provisions and the pattern and practice of Pontiac Pointe, plaintiff had no legal obligation to go up on the roof on behalf of Morgan Motors on January 15, 2008.

33. Based upon a preponderance of the evidence of record, the Full Commission finds that plaintiff was at Pontiac Pointe on the morning of January 15, 2008 for the sole purpose of conducting Pontiac Pointe financial operations and he was there solely in his role as the owner/financial manager of Pontiac Pointe. At no point during his decision to go up on the roof did plaintiff deviate from his role as the owner/financial manager of Pontiac Pointe and plaintiff's contention that he was going up on the roof on behalf of Morgan Motors is not credible.

> 34. Based upon a preponderance of the evidence of record, the Full Commission finds that plaintiff's fall on January 15, 2008 did not arise out of his employment with Morgan Motors.
>
> 35. Based upon a preponderance of the evidence of record, the Full Commission further finds that plaintiff's fall on January 15, 2008 did not occur in the course of his employment with Morgan Motors.

Thus, the Commission's ultimate determination that Plaintiff's injury was not compensable rested on its findings that the accident neither arose out of, nor occurred in the course of, his employment with Morgan Motors. In analyzing the "arising out of" element, the Commission found that Plaintiff's accident "was not a natural or probable consequence of his employment with Morgan Motors" because his act of climbing up to the roof was not "causally related to his duties with Morgan Motors, but was instead directly related to his ownership and management of Pontiac Pointe." *See Mintz v. Verizon Wireless*, ___ N.C. App. ___, ___, 735 S.E.2d 217, 221 (2012) ("[A]n injury arises out of the employment when it is a natural and probable consequence or incident of the employment and a natural result of one of its risks, so that there is some causal relation between the injury and the performance of some service of the employment.") (citation and quotation marks omitted)).

Specifically, the Commission relied upon Pontiac Pointe's and Morgan Motors' respective obligations under the lease, finding that (1) Pontiac Pointe was responsible for maintenance or repairs to the HVAC system; (2) Pontiac Pointe employees would, on occasion, attempt to repair HVAC equipment themselves before contacting an outside contractor; and (3) the financial records documenting the past practices of Pontiac Pointe and Morgan Motors were consistent with the obligations of both parties as spelled out in the lease. The Commission thus concluded that Plaintiff's actions leading up to his accident did not arise out of his employment with Morgan Motors because he was not under an obligation to check the HVAC system on behalf of Morgan Motors and his actions were instead solely for the benefit of, and on behalf of, Pontiac Pointe.

Similarly, the Commission concluded that Plaintiff's injury did not occur in the course of his employment with Morgan Motors because Plaintiff

> was at the restaurant at a time he would normally be at the restaurant performing his duties as the owner/financial

> manager of the restaurant. Plaintiff's duties with Morgan Motors did not take him to the restaurant for anything on the day of the accident [and] Plaintiff was not engaged in any activity that he was authorized to undertake for Morgan Motors pursuant to the lease at the time of the accident.

See Powers, 306 N.C. at 730, 295 S.E.2d at 475 ("A claimant is injured in the course of employment when the injury occurs during the period of employment at a place where an employee's duties are calculated to take him, and under circumstances in which the employee is engaged in an activity which he is authorized to undertake and which is calculated to further, directly or indirectly, the employer's business.").

The Commission based its conclusion that Plaintiff's accident did not occur in the course of his employment with Morgan Motors on its findings that (1) on the morning of the accident, Plaintiff was at the old dealership building for the purpose of conducting his business as the financial manager of Pontiac Pointe (and not pursuant to any duties he had as an employee of Morgan Motors); (2) he was at the building during the time of day that he typically conducted his business as owner and financial manager of Pontiac Pointe; and (3) his action of climbing up to the roof was not authorized by or undertaken to benefit Morgan Motors.

While Plaintiff testified that he climbed up on the roof out of a concern that a bearing in the air conditioning unit was "going bad" (thereby potentially implicating Morgan Motors' obligation under the lease to replace heating and air conditioning equipment), the Commission specifically found that his testimony on this issue lacked credibility. The Commission also found that he had no general mechanical training or knowledge; "that he did not know the source of the alleged noise;" and that Koral did not hear any noise at all. The Commission further determined that Plaintiff's "contention that his intent was to benefit Morgan Motors [was] not credible" and that any alleged benefit that Plaintiff "now contends was conferred upon Morgan Motors is speculative at best . . . ." These credibility determinations by the Commission are not reviewable on appeal. *See Seay v. Wal-Mart Stores, Inc.*, 180 N.C. App. 432, 434, 637 S.E.2d 299, 301 (2006) ("This Court may not weigh the evidence or make determinations regarding the credibility of the witnesses.").

Plaintiff concedes that the Commission found his testimony that "his intent was to benefit Morgan Motors [was] not credible." However, he argues that its findings relating to his decision to climb up to the roof were erroneous because, in making them, the Commission failed to

take into account the fact that Plaintiff was the designated "point person" authorized to address any issues regarding the conditions of the old dealership building on Morgan Motors' behalf. Plaintiff thus asserts that the Full Commission's finding that he "was acting solely on behalf of and for the benefit of Pontiac Pointe as the owner of Pontiac Pointe at all times relevant to this action" is erroneous. In making this contention, he argues that his actions leading up to the accident could have benefitted Pontiac Pointe yet still constituted a compensable injury by accident because those same actions also conferred a benefit upon Morgan Motors. In support of this "dual benefit" argument, Plaintiff cites *Watkins v. City of Wilmington*, 290 N.C. 276, 225 S.E.2d 577 (1976). In *Watkins*, our Supreme Court affirmed the Commission's determination that an on-duty firefighter's accident while assisting a co-worker in the maintenance of a personal automobile was compensable. *Id.* at 285, 225 S.E.2d at 583. The Court reasoned that

> [a]cts of an employee for the benefit of third persons generally preclude the recovery of compensation for accidental injuries sustained during the performance of such acts, usually on the ground they are not incidental to any service which the employee is obligated to render under his contract of employment, and the injuries therefore cannot be said to arise out of and in the course of the employment. . . . However, where competent proof exists that the employee understood, or had reasonable grounds to believe that the act resulting in injury was incidental to his employment, or such as would prove beneficial to his employer's interests or was encouraged by the employer in the performance of the act or similar acts for the purpose of creating a feeling of good will, or authorized so to do by common practice or custom, compensation may be recovered, since then a causal connection between the employment and the accident may be established.

Id. at 283, 225 S.E.2d at 582 (citation and quotation marks omitted).

The Court then determined that the plaintiff's act of assisting in the maintenance of a co-worker's personal vehicle was a reasonable activity and a risk of his employment as a firefighter because (1) his superiors at the fire department had authorized the practice of making minor repairs to personal vehicles while on duty; and (2) those repairs were "to an appreciable extent a benefit to the fire department" because firefighters used their personal vehicles to respond to emergencies when they were called in from off duty. *Id.* at 284, 225 S.E.2d at 582.

We believe the present case is readily distinguishable from *Watkins*. Unlike in *Watkins*, Plaintiff here failed to show that his actions leading up to the accident were authorized by Morgan Motors. Moreover, competent evidence supported the Commission's finding that any benefit accruing to Morgan Motors from Plaintiff's actions was "tenuous, immeasurable, speculative, and remote."

In asserting that he was authorized by Morgan Motors to inspect the HVAC system and that the Commission erred by failing to make findings regarding his role as the "point person" for Morgan Motors in this regard, Plaintiff relies heavily on a brief portion of his brother's testimony. When asked on direct examination if he [Robert T. Morgan] had ever completed any maintenance or repairs at the old dealership building after Pontiac Pointe began leasing the property, his brother replied: "I really didn't have hardly anything to do with Pontiac Point[e]. David did most of that because he was down there approximately every day." Plaintiff contends that this testimony affirmatively established that he "was authorized [by Morgan Motors] to undertake the activity he was undertaking when his accident occurred and that his co-majority owner in fact relied upon him to do so." We believe, however, that the brief testimony of Plaintiff's brother on this point fell well short of *compelling* a finding by the Full Commission that Plaintiff was authorized by Morgan Motors to take these actions or that he was acting for the benefit of Morgan Motors at the time of the accident.

In a workers' compensation action, the plaintiff "has the burden to prove each element of compensability." *Holley v. ACTS, Inc.*, 357 N.C. 228, 234, 581 S.E.2d 750, 754 (2003). Plaintiff simply failed to offer evidence requiring the Commission to find that (1) his job duties with Morgan Motors included inspecting the HVAC system for potential malfunctions; (2) he was authorized by Morgan Motors to undertake these actions; (3) his accident was a result of a risk inherent in his employment with Morgan Motors; or (4) he was acting on behalf, or for the benefit, of Morgan Motors at the time of the accident. Given that it was Plaintiff's burden to produce such evidence and he failed to meet this burden, we cannot say that the Commission erred in its determination that Plaintiff's accident neither arose out of nor occurred in the course of his employment with Morgan Motors.

In reaching a contrary conclusion, the dissent goes beyond the scope of appellate review applicable in workers' compensation cases. Our Supreme Court has made clear that when reviewing an opinion and award from the Industrial Commission, an appellate court "does not have the right to weigh the evidence and decide the issue on the

basis of its weight." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (citation and quotation marks omitted). Our review is purely "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*, 362 N.C. at 660, 669 S.E.2d at 584.

Thus, while the dissent discusses the doctrine of joint employment — which provides that two employers may be jointly liable for workers' compensation benefits to the same employee if he is simultaneously performing services for both at the time of his injury by accident — such an analysis is inapplicable here based on the findings of fact of the Industrial Commission. Where — as here — there is competent evidence to support the Commission's findings of fact and those factual findings support its conclusions of law, our review is at an end. *See Johnson v. S. Tire Sales & Serv.*, 358 N.C. 701, 705, 599 S.E.2d 508, 512 (2004) ("The Commission's findings of fact are conclusive on appeal when supported by competent evidence even though evidence exists that would support a contrary finding.") (citation and quotation marks omitted)).

We "are not at liberty to reweigh the evidence and to set aside the findings of the Commission, simply because other inferences could have been drawn and different conclusions might have been reached." *Hill v. Hanes Corp.*, 319 N.C. 167, 172, 353 S.E.2d 392, 395 (1987) (citation and quotation marks omitted). The dissent relies on the notions that Morgan Motors had an interest in "keeping tabs" on the HVAC unit and a "need to make regular determinations regarding the condition of its investment" to support its conclusion that Plaintiff's actions provided an "appreciable benefit" to Morgan Motors, but these findings simply were not made by the Commission.

In short, the dissent reaches a result based on findings the Industrial Commission could have conceivably made but did not actually make. Such an analysis is inconsistent with our standard of review in workers' compensation cases. Because the result the Commission reached is supported by findings of fact that are supported by competent evidence of record, our analysis must end there.

The dissent does not deny the existence of competent evidence in the record to support all of the findings of fact made by the Commission. Nor does it explain why these findings do not support the Commission's legal conclusions. Instead, the dissent — in essence — is claiming that the facts of this case could have supported a different conclusion. The

dissent asserts that the Commission's findings are not "determinative" or "dispositive" on the issue of Morgan Motors' liability. However, the correct standard is merely whether the Commission's factual findings *support* its conclusions — not whether other conclusions could have possibly been drawn. *See Rose v. City of Rocky Mount*, 180 N.C. App. 392, 400, 637 S.E.2d 251, 257 (2006) ("We may not substitute our own judgment for that of the Commission, even though the evidence might rationally justify reaching a different conclusion.") (citation and quotation marks omitted)), *disc. review denied*, 361 N.C. 356, 644 S.E.2d 232 (2007).

II. Findings of Fact 23 and 27

[2] In addition to those findings of the Commission addressed in his primary argument on appeal, Plaintiff also contends that findings 23 and 27 are not supported by competent evidence and, therefore, do not support the Commission's ultimate conclusion that Plaintiff's injury was not compensable. In making this argument, he focuses on the specific portions of those findings referencing the absence of subsequent repairs or maintenance to the HVAC system following the accident.

During the hearing before the deputy commissioner, Robert T. Morgan testified that he was not aware of any replacements of HVAC equipment after Plaintiff's injury. When asked if "[a]s part of the foreclosure process, was Morgan Motors asked to replace any equipment on top of the roof?," he replied: "Not that I know of." We conclude that this testimony constituted competent evidence upon which the Commission could base its findings that no subsequent replacements or repairs to the HVAC system occurred in the aftermath of Plaintiff's injury or when the building was ultimately sold.

Furthermore, even assuming *arguendo* that these findings were unsupported by any competent evidence of record or that the existence (or nonexistence) of post-accident repairs or maintenance lacked relevance to the question of whether Plaintiff's injury was compensable, we believe the remaining findings by the Commission — as discussed in detail above — adequately support its ultimate conclusion. *See Meares v. Dana Corp.*, 193 N.C. App. 86, 89-90, 666 S.E.2d 819, 823 (2008) ("Where there are sufficient findings of fact based on competent evidence to support the Commission's conclusions of law, the award will not be disturbed because of other erroneous findings which do not affect the conclusions.") (citation, quotation marks, and alterations omitted)), *disc. review denied*, 363 N.C. 129, 673 S.E.2d 359 (2009).

III. Interpretation of the Lease

[3] Plaintiff also asserts that the Commission erred by failing to make an explicit finding as to whether Paragraph 6 of the lease between Morgan Motors and Pontiac Pointe was ambiguous. Our review of the Commission's findings lead us to conclude that it determined the lease provision was unambiguous — that is, Pontiac Pointe was to pay for maintenance and repairs of the HVAC system while Morgan Motors was to pay for the replacement of HVAC system equipment. "When the parties use clear and unambiguous terms, the contract should be given its plain meaning, and the court can determine the parties' intent as a matter of law." *42 East, LLC v. D.R. Horton, Inc.*, ___ N.C. App. ___, ___, 722 S.E.2d 1, 8 (2012) (citation and quotation marks omitted). In our view, the plain language of Paragraph 6 of the lease makes clear the respective obligations of the parties regarding the HVAC system.[1] Accordingly, we conclude that the Commission did not err in its findings regarding the parties' duties based on the lease. Nor did it err in failing to make a finding expressly determining Paragraph 6 to be unambiguous.

IV. Morgan Motors' Offers of Proof

[4] Finally, Plaintiff asserts that the Full Commission erred by failing to make express findings regarding various offers of proof made by Morgan Motors during the hearing before the deputy commissioner. As there is no evidence that these offers of proof formed the basis for the Full Commission's Opinion and Award, we will not assume that the Commission relied upon this evidence in reaching its conclusions. *See McKyer v. McKyer*, 182 N.C. App. 456, 463, 642 S.E.2d 527, 532 (2007) ("An appellate court is not required to, and should not, assume error by the trial [tribunal] when none appears on the record before the appellate court.") (citation and quotation marks omitted)). This argument is accordingly overruled.

Conclusion

For the reasons stated above, we affirm the Opinion and Award of the Full Commission.

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1. Plaintiff also argues that the Commission erred by failing to take into account Morgan Motors' admission that it paid a 2005 bill for a new compressor in the HVAC system. As the payment was for the *replacement* of the compressor, however, this evidence simply corroborates the fact that the parties acted in accordance with their understanding of the unambiguous obligation of Morgan Motors under Paragraph 6 of the lease to replace HVAC equipment.

AFFIRMED.

Judge CALABRIA concurs.

DILLON, Judge, dissenting.

While I believe the Commission's findings support a conclusion that Pontiac Pointe may be liable for Plaintiff's injuries, I also believe that these same findings compel a conclusion that Morgan Motors is also liable. I do not believe that the Commission made any findings which compel its conclusion that Plaintiff failed to meet his burden of proving that the accident "arose out of his employment with Morgan Motors [or that it] occurred during the course and scope of his employment with Morgan Motors." Accordingly, I respectfully dissent.

While it has been said that a person cannot serve two masters, this is not the rule when determining liability for workers' compensation coverage under North Carolina law. Rather, our courts have recognized that there may be situations where an employee sustains an injury while in the service of two different employers. Specifically, our Court has stated as follows:

> Joint employment . . . occurs when 'a single employee, *under contract* with two employers, and under the simultaneous control of both, simultaneously performs services for both employers, and when the service for each employer is the same as, or is closely related to, that for the other. In such a case, both employers are liable for workman's compensation.

Anderson v. Texas Gulf, Inc., 83 N.C. App. 634, 636, 351 S.E.2d 109, 110 (1986) (quoting 1C, Larson, *The Law of Workmen's Compensation* § 48.40). Our Supreme Court has held that where two employers are liable for an employee's injuries, the employee "ha[s] the right to proceed" against either employee or against both. *Leggette v. McCotter*, 265 N.C. 617, 623, 144 S.E.2d 849, 853 (1965); *see also Hughart v. Dasco Transportation, Inc.*, 167 N.C. App. 685, 691, 606 S.E.2d 379, 383 (2005) (recognizing the concept of "joint employment" where the employee has a contract, whether "express or implied" with each employer); *Henderson v. Manpower*, 70 N.C. App. 408, 415, 319 S.E.2d 690, 694 (1984) (holding that each employer is "liable equally" in compensating the employee for a work-related injury).

Our Supreme Court has stated that the "compensability of a claim basically turns upon whether or not the employee was acting for the benefit of his employer 'to any appreciable extent' when the accident occurred." *Hoffman v. Truck Lines, Inc.*, 306 N.C. 502, 506, 293 S.E.2d 807, 809 (1982) (citation omitted). In this case, I believe that the Plaintiff's action to determine the source of a noise on the roof where the HVAC system was located - a system which his employer Morgan Motors owned – benefited Morgan Motors to some "appreciable extent"; and, accordingly, I believe that Morgan Motors is liable for Plaintiff's injuries sustained when he fell off the roof. Specifically, the Commission found that Morgan Motors owned the building where the accident occurred; that Morgan Motors borrowed $1.3 million[1] to renovate the building; that Morgan Motors leased the renovated building to Pontiac Pointe for $13,000.00 per month; that Pontiac Pointe never actually paid any of the rent due under the lease; that under the lease, Morgan Motors was responsible for "replacements of [HVAC] equipment" and Pontiac Pointe was responsible for "all normal and routine maintenance [to the HVAC system]"; that Plaintiff was an employee of both Morgan Motors and Pontiac Pointe; that Plaintiff was the only owner of Morgan Motors who was involved with the renovations of the building; and that Morgan Motors had no other employees whose responsibility was to oversee the condition of the building. Further, the Full Commission found that, on the day of the accident, Plaintiff heard a noise on the roof but he "did not know the source of the noise"; that Plaintiff climbed on the roof with a wrench; and that Plaintiff slipped from the roof and sustained injuries.

The Full Commission made a number of findings which, Defendants argue, support the conclusion that Morgan Motors was not liable for Plaintiff's injuries when he decided to climb on the roof. However, I do not believe that any of these findings compel a conclusion that Morgan Motors is not liable in this case. For instance, the Full Commission found that "[P]laintiff's contention that his intent was to benefit Morgan Motors [is] not credible." I do not believe, though, that Plaintiff's "intent" is dispositive on the issue of Morgan Motors' liability. In other words, I believe that under North Carolina law, Morgan Motors can still be found liable as Plaintiff's employer for Plaintiff's injuries even though Plaintiff had no specific intent to benefit Morgan Motors when he climbed on the roof to investigate the noise. Our Supreme Court has held that coverage may be found even where an employee's intent is to benefit a third

1. Though not included in the findings by the Full Commission, the Deputy Commissioner found – and the evidence is uncontradicted – that over $100,000.00 of the loan proceeds funded spent a new HVAC system for the building.

party as long as "the acts benefit the employer to an appreciable extent". *Roberts v. Burlington Industries*, 321 N.C. 350, 355, 364 S.E.2d 417, 421 (1988) (citation omitted). Accordingly, even though the Commission failed to find that Plaintiff *intended* to benefit Morgan Motors, Morgan Motors may still be held liable since Plaintiff's actions, in attempting to determine the source of the noise on the roof where the HVAC was located, would have some "appreciable" benefit to Morgan Motors as the owner of the building.

Further, I do not believe that the Full Commission's finding - that Plaintiff was at the building on the day of the accident "for the sole purpose of conducting [work for Pontiac Pointe and that] his decision to go up on the roof [did not] deviate from his role as the owner/financial manager of Pontiac Pointe" - is dispositive on the issue of Morgan Motors' liability. Rather, I believe this finding *only* supports a determination that Pontiac Pointe may also be liable to Plaintiff for his injuries. I agree with the Commission that Plaintiff was acting for the sole benefit of Pontiac Pointe – and thereby deviated from his employment with Morgan Motors - when he traveled to the building to meet with the restaurant manager about the financial performance of the restaurant. However, I believe this deviation from his employment with Morgan Motors ceased when he made the decision to climb on the roof to determine the source of the noise, notwithstanding that this decision might *not* have been a deviation from his employment with Pontiac Pointe, because this decision conferred an "appreciable" benefit on both his employers: Both had an interest in the maintenance of the building and the HVAC system. *See Jackson v. Dairymen's Creamery*, 202 N.C. 196, 162 S.E. 359 (1932) (holding that an employee who has deviated from his employment is covered for injuries occurring after he returns to work).

Also, I do not believe the Full Commission's determination that Morgan Motors had no "legal obligation" under its lease to send an employee onto the roof to determine the nature of the noise is determinative of Morgan Motors' liability for Plaintiff's accident. In other words, even if Morgan Motors had no such "legal obligation" under its lease agreement, Morgan Motors still had a significant interest as the building's owner to make sure that its new HVAC system was being properly maintained by its tenant. *See Hoffman*, 306 N.C. at 507-08, 293 S.E.2d at 810 (stating that "an employer would not be permitted to escape his liability or obligations under the [Workers' Compensation] Act through the use of a special contract or agreement if the elements required for coverage of the injured individual would otherwise exist"). Even if the potential replacement of the HVAC system was merely "speculative and

remote," as found by the Commission, Morgan Motors still had a significant interest, as the owner of the HVAC system and building, in "keeping tabs" on the condition of its $1.3 million investment, notwithstanding any obligation of its tenant to maintain this investment in good repair. Morgan Motors' need to make regular determinations regarding the condition of its investment is bolstered by the Full Commission's finding that Morgan Motors' tenant was not meeting its financial obligation to pay rent.

Finally, I do not believe that the Full Commission's determination that Plaintiff's activity was not "authorized" by Morgan Motors is relevant as to Morgan Motors' liability based on the evidence in this case. There is nothing in the evidence nor did the Commission make any finding to suggest that Plaintiff was expressly prohibited by anyone at Morgan Motors from climbing onto the roof of the building to make an inspection. Rather, the findings by the Full Commission suggest that Plaintiff was the only employee of Morgan Motors who had any involvement with the building. This Court has held as follows:

> [I]f an employee does something which he is not specifically ordered to do by a then present superior and the thing he does furthers the business of the employer although it is not part of the employee's job, an injury sustained by accident while he is so performing is in the course of employment. This has been characterized as "being about his work."

Parker v. Burlington Industries, Inc., 78 N.C. App. 517, 519-20, 337 S.E.2d 589, 591 (1985); *see also Hensley v. Caswell Action Committee*, 296 N.C. 527, 531, 259 S.E.2d 399, 401 (1978) (holding that coverage exists where an employee's actions, though not expressly authorized, are "not so extreme as to break the causal connection between his employment and his [injury]").

In conclusion, I believe that the actions of Plaintiff as found by the Commission - that Plaintiff climbed onto the roof of the building to determine the source of a noise coming from the HVAC system owned by and paid for by Morgan Motors – served to benefit Morgan Motors to some "appreciable extent," and that, therefore, these findings do not support a conclusion that Morgan Motors is not liable for the injuries sustained by Plaintiff, notwithstanding that Pontiac Pointe may also be liable for those injuries.

PARSONS v. PARSONS

[231 N.C. App. 397 (2013)]

DAVID EARL PARSONS, PLAINTIFF
v.
LOUISE DIXON PARSONS, DEFENDANT

No. COA13-714

Filed 17 December 2013

1. Divorce—alimony—modification—increase in reasonable expenses

The trial court did not err by modifying the amount of alimony. The trial court found a substantial change of circumstances and correctly considered the value of defendant's total estate, including her investment account, and the income from her investments in deciding whether the increase in her reasonable expenses merited an increase in alimony. Its findings on the parties' assets, incomes, and expenses were supported by competent evidence.

2. Child Custody and Support—support modification—house maintenance expenses—educational expenses

The trial court did not err by modifying the amount of child support. Although plaintiff challenged the trial court's allocation of a portion of the house maintenance expenses to the child, such determinations are in the trial court's discretion. Further, defendant's affidavit was itself evidence of the amount of the educational expense as claimed by defendant and did not need to be supported by other evidence to be competent and relevant.

3. Attorney Fees—alimony—child support—sufficient means to defray costs

The trial court erred in an alimony and child support modification case by awarding defendant $40,000 in attorney fees under N.C.G.S. § 50-16.4 because defendant had sufficient means to defray the costs of the suit since her estate was worth over $1.5 million.

Appeal by plaintiff from Order entered 19 December 2012 by Judge Christy T. Mann in District Court, Mecklenburg County. Heard in the Court of Appeals 5 November 2013.

Church Watson Law, PLLC, by Kary C. Watson and Seth A. Glazer, for plaintiff-appellant.

Hamilton Stephens Steele & Martin, PLLC, by Allison Pauls Holstein, for defendant-appellee.

STROUD, Judge.

David Parsons ("plaintiff") appeals from an order entered 19 December 2012 modifying a 15 September 2009 Child Support and Alimony Order, increasing the amount of alimony and child support plaintiff is required to pay to Louise Parsons ("defendant"), and awarding defendant $40,000 in attorney's fees. We affirm in part and reverse in part.

I. Background

Plaintiff and defendant were married in May 1988 and separated in May 2007. The parties have three children, born April 1992, July 1994, and November 1997. The parties agreed that defendant would have primary custody of the children. On 15 September 2009, the District Court entered a "Permanent Child Support and Alimony Order" that required plaintiff to pay defendant $3,963 per month in child support and $5,028 per month in alimony. At the time, plaintiff earned $30,625 per month from his employment, plus bonuses. As the parties had agreed during their marriage, defendant did not work outside of the home and was primarily responsible for "tending to the home and to the children." In the 2009 order, the trial court determined that defendant's only source of income was $1,800 per month in investment income, while her reasonable monthly living expenses were $5,144.

On 13 September 2011, defendant filed a motion to modify alimony and child support. Plaintiff initially filed a cross-motion to modify, but later withdrew it. The trial court held a hearing on the motion to modify on 19 and 28 September 2012. By order entered 19 December 2012, the trial court found that defendant's reasonable living expenses had increased 24%, while she remained unemployed and her investment income had decreased to $1,100 per month, and concluded that this change constituted a substantial change of circumstances. The trial court awarded plaintiff increased alimony of $7,560 per month and decreased child support of $2,210 per month, as two of the children had reached the age of majority in the intervening years. It also awarded defendant $40,000 in attorney's fees. Plaintiff filed timely notice of appeal to this Court.

II. Modification of Alimony and Child Support

[1] Plaintiff argues on appeal that the trial court erred in modifying alimony and child support because its findings on the income and expenses of defendant and the parties' minor child were unsupported by evidence. We disagree.

A. Standard of Review

To modify an award of alimony under N.C. Gen. Stat. § 50-16.9 (2011), the trial court must conclude that there was a change in circumstances in light of the relevant factors under N.C. Gen. Stat. § 50-16.3A(b) (2011). *See Barham v. Barham*, 127 N.C. App. 20, 26, 487 S.E.2d 774, 778 (1997). "As a general rule, the changed circumstances necessary for modification of an alimony order must relate to the financial needs of the dependent spouse or the supporting spouse's ability to pay." *Rowe v. Rowe*, 305 N.C. 177, 187, 287 S.E.2d 840, 846 (1982) (citations omitted).

We review a trial court's challenged findings of fact to determine whether they are supported by competent evidence. *See Spencer v. Spencer*, 133 N.C. App. 38, 43, 514 S.E.2d 283, 287 (1999). If the trial court makes sufficient findings to show that it considered the relevant statutory factors and to support its conclusions, and those findings are supported by competent evidence, the trial court's decision as to the amount of alimony awarded is reviewed only for an abuse of discretion. *Quick v. Quick*, 305 N.C. 446, 453, 290 S.E.2d 653, 658 (1982); *Rhew v. Rhew*, 138 N.C. App. 467, 472, 531 S.E.2d 471, 474-75 (2000). Similarly, "[t]he determination of what constitutes the reasonable needs and expenses of a party in an alimony action is within the discretion of the trial court." *Megremis v. Megremis*, 179 N.C. App. 174, 183, 633 S.E.2d 117, 123 (2006) (citation, quotation marks, and brackets omitted).

B. Analysis

In its December 2012 order, the trial court found the following facts: (1) that defendant's total reasonable monthly expenses had increased 24% since the 2009 order, to $7,474 per month; (2) that her monthly income was $1,100 per month; (3) that plaintiff's gross monthly income had increased from approximately $30,000 to $51,271—even excluding a significant amount of deferred income; and (4) that his reasonable monthly expenses had decreased from $11,238 to $7,393. After considering the parties' assets, incomes, expenses, and the tax consequences of the alimony award, the trial court ordered plaintiff to pay $7,560 per month in alimony.

Plaintiff primarily contends that the trial court's findings of fact on defendant's expenses were erroneous because the financial affidavit presented by defendant, on which the trial court largely based its findings regarding defendant's income and expenses, was unsupported by other evidence. Plaintiff fails to recognize that the affidavit itself is evidence of defendant's expenses. *See Row v. Row*, 185 N.C. App. 450, 460, 650 S.E.2d 1, 7 (2007) ("The affidavits were competent evidence

. . . which the trial court was allowed to rely on in determining the cost of raising the parties' children."), *disc. rev. denied*, 362 N.C. 238, 659 S.E.2d 741, *cert. denied*, 555 U.S. 824, 172 L.Ed. 2d 39 (2008). Plaintiff's argument simply goes to the credibility and weight to be given to the affidavit. Plaintiff was free to attack defendant's affidavit at trial by cross-examination and by presentation of evidence which may contradict her claims, and he did so. Such determinations of credibility are for the trial court, not this Court. *Megremis*, 179 N.C. App. at 183, 633 S.E.2d at 123. The evidence supports the trial court's finding that defendant's reasonable monthly expenses have increased to $7,474.

Plaintiff further argues that the trial court erred in including an cost of $198 per month for defendant's home maintenance expenses. As plaintiff explains, "Judge Mann arrived at this number based on a 10-year amortization of potential repairs to the parties' former martial residence which was distributed to Ms. Parsons." The evidence presented as to the expenses included defendant's affidavit, which claimed a monthly shared family expense of $1,160.36,[1] based upon the fact that she had "received a quote of $12,695 to replace her home's HVAC system, including the 20-year old AC units, received an average quote of approximately $6,500 for the exterior of the home to be painted, received an average quote of approximately $4,578 for the replacement of appliances, including the refrigerator, trash compactor, washer and gas dryer," for a total of $23,773. In her testimony, defendant explained her affidavit as follows:

> Q. All right. Explain briefly, please, the change to home maintenance that we explained by the asterisk.
>
> A. The difference or the substantial increase in the home maintenance was because the first time at the entry of the Order, they had based that on figures or records that [plaintiff] did 90 percent of the home maintenance. We repaired every appliance that we had, he did the lawn, we didn't have a lawn person. He did the aeration, he did the mowing of the lawn, he did the trimming, or we both did. He repaired everything. I didn't have records. I have appliances that are currently 14 years old since we moved into the house, they're breaking. He used to repair the appliances, I can't do that. My income -- my expenses on house maintenance and home maintenance have increased

1. Defendant's counsel had amortized this expense over 36 months. The trial court's order amortized it over 10 years.

> substantially because I can't do them personally. I can't go outside and trim a tree with a chain saw.
>
> . . . .
>
> I have a -- I have had issues with some air–conditioning units and appliances and my home hasn't been -- the exterior of the home has not been painted in 15 years. All of those items are upcoming. Some I have already have [sic] to replace. So those are estimates that are currently in the future. I've got two air conditioning units that I've had repaired and they're over 20 years old.

Plaintiff contends that it is inappropriate for the trial court to include such a "hypothetical expense" in its findings on defendant's reasonable living expenses, although he does not challenge the actual estimates presented by defendant as excessive or unreasonable or the fact that the home's HVAC system, appliances, and paint are in fact the ages claimed by defendant.

It is, of course, appropriate for the trial court to make findings on and consider reasonable future expenses in awarding or modifying alimony, including those relating to upkeep of defendant's residence. In attempting to estimate future expenses, the trial court must necessarily base its determination on relevant past expenses and predictions of future expenses. Although it is nearly certain that these types of expenses will arise, the exact timing and amounts can only be predicted based on past experience. This kind of prognostication is, by nature, somewhat "hypothetical." So long as there is evidence to support the trial court's finding, however, that finding will not be disturbed by this Court. *See Kelly v. Kelly*, ___ N.C. App. ___, ___, 747 S.E.2d 268, 275 (2013) ("When the trial judge is authorized to find the facts, his findings, if supported by competent evidence, will not be disturbed on appeal despite the existence of evidence which would sustain contrary findings." (citation and quotation marks omitted)). Defendant's affidavit and testimony outlining past and future expected costs for home maintenance and repair constitutes such evidence here. The reasonableness of the expenses is an issue for the trial court to determine in its discretion. *Megremis*, 179 N.C. App. at 183, 633 S.E.2d at 123.

Plaintiff next argues that the trial court erred in its finding relating to defendant's estate. The trial court found that defendant's "estate available to her presently consists of a house worth approximately $1.7 million, a car, a CAP investment account with approximately $400,000, and

a debt owed to [Plaintiff] from the Equitable Distribution Judgment of at least $300,000." The trial court found that defendant's "estate, including the house, is in excess of $1.5MM . . . ." Plaintiff contends that defendant's total estate is actually worth $1,935,772. The trial court noted the various assets in defendant's estate and estimated their value—it did not purport to give an exact value to the dollar of the total estate, nor was it required to.[2] These findings are adequate to show that it considered all valuable assets and debts in defendant's estate in deciding the amount of alimony.

Plaintiff further contends that the trial court's finding that defendant has a monthly gross income of $1,100 was unsupported by the evidence. Defendant introduced the statement from her CAP investment account for the first six months of 2012. The statement showed a total income from dividends and interest of $6,533.38. Averaged over six months, this amount results in a monthly income of $1,088. Defendant had no other source of income and plaintiff cannot point to any.

Nevertheless, plaintiff argues that the trial court should have included the passive appreciation of her "CAP" investment account in calculating defendant's monthly income. Plaintiff contends that the average monthly return of the CAP account was approximately $4,551 between April 2009 and June 2012 and that defendant should have used this amount to supplement her income rather than continuing to let her account appreciate in value.

Investment income is certainly an important component of a party's total income. *See Bryant v. Bryant*, 139 N.C. App. 615, 618, 534 S.E.2d 230, 232, *disc. rev. denied*, 353 N.C. 261, 546 S.E.2d 91 (2000). As plaintiff highlights, "the purpose of alimony is not to allow a party to accumulate savings." *Glass v. Glass*, 131 N.C. App. 784, 790, 509 S.E.2d 236, 239-40 (1998) (citations omitted). But this case is not one where defendant is increasing her estate by directing part of her income to savings, while relying on alimony to cover her expenses. Instead, the CAP account was distributed to defendant in 2009. Since then, it has gained in value by passive appreciation in the value of the assets in the account, and defendant has relied upon the interest and dividend income generated by the account to provide for a portion of her support.

Here, the trial court properly included the total value of the investment account in its estimation of defendant's estate and clearly considered it

2. In fact, most of the variation in estimates of the total value of defendant's estate as claimed by plaintiff or defendant is based upon differences in the parties' own estimates of the value of defendant's home, since the home is by far her single largest asset.

in awarding additional alimony. *See Cunningham v. Cunningham*, 345 N.C. 430, 440, 480 S.E.2d 403, 409 (1997) (noting that "an increase in the value of the dependent spouse's property after the entry of the alimony decree is an important consideration in determining whether there has been a change in circumstances." (citation omitted)). The market value of the property appreciated over the three years since the property was distributed to defendant, while the amount earned in interest and dividends—the amount counted by the trial court as defendant's income—decreased. Plaintiff effectively urges us to hold that the trial court erred in not counting the increased value of the investment account twice—once as an asset of defendant's estate, and again by treating increases in the value of the assets as income. We decline to do so.

The trial court found a substantial change of circumstances. The trial court correctly considered the value of defendant's total estate, including her investment account, and the income from her investments in deciding whether the increase in her reasonable expenses merited an increase in alimony. Its findings on the parties' assets, incomes, and expenses were supported by competent evidence. The findings demonstrate that the trial court considered the relevant factors and logically support its conclusions. Therefore, we affirm the trial court's order modifying the prior award of alimony.

III. Child Support

[2] Plaintiff also challenges the trial court's modification of child support. He only argues that the trial court erred in determining the reasonableness of the minor child's expenses and that defendant's *affidavit* was not supported by competent evidence. He does not point to the absence of evidence as to any particular expense, which is quite reasonable, as the record includes just over 500 pages of defendant's exhibits regarding her financial situation and expenses, along with the 334 pages of the hearing transcripts. Specifically, he challenges the trial court's allocation of a portion of the house maintenance expenses discussed above to the child, and to the amount of the educational expense as claimed by defendant. As discussed above, the first argument is meritless because such determinations are in the trial court's discretion and the second argument is meritless because defendant's affidavit is itself evidence and does not need to be supported by other evidence to be competent and relevant. Plaintiff does not otherwise challenge the modification of child support. Therefore, we affirm the trial court's modification of child support.

IV. Attorney's Fees

[3] Finally, plaintiff argues that the trial court erred in awarding defendant $40,000 in attorney's fees under N.C. Gen. Stat. § 50-16.4 because defendant had sufficient means to defray the costs of the suit.[3] We agree.

> [A]ccording to N.C. Gen. Stat. § 50–16.4, a court may award attorneys' fees to the dependent spouse when "a dependent spouse would be entitled to alimony...." N.C. Gen. Stat. § 50–16.4 (2009). Further, an award of counsel fees is appropriate whenever it is shown that the spouse is, in fact, dependent, is entitled to the relief demanded, and is without sufficient means whereon to subsist during the prosecution and defray the necessary expenses thereof.

Martin v. Martin, 207 N.C. App. 121, 127, 698 S.E.2d 491, 496 (2010) (citations and quotation marks omitted). "This means the dependent spouse must be unable to employ adequate counsel in order to proceed as litigant to meet the other spouse as litigant in the suit." *Larkin v. Larkin*, 165 N.C. App. 390, 398, 598 S.E.2d 651, 656 (citation and quotation marks omitted), *disc. rev. on additional issues denied*, 359 N.C. 69, 604 S.E.2d 666 (2004), *aff'd per curiam as modified*, 359 N.C. 316, 608 S.E.2d 754 (2005).

> A spouse is entitled to attorney's fees if that spouse is (1) the dependent spouse, (2) entitled to the underlying relief demanded . . . , and (3) without sufficient means to defray the costs of litigation. Entitlement, i.e., the satisfaction of these three requirements, is a question of law, fully reviewable on appeal.

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3. The trial court also purported to award attorney's fees under N.C. Gen. Stat. § 50-13.6, but failed to make a finding that the father failed to provide adequate child support, a necessary finding to justify such an award in a support action. *See* N.C. Gen. Stat. § 50-13.6 (2011) ("Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding."); *Thomas v. Thomas*, 134 N.C. App. 591, 597, 518 S.E.2d 513, 517 (1999) (holding that "the court must make the following findings of fact prior to awarding attorney's fees to an interested party in a proceeding for a modification of child support: (1) the party is acting in good faith, (2) the party has insufficient means to defray the expenses of the suit; and (3) the party ordered to pay support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding." (citation omitted)). Indeed, the trial court found that plaintiff had overpaid child support for four months and credited him $3,612. Neither party argues on appeal that the award would be justified under N.C. Gen. Stat. § 50-13.6.

Barrett v. Barrett, 140 N.C. App. 369, 374, 536 S.E.2d 642, 646 (2000) (citations omitted).

Plaintiff only contends that defendant is not "without sufficient means to defray the costs of litigation." *Id.* "In making this determination, a trial court should generally rely on the dependent spouse's disposable income and estate." *Rhew v. Felton*, 178 N.C. App. 475, 485, 631 S.E.2d 859, 867, *app. dismissed and disc. rev. denied*, 360 N.C. 648, 636 S.E.2d 810 (2006).

Defendant has a substantial separate estate worth over $1.5 million, including an investment account worth over $400,000. Nevertheless, defendant argues that she should not be required to deplete her estate at all to pay for her counsel. "[T]he purpose of the [attorney's fees] statute . . . is to prevent requiring a dependent spouse to meet the expenses of litigation through the *unreasonable* depletion of her separate estate where her separate estate is considerably smaller than that of the supporting spouse . . . ." *Patronelli v. Patronelli*, 360 N.C. 628, 631, 636 S.E.2d 559, 562 (2006) (citations and quotation marks omitted) (emphasis added). Although defendant would be required to deplete her estate to some extent in order to pay attorney's fees and her estate is significantly smaller than plaintiff's, which the trial court estimated to be worth more than $2.5 million, it is not unreasonable to expect her to pay $40,000 out of a $1.5 million estate to employ adequate counsel.[4] We hold that the trial court erred in concluding that defendant was "without sufficient means to defray the costs of litigation." *Barrett*, 140 N.C. App. at 374, 536 S.E.2d at 646. Therefore, we reverse that portion of the trial court's order requiring plaintiff to pay $40,000 in attorney's fees.

V. Conclusion

The trial court's findings of fact on issues relevant to its modification of alimony and child support are supported by competent evidence. The

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4. *See, e.g.*, *McLeod v. McLeod*, 43 N.C. App. 66, 68, 258 S.E.2d 75, 77 (holding that the trial court erred in awarding the dependent spouse attorney's fees where she had a savings account worth $27,000), *disc. rev. denied*, 298 N.C. 807, 261 S.E.2d 920 (1979), *Rickert v. Rickert*, 282 N.C. 373, 382, 193 S.E.2d 79, 84-85 (1972) (holding that the dependent spouse did not need attorney's fees to meet the opposing party as litigant where she had significant, valuable assets in her estate, including stocks and bonds worth over $141,000); *cf. Rhew*, 178 N.C. App. at 486, 631 S.E.2d at 867 (affirming the trial court's determination that the dependent spouse was entitled to attorney's fees where she had only limited funds in her bank accounts and no real property); *Walker v. Walker*, 143 N.C. App. 414, 425, 546 S.E.2d 625, 632 (2001) (holding that the trial court did not err in awarding attorney's fees where the plaintiff only earned $1,040 per month and, "unlike the plaintiff in *Rickert*, . . . did not have substantial stock and bond holdings at the time of trial.").

findings support its conclusions on these issues. Therefore, we affirm those portions of the trial court's order modifying alimony and child support. However, the trial court erred in concluding that defendant did not have sufficient means to employ adequate counsel because her estate was worth over $1.5 million. Therefore, we reverse the portion of the trial court's order awarding attorney's fees.

AFFIRMED in part; REVERSED in part.

Judges McGEE and BRYANT concur.

PHILIP SCHMIDT, AS ADMINISTRATOR OF THE ESTATE OF MARTHA JEAN SCHMIDT, PLAINTIFF
v.
SCOTT MILLER PETTY, MD AND NANTAHALA RADIOLOGY ASSOCIATES, P.A., DEFENDANTS

No. COA13-278

Filed 17 December 2013

Evidence—medical malpractice—exclusion of evidence—standard of care violation—not proximate cause of death

The trial court did not abuse its discretion in a medical malpractice action by granting defendants' motion *in limine* to exclude certain expert testimony about a violation of the standard of care. Plaintiff conceded that the violation was not a proximate cause of the decedent's death and confusion of the issues in the minds of the jurors and ensuing prejudice to defendants were likely to occur.

Appeal by plaintiff from judgment entered 22 October 2012 by Judge Sharon T. Barrett in Macon County Superior Court. Heard in the Court of Appeals 29 August 2013.

Fred D. Smith Jr., P.C., by Fred D. Smith, Jr. and Ron L. Moore, P.A., by Ron L. Moore, for plaintiff-appellant.

Northup, McConnell & Sizemore PLLC, by Isaac N. Northup, Jr. and Katherine M. Bulfer, for defendants–appellees.

DAVIS, Judge.

Plaintiff Philip Schmidt, administrator of the estate of Martha Jean Schmidt ("Plaintiff"), appeals from a judgment entered by the trial court upon a jury verdict in favor of Scott Miller Petty, M.D. ("Dr. Petty") and Nantahala Radiology Associates, P.A. (collectively "Defendants") in a medical malpractice action. On appeal, he contends the trial court committed reversible error by granting a motion *in limine* filed by Defendants that had the effect of precluding his expert witnesses from offering certain opinion testimony at trial. After careful review, we affirm.

Factual Background

On 12 May 2006, Plaintiff's decedent, Martha Jean Schmidt ("Mrs. Schmidt"), sought medical care at Smokey Mountain Healthcare Associates ("SMHA") based on symptoms of an upper respiratory infection. During her visit, a two-view x-ray was taken of Mrs. Schmidt's chest. Dr. Petty, a licensed radiologist who reviewed x-rays for SMHA and Angel Medical Center, Inc. ("Angel Medical"), reviewed the x-ray but did not note in his report the presence of a lesion in the upper lobe of Mrs. Schmidt's left lung.

On 27 May 2007, Mrs. Schmidt sought medical care at Angel Medical, complaining of pain in her neck and chest. A chest x-ray was ordered by emergency room physician Dr. James Lapkoff. In his report interpreting the x-ray, Dr. Petty stated that "the lungs are clear and the heart size and pulmonary vasculature are within normal limits. No acute bony abnormalities are identified." Once again, Dr. Petty's report failed to detect the presence of a lesion in Mrs. Schmidt's left lung.

On 27 May 2008, Mrs. Schmidt sought medical care from her primary physician, Dr. Sondra K. Wolf ("Dr. Wolf"), complaining of symptoms associated with pneumonia. Dr. Wolf ordered a chest x-ray, which was performed at Angel Medical. Dr. Petty reviewed the x-ray and reported that "[b]ilateral hyperinflation remains compatible with COPD. There are no new areas of infiltrate or atelectasis. The heart size is stable and there is no evidence for pulmonary edema." Dr. Petty's report again failed to note the presence of the lesion in Mrs. Schmidt's left lung.

Mrs. Schmidt subsequently sought treatment from Dr. Garland C. King ("Dr. King") on 16 June 2008 based on complaints of pleuritic chest pain and abdominal pain. Dr. King ordered a computed tomography ("CT") scan of her abdomen and chest. Dr. Petty reviewed these images and reported that "the findings are indicative of primary lung neoplasm [cancer] until otherwise excluded."

On 21 February 2009, Mrs. Schmidt died of metastatic lung cancer. On 10 February 2011, Plaintiff initiated a medical malpractice action in Macon County Superior Court against Dr. Petty and his practice, Nantahala Radiology Associates, P.A. Plaintiff alleged in his complaint that from May 2006 through May 2008 Mrs. Schmidt's radiographic findings were "reasonably suspicious for cancer . . . and failure to timely diagnose and treat Mrs. Schmidt's lung cancer in May of 2006 and 2007 . . . led to a progression of her lung cancer from treatable, curable stage in May of 2006 and 2007 to an incurable, terminal stage by June of 2008." Plaintiff further alleged that the two-year delay in diagnosis constituted negligence and was a proximate cause of her death.

Plaintiff's expert oncologist, Dr. Gerald Sokol, testified in his deposition that had Mrs. Schmidt's lung cancer been diagnosed in May of 2006 or May of 2007, she would have had an 80% to 85% probability of being cured. He further opined that by May of 2008, however, Mrs. Schmidt's lung cancer was incurable.

Dr. Paul Molina ("Dr. Molina") and Dr. Philip Goodman ("Dr. Goodman") — Defendants' expert witnesses — testified at their depositions that Mrs. Schmidt's 2006 and 2007 chest x-rays did not contain a left upper lobe focal opacity that was suspicious for cancer such that no CT scan was required, and that, therefore, Dr. Petty had not violated the applicable standard of care with respect to his review of these x-rays.

Plaintiff's expert witnesses, Dr. Karsten Konerding ("Dr. Konerding") and Dr. Randall Patten ("Dr. Patten"), testified in their depositions, conversely, that Dr. Petty had in fact violated the standard of care by failing to report the presence of the focal opacity that was present on all three of Mrs. Schmidt's x-rays as a suspicious area that required follow-up study by means of a chest CT scan. Drs. Konerding and Patten also testified that the 27 May 2008 chest x-ray revealed a widened mediastinum that likewise should have been noted by Dr. Petty as indicative of metastatic disease with a recommendation for further study through a chest CT scan. Notably, however, both Dr. Patten and Dr. Konerding admitted that a finding to this effect by Dr. Petty on 27 May 2008 would not have prevented Mrs. Schmidt's death from metastatic lung cancer.

A motion *in limine* was filed by Defendants to exclude evidence regarding Dr. Petty's analysis of Mrs. Schmidt's 27 May 2008 chest x-ray. The motion was orally amended so as to seek the exclusion of "any testimony that Dr. Petty violated the standard of care in reading that x-ray."

The motion was heard before the Honorable Sharon T. Barrett on 8 October 2012. Plaintiff argued that expert testimony that Dr. Petty

violated the standard of care by failing to note a lesion in his analysis of the 27 May 2008 x-ray was relevant and admissible to "show how the lesion progresse[d]." Plaintiff further contended such opinion testimony was relevant because the "jury could infer . . . that since Dr. Petty did not report the 2.5 or 1.5 centimeter lesions, that he was not looking for cancer in the upper lobe of Mrs. Schmidt's [lung] on the two prior occasions." In response, Defendants asserted that this evidence lacked relevance because of "the fact that any alleged failure by Dr. Petty to report the lesion on the May 2008 x-ray could not have been the proximate cause of the injuries suffered."

Judge Barrett made a relevancy determination based on Rules 404(b) and 406 of the North Carolina Rules of Evidence. She ruled that this evidence was inadmissible under Rule 406 because "there's not a sufficient showing of an adequate number of times that the alleged conduct occurred to establish it as a habit." Judge Barrett further determined that the evidence also lacked relevance under Rule 404(b) because the x-ray was "the final in a series of three x-rays in different years, and . . . the conduct is not conduct that proximately caused the decedent's injury . . . ."

Despite its determination that this opinion testimony was not relevant, the trial court nevertheless proceeded to perform an analysis under Rule 403 of the North Carolina Rules of Evidence, weighing the probative value of this evidence against its prejudicial impact on Defendants and the likelihood of confusion of the issues. Judge Barrett concluded that the probative value of the testimony was substantially outweighed by the danger of unfair prejudice to Defendants and that the admission of this evidence would lead to confusion by the jury. She proceeded to grant the motion *in limine*, ruling that "opinion evidence that the defendant violated the standard of care in May of 2008 . . . shall not be admitted," and "evidence regarding the defendant's failure to note in his report certain findings regarding the decedent's medical condition . . . shall be excluded." Judge Barrett further ruled, however, that the report of the 27 May 2008 x-ray itself was admissible.

The case proceeded to trial on 9 October 2012. At the conclusion of the trial, the jury returned a verdict in favor of Defendants, and the trial court entered a judgment on 17 October 2012. Plaintiff filed a timely notice of appeal to this Court.

Analysis

The sole issue raised on appeal is whether the trial court erred in granting Defendants' motion *in limine*. "A motion *in limine* seeks

pretrial determination of the admissibility of evidence proposed to be introduced at trial; its determination will not be reversed absent a showing of an abuse of the trial court's discretion." *Warren v. Gen. Motors Corp.*, 142 N.C. App. 316, 319, 542 S.E.2d 317, 319 (2001). An abuse of discretion exists when the record shows that the trial court's ruling was so arbitrary that it " 'could not have been a result of competent inquiry.' " *Morris v. Gray*, 181 N.C.App. 552, 556, 640 S.E.2d 737, 740 (2007)(quoting *Wiencek-Adams v. Adams*, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992)). In our review, "we consider not whether we might disagree with the trial court, but whether the trial court's actions are fairly supported by the record." *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008)(citation omitted).

Plaintiff argues that: (1) the trial court committed error by failing to find the opinion testimony of Plaintiff's expert witnesses regarding Dr. Petty's allegedly negligent interpretation of the 27 May 2008 x-ray relevant under Rule 401 of the North Carolina Rules of Evidence; (2) the trial court abused its discretion by ruling that the probative value of this testimony was substantially outweighed by its prejudicial effect on Defendants and the likelihood of confusion of the issues in the minds of the jurors pursuant to Rule 403; and (3) the error prejudiced Plaintiff because a different result would likely have ensued had the error not occurred.

Even assuming, without deciding, that the excluded evidence could be characterized as relevant under Rule 401, we hold that the trial court did not abuse its discretion in granting Defendant's motion *in limine* based on Rule 403. Rule 403 states, in pertinent part, that 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. R. Evid. 403. The "application of the Rule 403 balancing test remains entirely within the inherent authority of the trial court." *Warren v. Jackson*, 125 N.C. App. 96, 98, 479 S.E.2d 278, 280, *disc. review denied*, 345 N.C. 760, 485 S.E.2d 310 (1997). Hence, the trial court's determination as a result of this balancing test will not be disturbed on appeal absent a clear showing that the court abused its discretion. *Id.*

Here, the trial court stated the following in connection with its application of Rule 403:

> The next step in the analysis is to consider, even if this could have been admitted as habit or 404(b) evidence, whether under Rule 403, the probative value of this

> evidence vis-à-vis the danger of confusion of the issues in the minds of the jury, as this is a medical malpractice case, the factual finding by the jury about the standard of care and about proximate cause are so critical to the determination of liability, that this is a crucial finding by the jury.
>
> If the jury were to hear opinion testimony about the violation of the standard of care that is not alleged as a proximate cause of injury, or if the jury were to hear evidence regarding whether or not the defendant failed to note in his May 2008 report certain findings regarding the decedent's medical condition at that time, I believe and have determined in the exercise of discretion that significant danger of confusion of the jury on a matter that is dispositive of the case would be presented.
>
> Further, the Court finds that the probative value is greatly outweighed by the danger of unfair prejudice to the defendant. And all of this ruling is based on my evaluation of the forecast of the evidence, the pleadings and the contentions of the parties and the authorities submitted at this particular time.

A jury is likely to attach great significance to expert testimony that a party violated the applicable standard of care. *See U.S. v. Dorsey*, 45 F.3d 809, 815 (4th Cir. 1995)("[E]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the [Rules of Evidence] exercises more control over experts than over lay witnesses." (citations omitted)).

We believe that the trial court acted within its discretion in granting Defendants' motion *in limine*. It was reasonable for Judge Barrett to conclude that had the jury been permitted to hear expert testimony by Drs. Konerding and Patten to the effect that Dr. Petty violated the standard of care in reviewing Mrs. Schmidt's 27 May 2008 x-ray — an error that Plaintiff concedes was not a proximate cause of Mrs. Schmidt's death — confusion of the issues in the minds of the jurors and ensuing prejudice to Defendants were likely to occur. The key issues to be resolved by the jury in this case were whether (1) Dr. Petty violated the applicable standard of care in his reading of the 2006 and 2007 x-rays; and (2) whether these acts of alleged negligence by Dr. Petty proximately caused Mrs. Schmidt's death. We cannot say that the trial court abused

its discretion in determining that the potential for harm stemming from the admission of expert testimony regarding a standard of care violation by Dr. Petty on a separate occasion substantially outweighed any limited probative value of this evidence — given the parties' agreement that any such violation did not proximately cause Mrs. Schmidt's death. *See Horne v. Roadway Package Sys., Inc.*, 129 N.C. App. 242, 244, 497 S.E.2d 436, 438 (1998)("Expert opinion testimony can be excluded when the trial court determines . . . the chance of misleading the jury outweighs the probative value of the evidence."). Thus, the trial court did not abuse its discretion in granting Defendants' motion *in limine*.

Conclusion

For the reasons stated above, we affirm.

AFFIRMED.

Judges CALABRIA and STROUD concur.

TARALYN SHALANDRA SIMPSON, Plaintiff
v.
SEARS, ROEBUCK AND CO., and Amy Edwards, Defendants

No. COA13-329

Filed 17 December 2013

Malicious Prosecution—false imprisonment—district court conviction—larceny—obtained through fraudulent or other unfair means

The superior court erred in a malicious prosecution and false imprisonment case by granting defendants' motion to dismiss. Plaintiff's complaint alleged malicious prosecution and false imprisonment, and also clearly alleged that the verdict against her in district court for misdemeanor larceny of goods was procured "fraudulently or unfairly." This allegation complied with *Myrick v. Cooley*, 91 N.C. App. 209, and thus, the conviction in district court did not conclusively establish probable cause. Accordingly, plaintiff's complaint stated a claim upon which relief could be granted. Plaintiff's remaining arguments were not addressed.

Appeal by plaintiff from judgment entered 5 November 2012 and orders entered 20 December 2012 by Judge Bradley B. Letts in Buncombe County Superior Court. Heard in the Court of Appeals 27 August 2013.

Law Offices of Thomas F. Loflin, III, by Thomas F. Loflin III for plaintiff-appellant.

Henson & Talley, LLP, by Perry C. Henson, Jr. and Heather Nicolini Wade, for defendants-appellees.

STEELMAN, Judge.

Where plaintiff's complaint alleged that the conviction against her in district court was obtained through fraudulent or other unfair means, this allegation complied with the requirements of *Myrick v. Cooley*. Where plaintiff's complaint stated a claim for which relief could be granted, the trial court erred in granting defendant's motion to dismiss. Because we reverse the ruling of the trial court, we do not reach plaintiff's remaining arguments.

I. Factual and Procedural History

On 14 May 2008, Amy Edwards was employed by Sears Roebuck and Co., as a loss control manager at its store in Asheville. Edwards detained Taralyn Simpson (plaintiff) on suspicion of larceny. Plaintiff was subsequently arrested and charged with misdemeanor larceny of goods from Sears in the amount of $623.93. On 15 April 2009, plaintiff was found guilty as charged in district court. Plaintiff appealed to superior court for a trial *de novo* before a jury, and was found not guilty on 20 May 2009.

On 31 January 2011, plaintiff filed a complaint against Sears and Edwards (defendants) seeking compensatory and punitive damages for malicious prosecution and false imprisonment. This complaint was subsequently dismissed without prejudice. On 9 May 2012, plaintiff filed the present complaint against defendants, asserting the same claims and seeking the same relief. On 18 July 2012, defendants filed an answer and a motion to dismiss. The trial court heard defendants' motion to dismiss on 6 August 2012. On 8 August 2012, after the hearing on defendants' motion to dismiss, plaintiff filed a motion to amend her complaint. By order filed on 5 November 2012, the trial court granted defendants' motion to dismiss. This order did not address plaintiff's motion to amend her complaint. On 15 November 2012, plaintiff moved to amend the order, requesting that the court either grant or deny plaintiff's motion

to amend her complaint. On 20 December 2012, the trial court filed an order denying plaintiff's motions to amend the order and her complaint.

Plaintiff appeals.

II. Granting of Defendants' Motion to Dismiss

[1] In her first argument, plaintiff contends that the trial court erred by granting defendants' motion to dismiss. We agree.

A. Standard of Review

> The motion to dismiss under N.C. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted.

Stanback v. Stanback, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citations omitted).

"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).

B. Analysis

Plaintiff's complaint presented two claims for relief. The first claim was for malicious prosecution; the second was for false imprisonment. Defendants do not contend that plaintiff failed to allege all of the elements of her claims. Instead, defendants challenge one element – that of probable cause. Defendants contend that the finding of guilt by the district court conclusively established that probable cause existed for both the prosecution and the detention of plaintiff, and would mandate the dismissal of both of her claims.

Defendants cite to our Supreme Court's decisions in *Griffis v. Sellars*, 20 N.C. 315 (1838), and *Overton v. Combs*, 182 N.C. 4, 108 S.E. 357 (1921). In *Griffis*, plaintiff brought suit against defendant for wrongful prosecution. In the county court, plaintiff had been found guilty, but in the superior court, plaintiff had been found not guilty. Nonetheless, our Supreme Court held that "[t]he judgment in the county court justifies the institution of the prosecution in that court." *Griffis*, 20 N.C. at 317. Similarly, in *Overton*, our Supreme Court held that where in a

former suit the essential issue is decided in favor of the plaintiff on the question of probable cause, that finding is conclusive and plaintiff may not be held liable in a subsequent complaint for malicious prosecution. *Overton*, 182 N.C. at 7, 108 S.E. at 358.

We note, however, that this doctrine has eroded somewhat over time. In *Moore v. Winfield*, 207 N.C. 767, 178 S.E. 605 (1935), our Supreme Court clarified its decision in *Overton*, and held that despite its ruling in that case, "the great weight of authority is to the effect that a conviction and judgment in a lower court is conclusive, but if not sustained on appeal, it can be impeached for fraud or other unfair means in its procurement." *Moore*, 207 N.C. at 770, 178 S.E. at 606.

This Court later held that, where a conviction was procured by "fraud or other unfair means," it did not conclusively establish probable cause. *Myrick v. Cooley*, 91 N.C. App. 209, 213, 371 S.E.2d 492, 495 (1988). In *Myrick*, we noted the following language from the Supreme Court's opinion in *State v. Sparrow*, 276 N.C. 499, 173 S.E.2d 897 (1970), discussing the effect of the appeal of a conviction from the district court to the superior court.

> [W]hen an appeal of right is taken to the Superior Court, in contemplation of law it is as if the case had been brought there originally and there had been no previous trial. The judgment appealed from is completely annulled and *is not thereafter available for any purpose*.

Myrick, 91 N.C. App. at 213, 371 S.E.2d at 495 (quoting *Sparrow*, 276 N.C. at 507, 173 S.E.2d at 902). This Court expressed doubt as to "whether a judgment of the District Court which is overturned on the merits should be afforded any more weight in these circumstances than a magistrate's independent determination of probable cause[,]" and noted that "it seems incongruous to infer from a subsequent conviction the existence of probable cause for the initial arrest when it is clear that innocence of the offense charged does not establish an absence of probable cause for the arrest." *Id.* at 213-14, 371 S.E.2d 495. Nonetheless, we held that "in the absence of a showing that the District Court conviction of Myrick was obtained improperly, the conviction establishes, as a matter of law, the existence of probable cause for his arrest and defeats both his federal and state claims for false arrest or imprisonment." *Id.* at 214, 371 S.E.2d at 495. We then held that the plaintiff had failed to produce evidence that his conviction in district court was procured by fraudulent or unfair means, and that the trial court properly granted a directed verdict dismissing plaintiff's claims for false arrest and false imprisonment.

Based upon *Myrick*, we hold that where the plaintiff's complaint affirmatively discloses that a defendant was convicted of criminal charges in district court, before being found not guilty in superior court, the plaintiff must plead that the conviction in district court was procured by fraud or some other unfair means.

In the instant case, defendants contend that plaintiff failed to allege that her conviction in district court was wrongfully procured. The relevant allegations contained in plaintiff's complaint are as follows:

> 14. The Plaintiff was found guilty on the charge in the citation incorporated into this Complaint as Exhibit A in Buncombe County District Court on or about April 15, 2009, as a result of the false, fictitious, fabricated, and fraudulent written "confession" described above and further as a result of the maliciously false and fraudulent testimony willfully, wantonly, recklessly, and intentionally given by the Defendant Edwards at the District Court trial. Because of the foregoing, the conviction of the Plaintiff in District Court was procured by fraud or unfair means.
>
> 15. The Plaintiff [gave] timely notice of appeal of her fraudulently or unfairly procured District Court conviction to the Superior Court of Buncombe County. The Plaintiff received a speedy jury trial, and on or about the 20th day of May, 2009, was found not guilty of the charge in the citation attached to the Complaint as Exhibit A. The jury only deliberated for approximately ten (10) minutes before returning its not guilty verdict. The phony, fake written "confession" was not offered into evidence at the Superior Court trial. A true copy of the jury's not guilty verdict is attached to this Complaint as Exhibit B and is incorporated by reference the same as if fully set forth herein. A true copy of the judgment of the Buncombe County Superior Court entered on the jury's verdict of not guilty is attached to this Complaint as Exhibit C and is incorporated by reference the same as if fully set forth herein.

These allegations are clear on their face. Plaintiff not only alleged malicious prosecution and false imprisonment, but also clearly alleged that the verdict against her in district court was procured "fraudulently or unfairly." We hold that this allegation complied with *Myrick*. Based upon this allegation, the conviction in district court does not conclusively establish probable cause. We further hold that these

allegations, which we are required to treat as true, are sufficient to withstand a motion to dismiss. We therefore vacate the order dismissing plaintiff's complaint, and remand this matter to the trial court for further proceedings consistent with this opinion.

III. Plaintiff's Remaining Arguments

Since we have vacated the trial court's dismissal of plaintiff's complaint, it is not necessary that we reach plaintiff's remaining arguments.

VACATED AND REMANDED.

Judges McGEE and ERVIN concur.

STATE OF NORTH CAROLINA
v.
RANDY BENJAMIN BARTLETT

No. COA13-471

Filed 17 December 2013

Judges—hearing by one judge—written order by second

Although the State contended that a second superior court judge did not have the authority to enter a written order granting defendant's motion to suppress because the hearing had been held earlier before a different judge, the order granting defendant's motion to suppress was effectively entered in open court by the first judge and the written order was unnecessary. The evidence in the case was not materially conflicting and the first judge supplied the rationale for his ruling from the bench.

Appeal by the State from order entered 22 February 2013 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 24 September 2013.

Attorney General Roy Cooper, by Assistant Attorney General Joseph L. Hyde, for the State.

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

DILLON, Judge.

The State appeals from the trial court's order granting Defendant's motion to suppress, contending the Honorable Orlando Hudson did not have the authority to sign the order entered on 13 February 2013, because the hearing was before the Honorable Abraham Jones on 18 December 2012. Because Judge Jones' ruling from the bench on 18 December 2012 was sufficient, in this case, to enter the trial court's order allowing Defendant's motion to suppress, we conclude the State's argument is without merit.

The evidence of record tends to show the following: On 25 March 2011 at approximately 1:00 A.M., Officer Howard Henry of the Durham County Police Department saw Randy Benjamin Bartlett ("Defendant") allegedly speeding on I-40. Officer Henry believed he was "racing" or attempting to race a Corvette. Officer Henry estimated that Defendant was driving 80 mph in a 65 mph zone. Officer Henry pulled Defendant and, upon approaching the driver's side of the vehicle, detected a strong odor of alcohol. Defendant's wife, Ms. Jamie Jones, was a passenger in the vehicle. When Officer Henry asked Defendant if he had been drinking, Defendant replied that he had had two beers. After performing a series of field sobriety tests, Officer Henry arrested Defendant for speeding and driving while impaired.

On 17 February 2012, Defendant filed a motion to suppress the evidence gathered after his arrest based on the lack of probable cause to arrest Defendant. A probable cause hearing was held before Judge Jones on 18 December 2012. Officer Henry, Ms. Jones, and Mr. Julian Douglas Scott ("Mr. Scott") testified at the hearing.

Officer Henry testified that he executed a series of field sobriety tests to determine that probable cause existed to arrest Defendant on the basis of driving while impaired. First, Officer Henry performed the Horizontal Gaze Nystagmus ("HGN") field sobriety test, and he stated that "[t]he first part of the HGN is to check his pupils to make sure that they're of normal size, which his were." Officer Henry stated, however, that Defendant's eyes lacked "smooth pursuit," and Defendant had "sustained nystagmus at a maximum deviation in both eyes." Defendant did not exhibit "the onset of nystagmus prior to 45 degrees[.]" Officer Henry also executed the "walk and turn" field sobriety test, which Officer Henry admitted, "he was able to do" it. In the next portion of the field sobriety test, Defendant was asked to take nine steps, heal to toe, on an imaginary line, then turn around and take nine additional steps on the same imaginary line. Defendant stepped off the imaginary line once. Defendant was also asked to perform "the one-leg stand" field sobriety test, which entailed "rais[ing] the foot . . . six inches from the

ground, keeping the foot parallel to the ground and the leg straight, and then keeping his hands down to his side[,]" while he was "to count one thousand one, one thousand two, and to keep counting until [Officer Henry told] him to stop." Defendant passed this test. Lastly, Defendant was asked to do a "preliminary breath test," which Officer Henry performed twice, and which gave a positive result both times, indicating that Defendant had some alcohol in his system.

Mr. Scott was qualified as an expert[1] at the hearing in this matter and testified for Defendant that, on the undisputed evidence presented concerning this particular stop, he would not have "been comfortable" making the arrest.

At the end of the hearing, Judge Jones stated, "I may be wrong, but I think the guy substantially passed the test. . . . So on the basis of that, I'll grant the motion. You draw up the order, get it to me."

Subsequently, Judge Hudson signed an order drafted by the parties, making findings of fact and conclusions of law based on the evidence presented at the hearing before Judge Jones, and granting Defendant's motion to suppress. From this written order, the State appeals.

I: Authority of Superior Court Judges

In the State's sole argument on appeal, it contends Judge Hudson had no authority to sign the order prepared for Judge Jones, based upon evidence presented at a hearing before Judge Jones. We find it unnecessary to reach this question.

N.C. Gen. Stat. § 15A-977(f) (2011), requires that "[t]he judge must set forth in the record his findings of facts and conclusions of law." *Id.* However, N.C. Gen. Stat. § 15A-977(f), has been interpreted as "mandating a written order unless (1) the trial court provides its rationale from the bench, and (2) there are no material conflicts in the evidence at the suppression hearing." *State v. Williams*, 195 N.C. App. 554, 555, 673 S.E.2d 394, 395 (2009) (citation omitted). "If these two criteria are met, the necessary findings of fact are implied from the denial of the motion to suppress." *Id.*

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1. Mr. Scott had formerly been employed as a police officer and had taken the "standardized field sobriety testing student course" and the "detection and standardized field sobriety testing instructor training course." He had also completed his certification requirements and become "the first drug recognition expert in North Carolina." He then founded the State's "drug recognition expert training program" and coordinated the program for three years.

"[A] material conflict in the evidence exists when evidence presented by one party controverts evidence presented by an opposing party such that the outcome of the matter to be decided is likely to be affected." *State v. Morgan*, __ N.C. App. __, __, 741 S.E.2d 422, 425 (2013).

In this case, there was no material conflict in the evidence presented at the suppression hearing. Officer Henry was the only witness who supplied testimony concerning Defendant's performance in the field sobriety tests. *Compare*, *Morgan*, __ N.C. App. at __, 741 S.E.2d at 426 (stating that the defendant and the detective's recitations of the facts were contradictory, and concluding that there was a material conflict in the evidence, when the defendant stated, but the detective denied, that the detective "indicated he could help defendant get probation" if the defendant signed a waiver, and when the defendant also stated that he was " 'highly under the influence' of the controlled substances" but the detective opined that the "defendant did not appear to be under the influence of any 'impairing-type substance' "); *State v. Williams*, __ N.C. App. __, __, 715 S.E.2d 553, 558 (2011) (holding that, under the circumstances, even though the defendant's testimony conflicted with the detective's testimony, the conflict was not material, because the conflict was not "such that the outcome of the matter to be decided [was] likely to be affected").

In the present case, there were differing *opinions* regarding whether the evidence presented by Officer Henry concerning Defendant's performance during the field sobriety tests supported Officer Henry's decision that there was probable cause to believe that Defendant was appreciably impaired. However, the actual evidence concerning Defendant's performance in the field sobriety tests was undisputed. For this reason – because the evidence in this case was not materially conflicting and because Judge Jones supplied the rationale for his ruling from the bench – we conclude that the order granting Defendant's motion to suppress was effectively entered on 18 December 2012 in open court. Therefore, Judge Hudson's 22 February 2013 written order, containing findings of facts and conclusions of law based on the evidence received at the 18 December 2012 hearing, was unnecessary. *State v. Oates*, 366 N.C. 264, 268, 732 S.E.2d 571, 574 (2012) (stating that "[w]hile a written determination is the best practice, nevertheless the statute does not require that these findings and conclusions be in writing") (citing *State v. Horner*, 310 N.C. 274, 279, 311 S.E.2d 281, 285 (1984)).

AFFIRMED.

Judge McGEE and Judge McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
CORNELIUS JEVON CLARK

No. COA13-561

Filed 17 December 2013

1. Homicide—first-degree murder—sufficient evidence

The trial court did not err in a homicide case by denying defendant's motion to dismiss the charge of first-degree murder. The State presented sufficient evidence of each element of the charge, including that defendant acted with premeditation and deliberation.

2. Appeal and Error—preservation of issues—failure to object at trial

Defendant waived his right to appeal the issue of whether the trial court erred by informing the jury pool that defendant had given notice of self-defense by failing to object to the instruction at trial.

Appeal by defendant from judgment entered 17 January 2013 by Judge Marvin K. Blount, III in Nash County Superior Court. Heard in the Court of Appeals 9 October 2013.

Attorney General Roy Cooper, by Assistant Attorney General C. Norman Young, Jr., for the State.

Kathryn L. VandenBerg for defendant.

ELMORE, Judge.

This appeal presents questions concerning the correctness of the trial judge's jury instructions and his denial of defendant's motion to dismiss the first degree murder charge for insufficient evidence of premeditation and deliberation. On 4 June 2011, Cornelius Jevon Clark (defendant) was charged in the stabbing death of Jakwan Esquire Pittman. After a jury trial, defendant was found guilty of first degree murder and sentenced to life imprisonment without parole. Defendant subsequently gave notice of appeal in open court on 16 January 2013. After careful consideration, we find no error.

The State's evidence tended to show the following: Officer Robert Smith of the Rocky Mount Police Department testified that on 4 June 2011 he was at Club Rain working security detail when he was alerted

that there was going to be a fight. He and Officer Anthony Creech approached a growing crowd. He saw defendant "get into the face" of Pittman and then "strike [him] in the throat, almost like he pushed him with two hands in the throat area." As Officer Smith removed Pittman from the club, he tasted blood in his mouth and felt a warm liquid spray in his eyes. He then saw Pittman lying on the ground "bleeding out."

Mr. Russell Ray Rouse, Jr. testified that on 4 June 2011 he was working security when he heard a fight was about to break out between two black males over money. Mr. Rouse saw defendant and Pittman "face off" for approximately 20 seconds before defendant made a swiping motion "towards [defendant's] mouth and around the neck area of Pittman." Defendant then struck Pittman in the throat, and Pittman was "holding his neck and when he moved his hand, blood shot out of his neck."

Officer Creech of the Rocky Mount Police Department testified that he saw defendant and Pittman standing approximately three feet apart from each other, but he did not hear them arguing. To be safe, he told the men to "back up." He noticed that Pittman started backing up when defendant "lunge[d] at him with his thumb and he pushed him with his left hand and jabbed it towards the throat section." Dr. William Oliver performed an autopsy on Pittman and concluded that the cause of death was a single slit-like stab wound perforating inward near the trachea that cut the jugular vein and the carotid artery.

Defendant testified that he and Pittman had been acquaintances since the early 1990s, and had no troubles with one another. Defendant went to Club Rain around midnight; he admitted to sneaking a pocket knife through security, explaining that he carried one every day for protection. Defendant was drinking heavily. At some point, defendant felt himself get pushed; he turned and saw that Pittman was behind him. The men started fighting: defendant said, we "was face to face and we arguing and to me like it seemed like he was taking a step forward. So, that's when I -- I pushed him with both hands. And that's when the incident occurred." Defendant pulled out the knife because he "didn't know what his intentions were[.] . . . I pulled it out for my protection." In an alleged effort to defend himself, defendant pushed Pittman "just hard enough to get him off me. Like to get him from out of my -- out of my arm reach." At the close of the State's evidence and after the defense rested, defendant moved to dismiss the charge of first degree murder based on a lack of premeditation and deliberation. The trial court denied both motions.

II. Denial of Motion to Dismiss

[1] Defendant argues that the trial court erred in denying his motion to dismiss the charge of first degree murder because the State presented insufficient evidence that he acted with premeditation and deliberation. We disagree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). On a motion to dismiss for insufficiency of evidence, " 'the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence 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) (citation omitted), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

First degree murder is the intentional and unlawful killing of another human being with malice and with premeditation and deliberation. *See* N.C. Gen. Stat. § 14-17 (2011).

> "Premeditation" means that the defendant formed the specific intent to kill the victim some period of time, however short, before the actual killing. "Deliberation" means an intent to kill executed by the defendant in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation.

State v. Bonney, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991) (citations omitted).

"Generally, premeditation and deliberation must be proved by circumstantial evidence because they are not susceptible of proof by direct evidence." *State v. Misenheimer*, 304 N.C. 108, 113, 282 S.E.2d 791, 795

(1981) (quotation and citation omitted). "[A]lthough there may have been time for deliberation, if the purpose to kill was formed and immediately executed in a passion, especially if the passion was aroused by a recent provocation or by mutual combat, the murder is not deliberate and premeditated." *Id.* (alteration in original).

Our courts have found the following circumstances to be instructive as to whether circumstantial evidence of premeditation and deliberation exists: (1) want of provocation on the part of the deceased; (2) the conduct and statements of the defendant before and after the killing; (3) threats and declarations of the defendant before and during the course of the occurrence giving rise to the death of the deceased; (4) ill-will or previous difficulty between the parties; (5) the dealing of lethal blows after the deceased has been felled and rendered helpless; and (6) evidence that the killing was done in a brutal manner. *State v. Joplin*, 318 N.C. 126, 130, 347 S.E.2d 421, 423-24 (1986).

Defendant argues that "none of these factors was present here to a degree that a reasonable mind would accept as adequate to support a conclusion of premeditation and deliberation beyond a reasonable doubt." We are not persuaded.

Based on the criteria set forth above, the State presented sufficient circumstantial evidence of premeditation and deliberation. First, there was want of provocation on the part of the deceased because no evidence showed that Pittman threatened or otherwise provoked defendant, other than possibly bumping into him. The cause of the fight is uncertain and Pittman was unarmed.

Second, defendant's conduct was inconsistent with a man acting in self-defense. Defendant testified that he pulled out his knife "for my protection" and admitted to pushing Pittman "just hard enough to get him off me." However, the State presented evidence to the contrary. Officer Smith saw defendant "get into the face" of Pittman before striking him. Mr. Rouse saw defendant make a swiping motion towards his own mouth and then around Pittman's throat area, likely signaling that he was carrying a small weapon. Most notably, when Officer Creech asked the men to "back up," defendant lunged and delivered the fatal blow as Pittman was backing away – undermining defendant's theory of self-defense. Defendant's conduct and the want of provocation on the part of the deceased constituted substantial evidence to put the issue of premeditation and deliberation before the jury. The trial court did not err in denying defendant's motion to dismiss.

III. Notice of Self-defense

[2] Defendant argues that the trial court committed reversible error when it informed the jury pool, without objection, that he gave notice of self-defense. "As a general rule, defendant's failure to object to alleged errors by the trial court operates to preclude raising the error on appeal." *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985); N.C.R. App. P. 10(a). However, defendant avers that this issue is properly before us despite his failure to object at trial because the trial judge acted contrary to statutory mandate. We disagree and hold that defendant has waived his right to appeal this issue by failing to object at trial.

The North Carolina discovery statutes are codified in Chapter 15A, Article 48 of our general statutes. These statues mandate our discovery procedures. Specifically, N.C. Gen. Stat. § 15A-905(c) (2011) provides that, upon motion by the State, a defendant must give notice of his intent to offer certain defenses at trial, including notice of self-defense. The notice of defense is inadmissible against the defendant at trial. N.C. Gen. Stat. §15A-905(c) (2011).

Chapter 15A, Article 72 contains the statutory procedures for selecting and impaneling a jury. N.C. Gen. Stat. § 15A-1213 (2011) specifically addresses the trial court's duty to orient the prospective jurors as to the case:

> Prior to selection of jurors, the judge **must** identify the parties and their counsel and briefly inform the prospective jurors, as to each defendant, of the charge, the date of the alleged offense, the name of any victim alleged in the pleading, the defendant's plea to the charge, and **any affirmative defense of which the defendant has given pretrial notice as required by Article 52, Motions Practice**. The judge may not read the pleadings to the jury.

N.C. Gen. Stat. § 15A-1213 (2011) (emphasis added). Defendant argues, *inter alia*, that the trial judge had a duty to exclude evidence from the jury of his notice of self-defense *sua sponte* because such disclosure violated N.C. Gen. Stat. § 15A-905(c). Again, § 15A-905(c) is a discovery statute, not a statute included within Article 72 for selecting and impaneling a jury.

While speaking to the prospective jury pool, the trial judge made the following statement, likely pursuant to N.C. Gen. Stat. § 15A-1213: "Defendant, ladies and gentlemen, has entered a plea of not guilty and

given the affirmative defense of self-defense." There is no evidence that the trial court acted contrary to statutory mandate. In fact, the opposite is true. The trial judge properly informed the prospective jurors of the affirmative defense defendant noticed. *See* N.C. Gen. Stat. § 15A-1213; *see generally State v. Berry*, 51 N.C. App. 97, 102, 275 S.E.2d 269, 273 *cert. denied*, 303 N.C. 182, 280 S.E.2d 454 (1981) (Trial judge did not err when he asked defense counsel in the presence of the jury whether there were any affirmative defenses of which counsel wished the judge to inform the jury). As defendant failed to preserve this issue for our review, we decline to address the merits of his argument on appeal.

IV. Conclusion

In sum, the trial court did not err in denying defendant's motions to dismiss. The State presented substantial evidence to put the issue of premeditation and deliberation before the jury. We conclude that defendant received a trial free from error.

No error.

Judges CALABRIA and STEPHENS concur.

STATE OF NORTH CAROLINA
v.
JAMES EDWARD HOLLOMAN III, DEFENDANT

No. COA13-559

Filed 17 December 2013

1. Constitutional Law—effective assistance of counsel—appointed counsel—not replaced

The trial court's denial of defendant's request for substitute counsel in a prosecution for rape, kidnappig and other offenses was proper where appointed counsel was reasonably competent and there was no alleged or apparent conflict between defendant and counsel that would have rendered counsel ineffective.

2. Constitutional Law—double jeopardy—sentencing—first-degree kidnapping and sexual offense

Defendant's conviction and sentencing for both first-degree kidnapping and second-degree sexual offense violated the constitutional prohibition against double jeopardy where the jury returned

guilty verdicts for both first-degree kidnapping and second-degree sexual offense but did not specify the statutory ground upon which it relied in finding defendant guilty of kidnapping. Principles of double jeopardy preclude the use of the underlying sexual assault to support first-degree kidnapping and second-degree sexual offense: the ambiguous verdict is construed in favor of defendant by assuming that the jury relied on the sexual assault in finding defendant guilty of first-degree kidnapping.

Appeal by defendant from judgments entered 18 October 2012 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 21 October 2013.

Roy Cooper, *Attorney General*, *by Daniel D. Addison*, *Special Deputy Attorney General*, *for the State.*

Law Offices of John R. Mills NPC, *by John R. Mills*, *for defendant-appellant.*

MARTIN, Chief Judge.

Defendant James Edward Holloman III appeals from judgments entered upon jury verdicts finding him guilty of first-degree kidnapping, second-degree sexual offense, simple assault, violation of a domestic violence protective order, and impaired driving. For the reasons stated herein, we find no error in the trial but remand the case to the trial court for a new sentencing hearing with respect to the convictions for first-degree kidnapping and second-degree sexual offense.

Complainant and defendant dated for about five years and had a child together. Complainant ended their relationship in February 2011 and obtained a domestic violence protective order against defendant shortly thereafter. In compliance with the protective order, complainant communicated with defendant with regards to their child and met with him to exchange the child for visits. Relations between complainant and defendant became increasingly more cordial during the meetings, and a few days before the incident which gave rise to the charges in this case, complainant and defendant had consensual sex.

On the night of 2 April 2011, complainant and defendant went out for drinks at a club. Complainant testified that defendant began to behave jealously when other men looked at her, grabbing her when she moved away from him and stating "[t]his is mine." Alarmed by his behavior,

complainant asked the club's bouncers to keep defendant away from her, and the bouncers arranged for a cab for complainant.

When complainant arrived at her house, defendant was standing by his car parked in the driveway. In an effort to get away from defendant, complainant asked defendant to pay her cab fare, and as he did so, she got in his car, locked the doors, and started backing out of the driveway. Defendant jumped onto the hood of the car and hung onto the windshield wipers while complainant backed out of the driveway and drove up the street. Not wanting to run over defendant, complainant pulled the car back into the driveway.

Once the car was parked, defendant kicked in the car window, grabbed complainant by her neck, and forced her into the passenger seat. Complainant screamed and struggled to get away as defendant positioned himself on top of her and choked her until she nearly lost consciousness. When he finally let go of her neck, defendant told complainant to shut up, to put on her seat belt, and that she had "four days of this hell coming." Defendant drove the car away, while continuously hitting complainant, calling her names, and accusing her of having sexual relations with other men. Defendant was looking at complainant and hitting her while driving when the car veered off the road and crashed into a ditch. Once the car was stopped, defendant told complainant to perform oral sex on him, and complainant complied out of fear for her life. When defendant finally appeared relaxed and nearly asleep, complainant got out of the car and ran for the nearest house. Just as complainant approached the house, defendant caught up to her. Complainant grabbed a wooden pole that was by the door of the house and attempted to hit defendant with it. Defendant, however, grabbed the pole, yanked complainant down the stairs, and dragged her across the yard while continuing to beat her with it. Defendant then instructed complainant to get up off of the ground, and when she did not do so, defendant kicked her in the face.

Complainant testified that she did not recall exactly how, but that she ended up back in the car with defendant where he threatened to kill her if she tried to escape again. Defendant then forced complainant to perform oral sex and have vaginal and anal sex. Defendant fell asleep thereafter, and complainant flickered the car lights in an attempt to stop passing cars for help while defendant slept.

Defendant later woke up and told complainant to get out of the car and walk with him to get help. Complainant, however, stayed behind because her foot was injured and continued to flicker the car lights until

a passerby stopped and called the police. Defendant returned to the car as the police arrived. Defendant told the police that he had no recollection of the events that occurred after he and complainant had drinks at the club. The State's expert testified that swabs from complainant's vagina and rectum tested positive for defendant's DNA.

Defendant was indicted on two counts of second-degree sexual offense, second-degree rape, first-degree kidnapping, simple assault, violation of a domestic violence protective order, and impaired driving. A jury unanimously acquitted defendant of second-degree rape and one count of second-degree sexual offense and convicted him of the remaining counts. Defendant appeals.

On appeal, defendant contends that the trial court erred by (I) failing to inquire into a potential conflict of interest between defendant and his appointed trial counsel, and (II) sentencing defendant for both first-degree kidnapping and second-degree sexual offense.

I.

[1] Defendant first argues that the trial court committed reversible error by failing to conduct an adequate inquiry to determine whether a conflict of interest existed between defendant and his appointed trial counsel when he informed the court of his dissatisfaction with counsel and requested the appointment of new counsel. The court's failure to make such an inquiry, defendant argues, denied him his right to counsel. We disagree.

We review the denial of a defendant's request for the appointment of substitute counsel for an abuse of discretion. *State v. Sweezy*, 291 N.C. 366, 371–72, 230 S.E.2d 524, 529 (1976). An indigent defendant's right to appointed counsel in a criminal prosecution is guaranteed by both the North Carolina Constitution and the Sixth Amendment to the United States Constitution. *State v. Taylor*, 155 N.C. App. 251, 254, 574 S.E.2d 58, 61–62 (2002), *cert. denied*, 357 N.C. 65, 579 S.E.2d 572 (2003). The right to appointed counsel, however, does not "include the privilege to insist that counsel be removed and replaced with other counsel merely because defendant becomes dissatisfied with his attorney's services." *Sweezy*, 291 N.C. at 371, 230 S.E.2d at 528.

A trial court must appoint substitute counsel "whenever representation by counsel originally appointed would amount to denial of defendant's right to effective assistance of counsel." *State v. Thacker*, 301 N.C. 348, 352, 271 S.E.2d 252, 255 (1980). It is thus "the obligation of

the court to inquire into defendant's reasons for wanting to discharge his attorney[] and to determine whether those reasons [are] legally sufficient to require the discharge of counsel." *State v. Hutchins*, 303 N.C. 321, 335, 279 S.E.2d 788, 797 (1981). "A disagreement over trial tactics does not, by itself, entitle a defendant to the appointment of new counsel." *Id.* Rather, in order to warrant the appointment of substitute counsel a "defendant must show good cause, such as a conflict of interest, a complete breakdown in communication or an irreconcilable conflict which leads to an apparently unjust verdict." *Sweezy*, 291 N.C. at 372, 230 S.E.2d at 529 (internal quotation marks omitted).

When a defendant requests the appointment of substitute counsel based on an alleged conflict of interest, "the trial court must satisfy itself only that present counsel is able to render competent assistance and that the nature or degree of the conflict is not such as to render that assistance ineffective." *Thacker*, 301 N.C. at 353, 271 S.E.2d at 256. "Once it becomes apparent that the assistance of counsel has not been rendered ineffective, the trial judge is not required to delve any further into the alleged conflict." *State v. Poole*, 305 N.C. 308, 311–12, 289 S.E.2d 335, 338 (1982). Denial of a defendant's request for substitute counsel is therefore proper, where it appears that counsel is reasonably competent and there is no conflict between defendant and appointed counsel that renders counsel ineffective to represent defendant. *Thacker*, 301 N.C. at 352, 271 S.E.2d at 255.

In the instant case, defendant informed the trial court at a pretrial hearing that he wished to have his appointed counsel relieved so that he could retain other counsel. Defendant did not express any concerns with his appointed counsel, nor did he give the court any reason for wanting to replace his appointed counsel. The court allowed defendant to seek alternate counsel but declined to relieve appointed counsel until defendant had retained new counsel. Defendant did not retain new counsel, and, thus, appointed counsel represented him at trial.

At trial, the court, defendant, and his appointed counsel engaged in the following dialogue:

> THE COURT: The constitution requires that the court appoint you an attorney, not an attorney of your choosing. Mr. Freeman is certainly competent and capable and has been determined to be such to represent individuals charged with these offences [sic]. Is there some specific concern that you have about Mr. Freeman that you'd like to share with the Court?

> THE DEFENDANT: I just feel as if I'm being misrepresented, Your Honor. I've asked Mr. Freeman to retrieve some information that would give some validity to my innocence, and I've asked him to subpoena some character witnesses, which he has not done. And I've asked him many things. And even yesterday he misrepresented me because there's [sic] certain things that I believe should have been brought forth that were not. So at this point, I'm being misrepresented, Your Honor.
>
> THE COURT: Mr. Freeman, do you wish to be heard? I don't need to hear about your strategic choices in this case, but are there concerns that you need to bring to my attention that you believe the Court ought to be aware of?
>
> MR. FREEMAN: No, Your Honor.
>
> THE COURT: All right. Based on what I've heard, sir, I'm not going to permit substitution of counsel at this late date. And so the motion is denied.

Defendant argues that the trial court committed reversible error because its inquiry was inadequate to ensure that a conflict of interest did not exist between defendant and his appointed counsel after defendant informed the court that he was "being misrepresented." Defendant, however, presents no direct authority suggesting that a trial court must inquire into a potential conflict of interest where a defendant merely expresses dissatisfaction with appointed counsel.

While we have held that a failure to conduct an adequate inquiry into a potential conflict of interest is reversible error, we have not held that a conviction may be reversed based on conflicts that are neither alleged nor apparent at trial. *See State v. James*, 111 N.C. App. 785, 791, 433 S.E.2d 755, 758–59 (1993) (holding that a trial court's failure to inquire into whether a conflict of interest exists between a defendant and counsel *once the court is made aware of* the possibility of a conflict constitutes reversible error). Defendant's statements to the trial court regarding his appointed counsel neither alleged nor indicated the possibility of a conflict of interest. Rather, his statements merely amounted to statements of his dissatisfaction with his appointed counsel and disagreements over trial tactics; defendant's statements, therefore, did not trigger the need for additional inquiry and did not entitle defendant to the appointment of substitute counsel. *See Hutchins*, 303 N.C. at 335, 279 S.E.2d at 797; *see also State v. Prevatte*, 356 N.C. 178, 216, 570 S.E.2d 440, 461 (2002) ("An indigent defendant has no right to

replace appointed counsel merely because the defendant is dissatisfied with the present attorney's work or because of a disagreement over trial tactics."), *cert. denied*, 538 U.S. 986, 155 L. Ed. 2d 681 (2003). Because appointed counsel was reasonably competent and there was no alleged or apparent conflict between defendant and counsel that would render counsel ineffective to represent defendant, we conclude that the trial court's denial of defendant's request for substitute counsel was proper. Accordingly, defendant's argument is overruled.

II.

[2] Defendant next argues that his conviction and sentencing for both first-degree kidnapping and second-degree sexual offense violate the prohibition against double jeopardy. The State concedes error. We agree.

The offense of kidnapping is elevated to first-degree kidnapping upon proof that the victim was either not released in a safe place, seriously injured, or sexually assaulted. N.C. Gen. Stat. § 14-39(b) (2011). Where a jury is presented with more than one statutory ground upon which to convict a defendant of first-degree kidnapping and does not specify which one it relied upon to reach its verdict, "[s]uch a verdict is ambiguous and should be construed in favor of defendant." *State v. Whittington*, 318 N.C. 114, 123, 347 S.E.2d 403, 408 (1986), *appeal after remand*, 321 N.C. 115, 361 S.E.2d 560 (1987). A defendant may not be punished for both first-degree kidnapping and the underlying sexual assault that raised the kidnapping to the first degree. *State v. Freeland*, 316 N.C. 13, 23, 340 S.E.2d 35, 40–41 (1986).

The trial court in this case instructed the jury that, to convict defendant of first-degree kidnapping, it had to find that complainant "was not released in a safe place, had been sexually assaulted, or had been seriously injured." The jury returned guilty verdicts for both first-degree kidnapping and second-degree sexual offense but did not specify the statutory ground upon which it relied on in finding defendant guilty of first-degree kidnapping. We must, therefore, construe the ambiguous verdict in favor of defendant and "assume that the jury relied on defendant's commission of the sexual assault in finding him guilty of first-degree kidnapping." *Whittington*, 318 N.C. at 123, 347 S.E.2d at 408. Because defendant was also convicted of second-degree sexual offense, principles of double jeopardy preclude the use of the underlying sexual assault to support the first-degree kidnapping conviction. *See Freeland*, 316 N.C. at 23, 340 S.E.2d at 40–41. Accordingly, we remand the case to the trial court for resentencing.

At the resentencing hearing, the trial court may arrest judgment on the first-degree kidnapping conviction and resentence defendant for second-degree kidnapping or it may arrest judgment on the second-degree sexual offense conviction.

No error, remanded for resentencing.

Judges STEELMAN and DILLON concur.

STATE OF NORTH CAROLINA
v.
JIMMY I. JONES, DEFENDANT

No. COA13-215

Filed 17 December 2013

Criminal Law—referring to complaining witness as victim—no plain error—no prejudice

The trial court did not commit plain error in a first-degree rape, second degree rape, and multiple indecent liberties case by repeatedly using the term "victim" to describe the complaining witness. Defendant failed to show he suffered any prejudice.

Appeal by defendant from judgments entered 2 May 2012 by Judge R. Allen Baddour in Orange County Superior Court. Heard in the Court of Appeals 21 October 2013.

Roy Cooper, Attorney General, by Jill A. Bryan, Assistant Attorney General, for the State.

Mark Montgomery, for defendant–appellant.

MARTIN, Chief Judge.

Defendant Jimmy I. Jones was charged in proper bills of indictment with one count of first-degree rape, two counts of second-degree rape, and eight counts of indecent liberties with a minor. He appeals from judgments entered upon jury verdicts finding him guilty of the first- and second-degree rape of his stepdaughter, as well as multiple counts of taking indecent liberties with his stepdaughter and with two of his nieces. We find no error.

The evidence presented at trial tended to show that, from October 1975 through February 1981, defendant sexually abused his stepdaughter and two of his nieces. At trial, one niece testified that, beginning from the time that she was about seven years old, each time she visited the home that defendant shared with her aunt—which the niece visited every weekend so that her mother and aunt could rehearse for their singing group—defendant "place[d] [her] in his lap" and "would take [her] hand and touch his genitals." She also testified that, when she was nine or ten years old, defendant began regularly entering the bedroom that she shared with her cousins "in the middle of the night" and "would play with [her] genitals" by placing his fingers inside her vagina. She further testified that this abuse continued until she was about fourteen years old and stopped visiting her aunt's house.

Defendant's other niece testified that, between the ages of five and eleven years old, when she would go to visit her cousins at the home shared by her aunt and defendant, defendant would repeatedly hug her and "grind[]" his hips against hers, kissed her by putting his tongue in her mouth, and would bring her into one of the bedrooms, lay her prostrate on top of him, and "grind[]" against her hips and vagina. She further testified that, on one occasion, when she was eight or nine years old, defendant called her into the bedroom, placed her right hand onto his exposed penis, and held it there and asked her "if it felt good."

Finally, defendant's stepdaughter testified that, when she was twelve years old, on a night that her mother was away from the house, defendant took her from her own bedroom and brought her into her mother's bedroom, took off her nightgown and underwear, and had vaginal intercourse with her. She also testified that defendant took her to her mother's bedroom and had vaginal intercourse with her again when she was fourteen years old, and again when she was sixteen years old.

About twenty-five years later, in the spring of 2008, Sergeant Tina Rimmer in the Criminal Investigative Division of the Orange County Sheriff's Office received a phone call from a detective with the Durham Police Department regarding an investigation "involving [defendant] and a juvenile." The detective informed her that, through his investigation, he had received information "in reference to [defendant's two nieces] being victimized by [defendant], also," at a residence in Orange County, which was located in Sergeant Rimmer's jurisdiction. Sergeant Rimmer interviewed defendant's two nieces, who described to her the manner in which defendant had sexually abused them when they were minor children. One of the nieces also gave the sergeant a list of names of people who "could [also] be potential victims," one of whom was defendant's

stepdaughter. Without objection from defendant at trial, Sergeant Rimmer read into evidence the statements she took from defendant's stepdaughter and two nieces, which statements chronicled their abuse at the hands of defendant and corroborated the testimony of each accusing witness.

At the close of the State's evidence, defendant moved to dismiss the charge of first-degree rape and four of the eight charged counts of taking indecent liberties with a child, which motions were denied. Defendant offered no evidence and did not renew his motions to dismiss at the close of all of the evidence. The jury found defendant guilty of one count of first-degree rape, two counts of second-degree rape, and eight counts of indecent liberties with a child. The court sentenced defendant to three concurrent life sentences and two consecutive ten-year terms of imprisonment to run at the expiration of the life sentences. Defendant appeals.

Defendant first contends the trial court committed plain error when it charged the jury on the offenses of first- and second-degree rape by repeatedly using the term "victim" to describe the complaining witness. We disagree.

"Because our courts operate using the adversarial model, we treat preserved and unpreserved error differently. Preserved legal error is reviewed under the harmless error standard of review." *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012). "Unpreserved error in criminal cases, on the other hand, is reviewed only for plain error," *id.*, which "is normally limited to instructional and evidentiary error." *Id.* at 516, 723 S.E.2d at 333. "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *Id.* at 518, 723 S.E.2d at 334. "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.' " *Id.* (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)).

Defendant concedes that the court instructed the jury on the offenses of first- and second-degree rape by using the same language as that which is set forth in the North Carolina Pattern Jury Instructions for these offenses, which use the term "victim" to identify the person against whom the charged offenses are alleged to have been committed. *See* N.C.P.I.—Crim. 207.10 (2002); N.C.P.I.—Crim. 207.20 (2007). Defendant also concedes that defense counsel did not object to the court's use of this term in its instructions to the jury at trial, and further

admits that "when a judge calls a person 'a victim,' it does not mean that the judge believes the person to be a victim, nor would a juror understood [sic] this to be so." *See State v. Richardson*, 112 N.C. App. 58, 67, 434 S.E.2d 657, 663 (1993) ("The word 'victim' is included in the pattern jury instructions promulgated by the North Carolina Conference of Superior Court Judges and is used regularly to instruct on the charges of first-degree rape and first-degree sexual offense."), *disc. review denied*, 335 N.C. 563, 441 S.E.2d 132 (1994); *see also State v. Henderson*, 155 N.C. App. 719, 722, 574 S.E.2d 700, 703 ("[I]t is clear from case law that the use of the term 'victim' in reference to prosecuting witnesses does not constitute plain error when used in instructions."), *appeal dismissed and disc. review denied*, 357 N.C. 64, 579 S.E.2d 569 (2003).

Nevertheless, defendant urges this Court to conclude that the trial court's use of this term in its instruction was prejudicial in accordance with our decision in *State v. Walston*, __ N.C. App. __, __, __, 747 S.E.2d 720, 726, 728 (2013) (concluding the trial court's use of the term "victim" in its instruction to the jury was prejudicial error). However, Walston is distinguishable from the present case. First, in Walston, the trial court denied defendant's request to modify the pattern jury instructions to use the term "alleged victim" in place of the term "victim," and "objected repeatedly to the proposed instructions," *see id.* at __, 747 S.E.2d at 726–27, whereas, in the present case, defendant made no such request to modify the language in the instruction and did not raise any objection to the use of this term at trial. Next, in *Walston*, since conflicting testimony was presented from the accusing witnesses and from defendant, who testified on his own behalf, there were disputed issues of fact as to whether the sexual offenses even occurred, *see id.*, whereas, here, there were no such conflicts in the testimony presented. Moreover, while this Court in *Walston* concluded that the trial court committed prejudicial error, *see id.* at __, 747 S.E.2d at 728, this defendant makes no specific argument that he has suffered any prejudice as a result of the trial court's uncontested use of the term "victim" in its jury instructions. For these reasons, we find Walston inapplicable to the present case, and hold that the trial court did not commit plain error when it used the term "victim" in its instruction to the jury on the offenses of first- and second-degree rape.

Finally, defendant contends the trial court erred because it allowed the prosecutor to "repeatedly refer[] to the complainants as 'victims' " during his closing argument, and did not intervene *ex mero motu* to prevent the prosecutor from expressing his "personal opinion concerning the guilt of the defendant or the veracity of [the] witness[es]."

"The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002). "Under this standard, '[o]nly an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken.' " *State v. Anthony*, 354 N.C. 372, 427, 555 S.E.2d 557, 592 (2001) (alteration in original) (quoting *State v. Richardson*, 342 N.C. 772, 786, 467 S.E.2d 685, 693, *cert. denied*, 519 U.S. 890, 136 L. Ed. 2d 160 (1996)), *cert. denied*, 536 U.S. 930, 153 L. Ed. 2d 791 (2002). " '[D]efendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair.' " *Id.* at 427–28, 555 S.E.2d at 592 (alteration in original) (quoting *State v. Davis*, 349 N.C. 1, 23, 506 S.E.2d 455, 467 (1998), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999)).

In the present case, defendant challenges the prosecutor's use of the word "victim" when he described the elements of the charged offenses, and when he stated that "these first incidents of abuse by the [d]efendant is [sic] a pattern of abuse that continued for years in this household . . . involving multiple victims," and that "the third victim who testified, . . . there's a couple of sets of charges involving her testimony and the evidence in her case." Defendant suggests, in his argument on this issue, that the prosecutor's comments in this case are analogous to comments made by the prosecutors in *State v. Smith*, 279 N.C. 163, 165–67, 181 S.E.2d 458, 459–61 (1971) (ordering a new trial where the prosecutor called the defendant a "Liar," and told the jury: "I don't care who they bring in here . . . to say to you that his character and reputation in the community in which he lives is good. I tell you it isn't worth a darn. . . . I don't believe a living word of what he says about this case." (omissions in original)), and *State v. Locklear*, 294 N.C. 210, 214–15, 218, 241 S.E.2d 65, 68, 70 (1978) (ordering a new trial where the prosecutor told a defense witness during cross-examination, "[Y]ou are lying through your teeth and you know you are playing with a perjury count; don't you?," and concluded the exchange with the witness by saying, "Now, think fast, Leonard. Think up a good story while you are up there."). However, defendant has failed to establish that the remarks spoken by the prosecutor in the present case approach the level of gross impropriety illustrated by the remarks made by the prosecutors in *Smith* and *Locklear*. Because defendant has not shown that the prosecutor's comments "so

infected [this] trial with unfairness that they rendered [his] conviction[s] fundamentally unfair," *see Davis*, 349 N.C. at 23, 506 S.E.2d at 467, we overrule this issue on appeal.

No Error.

Judges STEELMAN and DILLON concur.

STATE OF NORTH CAROLINA
v.
DANIEL CHARLES LEWIS, DEFENDANT

No. COA13-254

Filed 17 December 2013

1. Appeal and Error—preservation of issues—failure to object—failure to argue plain error

Defendant failed to preserve the issue that the trial court erred in an attempted first-degree murder and possession of a firearm by a felon case by admitting a detective's testimony regarding his belief that a baggy carried by defendant contained crack cocaine. Defendant did not object at trial and did not argue plain error. Further, it was improbable that the jury would have reached a different verdict if the testimony regarding the drugs had been excluded.

2. Sentencing—credit—none for time spent in federal prison

The trial court did not err in an attempted first-degree murder and possession of a firearm by a felon case by failing to grant defendant credit for his time spent in federal custody prior to trial on the charges in this case. Under N.C.G.S. § 15-196.1, defendant's time in federal custody did not qualify under its terms for sentencing credit. Further, defendant's remaining arguments were also unpersuasive.

Appeal by defendant from judgments entered 29 August 2012 by Judge James Floyd Ammons, Jr. in Johnston County Superior Court. Heard in the Court of Appeals 28 August 2013.

Attorney General Roy Cooper, by Assistant Attorney General Stuart M. Saunders, for the State.

Law Offices of John R. Mills NPC, by John R. Mills, for defendant-appellant.

GEER, Judge.

Defendant Daniel Charles Lewis appeals from his convictions of attempted first degree murder and possession of a firearm by a felon. On appeal, defendant primarily argues that the trial court erred in not granting him credit for his time spent in federal custody prior to trial on the charges in this case. The statute authorizing credit is, however, clear and unambiguous, and defendant's time in federal custody did not qualify under its terms for sentencing credit. The trial court, therefore, properly denied defendant the requested credit. Because we find defendant's remaining arguments also unpersuasive, we hold that defendant received a trial free of prejudicial error.

Facts

The State's evidence tended to show the following facts. On 2 July 2009, Jeff Canady, a detective in the narcotics division of the Johnston County Sheriff's Office, was investigating a tip that cocaine was being distributed from a house on Barber Mill Road. From his unmarked patrol car, he observed a gold Nissan automobile pull up to the residence and leave after fewer than five minutes. Because the detective knew that it is typical for vehicles to pull up and stay for a very short time when narcotics transactions are taking place, he followed the Nissan. After calling in the vehicle tag, Detective Canady learned that the tag had been reported stolen. Based on these circumstances and his observation that one of the vehicle's brake lights was out, Detective Canady initiated a traffic stop.

Defendant was seated in the rear of the Nissan. Before the Nissan came to a complete stop, defendant opened the right rear passenger door and began running. Detective Canady called for backup and began pursuing defendant, at first in his car and then on foot after defendant turned into a wooded area. When the detective caught up to defendant, he put his arms around him, pushed him into a fence, and then pushed him onto the ground. Defendant was on his hands and knees with Detective Canady on top, straddling him, as the detective tried, unsuccessfully, to handcuff defendant. After pulling the handcuffs off his left wrist, defendant snatched the handcuffs from Detective Canady and threw them out of reach.

Defendant continued to resist and ultimately stood up with Detective Canady on his back. Once they were standing, defendant reached down to the ground with his right hand and then raised his right arm up and around towards his left shoulder. Defendant had a black,

semiautomatic handgun in his right hand and a clear plastic bag containing what Detective Canady believed to be crack cocaine in his left hand. Defendant pointed the gun at Detective Canady's head and pulled the trigger multiple times. The gun did not fire because Detective Canady grabbed the top of the gun with his left hand and prevented the hammer from cocking all the way back. Defendant eventually dropped the gun and ran away. He was detained shortly thereafter by two other officers.

When Detective Canady recovered defendant's handgun, the safety was in the forward position, meaning the gun was ready to fire. The magazine from the gun contained live rounds, and the chamber held a live round.

Defendant was charged with attempted first degree murder, assault with a deadly weapon on a law enforcement officer, and possession of a firearm by a felon. Initially, the State dismissed the charges to allow federal charges based on the same conduct to proceed in federal court. In federal court, defendant pled guilty to being a felon in possession of a firearm, but his conviction was vacated on appeal because none of his felonies made him eligible for such a conviction under federal law. *United States v. Lewis*, 453 F. App'x 344, 2011 WL 5532247, 2011 U.S. App. LEXIS 22852 (4th Cir. Nov. 15, 2011) (unpublished) (per curiam). After defendant's federal conviction was vacated, the State reinstated the state charges against defendant.

At trial, defendant testified in his own defense that on the day of the crime, defendant and the four other men in the Nissan were searching for an individual known as "Maniac" who had robbed one of them. When the men found Maniac, defendant got out of the car and tried to fire his gun to let Maniac know he was there. He pulled the trigger four times, but it did not shoot. When Maniac and the others saw defendant they took off running, so defendant got back in the car and they left.

Defendant testified that the gun was not his, and although he was told that the gun worked, no one in the car could get it to shoot. At one point, the gun fell apart and even after he put it back together, it would not shoot.

Defendant further testified that after Detective Canady activated his lights, defendant ran because he "knew there was more stuff in this car than what I had on me and I figured that he would search the car and I was just running to get away." Defendant admitted resisting Detective Canady's attempt to arrest him and to pulling out his handgun, but defendant claimed that he pulled out the gun to try to toss it away "[t]o get him to go towards the gun to give me a chance to keep running."

According to defendant, he was ultimately unable to toss the gun away because Detective Canady grabbed it, causing a "tug-of-war over the gun" for approximately 30 to 45 seconds. Defendant claimed that during the tug-of-war, he told Detective Canady that the gun didn't work, which he tried to demonstrate by pulling the trigger. He also said to Detective Canady, "Man, just give me one more chance to run." Defendant then let go of the gun and kept running. Defendant testified that he never had the gun pointed at Detective Canady's head.

The jury found defendant guilty of attempted first degree murder and assault with a firearm on a law enforcement officer. Defendant pled guilty to possession of a firearm by a felon. The trial court arrested judgment on the assault charge. On the other charges, the court sentenced defendant to concurrent presumptive-range terms of 220 to 273 months imprisonment for the attempted murder charge and 16 to 20 months imprisonment for the possession of a firearm charge. Defendant received 566 days of credit for time served in state custody. At the sentencing hearing, defendant also requested credit for the 18 months he spent in federal custody. The trial judge denied his request, stating: "He's to be given credit for any time he's entitled. . . . I don't believe I have any authority to give him any credit for the time spent in federal custody, which is about 18 months." Defendant timely appealed to this Court.

I

[1] Defendant first argues that Detective Canady's testimony regarding his belief that a baggy carried by defendant contained crack cocaine was inadmissible as irrelevant under Rule 401 and unfairly prejudicial under Rule 403 of the Rules of Evidence. We must first address whether this issue was properly preserved for appeal.

At trial, Detective Canady's testimony began with a narrative description of the events on the day of the crime. Defendant did not object when the detective testified that "[a]t that point[,] I saw the defendant's left hand -- there was a clear plastic bag with what I believe to contain an off-white rock substance that I believed to be crack cocaine." It was not until the topic came up again during Detective Canady's direct testimony, 31 pages later in the transcript, that defendant objected:

> Q. You stated that in addition to the defendant having a gun in his hand, in his right hand on July 2, 2009, that you observed something in his left hand; is that correct?
>
> A. That's correct.
>
> Q. Describe for the jury what you saw[.]

A. I observed a clear plastic bag --

[DEFENSE COUNSEL]: Your Honor, Objection. He's not charged with that and the whole purpose of that is to inflame the jury at this point.

THE COURT: Overruled.

A. I observed a clear plastic bag with an off-white hard rock substance that I believed to be crack cocaine.

"Where evidence is admitted over objection, and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost." *State v. Whitley*, 311 N.C. 656, 661, 319 S.E.2d 584, 588 (1984). Because defendant did not object to the evidence the first time it was introduced, he did not preserve the issue for appeal.

Nor was the issue preserved for plain error. Pursuant to Rule 10(a)(4) of the Rules of Appellate Procedure, a defendant asserting plain error must contend "specifically and distinctly" in his brief that any error committed by the trial court amounted to plain error. *See, e.g.*, *State v. Nobles*, 350 N.C. 483, 501-02, 515 S.E.2d 885, 896-97 (1999) (declining to address admissibility of evidence to which defendant did not object at trial and did not allege plain error on appeal). Because defendant did not allege plain error in his brief, defendant has waived appellate review of this issue.

Even if defendant had asserted plain error, he has not shown sufficient prejudice. "To show that an error was fundamental, a defendant must establish prejudice -- that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal quotation marks omitted). Here, it is undisputed that several times during defendant's struggle with Detective Canady, defendant pulled the trigger of a fully loaded gun with a live bullet in the chamber, and that defendant knew that the gun was loaded because he had loaded it himself. According to Detective Canady, defendant had aimed the gun at the detective's head when defendant pulled the trigger, and the only reason why the gun did not fire was because Detective Canady was able to grab the top of the gun and put his thumb on the hammer to keep it from cocking all the way back. Defendant did not run away from Detective Canady again until after he lost control of and dropped the gun.

Although defendant testified that the gun did not work, an SBI forensic specialist testified that she performed a firearm function exam

on defendant's gun and that without manipulating the gun in any way, she was able to fire the gun three times and did not note any malfunctions or unusual reactions. Defendant also admitted that the person who gave him the gun, when they were looking for Maniac, had told him that the gun worked. Given our review of the entire record, we believe that it is improbable that the jury would have reached a different verdict if the testimony regarding the drugs had been excluded.

II

[2] Next, defendant argues that his judgment should be vacated and remanded for a proper sentencing determination that gives him credit for his 18 months in federal custody. Generally, sentencing errors are reviewed for " 'whether [the] sentence is supported by evidence introduced at the trial and sentencing hearing.' " *State v. Deese*, 127 N.C. App. 536, 540, 491 S.E.2d 682, 685 (1997) (quoting N.C. Gen. Stat. § 15A-1444(a1) (Cum. Supp. 1996)). However, because defendant's argument is based upon statutory construction of the sentencing statute, it is reviewed de novo. *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) ("Issues of statutory construction are questions of law, reviewed de novo on appeal.").

Defendant argues that he is entitled to credit for his time in federal custody under N.C. Gen. Stat. § 15-196.1 (2011), which states:

> The minimum and maximum term of a sentence shall be credited with and diminished by the total amount of time a defendant has spent, committed to or in confinement in *any State or local correctional, mental or other institution* as a result of the charge that culminated in the sentence. The credit provided shall be calculated from the date custody under the charge commenced and shall include credit for all time spent in custody pending trial, trial de novo, appeal, retrial, or pending parole, probation, or post-release supervision revocation hearing: Provided, however, the credit available herein shall not include any time that is credited on the term of a previously imposed sentence to which a defendant is subject.

(Emphasis added.)

The language of the statute is plain and unambiguous. Under the statute, a defendant will receive credit for confinement in "any State or local correctional, mental or other institution as a result of the charge that culminated in the sentence." *Id.* "When 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." *In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 388-89 (1978).

Defendant's time spent in federal custody does not satisfy the requirements for credit under this provision because (1) his confinement was in a federal institution and not a "State or local" institution; and (2) his confinement was not a "result of the charge that culminated in the sentence," but rather a result of the federal charge. N.C. Gen. Stat. § 15-196.1. Therefore, N.C. Gen. Stat. § 15-196.1 does not require that defendant be given credit.

Conceding that the statute does not explicitly give credit for confinement in a federal institution, defendant argues that the statute should be interpreted to allow credit in this case to avoid constitutional prohibitions on cruel and unusual punishment and double jeopardy. He cites *Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 299-300, 150 L. Ed. 2d 347, 361, 121 S. Ct. 2271, 2279 (2001) (internal citation and quotation marks omitted), for the principle that "if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible, we are obligated to construe the statute to avoid such problems." However, this rule of statutory construction only comes into play when a statute is ambiguous and subject to more than one interpretation. When, as with N.C. Gen. Stat. § 15-196.1, the statute is clear and unambiguous, the Court is powerless to adopt an alternate interpretation. *In re Banks*, 295 N.C. at 239, 244 S.E.2d at 388-89.

To the extent defendant is also arguing that the failure to give him credit renders his sentence unconstitutional, that issue was not raised below and, therefore, was not preserved for appeal. *See State v. Freeman*, 185 N.C. App. 408, 414, 648 S.E.2d 876, 881 (2007) (dismissing defendant's assignment of error that sentence was grossly disproportionate to severity of crime in violation of Eighth Amendment because defendant did not object at trial, and therefore failed to preserve argument), *overruled on other grounds as recognized in State v. Ward*, 199 N.C. App. 1, 681 S.E.2d 354 (2009).

Defendant next urges this Court to adopt the approach of the federal district court in *Childers v. Laws*, 558 F. Supp. 1284 (W.D.N.C. 1983), and give credit in situations where the incarceration is related to the conviction in North Carolina and is not credited toward any valid

conviction in a foreign jurisdiction. In *Childers*, an inmate was arrested and jailed in Virginia after escaping from the North Carolina Department of Corrections. *Id.* at 1285. The inmate's confinement in Virginia was "solely at the request and direction of the State of North Carolina" and based on the fact that the inmate "had not yet completed a lawfully imposed sentence of imprisonment" in North Carolina. *Id.* at 1287.

The federal district court concluded that double jeopardy was implicated, and the court interpreted N.C. Gen. Stat. § 15-196.1 as giving the inmate credit for his time spent in custody in Virginia because the original sentence was a "final judgment not open to further expansion" and not granting credit "in effect amounts to an *increase* in [the inmate's] prison sentence." *Childers*, 558 F. Supp. at 1287. Further, the court found that not granting credit deprived the inmate of due process because "[t]he sentencing judge or judges at [the inmate's] original convictions have thus been totally bypassed and [the inmate] has received a greater sentence not contemplated by those earlier sentencing judges." *Id.*

Childers is not, however, binding on this Court. Regardless, unlike the inmate in *Childers*, defendant's time in federal custody was based upon a separate federal charge. Double jeopardy is not implicated when different sovereigns punish for the same conduct. *See In re Cobb*, 102 N.C. App. 466, 467-68, 402 S.E.2d 475, 476 (1991) ("The U.S. Supreme Court has held that 'two identical offenses are not the same offence within the meaning of the Double Jeopardy Clause if they are prosecuted by different sovereigns.' . . . '[T]he States are separate sovereigns with respect to the Federal Government.' " (quoting *Heath v. Alabama*, 474 U.S. 82, 89, 92, 88 L. Ed. 2d 387, 394, 396, 106 S. Ct. 433, 438, 439 (1985))). Nor is due process implicated because the sentencing judge was not "bypassed" -- on the contrary, the trial judge was presented with the request for credit and denied it.

Finally, defendant argues, in the alternative, that even if the statutory scheme does not *mandate* the provision of credit for his time spent in federal custody, it does not limit the court's discretion to provide such credit because (1) "[n]othing in the statute limits the trial judge's traditional discretion to impose sentences befitting the crime"; (2) such a limit would unconstitutionally infringe on judicial power under Article IV, Section 1 of the North Carolina Constitution; and (3) as in *State v. Weaver*, 264 N.C. 681, 686-87, 142 S.E.2d 633, 637 (1965), "the courts of this state have long found it appropriate to provide credit for time served on convictions arising out of the same conduct that produced a later invalidated initial conviction."

The General Assembly, however, has limited the trial court's discretion in sentencing by the Structured Sentencing Act, which lays out the procedure for sentencing:

> Before imposing a sentence, the court shall determine the prior record level for the offender pursuant to G.S. 15A-1340.14. The sentence shall contain a sentence disposition specified for the class of offense and prior record level, and its minimum term of imprisonment shall be within the range specified for the class of offense and prior record level, *unless applicable statutes require or authorize another minimum sentence of imprisonment.*

N.C. Gen. Stat. § 15A-1340.13(b) (2011) (emphasis added). "As used in statutes, the word 'shall' is generally imperative or mandatory." *State v. Johnson*, 298 N.C. 355, 361, 259 S.E.2d 752, 757 (1979) (quoting *Black's Law Dictionary* 1541 (4th rev. ed. 1968)).

Therefore, because a sentence "shall" be determined according to the statute, a trial judge's discretion in sentencing is " 'bound by the range of sentencing options prescribed by the legislature.' " *State v. Streeter*, 146 N.C. App. 594, 599, 553 S.E.2d 240, 243 (2001) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 481, 147 L. Ed. 2d 435, 450, 120 S. Ct. 2348, 2358 (2000)). *See also State v. Allen*, 359 N.C. 425, 431, 615 S.E.2d 256, 261 (2005) ("Pursuant to the Structured Sentencing Act, sentencing judges *must* impose both a minimum and maximum active, intermediate, or community punishment for felony convictions. Separate statutory punishment charts *dictate* a defendant's minimum and maximum sentence." (emphasis added) (internal citation omitted)), *opinion withdrawn on other grounds*, 360 N.C. 569, 635 S.E.2d 899 (2006). Only when "applicable statutes require or authorize another minimum sentence of imprisonment" does a judge have discretion to deviate from the prescribed range. N.C. Gen. Stat. § 15A-1340.13(b).

We find that N.C. Gen. Stat. § 15-196.1 is an "applicable statute" that "require[s] or authorize[s] another minimum sentence of imprisonment" under the Structured Sentencing Act. N.C. Gen. Stat. § 15A-1340.13(b). The General Assembly provided, in N.C. Gen. Stat. § 15-196.3 (2011), that "[t]ime creditable under [N.C. Gen. Stat. § 15-196.1] *shall reduce the minimum and maximum term of a sentence* . . . ." (Emphasis added.) Because the statute specifically identifies credit for pre-trial custody as a mandatory reduction in the sentence, we hold that the General Assembly intended N.C. Gen. Stat. § 15-196.1 to be an "applicable statute" under N.C. Gen. Stat. § 15A-1340.13(b) that provides an exception

to the minimum terms of imprisonment required under the sentencing guidelines. Because no statute specifically authorizes credit for time spent in federal custody, the trial court had no discretion under the Structured Sentencing Act to reduce defendant's sentence for his time in federal custody.

As for defendant's constitutional argument that a limit on a judge's discretion to grant credit unconstitutionally infringes on judicial power under the North Carolina Constitution, that issue was not raised below and is not properly before this Court. Regardless, limiting a judge's discretion to grant credit does not infringe upon judicial power because "[t]he power to define a crime and prescribe its punishment originates with the Legislative Branch." *In re Greene*, 297 N.C. 305, 309, 255 S.E.2d 142, 145 (1979) (holding that "[t]he power to continue prayer for judgment on conditions or to suspend execution of sentence on conditions does not arise from an 'inherent' power of the Judiciary for that is a mode of punishment for crime rightly for determination by the General Assembly"). "In prescribing punishment the Legislature may be very specific or it may grant the trial judge discretion to determine punishment *within limits prescribed by the Legislature*." *Id.* at 308, 255 S.E.2d at 144 (emphasis added).

Finally, defendant's reliance on *Weaver* is misplaced. In *Weaver*, the defendant was initially convicted of felonious assault and sentenced, but the conviction was vacated and set aside in a habeas corpus proceeding. 264 N.C. at 683, 142 S.E.2d at 634. The defendant was subsequently retried on an identical bill of indictment and convicted of a lesser included offense of assault with a deadly weapon. *Id.*, 142 S.E.2d at 635. At the second trial, the defendant was sentenced to two years, which was the maximum permissible sentence, and was not given credit for the time served on the first sentence. *Id.* at 684, 686, 142 S.E.2d at 635, 637. The Supreme Court held that he was entitled to credit for the time served under the first sentence, reasoning that, otherwise, the total time served would exceed the maximum punishment for the offense charged. *Id.* at 687, 142 S.E.2d at 637. Notably, the Court did not grant credit for the time the defendant was in custody after his original sentence was vacated but while awaiting the new trial because the "defendant was not serving a sentence as punishment for the conduct charged in the bill of indictment," but rather for his failure to pay bond fixed by the trial court's order. *Id.*, 142 S.E.2d at 637-38.

Here, unlike *Weaver*, the original sentence was under a different *federal* charge, and, therefore, not pursuant to an identical bill of indictment. Furthermore, *Weaver* did not give the trial judge discretion to

grant credit where not authorized by statute. On the contrary, it followed the limitations of the statute by denying credit for the defendant's confinement in a state prison when it was not punishment for the charged offense but rather due to his default on bond.

No error.

Judges ROBERT C. HUNTER and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
DANNY RAYMOND PAUL

No. COA13-717

Filed 17 December 2013

Sentencing—resentencing—prior record level—law of case doctrine

The trial court did not err by concluding at resentencing for a habitual felon that defendant was a prior record level IV offender. The law of the case doctrine did not preclude such a determination.

Appeal by defendant from judgment entered 25 March 2013 by Judge Phyllis Gorham in Pender County Superior Court. Heard in the Court of Appeals 20 November 2013.

Attorney General Roy Cooper, by Assistant Attorney General Derek L. Hunter, for the State.

Winifred H. Dillon for defendant-appellant.

Elmore, Judge.

Defendant appeals from a judgment entered on resentencing pursuant to this Court's decision in *State v. Paul*, ___ N.C. App. ___, 736 S.E.2d 649 (2013) (unpublished) (*Paul I*). Defendant raises as error the trial court's determination that he was a prior record level IV offender (PRL IV). After careful consideration, we conclude that the trial court did not err, and we affirm the judgment.

I. Facts

On 5 November 2007, defendant pled guilty to sale of a schedule II controlled substance as a habitual felon. At defendant's sentencing hearing in 2007, the trial court found that defendant had one prior Class H felony conviction worth two points and seven prior Class 1 misdemeanor convictions worth seven points, for a total of nine points and a corresponding PRL IV. *See* N.C. Gen. Stat. § 15A-1340.14(c) (2007). The trial court imposed an active prison sentence of 80 to 105 months. Upon review of *Paul I*, we ruled that the trial court miscalculated defendant's PRL by assigning prior record points for two misdemeanor convictions obtained on the same day of court, 8 February 2000, in violation of N.C. Gen. Stat. § 15A-1340.14(d) (2011). Because subtraction of the erroneous point reduced defendant's PRL from IV (nine points) to III (eight points), we remanded for resentencing.

On remand, the State adduced evidence of an additional Class G felony conviction for trafficking in cocaine obtained on 8 September 1988, resulting in four prior record points. Adding these four points to the two points for defendant's Class H felony conviction and the six points for his six Class 1 misdemeanor convictions obtained during different sessions of court, the trial court concluded that defendant had twelve points and was a PRL IV. See N.C. Gen. Stat. § 15A-1340.14(c) (2011). Defendant was resentenced to 80 to 105 months imprisonment.

II. Analysis

On appeal, defendant argues that the trial court was bound by our decision in *Paul I* by the law of the case doctrine to resentence him as a PRL III. We disagree.

"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). 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). Should this Court find a sentencing error and remand a case to the trial court for resentencing, that hearing shall generally be conducted *de novo*. *State v. Daye*, 78 N.C. App. 753, 756, 338 S.E.2d 557, 560, *aff'd*, 318 N.C. 502, 349 S.E.2d 576 (1986); *see also State v. Morston*, ___ N.C. App. ___, ___, 728 S.E.2d 400, 405 (2012) ("For all intents and purposes the resentencing hearing is *de novo* as to the appropriate sentence."). Pursuant to a de novo review on resentencing, the trial court "must take its own look at

the evidence[.]" *Daye*, 78 N.C. App. at 756, 338 S.E.2d at 560, *aff'd*, 318 N.C. 502, 349 S.E.2d 576.

However, under the law of the case doctrine, "an appellate court ruling on a question governs the resolution of that question both in subsequent proceedings in the trial court and on a subsequent appeal, provided the same facts and the same questions, which were determined in the previous appeal, are involved in the second appeal." *Bissette v. Auto-Owners Ins. Co.*, 208 N.C. App. 321, 329, 703 S.E.2d 168, 174 (2010) (citation and internal quotation marks omitted). This doctrine applies to both criminal and civil cases alike. *State v. Dorton*, 182 N.C. App. 34, 39, 641 S.E.2d 357, 361 (2007). The law of the case principle "does not apply when the evidence presented at a subsequent proceeding is different from that presented on a former appeal." *State v. Lewis*, 365 N.C. 488, 505, 724 S.E.2d 492, 503 (2012). Moreover, "the law of the case doctrine is specifically limited . . . to points *actually presented and necessary for the determination of the case*." *Dorton*, 182 N.C. App. at 40, 641 S.E.2d at 361 (citation and internal quotation marks omitted) (emphasis in original).

Here, the resentencing court did not contravene our ruling in *Paul I* that only one of defendant's misdemeanor convictions on 8 February 2000 could be applied to his PRL calculation. Rather, upon new evidence, the resentencing court found that defendant had an additional prior felony conviction, which more than offset the lost point from the improperly counted misdemeanor. *Cf. State v. King*, 178 N.C. App. 122, 133, 630 S.E.2d 719, 726 (2006) ("The trial court is required to calculate defendant's prior record level upon resentencing her.")[1]. The additional conviction admitted by the State constituted new evidence presented to the resentencing court that was not available for consideration by this Court during *Paul I*. Thus, the resentencing court did not err in determining that defendant was a PRL IV because the new facts rendered the law of the case doctrine inapplicable. *See Lewis*, *supra* (ruling that the "retrial court erred in applying the doctrine of the law of the case" where "defense counsel and the State introduced evidence that had not

1. While we did note in *Paul I* that "[w]hen the superfluous point is deducted from defendant's total, he becomes a prior record level III offender, rather than a Level IV[,]" 2013 N.C. App. LEXIS 75, *3-4, this observation merely served to show that the trial court's error was prejudicial. *See State v. Smith*, 139 N.C. App. 209, 220, 533 S.E.2d 518, 524 (Error in calculating prior record points is harmless if it does not affect the defendant's PRL.), *appeal dismissed*, 353 N.C. 277, 546 S.E.2d 391 (2000). Absent such prejudice, there would have been no cause to remand for resentencing.

been presented at defendant's first trial[;]" *Cf. State v. Mason*, 125 N.C. App. 216, 224, 480 S.E.2d 708, 713 (1997) (holding that when "evidence presented at the resentencing hearing is not identical to that which was previously before this Court . . . the doctrine of the law of the case does not bind this Court on the current appeal.").

III. Conclusion

In sum, the trial court did not err in finding that defendant was a prior record level IV because the law of the case doctrine did not preclude such a determination. We therefore affirm the trial court's judgment.

Affirmed.

Judges McCULLOUGH and DAVIS concur.

STATE OF NORTH CAROLINA
v.
RICHARD COLT ROLLINS, DEFENDANT

No. COA13-362

Filed 17 December 2013

1. Criminal Law—closure of courtroom during trial—findings of fact—not based solely on evidence presented prior to motion

The trial court's challenged findings of fact upon remand of a rape case during which the trial court temporarily closed the courtroom to spectators while the prosecuting witness testified were supported by competent evidence. Defendant's argument that the trial court's findings of fact must have been based solely upon the evidence presented prior to the State's motion for closure was without merit.

2. Criminal Law—closure of courtroom during trial—sufficient evidence—Waller test

Defendant's argument in a rape case that the trial court erred by temporarily closing the courtroom to spectators while the prosecuting witness testified was without merit. The uncontested findings of fact along with the challenged findings of fact which the Court of Appeals concluded were supported by competent evidence were sufficient to support the trial court's application of the test set

forth in *Waller v. Georgia*, 467 U.S. 39, and its determination that the limited removal of spectators was permissible in this case.

Appeal by defendant from order and judgments entered on or about 6 September 2012 by Judge C. Philip Ginn in Superior Court, Henderson County. Heard in the Court of Appeals 9 September 2013.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Elizabeth J. Weese, for the State.

Paul F. Herzog, for defendant-appellant.

STROUD, Judge.

Defendant appeals order and judgments allowing the State's motion to exclude spectators from his trial and convicting him of second degree rape, resisting public officer, breaking and/or entering, and second degree kidnapping. For the following reasons, we affirm and find no error.

I. Background

"[D]efendant was convicted of non-felonious breaking or entering, first degree kidnapping, second degree rape, and resisting a public officer." *State v. Rollins*, ___ N.C. App. ___, 729 S.E.2d 73, 75-76 (2012). The background of this case can be found in this Court's prior opinion at *State v. Rollins*, ___ N.C. App. ___, 729 S.E.2d 73 (2012) (*"Rollins I"*). In *Rollins I*, this Court addressed two issues on appeal, but the only one pertinent to the current appeal was the trial court's closure of the courtroom during the testimony of M.S., the complaining witness. *Rollins I*, ___ N.C. App. ___, 729 S.E.2d 73. In *Rollins I*,

> Defendant argue[d] that the trial court violated his Sixth Amendment right to a public trial when the trial judge temporarily closed the courtroom while M.S. testified concerning the alleged rape perpetrated by defendant without engaging in the four-part test set forth in *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed. 2d 31 (1984).

Id. at ___, 729 S.E.2d at 76. This Court determined:

> Given the limited closure in the present case and the fact that the trial court did not utilize the *Waller* four-part test, we hold that the proper remedy is to remand this

> case for a hearing on the propriety of the closure. The trial court must engage in the four-part *Waller* test and make the appropriate findings of fact regarding the necessity of closure during M.S.'s testimony in an order. If the trial court determines that the trial should not have been closed during M.S.'s testimony, then defendant is entitled to a new trial. If the trial court determines that the trial was properly closed during M.S.'s testimony on remand, then defendant may seek review of the trial court's order by means of an appeal from the judgments that the trial court will enter on remand following the resentencing hearing as set out in the next section of this opinion.

Id. at ___, 729 S.E.2d at 79.

On 6 September 2012, upon remand, the trial court entered an order:

> [T]he Court determines that the temporary closure of the courtroom during the testimony of the victim is necessary to provide complete, open and uninhibited testimony from the victim which is an overriding interest to the 6th Amendment rights of the Defendant, that there are no reasonable alternatives available to the Court other than to temporarily close the courtroom, that the closure was no broader than necessary to protect the overriding interest, and the above findings advance the interests of justice in this matter.
>
> IT IS HEREBY ORDERED, ADJUDGED AND DECREED that based upon the foregoing findings of fact, and after conducting the four-part balancing test as set out in *Waller v. Georgia*, 467 U.S. 39 (1984) that the State's Motion to close the courtroom during the testimony of the victim is hereby ALLOWED.

On or about this same date, the trial court entered judgments convicting defendant for second degree rape, resisting public officer, breaking and/or entering, and second degree kidnapping. Defendant appeals.

II. Standard of Review

> 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 Cnty. v. Simply Fashion Stores, Ltd., 208 N.C. App. 664, 668, 704 S.E.2d 48, 52 (2010) (citations and quotation marks omitted).

III. Findings of Fact

[1] Defendant raises several contentions regarding the findings of fact. We address each in turn.

A. Evidence to Support Findings of Fact

Defendant, with admittedly no legal support, contends "that the trial judge ought to place himself back at that point in time in the trial when he heard the State's initial motion, and to consider only those facts he (the trial judge) knew at the time." Essentially, defendant argues that the trial court's findings of fact can be based only upon evidence presented by the State's first eight witnesses, and not on that presented by M.S. or the State's last witness, both of whom testified after the ruling on the State's motion to exclude spectators during M.S.'s testimony. Defendant's argument would require that M.S. be submitted for *voir dire* or direct testimony in support of the State's motion, which would defeat the very purpose of N.C. Gen. Stat. § 15-166, since this would entail calling the very witness the statute seeks to protect to testify in an open courtroom to provide evidence to support the closure of the courtroom. *See* N.C. Gen. Stat. § 15-166 (2011). Thus, in many cases, although not all, the evidence supporting the closure is likely to come from other witnesses who have knowledge of the victim's circumstances and condition and the crime.

We also note that in *Rollins I*, this Court remanded this case for the trial court to make the appropriate findings of fact; this Court did so knowing that M.S. testified only after the trial court had already allowed the State's motion for the spectators to be removed during her testimony and that some of the findings of fact for *Waller* might be based upon evidence presented in her testimony which occurred after the ruling upon the motion. *See Rollins I* at ___, 729 S.E.2d at 77-79. As such, this Court essentially required the trial court to perform a retrospective analysis considering all of the evidence due to the trial court's failure to address the *Waller* factors specifically during the trial.

Defendant argues that a retrospective determination of the findings of fact based upon evidence presented both before and after the State's

motion is "unfair." Defendant has not presented any legal authority which would prevent a retrospective analysis, and we have found none. Although we would agree that the burden is upon the State to present sufficient evidence, either in its case in chief or by *voir dire*,[1] to permit the trial court to satisfy the *Waller* test, we specifically do not adopt any particular requirements as to how this presentation of evidence must be made, as it is not necessary under the facts before us. Although some of the trial court's findings of fact may be based upon evidence presented after the State's motion, there was evidence to support several of the trial court's findings of fact presented prior to the State's motion. Eight witnesses had testified prior to the State's motion, and below we will address the evidence from these witnesses which would support the challenged findings of fact. Accordingly, defendant's argument that the trial court's findings of fact must be based solely upon the evidence presented prior to the State's motion for closure is without merit, where there was sufficient evidence to support many of the findings of fact presented prior to the State's motion.

B. Mislabeled Findings of Fact

Defendant further contends that findings of fact 4, 13, 14, 16, and 18 are actually conclusions of law. "Findings of fact that are essentially conclusions of law will be treated as such upon review. *Wachacha v. Wachacha*, 38 N.C. App. 504, 248 S.E.2d 375 (1978)." *State v. Rogers*, 52 N.C. App. 676, 681-82, 279 S.E.2d 881, 885 (1981). However, defendant's arguments do not specifically challenge these "conclusions of law" beyond noting that they are mislabeled.

C. Challenged Findings of Fact

Defendant contends that the trial court's findings of fact 7, 9, 10, 11, 12, and 15 were unsupported by the evidence. We disagree. Finding of fact 7 states, "The particular circumstances of this case involved common church attendance and involvement of the victim and defendant, and includes additional issues of moral guilt imposed on the victim because of prior consensual sexual acts with Defendant[.]" The State's first witness, Mr. Thomas Sitler, was a fellow church member of M.S. and defendant and testified that M.S. and defendant socialized at church activities and that the church was opposed to sexual relations outside of marriage. M.S. also testified that she met defendant at church camp, saw

1. As noted above, *voir dire* of the prosecuting witness may, in a particular case, defeat the purpose of North Carolina General Statute § 15-166, and this determination must be made on a case-by-case basis by the trial judge.

him at church, and eventually entered into a consensual sexual relationship with defendant wherein she "felt uncomfortable with [her] convictions" because "it just [went] against what [she] fe[lt] as far as right and wrong outside of marriage."

Defendant also challenges finding of fact 9, which stated, "The victim intended to continue to be an active member of her Seventh Day Adventist Church[.]" The evidence supports this finding also. Mr. Sitler testified that he had known M.S. as a church member for eight years at the time of the incident, indicating she had an extensive history with the church. M.S. also testified that she "grew up in this church" and had been a member for approximately 15 years. M.S.'s testimony indicated that her church was a large part of her past and nothing indicated that this would change.

Finding of fact 10 stated, "There existed a particular fragile mental and emotional state of the victim due to the circumstances of the crime[.]" Although we agree with defendant that evidence of the victim's condition at the time of the rape is not necessarily sufficient to support a finding as to her "mental and emotional" state at a trial which may occur years later, we do find it to be some relevant evidence which the trial court may properly consider. In this case, a deputy who arrived at the scene to assist M.S. testified M.S. "was shaking uncontrollably, crying, she was hysterically screaming and she was nude." The deputy had difficulty getting the pertinent facts from M.S. because

> [s]he could not calm down enough for me to be able to get that information out of her. It was extremely chaotic. Whenever she would attempt to calm down and I was trying to get her clothed and she would attempt to calm down, she would come out of the closet, she would see the bedroom and then she would again become uncontrollably shaking and crying and it was hard to console her.

Later, when M.S.'s repeated bouts of "sobbing" remitted enough that she was able to provide more information to the deputy, she told her that prior to the incident which led to his arrest, defendant had been stalking her, was going to kill her, had tried to force himself on her, and she had once found him in the crawl space of her home. M.S.'s condition at the time of the rape and defendant's pattern of behavior leading up to it could certainly affect her "mental and emotional state" long after the event.

Furthermore, this type of finding of fact is one that the trial court is particularly well-qualified to make, and one that we are not well-qualified

to question. The trial judge had the opportunity to observe M.S., defendant, and the other witnesses during the trial, including M.S.'s demeanor during the State's evidence up to the point of the State's motion. Observations of this sort are something that cannot be captured in a written transcript but are crucial in this particular determination. Given the other findings of fact made by the trial court regarding the graphic nature of defendant's crime, M.S.'s accompanying moral guilt, and the circumstances of their mutual church attendance, there was evidence upon which to base this ultimate finding of fact that M.S. was in a fragile mental and emotional state. *See generally Woodard v. Mordecai*, 234 N.C. 463, 472, 67 S.E.2d 639, 645 (1951) ("Ultimate facts are those found in that vaguely defined area lying between evidential facts on the one side and conclusions of law on the other. In consequence, the line of demarcation between ultimate facts and legal conclusions is not easily drawn. An ultimate fact is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts. Whether a statement is an ultimate fact or a conclusion of law depends upon whether it is reached by natural reasoning or by an application of fixed rules of law." (citations omitted)).

Finding of fact 11 was that, "There were less [sic] tha[n] 6 spectators removed from the courtroom and only church members were excused, with the exception of the counselor for the victim[.]" While the transcript does not reflect how many people were excluded, the trial court did discuss with counsel whether "support people" for either M.S. or defendant would be permitted to remain, ultimately ruling that he would not permit anyone to remain for either side. Defendant has not directed us to any evidence that contradicts this finding of fact by the trial court. The trial court's own observations can serve as the basis of a finding of fact as to facts which are readily ascertainable by the trial court's observations of its own courtroom. *See generally State v. McRae*, 163 N.C. App. 359, 367, 594 S.E.2d 71, 77 ("[T]he trial judge did not err in making his finding of fact no. 8 referring to his observations as judge where the reference to his observations were only used to corroborate the undisputed facts in the record."), *disc. review denied and appeal dismissed*, 358 N.C. 548, 599 S.E.2d 911 (2004). In addition, as discussed in more detail below as to finding of fact 12, the trial court would have had knowledge of the identities of those present based upon the identification of witnesses and others in the courtroom during jury selection.

Finding of fact 12 stated, "The parties excluded by the Court had no actual knowledge of the specific acts committed by the Defendant that led to the particular charges before the Court[.]" Defendant is correct

that the record does not identify each person present or what knowledge each might have had, but it is apparent from the record that the trial court was aware of the general positions of those present. Although the actual *voir dire* of the jury was not recorded, the trial court's introduction of the case to the potential jurors and identification of potential witnesses, counsel, and members of the district attorney's office who may be present during the trial was in the record. Furthermore, the trial judge was on the bench watching the entire courtroom during jury selection, opening statements, and the first eight witnesses, so the trial court would have substantial knowledge regarding those present in the courtroom at the time the State's motion was made.

Lastly, finding of fact 15 stated, "No one from the media was present nor sought admission into the proceedings to advance an interest in being present for the testimony[.]" Again, as noted above, at this point in the trial, the trial court would have been well aware of who was present in the courtroom. Certainly no media representative requested on the record to remain in the courtroom. This finding of fact was also based upon the trial Judge's observations of his own courtroom. Accordingly, we conclude that all of the challenged findings of fact were supported by competent evidence before the trial court.

D. *Waller* Test

Finally, defendant "contends that there is insufficient evidence before the trial court to support element number (1) of the *Waller* test[.]" As defendant is actually challenging a conclusion of law, that the elements of *Waller* have not been met, we will address this contention below.

IV. Trial Court's Determination

[2] Defendant next presents a broad argument that generally challenges the trial court's ultimate determination to exclude spectators from the courtroom. Essentially defendant requests that we reweigh the evidence before the trial court. North Carolina General Statute § 15-166 provides,

> In the trial of cases for rape or sex offense or attempt to commit rape or attempt to commit a sex offense, the trial judge may, during the taking of the testimony of the prosecutrix, exclude from the courtroom all persons except the officers of the court, the defendant and those engaged in the trial of the case.

N.C. Gen. Stat. § 15-166. In *Rollins I*, this Court stated,

> while N.C. Gen. Stat. § 15–166 permits the trial court to close the courtroom during a rape victim's testimony, the trial court must balance the interests of the prosecutor with the defendant's constitutional right to a public trial. The Supreme Court in *Waller* set forth the following four-part test that the trial court must engage in while balancing these competing interests: (1) the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, (2) the closure must be no broader than necessary to protect that interest, (3) the trial court must consider reasonable alternatives to closing the proceeding, and (4) it must make findings adequate to support the closure.
>
> This Court has recognized the applicability of the *Waller* test when allowing a courtroom closure pursuant to N.C. Gen. Stat. § 15–166.

Rollins I, ___ N.C. App. at ___, 729 S.E.2d at 77 (citations and quotation marks omitted). The trial court found either uncontested or upon competent evidence:

> 1) The testimony of the victim involved matters of personal, delicate sexual nature;
>
> 2) The testimony of the victim involved forceful intercourse without the consent of the witness;
>
> 3) The testimony of the victim was of a graphic sexual nature making it uncomfortable for the witness to discuss openly;
>
> 4) The interests of justice require candid, honest and complete testimony from witnesses uninhibited by outside influences such as spectators in the courtroom;
>
> 5) The victim is an active member of the Seventh Day Adventist Church and has been for many years;
>
> 6) The defendant and witness met at a "camp meeting" and began to know each other through a singles group at her church, the Seventh Day Adventist Church, after the defendant was released from prison and brought into the church by the church's ministry;
>
> 7) The particular circumstances of this case involved common church attendance and involvement of the victim

and defendant, and includes additional issues of moral guilt imposed on the victim because of prior consensual sexual acts with Defendant;

8) The nature of the relationship between the defendant and witness and her efforts to end the relationship was the subject of the victim's testimony;

9) The victim intended to continue to be an active member of her Seventh Day Adventist Church;

10) There existed a particular fragile mental and emotional state of the victim due to the circumstances of the crime;

11) There were less tha[n] 6 spectators removed from the courtroom and only church members were excused, with the exception of the counselor for the victim;

12) The parties excluded by the Court had no actual knowledge of the specific acts committed by the Defendant that led to the particular charges before the Court;

13) A chilling effect on the completeness and opened of the victim's testimony is likely to occur if she feels overly embarrassed, emotional or intimidated by the presence of fellow church members during her testimony;

14) That in closing the courtroom, the victim will be less inhibited in testifying completely and the "chilling effect" will be reduced;

15) No one from the media was present nor sought admission into the proceedings to advance an interest in being present for the testimony;

16) *The overriding interest in providing an environment for truthful testimony of the victim would be prejudiced by allowing spectators during her testimony;*

17) *That the courtroom would be closed temporarily, only during the testimony of the victim, and there are many other witnesses whose testimony is open to the public;*

18) *That no reasonable alternatives to closing the courtroom during the victim's testimony exist.*

(Emphasis added.) We conclude that these uncontested findings of fact, *see Peters v. Pennington*, 210 N.C. App. 1, 13, 707 S.E.2d 724, 733 (2011) ("Unchallenged findings of fact are binding on appeal."), along with the contested findings of fact which we have already determined were supported by competent evidence, are sufficient to support the trial court's application of the *Waller* test as required by this Court in *Rollins I*. *Rollins I*, ___ N.C. App. at ___, 729 S.E.2d at 79.

Although it is possible that other findings of fact could have been made or that other conclusions could have been drawn weighing the factors more in defendant's favor does not mean that the trial court erred. The trial court's findings of fact support its determination that the limited removal of spectators should be permitted in this case.[2] As such, this argument is overruled.

V. Conclusion

For the foregoing reasons, we affirm and find no error.

AFFIRMED and NO ERROR.

Chief Judge MARTIN and Judge GEER concur.

2. We again note that the courtroom was closed only for the testimony of M.S. and was open for the testimony of the other 12 witnesses and all other proceedings during the trial.

STATE OF NORTH CAROLINA
v.
MICHAEL JUSTIN ROWE

No. COA13-308

Filed 17 December 2013

1. Appeal And Error—failure to serve proper notice of appeal—writ of certiorari granted

Defendant's petition for a writ of *certiorari* was granted where defendant failed to serve notice of his appeal on the State and filed an improper notice of appeal.

2. Criminal Law—acting in concert—assault—evidence sufficient

The trial court did not err by denying defendant's motion to dismiss the charge of assault inflicting serious injury. Defendant contended that the injuries that he inflicted on the victim were by themselves insufficient to be considered serious, but there was substantial evidence that defendant acted in concert with members of a group and that the injuries inflicted by the group were serious.

3. Appeal and Error—preservation of issues—issue raised at trial

Defendant preserved for appellate review the issue of whether a jury instruction should have been given even though he did not object at trial. Defendant specifically requested that the trial court include an instruction on simple assault and argued the point before the court. The fact that counsel did not say the words "I object" is not a reason to deny appellate review in this case.

4. Assault—inflicting serious injury—instruction on lesser offense—denied

The trial court did not err by denying an instruction on simple assault in a prosecution for assault inflicting serious injury arising from a beating by a group. Although defendant argued that the evidence showed that defendant kicked the victim in the body, which would be simple assault, the only evidence that defendant did not act in concert with other members of the group was not sufficient to entitle defendant to the instruction.

5. Appeal and Error—preservation of issues—fee included in sentence—not announced in open court—no objection

Defendant preserved for appeal the issue of whether he was properly charged a jail fee where he did not object at trial, but the jail fee was not announced in open court, and defendant could not object to it.

6. Sentencing—jail fees—active rather than probationary sentence

The trial court lacked the authority to order defendant to pay more than $10 in jail fees where defendant received an active rather than probationary sentence.

Appeal by Defendant from judgment entered 3 December 2012 by Judge Mark E. Powell in Henderson County Superior Court. Heard in the Court of Appeals 11 September 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Scott T. Slusser, for the State.

William B. Gibson for Defendant.

STEPHENS, Judge.

Evidence and Procedural History

This matter arises from a violent encounter occurring on 2 September 2011 between Howard Bryson, Defendant Michael Justin Rowe, and four other individuals. Following that encounter, Defendant was tried on a charge of assault inflicting serious injury. The jury found Defendant guilty, and the trial court imposed an active sentence of 60 days, with credit for 1 day served. At trial, the State's evidence tended to show the following:

On 2 September 2011, Bryson was visiting his friend Timothy Wilkie at Wilkie's home in Henderson County. At 7:45 p.m., after Wilkie and Bryson returned from the store, a group of five individuals approached Wilkie's deck. Bryson knew two of those individuals — Defendant and John Alexander. The group began "cursing" at the top of Wilkie's driveway. Wilkie went to the top of the driveway to tell them to leave. Alexander hit Wilkie on the back of the head and knocked him down. At that point, the group proceeded to "whip[] the dickens out of . . .

Wilkie." This involved a protracted period of kicking and stomping in which Defendant stomped on Wilkie.

While the group was beating Wilkie, Bryson grabbed a golf club and told the group to stop hurting him. One of them tackled Bryson to the ground. Defendant and Alexander began kicking Bryson while he was on the ground. At that point, Defendant kicked Bryson "in the body." As this occurred, another member of the group took Bryson's golf club and began hitting him in the head. The group was laughing throughout this beating, and, at one point, one of the women said, "Kill him." The group left together as police officers arrived on the scene. On 14 August 2012, Bryson took out a warrant against Defendant.

Testifying on his own behalf, Defendant stated that he tried to break up the fight by getting in between Wilkie and a member of his group. Defendant's girlfriend testified that she did not see Defendant hit or kick Bryson. She also testified that she could not see the fight clearly.

As a result of the beating, Bryson went to the hospital and received twenty-four staples in his head. There were seventy places on his body with some kind of scar or injury, and the letter "Z" was carved into his back. The next day, Bryson returned to the hospital because his head was swollen. In addition to these physical injuries, Bryson testified that he was emotionally traumatized by the encounter.

At the close of the State's evidence and at the close of all of the evidence, Defendant moved to dismiss the charge of assault inflicting serious injury. The trial court denied both motions. During the charge conference, Defendant requested that the trial court add the lesser-included offense of simple assault to its jury instructions. The court denied that request. Afterward, the trial court gave the following pertinent jury instruction:

> [I]f you find from the evidence[,] beyond a reasonable doubt[,] that . . . [D]efendant himself or with others acting with a common purpose intentionally assaulted the victim inflicting serious injury by striking him, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or both of these things, it would be your duty to return a verdict of not guilty.

The jury found Defendant guilty. Defendant did not give notice of appeal at trial. On 3 December 2012, Defendant, acting *pro se*, gave written notice of appeal of his conviction. Defendant concedes, however, that he failed to perfect his appeal by serving notice on the State. The State

also raises a number of other deficiencies with Defendant's notice of appeal. Defendant now seeks appellate review pursuant to a petition for writ of *certiorari*.

Defendant's Petition for Writ of Certiorari

[1] In criminal cases, a party entitled to appeal a judgment must take appeal by either (1) giving oral notice at trial or (2) filing written notice with the clerk of superior court and serving copies of that notice on all adverse parties within fourteen days. N.C.R. App. P. 4(a). Written notice of appeal must specify the party or parties taking the appeal, designate the judgment or orders from which appeal is taken and the court to which appeal is taken, and be signed by counsel of record or a *pro se* defendant. N.C.R. App. P. 4(b).

Defendant filed an improper notice of appeal. Instead of complying with Rule 4, Defendant filled out a form incorrectly indicating that his case was disposed of in the Henderson County District Court and did not state that he was appealing to this Court. As such, the notice failed to correctly designate the court to which appeal was taken. *See, e.g.*, *State v. Gardner*, __ N.C. App. __, __, 736 S.E.2d 826, 829 (2013) (holding that counsel for the defendant failed to correctly designate this Court as the court to which appeal was taken where counsel used a form for appealing decisions from district court to superior court).[1]

In addition, Defendant failed to serve notice of his appeal on the State. Accordingly, Defendant lost his right to appeal the trial court's judgment. "[W]hen a defendant has not properly given notice of appeal, this Court is without jurisdiction to hear [that] appeal." *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320, *appeal dismissed*, 360 N.C. 73, 622 S.E.2d 626 (2005). Because Defendant's notice of appeal is not proper under our rules, we must dismiss this appeal.[2]

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1. Contrary to the State's assertion that Defendant's notice of appeal was defective because it did not designate the judgment or order from which appeal is taken, Defendant's notice of appeal contained the specific case numbers that correspond with the judgment he is now appealing, thereby making it clear to this Court which judgments are being appealed. *See, e.g.*, *State v. Holly*, __ N.C. App. __, 749 S.E.2d 110 (2013) (unpublished opinion), *available at* 2013 WL 4004330 n.1 ("Because [the] defendant's notice of appeal does contain the specific case numbers that correspond with the judgment he is now appealing, thereby making it clear to this Court which judgments are being appealed from, we grant [the] defendant's petition for writ of *certiorari* and reach the merits of his appeal.") (italics added).

2. The State has not waived the service defect by participating in this appeal. "[A] party upon whom service of notice of appeal is required may waive the failure of service by not raising the issue by motion or otherwise and by participating without objection in

Given his failure to comply with Rule 4, Defendant requests that this Court grant his petition for writ of *certiorari*. A writ of *certiorari* may be issued "in appropriate circumstances . . . to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C.R. App. P. 21(a)(1). The rules regarding the issuance of a writ of *certiorari* are discretionary. *See McCoy*, 171 N.C. App. at 638, 615 S.E.2d at 320. Here, Defendant had a right to appeal the judgment finding him guilty of assault inflicting serious injury pursuant to N.C. Gen. Stat. § 7A-27 (2011). In addition, the State acknowledges that "this Court has the discretion to grant the instant petition . . . ." We grant Defendant's petition in our discretion and review this case on its merits.

Discussion

On appeal, Defendant argues that the trial court erred by (1) denying his motion to dismiss, (2) refusing his request to allow the jury to consider the lesser-included offense of simple assault, and (3) ordering Defendant to pay certain jail fees per its judgment and commitment. We find no error at trial, but hold that the court lacked the authority to order Defendant to pay the challenged jail fees.

I. Defendant's Motion to Dismiss

[2] "[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).

> Upon [the] 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 [the] 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 (citation omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980). "If there is substantial evidence — whether

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the appeal." *Hale v. Afro–Am. Arts Int'l, Inc.*, 335 N.C. 231, 232, 436 S.E.2d 588, 589 (1993). Here, the State has raised the issue of defective service of the notice of appeal by objecting to the petition for writ of *certiorari*. Accordingly, lack of service has not been waived. *See also State v. Ragland*, __ N.C. App. __, __,739 S.E.2d 616, 620, *disc. review denied*, __ N.C. __, 747 S.E.2d 548 (2013).

direct, circumstantial, or both — to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988) (citation omitted). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

Defendant was charged with assault inflicting serious injury pursuant to N.C. Gen. Stat. § 14-33 (2011). Conviction under that statute requires proof of the commission of an assault on another, which inflicts serious injury. *State v. Carpenter*, 155 N.C. App. 35, 42, 573 S.E.2d 668, 673 (2002) (citation omitted). "Our courts have defined 'serious injury' as injury which is serious but falls short of causing death . . . ." *Id.* (citation and certain internal quotation marks omitted).

Defendant contends that the trial court erred in denying his motion to dismiss the charge against him because the evidence at trial was insufficient to show that he acted in concert with the other members of the group. Therefore, Defendant asserts, the injuries he inflicted on Bryson by kicking were — alone — insufficient to be considered "serious," and the State failed to provide substantial evidence of the elements of assault inflicting serious injury. In making this argument, Defendant concedes that the injuries inflicted by the entire group "could rationally be deemed to be 'serious' by the [jury]." Given that concession, Defendant's argument turns as a threshold matter on whether there was sufficient evidence that he was acting "in concert" with the other members of the group. If so, then the injuries that were inflicted are admittedly serious and the motion to dismiss was properly denied. We hold that such evidence was present here.

A defendant can be found guilty of a crime under a theory of acting in concert where "he is present at the scene and acting together with another or others pursuant to a common plan or purpose to commit the crime." *State v. Taylor*, 337 N.C. 597, 608, 447 S.E.2d 360, 367 (1994). In addition,

> [i]f two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed

> by the other in pursuance of the common purpose . . . or as a natural or probable consequence thereof.

State v. Mason, __ N.C. App. __, __, 730 S.E.2d 795, 800 (2012).

Taken in the light most favorable to the State, the evidence presented at trial shows that Defendant was actually present during the assault. In addition, Defendant and Alexander kicked Bryson while one of the females hit Bryson in the head with a golf club. This beating lasted several minutes, and the group — including Defendant — left the scene when they heard police sirens. This is substantial evidence that Defendant acted with the members of the group to assault Bryson pursuant to a common plan or purpose. Therefore, we conclude that Defendant was "acting in concert" with the other members of the group. As a result, the admittedly serious injuries suffered by Bryson may be attributed to Defendant, and we need not address Defendant's argument that the injuries he personally inflicted were not "serious." For these reasons, Defendant's first argument is overruled.

II. Jury Instruction on Simple Assault

[3] In his second argument on appeal, Defendant contends that the trial court should have instructed the jury on the lesser-included offense of simple assault in addition to the crime of assault inflicting serious injury. Before addressing the merits of that argument, we consider the State's contention that Defendant did not preserve this issue for appellate review because he did not object when it was decided by the trial court.

Our Rules of Appellate Procedure provide as a general rule that

> [i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.

N.C.R. App. P. 10(a)(1). Regarding jury instructions, the rules state:

> A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection; provided that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

N.C.R. App. P. 10(a)(2). For the purposes of Rule 10(a)(2), a request for instructions constitutes an objection. *See State v. Collins*, 334 N.C. 54, 61, 431 S.E.2d 188, 192 (1993) (holding that the defendant failed to preserve the issue of whether the trial court should have instructed on lesser offenses when "the defendant did not object to the instructions given by the trial court *and did not request instructions on lesser offenses*") (emphasis added).

In this case, the following colloquy occurred during the charge conference regarding the trial court's decision not to include an instruction on the lesser-included offense of simple assault:

> [COUNSEL FOR DEFENDANT]: . . . Your Honor. I would like to make an addition for a lesser[ ]include[d] offense of simple assault.
>
> THE COURT: Would you like to make your argument as to that?
>
> [COUNSEL FOR DEFENDANT]: Just, Your Honor, the injuries that I observed in the photographs, at least what I consider serious injuries, were cuts to his head with staples and stitches. I would argue that the injuries upon his body were surface abrasions and scratches, and because of that there would be no serious injury alleged. If the jury were to find that [Defendant] had nothing to do with hitting . . . Bryson in the head but did have something to do with kicking him with his foot, then I think at that point — which is what he testified to — I think at that point we would have a simple assault if they were to believe that.
>
> . . .
>
> THE COURT: [Counsel], I appreciate your argument. . . , but I think as I understand the case law . . . that's not a reason to include a lesser[-]included offense on the verdict sheet. Do you wish to say anything else about that?
>
> [COUNSEL FOR DEFENDANT]: Well, Judge, . . . I think they can find a [not] serious injury as far as [Defendant] is concerned. I think that they can find that.
>
> THE COURT: Yes, sir. I understand. I'm going to leave the verdict sheet as it is.

As Defendant specifically requested the trial court to include a jury instruction on simple assault and argued that point before the court, we

hold that he properly preserved this issue for appellate review. *See id.* The fact that counsel did not say the words "I object" is not reason to deny appellate review in this case. Accordingly, the State's preliminary argument is overruled, and we proceed on the merits.

[4] Defendant contends that the trial court erred by failing to instruct the jury on simple assault because the State presented evidence tending to show that Defendant kicked Bryson in the body, an act which could rationally be considered to be a "simple assault." For support, Defendant cites his own testimony that he did not strike Bryson and did not act in concert with the other members of the group. We are unpersuaded.

The trial court's obligation to instruct on a lesser offense is solely determined by "the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense." *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981). "However, due process requires an instruction on a lesser-included offense only if the evidence would permit a jury *rationally* to find [the defendant] guilty of the lesser offense and acquit him of the greater." *State v. Conaway*, 339 N.C. 487, 514, 453 S.E.2d 824, 841 (citation and internal quotation marks omitted; emphasis added), *cert. denied*, 516 U.S. 884, 133 L. Ed. 2d 153 (1995).

> If the State's evidence is sufficient to fully satisfy its burden of proving each element of the greater offense and there is no evidence to negate those elements other than [the] defendant's denial that he committed the offense, [the] defendant is not entitled to an instruction on the lesser offense.

State v. Smith, 351 N.C. 251, 267–68, 524 S.E.2d 28, 40 (citation omitted), *cert. denied*, 531 U.S. 862, 148 L. Ed. 2d 100 (2000). Failure to give a necessary lesser-included offense instruction, however, is reversible error. *State v. Fisher*, 318 N.C. 512, 524, 350 S.E.2d 334, 341 (1986).

In this case, as discussed in the preceding section, the State's evidence shows that Defendant acted in concert with the other members of the group to seriously injure Bryson.[3] The only evidence presented to the contrary is Defendant's own denial that he committed the offense and the testimony of his girlfriend that she did not see Defendant hit Bryson.

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3. The fact that Defendant's girlfriend did not see Defendant hit Bryson is not positive evidence that Defendant did not, in fact, hit Bryson and is insufficient to negate the State's presentation of evidence. *See State v. Hartman*, 344 N.C. 445, 474, 476 S.E.2d 328, 344 (1996) ("But where the State adequately establishes all the elements of a crime and

Such evidence is not sufficient to permit a jury to rationally determine that Defendant committed simple assault and does not entitle Defendant to an instruction on the lesser offense of simple assault. Accordingly, Defendant's second argument is overruled.

III. Jail Fees

[5] After the jury returned its verdict, the trial court orally imposed an active sentence of 60 days, with credit for 1 day spent in pre-judgment custody. The court also orally entered judgment for $870.00 in court-appointed attorneys' fee. The written judgment included the $870.00 fee, as well as additional monetary obligations not stated in open court, which included a $2,370.00 jail fee. On appeal, Defendant argues that the trial court lacked the authority to order him to pay all but $10 of those jail fees, and we agree.

In response to Defendant's argument, the State first cites to Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure and asserts that Defendant failed to preserve this issue for review because he "did not object to the trial court's assessment of jail fees in the judgment[.]" This argument is inapposite. Rule 10(a) only applies to the preservation of issues resulting from trial proceedings. Because the jail fee was not announced in open court, Defendant was incapable of objecting to it. For that reason, we reject the State's argument.

Alternatively, the State argues that Defendant should have raised this issue before the trial court on a motion for appropriate relief — not on appeal. We disagree. This Court has previously handled cases dealing with the imposition of incorrect jail fees directly on appeal, and the State offers no reason or argument for why we should refrain from doing so here. *See*, *e.g.*, *State v. Corrothers*, __ N.C. App. __, 749 S.E.2d 111 (2013) (unpublished opinion), *available at* 2013 WL 4004527; *State v. McGriff*, __ N.C. App. __, 749 S.E.2d 110 (2013) (unpublished opinion), *available at* 2013 WL 4007081. Accordingly, we review this issue on the merits.

[6] Section 7A-304(c) of the North Carolina General Statutes provides that "jail fees . . . shall be assessed as provided by law in addition to other costs set out in this section." N.C. Gen. Stat. § 7A-304(c) (2012). Section 7A-313 describes jail fees for (1) persons lawfully confined in jail

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[the] defendant produces no evidence sufficient to negate these elements, the mere possibility that the jury could return with a negative finding does not, without more, require the submission of the lesser[-]included offense.") (citation, internal quotation marks, and brackets omitted).

and awaiting trial and (2) persons ordered to pay jail fees pursuant to a probationary sentence. N.C. Gen. Stat. § 7A-313 (2011).

Regarding the first type of fee, the statute reads:

> Persons who are lawfully confined in jail awaiting trial shall be liable to the county or municipality maintaining the jail in the sum of ten dollars ($10.00) for each 24 hours' confinement, or fraction thereof, except that a person so confined shall not be liable for this fee if the case or proceeding against him is dismissed, or if acquitted, or if judgment is arrested, or if probable cause is not found, or if the grand jury fails to return a true bill.

Id. Defendant concedes that he was properly charged $10.00 for the one day he spent in confinement awaiting trial pursuant to this section.

Regarding the second type of fee, the statute reads:

> Persons who are ordered to pay jail fees pursuant to a *probationary sentence* shall be liable to the county or municipality maintaining the jail at the same per diem rate paid by the Division of Adult Correction of the Department of Public Safety to local jails for maintaining a prisoner, as set by the General Assembly in its appropriations acts.

N.C. Gen. Stat. § 7A-313 (emphasis added). Defendant contests the remaining $2,360 in jail fees charged by the trial court pursuant to this section.

"Issues of statutory construction are questions of law, reviewed *de novo* on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) (italics added). "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) (citation and internal quotation marks omitted).

"Probation" is defined as "[a] court-imposed criminal sentence that, subject to stated conditions, releases a convicted person into the community instead of sending the criminal to jail or prison." Black's Law Dictionary 1322 (9th ed. 2009). A "probationary sentence" is one in which the defendant is sentenced to probation. Because an exclusively probationary sentence would necessarily eschew jail time, jail fees could only be awarded under this section when the probationary sentence nonetheless involves some element of jail time (*e.g.*, in the context of a "split sentence"). *See generally State v. Orr*, 195 N.C. App. 461, 673

S.E.2d 167 (2009) (unpublished opinion), *available at* 2009 WL 368389 ("The trial court then ordered a split sentence, with [the d]efendant to serve sixty days of active time and the remainder of the sentence was suspended, with five years of probation."); Jamie Markham, Jail Fees, North Carolina Criminal Law — UNC School of Government Blog (4 January 2012), http://nccriminal law.sog.unc.edu/?p=3176 (providing a more detailed discussion of the allocation of jail fees).

Defendant did not receive a probationary sentence in this case. He received an active sentence. Though counsel for Defendant requested a "probationary sentence," the court did not impose one. Rather, the court specifically stated that Defendant's sentence was "60 days active," and the record reflects that fact. Therefore, the statute, by its plain language, is inapplicable. Accordingly, we vacate the trial court's judgment and remand this case to the trial court for the limited purpose of entering a new judgment consistent with this opinion.

NO ERROR in part; VACATED AND REMANDED in part.

Judges CALABRIA and ELMORE concur.

STATE OF NORTH CAROLINA
v.
FREDERICK L. WEAVER

No. COA13-578

Filed 17 December 2013

Search and Seizure—reasonable suspicion—traffic stop—armed security guard—not state agent

The trial court erred in a driving while impaired case by granting defendant's motion to suppress evidence. Certain challenged findings of fact were not supported by the evidence and the remaining findings did not support the trial court's conclusion that an armed security guard was an agent of the State. Accordingly, the security guard's traffic stop of defendant did not require reasonable suspicion.

Appeal by the State from order entered 27 March 2013 by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 23 October 2013.

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

Appellate Defender Staples Hughes, by Assistant Appellate Defender Constance E. Widenhouse, for defendant.

Elmore, Judge.

On 20 April 2012, Frederick Lloyd Weaver, Jr. (defendant) was arrested in New Hanover County and charged with driving while impaired (DWI) and carrying a concealed weapon. He was found guilty of DWI in New Hanover County District Court and appealed his conviction to New Hanover County Superior Court. Defendant filed a pre-trial motion to suppress, which was heard on 23 January 2013 and granted by the trial court.

The State now appeals and raises as error the trial court's conclusion that an armed security guard was an agent of the State. After careful consideration, we reverse the trial court's order granting defendant's motion to suppress and remand for further proceedings.

I. Facts

Brett Hunter is a security guard employed by Metro Special Police and Security Services, Inc. (Metro). Hunter is a licensed security officer as defined by N.C. Gen. Stat. § 74C-3(a)(6) (2011). He is certified through the Private Protective Services Board (PPSB). As required by the PSSB, Hunter satisfied the basic required training, including a minimum of four hours of class time and eight hours of range time for firearm certification.[1] He is not trained in speed detection or in detection of impaired drivers. On 20 April 2012, Hunter had been employed by Metro for two years as a security officer. Although Metro employed an estimated 40 employees, some of whom were "special police officers," Hunter was not a "special police officer." On the date of defendant's arrest, and as part of his job responsibilities, Hunter wore a uniform, carried a firearm, and worked as a patrol and standing officer. He also drove a patrol car that had "Metro Public Safety" printed on the outside. The vehicle also had overhead warning lights that were white, red, and amber in color. The patrol car did not have a siren.

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1. We initially note that that despite Hunter being licensed as a security guard by the State and subject to training and certification requirements by the PPSB, Hunter is not considered "[a]n officer or employee of . . . this State[.]" N.C. Gen. Stat. § 74C-3(b)(2) (2011).

On 20 April 2012, Hunter was assigned to provide security services for Carleton Place, a town home community close to the campus of the University of North Carolina at Wilmington (UNCW). Although not a part of campus, Carleton Place is a college community with the usual concerns of any area close to a university: parties, underage drinking and possession of alcohol, vandalism, and failure to abide by community rules and regulations. As part of Metro's contract with Carleton Place, Hunter was authorized to issue civil citations and fines to anyone on the property who violated the rules and regulations of the community, such as exceeding the posted community speed limit. Unpaid civil fines would be sent to collections agencies for resolution.

At the suppression hearing, the only witnesses who testified were Hunter and Detective Michael Tenney of the Wilmington Police Department (WPD). Hunter testified that at approximately 2:10 A.M. on Friday, 20 April 2012, he observed a dark-colored Acura enter Carleton Place. Hunter testified that he saw the Acura through his rearview mirror as it crossed over the center street lines several times at a high rate of speed. Although cars were parked on both sides of the street, he reported seeing no other vehicles on the street. Hunter estimated the Acura to be travelling at 25 miles per hour (m.p.h.), 10 m.p.h. above the posted community speed limit. He believed this speed was unreasonable due to the rainy weather conditions. Hunter observed the Acura turn on a side street in the complex. At that time, Hunter activated his vehicle's warning lights and followed the Acura. The Acura pulled over to the side of the road and stopped.

Hunter testified that he approached the driver's window and observed defendant sitting in the driver's seat with no other occupants in the vehicle. Hunter introduced himself as "Officer Hunter from Metro Public Safety" and asked defendant if he had identification or a driver's license on him. Hunter testified that defendant was unresponsive and that he could "smell an odor of alcohol coming from the vehicle and [defendant's] person and also observed that his eyes were bloodshot." Hunter told defendant that he was stopped for "careless and reckless speeding." Hunter asked defendant if he had any "physical limitations or medical conditions that would . . . prevent [defendant] from understanding [his] questioning and also if [defendant] had any intoxicating substance that night." When defendant admitted that he had consumed alcohol at a local bar, Hunter then asked defendant to "step out of [the] vehicle and have a seat on the . . . sidewalk[.]" Hunter called city dispatch and asked them to "[s]end an officer out for possible DUI." Hunter issued

defendant a civil citation and testified that he did not give defendant any further instructions or carry on any additional conversation thereafter.

Five to ten minutes later, a UNCW police officer arrived. However, the officer realized that Carleton Place was outside her jurisdiction, so she called city dispatch back, requested that they send an officer from the WPD, and left the scene. At approximately 2:45 A.M., Detective Tenney arrived on the scene. Hunter told Detective Tenney about his observations of defendant's driving and physical condition. Thereafter, Detective Tenney saw defendant sitting on the curb. When Detective Tenney approached defendant, he testified that defendant "stood up," was "unsteady on his feet," had bloodshot eyes, and exhibited slurred speech. Detective Tenney then conducted several field sobriety tests, formed the opinion that defendant was appreciably impaired, and arrested defendant for DWI.

II. Analysis

a.) Findings of Fact

First on appeal, the State challenges several of the trial court's findings of fact and argues that the findings are not supported by competent evidence. We agree.

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

Here, the trial court concluded as a matter of law that:

> 1. The armed security guard . . . [a]cted as an agent for the State[.]
>
> 2. The armed security guard is a State actor.
>
> 3. There was lack of reasonable suspicion to stop.
>
> 4. The search and seizure were unconstitutional.
>
> 5. The evidence acquired beyond the stop and detention should be excluded.

The State challenges the following pertinent findings of fact in support of the trial court's conclusions of law above:

9. When Hunter suspected [d]efendant's impairment, he made him get out of his car and sit on the curb. The purpose of his encounter with [d]efendant then changed. No longer was he performing under Metro's contract. After issuing the civil citation his actions exceeded his contractual authority. His goal and purpose evolved into detaining [d]efendant until local law enforcement arrived to investigate a suspected impaired driver. His motivation was no longer personal to his employment. His primary intent was to serve law enforcement efforts.

10. His show of apparent lawful authority (flashing lights, uniform, badge, and gun) intimidated [d]efendant and made him feel compelled to wait outside his car for 45 minutes until WPD arrived.

21. Hunter likely had prior (and subsequent) handoff scenarios similar to the one in this case. His primary purpose when assisting law enforcement officers is to help them make arrests. He does not derive any personal benefit.

22. Various empirical measures suggest that private police outnumber public police forces. Private police forces in the United States near 1,000,000 officers. It is reasonable to assume that the factual scenario of this case occurs in all parts of this county, state, and nation on a regular basis.

23. Most state statutes only regulate a certain category of private police officers, leaving a substantial portion of the private policing industry virtually unregulated. Many state regulations of private police misunderstand, and thus inadequately protect against the threat posed by the private policing industry. Few statutes protect individuals from the potential social harms of the privatized police.

24. It is given that law enforcement officers are spread thin. Handoff cases occur on a regular basis. More times than imagined armed security guards arrest individuals and hold them for law enforcement officers who arrive on scene and make arrests. If law enforcement officers do not have to make the initial stop, and armed security guards detain individuals until they arrive, substantial time is saved.

34. Private security guards in North Carolina are subject to a high level of government regulation. North Carolina

> has a comprehensive regulatory scheme for its private security guards. They are vetted, trained, and continue to be subject to disciplinary action under the aegis of the North Carolina Attorney General.
>
> 38. Although the state may not have advanced knowledge of every individual arrest and search undertaken by a private security guard, the same is true of its sworn law enforcement officers. The state cannot turn its back in ignorance on armed private security guards when they do exactly what they are trained, regulated, licensed, and authorized to do.
>
> 55. Hunter wore a uniform, displayed a badge, had a gun in its holster, and stopped [d]efendant's vehicle using the flashing lights of his marked patrol vehicle[.]

Finding #9 is supported by competent evidence. After Hunter stopped defendant's vehicle to issue defendant a civil citation, Hunter instructed defendant to sit on the curb and testified that he called city dispatch to respond to the scene for a possible DWI. Hunter subsequently waited with defendant until law enforcement arrived. Finding #55 is also supported by competent evidence because Hunter testified that he wore a uniform, had a gun, and drove a Metro Public Safety vehicle equipped with emergency flashing lights when he stopped defendant.

However, the record contains no competent evidence supporting findings #10, 21, 22, 23, 24, 34, and 38. Finding #10 purports that defendant was intimidated by Hunter's security uniform, badge, and holstered gun, and felt compelled to comply with Hunter's request to wait outside his vehicle. However, there is no testimony by defendant or evidence in the record concerning defendant's state of mind at the time of Hunter's request. Furthermore, Hunter testified that once he issued defendant a civil citation, he did not give defendant any further instructions and stopped all conversation with defendant. Finding #21 indicates that Hunter and the police had previous "handoff scenarios" similar to the case at bar. However, this is mere speculation by the trial court because neither Hunter nor Detective Tenney provided any testimony or evidence to support this finding.

Findings #22, 23, and 24 include empirical data concerning private police versus public police forces in the United States, a reference to a law review article from West Virginia stating that a "substantial portion of the private policing industry is virtually unregulated," and theorizes that because law enforcement officers "are spread thin[,]" handoff cases

between armed security guards and police occur on a frequent basis. Similarly, finding #34 relates to the "high" level of government regulation private security guards are subject to in this State. None of the witnesses elicited such evidence at the hearing. Admittedly, Rule 201 of the North Carolina Rules of Evidence permits a trial court to take judicial notice of facts that are not reasonably in dispute, with or without the request of counsel. N.C. Gen. Stat. 8C-1, Rule 201(b) (2011); *but see Hinkle v. Hartsell*, 131 N.C. App. 833, 837, 509 S.E.2d 455, 458 (1998) (holding that the trial court erred in taking judicial notice *sua sponte* of criminal activity in a community where prevalence of crime in that vicinity was a matter of public debate). Undeniably, whether these findings are accurate within this State is a fact reasonably in dispute.

Finding #38 purports to find that private security guards are trained, regulated, licensed and authorized by the State to arrest and search private citizens. This finding is based on evidence at the hearing that Hunter was "a security officer" as defined by N.C. Gen. Stat. § 74C-3 (2011). However, nothing in that statute authorizes a security guard to arrest and search private citizens.[2]

Accordingly, findings of fact #10, 21, 22, 23, 24, 34, and 38 are not binding on this Court because they are not supported by competence evidence. Thus, we only consider findings of fact #9 and #55 in addition to the unchallenged findings of fact in determining whether the trial court's findings of fact support its conclusion of law.

b.) State Actor

The State argues that the trial court's remaining findings of fact binding on this Court do not support its legal conclusion that Hunter was a state actor. We agree.

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2. N.C Gen. Stat. § 74C-3(a)(6) (2011) defines a security guard as:

> [a]ny person, firm, association, or corporation that provides a security guard on a contractual basis for another person, firm, association, or corporation for a fee or other valuable consideration and performs one or more of the following functions: (a) Prevention or detection of intrusion, entry, larceny, vandalism, abuse, fire, or trespass on private property. (b) Prevention, observation, or detection of any unauthorized activity on private property. (c) Protection of patrons and persons lawfully authorized to be on the premises or being escorted between premises of the person, firm, association, or corporation that entered into the contract for security services. (d) Control, regulation, or direction of the flow or movement of the public, whether by vehicle or otherwise, only to the extent and for the time directly and specifically required to assure the protection of properties.

"The fourth amendment as applied to the states through the fourteenth amendment protects citizens from unlawful searches and seizures committed by the government or its agents. This protection does not extend to evidence secured by private searches, even if conducted illegally." *State v. Sanders*, 327 N.C. 319, 331, 395 S.E.2d 412, 420 (1990), *cert. denied*, 498 U.S. 1051, 111 S.Ct. 763, 112 L.Ed.2d 782 (1991) (citation omitted). "The party challenging admission of the evidence has the burden to show sufficient government involvement in the private citizen's conduct to warrant fourth amendment scrutiny." *Id.* (citation omitted). A traffic stop is "considered a seizure" subject to the protections of the fourth amendment. *State v. Otto*, 366 N.C. 134, 136-37, 726 S.E.2d 824, 827 (2012) (internal quotation marks omitted). Reasonable suspicion is necessary to stop a vehicle, and it consists of "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." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (citations omitted). Thus, a traffic stop conducted entirely by a non-state actor is not subject to reasonable suspicion because the fourth amendment does not apply.

In determining whether a private citizen is a state actor for the purposes of the fourth amendment, we use a totality of the circumstances approach that requires special consideration of 1.) "the citizen's motivation for the search or seizure," 2.) "the degree of governmental involvement, such as advice, encouragement, knowledge about the nature of the citizen's activities," and 3.) "the legality of the conduct encouraged by the police." *State v. Verkerk*, ___ N.C. App. ___, ___, 747 S.E.2d 658, 664 (2013) (citation and internal quotation marks omitted). Importantly, "[o]nce a private search [or seizure] has been completed, subsequent involvement of government agents does not transform the original intrusion into a governmental search." *State v. Kornegay*, 313 N.C. 1, 10, 326 S.E.2d 881, 890 (1985) (citation omitted).

A review of the trial court's applicable findings of fact reveals an absence of all three special considerations. No finding shows that Hunter's motivation was to assist law enforcement officials at the time he conducted the traffic stop. To the contrary, there is evidence in the record to show that Hunter's motivation in stopping defendant was to issue him a civil citation for violating community rules. Similarly, none of the findings indicate that the WPD or UNCW campus police recruited, requested or made any arrangement with Hunter, or encouraged him to stop and detain defendant. After Hunter called the WPD, Hunter ceased conversation with defendant, and law enforcement did not give Hunter

any instructions to detain defendant or conduct further investigation. The police merely responded to a "possible DUI[,]" and Hunter acted alone without any encouragement from law enforcement. Moreover, the subsequent arrival of the UNCW officer and Detective Tenney did not convert Hunter's private conduct to state action. *See Kornegay*, *supra*. Thus, Hunter was not a state actor, and his traffic stop of defendant did not require reasonable suspicion.

Even assuming *arguendo* that Hunter was a state actor, reasonable suspicion existed to conduct a traffic stop. Hunter observed defendant at 2:10 A.M in rainy weather conditions, traveling approximately 25 m.p.h. in a 15 m.p.h. zone, and crossing over the center street lines several times. The time, poor weather conditions, speed, and failure to maintain lane control provided Hunter with reasonable suspicion to stop defendant. *See State v. Thompson*, 154 N.C. App. 194, 197, 571 S.E.2d 673, 675-76 (2002) (reasonable suspicion found where defendant weaved within his lane early in the morning and exceeded the speed limit); *See also State v. Hudson*, 206 N.C. App. 482, 486, 696 S.E.2d 577, 581 (2010) (holding that an officer had reasonable suspicion to stop vehicle when evidence showed that the "[d]efendant crossed the center and fog lines twice[.]").

III. Conclusion

In sum, the trial court erred in granting defendant's motion to suppress because Hunter was not a state actor. Therefore, his traffic stop of defendant did not require reasonable suspicion. We reverse the trial court's order and remand for further proceedings.

Reversed and Remanded.

Judges McCULLOUGH and DAVIS concur.

THZ HOLDINGS, LLC, PLAINTIFF
v.
BARIT LEA MCCREA, DEFENDANT, AND DANIEL MCCREA, CHRISTINA MCCREA, AND LILLIAN GRACE MCCREA, BY AND THROUGH THEIR MOTHER AND LEGAL GUARDIAN, BARIT LEA MCCREA, THIRD-PARTY PLAINTIFFS
v.
RICHARD DEAN MCCREA, TRUSTEE FOR THE RICHARD DEAN MCCREA 2008 CHILDREN'S TRUST, RICHARD DEAN MCCREA, INDIVIDUALLY, NATALIE MARIE MCCREA, AND THZ HOLDINGS, LLC, AND RICHARD M. SAWDEY, THIRD-PARTY DEFENDANTS

No. COA13-425

Filed 17 December 2013

1. Trusts—trustee—duty of loyalty—breach—transfer of trust property

The trial court correctly concluded that a trustee breached his duty of loyalty by transferring trust property to himself for his own personal account in contravention of N.C.G.S. § 36C-8-802(b) where the trustee transferred a house to himself in cancellation of a debt from the trust to him, transferred the house to a holding company, and started an ejectment action against his former wife and children so that the house could be sold.

2. Trusts—transfer of property—voidable—breach of duty of loyalty

The trial court correctly concluded that a conveyance of real property by a trustee to himself was voidable because it breached the duty of loyalty to the beneficiaries and the judgment voiding the conveyance as a remedy was affirmed. The beneficiaries were affected in that they resided in the property and the party to whom it was conveyed sought their ejectment. Subsequent conveyances from the trustee were also voidable (and voided) because the trustee could not convey any better title than he received from the trust.

3. Trusts—appointment of new trustee—statutory order of priority

The trial court erred by appointing a new trustee after removing the old without following statutory procedure and looking to the terms of the trust instrument.

Appeals by plaintiff and third-party defendants from judgment and order entered 10 September 2012 by Judge Edwin G. Wilson, Jr. in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 September 2013.

Erwin, Bishop, Capitano & Moss, PA, by A. Todd Capitano, for plaintiff and third-party defendants-appellants.

Millsaps & Bratton, PLLC, by Joe T. Millsaps, for defendant and third-party plaintiffs-appellees.

HUNTER, Robert C., Judge.

Richard Dean McCrea ("Richard"), individually and as trustee for the Richard Dean McCrea 2008 Children's Trust ("the trust"), Natalie Marie McCrea ("Natalie"), and THZ Holdings, LLC ("THZ") (collectively "appellants") appeal from judgment and order entered 10 September 2012 by Judge Edwin G. Wilson, Jr. in Mecklenburg County Superior Court. Appellants put forth interrelated issues on appeal regarding the trustee position of the trust and title of the trust property. After careful review, we affirm the trial court as to the disposition of title and the removal of Richard as trustee, but we remand for reappointment of a trustee in accordance with the trust instrument.

Background

Richard and Barit Lea McCrea ("Lea") are the parents of Daniel McCrea, Christina McCrea, and Lillian Grace McCrea ("the children"), the third-party plaintiffs in this action. Richard and Lea ended their marriage by separation agreement on 10 April 2008. As conditions of separation, Richard agreed to provide housing for Lea and the children, and Lea agreed to enter into a lease with Richard in exchange for the housing.

Richard created the trust in April 2008 and designated the children as its beneficiaries. The trustee was initially North Star Trust Company ("North Star"), a Chicago business; Richard Sawdey ("Sawdey"), an Illinois estate lawyer, served as trust protector. The trust instrument specified that the trust protector "may amend or terminate this agreement and direct distribution of the trust estate in such manner as such person deems advisable . . . ." The instrument also authorized the trustee to "borrow money for any purpose, on such terms and from such source" as the trustee deemed proper. As settlor, Richard agreed to "expressly waive all right, power and authority to alter, amend, modify, revoke or terminate" the trust, thus making it irrevocable.

In April 2008, Richard lent funds to the trust which he borrowed from LPS, LLC ("LPS") for the purchase of a home located at 16539 Rudyard Lane, Huntersville, NC 28078 ("the Huntersville property"). Richard also contributed $36,000 to the trust as a gift for the benefit of his children.

Richard intended the Huntersville property to satisfy his obligation to provide housing for Lea and the children. There was no mortgage or deed of trust placed on the property, and title to the property was not legally encumbered in any way. At the time of closing, there was no written loan agreement between Richard and the trust. Richard and North Star later entered into a "Credit Advance Agreement" which covered the terms of the loan and specified that Richard was to be repaid by the trust on or before 31 December 2018. Lea and the children moved into the Huntersville property shortly after it was purchased.

Due to the economic downturn of 2008, Richard lost his job and all sources of income. Thus, the trust received no money, and North Star subsequently resigned from its position as trustee due to nonpayment. In a letter sent 30 November 2009, Sawdey advised Richard that the purposes of the trust could not be achieved in its then-current state and that liquidation of the trust was advisable. On 9 December 2009, Sawdey appointed Richard as trustee. Richard then transferred title to the Huntersville property from the trust to himself individually in exchange for forgiveness of the purchase-money debt. Sawdey, in his capacity as trust protector, signed off on this arrangement.

The Huntersville property was subsequently conveyed by Richard to himself and his new wife, Natalie, for estate planning purposes. They conveyed title to THZ, which acquired the note on the debt between Richard and LPS, for the purposes of selling the property and satisfying the debt. Richard testified at trial that he and his attorney made many attempts to relocate Lea and the children before selling the Huntersville property but received no response.

After receiving no response from Lea on the matter, THZ filed an action for summary ejectment against her on 13 July 2010 so that it could sell the property. The children were added by and through Lea as guardian ad litem on 17 December 2010. They filed a third-party complaint against Richard, individually and in his capacity as trustee, Natalie, and THZ seeking to void all subsequent conveyances of the Huntersville property, return title to the trust, and remove Richard as trustee. On 10 September 2012, the trial court entered a judgment: (1) vesting title in the Huntersville property to the trust; (2) removing Richard as trustee retroactive to 8 December 2009; (3) voiding all transfers of the property from and after 31 December 2009; (4) directing the Mecklenburg County Register of Deeds to strike the deeds from the public record; and (5) ruling that Lea and the children should not be evicted or ejected from the property. It entered a separate order appointing a new trustee for the trust. Appellants filed timely notice of appeal.

Discussion

A. Breach of trust

[1] Appellants first argue that the trial court erred by concluding that Richard breached his duty of loyalty to the beneficiaries of the trust. We disagree.[1]

This Court reviews a trial court's conclusions of law *de novo*. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011). Here, the trial court concluded: "If [Richard] were properly appointed as trustee, which he is not, the transfer of title, first to himself, then to himself and his wife, and then to THZ Holdings, LLC, all without compensation to the [t]rust and its beneficiaries, would demonstrate a complete absence of loyalty to the minor beneficiaries of the [t]rust."

"A violation by a trustee of a duty the trustee owes under a trust is a breach of trust." N.C. Gen. Stat. § 36C-10-1001 (2011). The duty of loyalty that a trustee owes the beneficiaries of a trust is prescribed by statute as follows:

> (a) A trustee shall administer the trust solely in the interests of the beneficiaries.
>
> (b) Subject to the rights of persons dealing with or assisting the trustee as provided in G.S. 36C-10-1012, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account, or that is otherwise affected by a conflict between the trustee's fiduciary and personal interests, is voidable by a beneficiary affected by the transaction, without regard to whether the transaction is fair to the beneficiary, unless:
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> (1) The terms of the trust authorized the transaction;
>
> (2) The court approved the transaction;

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1. Appellants also argue that the trial court erred by concluding that Richard was precluded from serving as trustee solely because of his status as the settlor of the trust. We agree that this was an error of law. The commentary to N.C. Gen. Stat. § 36C-1-103 (2011) states "[a]ny natural person, including a settlor or beneficiary, has capacity to act as trustee if the person has capacity to hold title to property free of trust." The Restatement of Trusts reaches the same conclusion. *See* Restatement (Second) of Trusts § 100 (1959) ("The settlor of a trust can be the trustee of the trust."). However, because this error does not affect our analysis of the dispositive issues on appeal, we need not disturb the court's judgment on this ground.

> (3) The beneficiary did not commence a judicial proceeding within the time allowed by G.S. 36C-10-1005;
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> (4) The beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with G.S. 36C-10-1009; or
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> (5) The transaction involves a contract entered into, or claim acquired by, the trustee before the person became or contemplated becoming trustee.
>
> (c) In determining whether a sale, encumbrance, or other transaction involving the investment or management of trust property is affected by a conflict of interest between the trustee's fiduciary and personal interests, the transaction is rebuttably presumed to be affected by a conflict of interest if the trustee enters into the transaction with:
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> (1) The trustee's spouse or a parent of the trustee's spouse;
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> (2) The trustee's descendants, siblings, ancestors, or their spouses;
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> (3) An agent, attorney, employee, officer, director, member, manager, or partner of the trustee, or an entity that controls, is controlled by, or is under common control with the trustee; or
>
> (4) Any other person or entity in which the trustee, or a person that owns a significant interest in the trust, has an interest or relationship that might affect the trustee's best judgment.

N.C. Gen. Stat. § 36C-8-802(a)-(c) (2011).

Here, the transaction was clearly one that was "entered into by the trustee for the trustee's own personal account," because Richard discharged the debt owed to him personally by the trust in exchange for the trust property. *See* N.C. Gen. Stat. § 36C-8-802(b). Therefore, the transaction was voidable by the beneficiaries affected under the plain language of the statute. Appellants argue that this sale falls under the exception in section 36C-8-802(b)(5) – involving "a contract entered into, or claim acquired by, the trustee before the person became or contemplated becoming trustee." However, the loan agreement is separate and distinct from the transfer of the Huntersville property. Because there was no deed of trust or mortgage included as part of the loan agreement, Richard's

only claim on the property stemmed from the transfer to himself individually after he became trustee. It was this contract for the property, not the loan agreement, which the beneficiaries sought to void. Nothing in the loan agreement required the balance be paid with the transfer of real property. That was a choice made by Richard in his capacity both as trustee and creditor of the trust. Because this contract was not entered into before Richard became trustee, and Richard thus had no claim on the property before he became trustee, the sale of the property does not fall under the exception contemplated by section 36C-8-802(b)(5).

In addition to the violation of section 36C-8-802, Richard's actions contravened a long-standing rule of our common law that trustees may not self-serve.

> The reasons for the loyalty rule are evident. A man cannot serve two masters. He cannot fairly act for his interest and the interest of others in the same transaction. Consciously or unconsciously, he will favor one side or the other, and where placed in this position of temptation, there is always the danger that he will yield to the call of self-interest.

Wachovia Bank & Trust Co. v. Johnston, 269 N.C. 701, 715, 153 S.E.2d 449, 459-60 (1967). Contrary to this tenet, appellants claim that Richard was compelled by law to carry out the transaction because trustees must act in accordance with the mandates of their trust protectors. We find this argument unpersuasive, because the record indicates that Richard was not forced into the transaction unwillingly. Sawdey only agreed to this course of action if Richard indemnified him against any harm that could potentially result from the transaction. Additionally, the letter from Sawdey to Richard which outlined this scheme concluded with the condition "[i]f you are in agreement with the foregoing . . . please so indicate by signing below and returning a copy of this letter to me. I will then initiate the action to implement the foregoing plan." Because Richard was not required by the trust protector to transfer the property, appellants' argument is overruled.

Accordingly, we affirm the trial court's conclusion that Richard breached the duty of loyalty because he transferred the trust property to himself for his own personal account in contravention of section 36C-8-802(b).

B. Transfer to Richard

[2] Appellants next argue that the trial court erred by concluding that the transfer of the Huntersville property to Richard in his individual

capacity was voidable. We affirm the trial court's judgment voiding the conveyance.

The designation of a statement by the trial court as a "finding of fact" or "conclusion of law" is not determinative. *Brown v. Bd. of Educ.*, 269 N.C. 667, 670, 153 S.E.2d 335, 338 (1967). "Whether a statement is an ultimate fact or a conclusion of law depends upon whether it is reached by natural reasoning or by an application of fixed rules of law." *Woodard v. Mordecai*, 234 N.C. 463, 472, 67 S.E.2d 639, 645 (1951). Although listed as a finding of fact, the trial court's finding that this transaction was voidable is more properly characterized as a conclusion of law given that it was derived from application of rules of law. *See id.* As such, we review this conclusion *de novo*. *Biber*, 365 N.C. at 168, 712 S.E.2d at 878.

North Carolina law treats transfers resulting in a breach of the duty of loyalty as voidable by the beneficiaries affected, regardless of whether the transaction was supported by fair consideration.

> [A] sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account, or that is otherwise affected by a conflict between the trustee's fiduciary and personal interests, is voidable by a beneficiary affected by the transaction, without regard to whether the transaction is fair to the beneficiary[.]

N.C. Gen. Stat. § 36C-8-802(b) (2011); *see also Wachovia*, 269 N.C. at 714, 153 S.E.2d at 459 ("We have seen that a trustee cannot properly purchase trust property for himself individually, even though he acts in good faith and pays a fair consideration for it.") (citation omitted). Here, the beneficiaries of the trust were affected by the transaction because the Huntersville property, in which they resided, was conveyed to a party that sought their ejectment. Therefore, we affirm the trial court's conclusion that the transfer of title from the trust to Richard was voidable by the beneficiaries under section 36C-8-802(b).[2]

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2. Because we conclude that the court properly voided the transfer from the trust to Richard as a result of Richard's breach of the duty of loyalty, we need not address whether the transaction was supported by adequate consideration. However, if we were to reach that issue, we would find that the forgiveness of the debt owed to Richard in addition to the $12,000.00 given to the trust for each beneficiary constituted adequate consideration, and the trial court erred by concluding otherwise. *See Smith-Douglas*, *Div. of Borden Chem.*, *Borden*, *Inc. v. Kornegay*, 70 N.C. App. 264, 268, 318 S.E.2d 895, 895 (1984) (recognizing satisfaction of a valid debt as adequate consideration in a transfer of real property).

C. Subsequent transfers

Appellants also argue that the trial court erred by concluding that the subsequent conveyances of the Huntersville property, first to Richard and his wife, then to THZ, were voidable. We disagree.

The trial court's rulings are again labeled as a findings of fact, but are more appropriately deemed conclusions of law that this Court reviews *de novo*. *See Woodard*, 234 N.C. at 472, 67 S.E.2d at 645.

The longstanding rule in North Carolina is that "[a] grantor cannot convey to his grantee an estate of greater dignity than the one he has." *Lovett v. Stone*, 239 N.C. 206, 214, 79 S.E.2d 479, 485 (1954); *see also Pennock v. Coe*, 64 U.S. 117, 128, 16 L. Ed. 436, 447 (1859) ("A person cannot grant a thing which he has not[.]"). Here, Richard could not have transferred to himself and his wife jointly any better title than he received from the trust. Because we affirm the trial court's conclusion that Richard's title was void based on his breach of the duty of loyalty, the title that he conveyed to himself and his wife, and later to THZ, must also be void. Thus, we affirm the trial court's judgment voiding all subsequent transfers of the Huntersville property and returning title to the trust. *See* N.C. Gen. Stat. § 36C-10-1001(b)(9) (2011) (allowing the trial court to void any act of a trustee who was in breach of trust and "trace trust property wrongfully disposed of and recover the property or its proceeds").[3] Accordingly, because the Huntersville property was properly returned to the trust, we find that the trial court did not err by declining to evict or eject the beneficiaries from the trust property. *See* N.C. Gen. Stat. § 36C-8-802 (2011) (noting that trusts are to be administered solely in the interests of the beneficiaries).

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3. Because we conclude that the subsequent conveyances were properly voided, we need not address whether they were supported by adequate consideration. However, were we to address this issue, we would find that the court erred by concluding that the transactions failed for lack of adequate consideration. First, the transfer from Richard to himself and his wife did not require consideration. *See Warren v. Warren*, 175 N.C. App. 509, 513, 623 S.E.2d 800, 802 (2006) ("When previously separate real property becomes titled by the entireties, the law presumes the transfer to be a gift to the marital estate."); N.C. Gen. Stat. § 47-26 (2011) (noting that deeds of gift are valid so long as title is recorded within two years of transfer). Second, the transfer from Richard and Natalie to THZ was supported by forgiveness of the debt Richard owed to LPS, which THZ acquired. As we noted above, forgiveness of debt is recognized as valuable consideration in a land sale transaction. *See Kornegay*, 70 N.C. App. at 268, 318 S.E.2d at 895. Therefore, the court erred in its conclusion that the transactions failed for lack of adequate consideration.

D. Court appointment of trustee

[3] Appellants argue that the trial court erred by appointing a new trustee after removing Richard without following statutory procedure. We agree and remand.

"A vacancy in a trusteeship occurs if . . . [a] trustee is disqualified or removed." N.C. Gen. Stat. § 36C-7-704(a)(4) (2011).

> A vacancy in a trusteeship of a noncharitable trust that is required to be filled must be filled in the following order of priority:
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> (1) By a person designated in the terms of the trust or appointed under the terms of the trust to act as successor trustee;
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> (2) By a person appointed by unanimous agreement of the qualified beneficiaries; or
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> (3) By a person appointed by the court.

N.C. Gen. Stat. § 36C-7-704(c) (2011).

We hold that Richard was properly removed as trustee by the trial court because he breached the duty of loyalty. *See* N.C. Gen. Stat. § 36C-10-1001(b)(7) (2011) (authorizing the trial court to remove a trustee who is in breach of trust). Thus, the provisions of section 36C-7-704(a)(4) were triggered. *See* N.C. Gen. Stat. § 36C-7-704(b) (2011) ("A vacancy in a trusteeship must be filled if the trust has no remaining trustee."). Paragraph 18 of the trust instrument specifically provides that successor trustees will be named or appointed by either the previous trustee, the trust protector, or the beneficiaries, in that order of priority. Because the trial court contravened section 36C-7-704(c) by appointing a trustee before looking to the applicable terms of the trust instrument, we reverse the trial court's order and remand for reappointment of a trustee pursuant to the provisions of the trust instrument.

E. Other findings and conclusions

Appellants further argue that the trial court made erroneous findings of fact and conclusions of law in its judgment unrelated to those discussed above. Because these arguments do not affect our analysis of the dispositive issues on appeal, we need not address them. *See Monteith v. Kovas*, 162 N.C. App. 545, 546, 594 S.E.2d 787, 788 (2004) (declining to address arguments unrelated to the dispositive issues on appeal).

Conclusion

Because Richard breached the duty of loyalty owed to the beneficiaries of the trust by transferring the Huntersville property to himself individually, we affirm the actions that the trial court undertook in remedy of that breach, including removal of Richard as trustee, voiding all subsequent transfers of the property, returning title to the trust, and declining to remove or evict Lea and the children from the property. However, we also find that the trial court erred by appointing a new trustee in contravention of the statutory order of priority. We therefore affirm in part and remand for reappointment of a trustee in accordance with the trust instrument.

AFFIRMED in part, REVERSED in part, and REMANDED.

Judges BRYANT and STEELMAN concur.

SIU S. TONG, ET AL., PLAINTIFFS
v.
DAVID DUNN, TIMOTHY KRONGARD, ED MASI, SOPHIA WONG AND JANET WYLIE, DEFENDANTS

No. COA12-1261

Filed 17 December 2013

1. Appeal and Error—motion to dismiss appeal—denied

Defendants' motion to dismiss the appeal under *Hill v. West*, 177 N.C. App. 132, was denied by the Court of Appeals. *Hill* has been repeatedly limited to its specific, unusual facts, which were not present here.

2. Collateral Estoppel and Res Judicata—claim splitting—federal and state actions—separate wrongs

The trial court erred in an action by the founder of a company arising from a merger by concluding that the doctrines of claim-splitting and res judicata applied. A separate wrong was asserted in the federal action and in this case; plaintiff's claims in the federal action involved claims arising out of his position as an employee while the current action involved a wrong inflicted upon plaintiff in his capacity as a common shareholder.

Appeal by plaintiff from order entered 25 May 2012 by Judge James L. Gale in Orange County Superior Court. Heard in the Court of Appeals 9 April 2013.

Poyner Spruill LLP, by Steven B. Epstein and Andrew H. Erteschik, for plaintiff-appellant.

Kilpatrick Townsend & Stockton LLP, by John M. Moye, for defendants-appellees.

GEER, Judge.

Plaintiff Siu S. Tong appeals from an order granting judgment on the pleadings to defendants David Dunn, Timothy Krongard, Ed Masi, Sophia Wong, and Janet Wylie on Mr. Tong's claim for breach of fiduciary duty. Defendants contended and the trial court agreed that Mr. Tong's claim in this case was barred by res judicata because the claim in this case arose from the same set of operative facts as the claims in Mr. Tong's earlier employment action. We hold that the order is contrary to our Supreme Court's holding in *Bockweg v. Anderson*, 333 N.C. 486, 428 S.E.2d 157 (1993), and, therefore, reverse and remand.

Facts

Mr. Tong was the founder of Engineous Software, Inc. ("Engineous"). During the events that gave rise to this action, Mr. Tong continued to be a key employee of Engineous, a common shareholder of Engineous, and a member of the Board of Directors of Engineous elected to represent the common shareholders. The common shareholders collectively owned a minority interest in the company.

In Spring 2006, the Engineous Board of Directors, a majority of which were preferred shareholders, hired Wachovia Bank to explore opportunities to sell Engineous. Ultimately, Dassault Systems S.A. ("Dassault") offered $35-40 million for Engineous. Although Mr. Tong believed that Dassault's offer was not in the best interests of the common shareholders, the Board ultimately agreed to a merger with Dassault in which Dassault acquired Engineous for approximately $40 million and merged Engineous into ENG Acquisition, Inc. ("ENG"), a wholly-owned subsidiary of Dassault.

On 11 July 2011, Mr. Tong filed suit in Wake County Superior Court against Dassault, Engineous, Dassault Systemes Simulia K.K. formerly known as Engineous Japan, Inc., Janet Wylie, Edward Masi, Tim

Krongard, David Dunn, Sophia Wong, and Charles Johnson. This action was ultimately removed to federal court ("the federal action").

In an amended complaint, Mr. Tong alleged that the individual defendants knew that the proposed merger agreement between Engineous and Dassault made Mr. Tong's continued employment a condition of Dassault purchasing Engineous. On 10 June 2008, however, Mr. Tong resigned from the Engineous Board of Directors because of his concerns regarding the manner in which the proposed sale of Engineous to Dassault would affect the common shareholders.

On 13 June 2008, three days before the execution of the merger agreement, Engineous, acting through defendant Krongard with the knowledge and consent of the other individual defendants (all of whom were members of Engineous' Board of Directors), promised Mr. Tong a payment of at least $300,000.00 (the "carve-out payment") if he would execute an employment agreement agreeing to continue to work for Dassault after the merger. The amended complaint alleged that Mr. Krongard knew that Mr. Tong would have to also sign a release agreement in order to receive the carve-out payment, but Mr. Krongard intentionally or negligently, with the knowledge and consent of the other individual defendants, failed to inform Mr. Tong of that requirement. Mr. Tong asserted that Mr. Krongard's offer of the carve-out payment without mention of the required release was intended to fraudulently induce Mr. Tong into signing an employment agreement with Dassault. Further, Mr. Tong alleged that Engineous and the individual defendants knew that he would likely exercise his rights as a minority shareholder to challenge the sale.

On 16 June 2008, Mr. Tong signed the employment agreement with Dassault. On the same day, after Mr. Tong signed the employment agreement, Engineous and Dassault signed the merger agreement. The merger agreement required that Mr. Tong, as well as certain other Engineous employees, have active and valid employment agreements with Dassault at the time the merger closed in order for the deal to be consummated.

On 8 July 2008, the shareholders approved the merger agreement. Mr. Tong did not vote in favor of the merger agreement and preserved his rights as a common shareholder to object to the merger. On 14 July 2008, however, defendant Janet Wylie, the CEO of Engineous, notified Mr. Tong for the first time that in order to receive the $300,000.00 carve-out payment, he would have to sign a release extinguishing any claims he had as a common shareholder to challenge the sale of Engineous.

Because Mr. Tong refused to sign the release, he was not paid the $300,000.00 carve-out payment. On 21 July 2008, the merger closed and other Engineous executives who had signed employment contracts and releases were paid the promised carve-out payments.

The federal amended complaint further alleged that Mr. Tong complied with his employment agreement by commencing work for Dassault. Mr. Tong alleged, however, that Dassault breached the employment agreement by not paying him performance bonuses and by undermining Mr. Tong's ability to earn compensation specified in the agreement as part of an incentive plan. The amended complaint alleged that Dassault terminated Mr. Tong's employment on 13 January 2010, but refused, in breach of the terms of the employment agreement, to pay reasonable business expenses and severance pay. Dassault also failed to pay a Japanese retirement allowance that Mr. Tong alleged was due for his service as a director of Engineous Japan, Inc.

Mr. Tong asserted claims in the federal action against the individual defendants (defendants Krongard, Wylie, Masi, Dunn, Wong, and Johnson) and Engineous for fraudulent inducement and negligent misrepresentation based on Mr. Tong's having been induced to sign the employment agreement in exchange for $300,000.00 without being told that receipt of the sum was conditioned on his signing a release of his claims as a common shareholder. Mr. Tong also alleged a claim for breach of contract against Engineous for failure to pay the $300,000.00 and against Dassault for tortious interference with the agreement to pay Mr. Tong $300,000.00.

In addition, Mr. Tong sued Dassault for breach of the employment agreement, violation of the North Carolina Wage and Hour Act, and breach of contract and/or quantum meruit for failure to pay the Japanese retirement allowance.[1] Mr. Tong stated in his amended complaint that he consented to arbitrate the claims brought against Dassault for breach of contract and violation of the Wage and Hour Act.

On 20 July 2011, 10 days after he filed his first lawsuit, Mr. Tong and 47 other plaintiffs, all common shareholders of Engineous, filed this action in Orange County Superior Court against individual defendants David Dunn, Timothy Krongard, Ed Masi, Sophia Wong, and Janet Wylie, all of whom were preferred shareholders of Engineous and members of Engineous' Board of Directors. Also joined as a defendant was ENG in its own capacity and as the successor to Engineous.

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1. Mr. Tong's claim for the retirement allowance was also brought against the successor to Engineous Japan, Inc.

The Orange County Superior Court complaint alleged that the individual defendants owed the common shareholders a fiduciary duty, which included a duty to maximize the value to all shareholders, including the common shareholders, in connection with Dassault's acquisition of Engineous. The complaint alleged that "[t]he Individual Defendants breached these duties by knowingly and recklessly placing their own interests above those of all shareholders, self-dealing, and failing to adequately oversee the Engineous[] officers, failing to maximize the value of the sale of Engineous, thereby actually and proximately causing Mr. Tong and the other Common Shareholders to suffer damages in an amount to be proven at trial." The complaint further asserted a claim for aiding and abetting these breaches of fiduciary duty against ENG.

In support of these claims, plaintiffs alleged that Mr. Tong agreed to work with Mr. Krongard and Wachovia Bank to explore opportunities to sell Engineous. Although Mr. Tong's efforts resulted in four well-known potential buyers expressing interest, with two of them entering a bidding process, the board of directors cut off Mr. Tong's interactions with the potential buyers. The complaint further alleged that during board meetings, statements were made reflecting that certain board members were placing their own interests ahead of the common shareholders. Mr. Tong refused to sign board minutes for one of the key board meetings because, the complaint alleged, of "the omission of many statements and the failure to acknowledge the apparent agreement between the preferred board members that their individual interests should and would drive the decision making process going forward (casting aside the common shareholders' interests)."

The board and Engineous' executive management then attempted to block Mr. Tong's interaction with the potential buyer, Dassault, so as to limit the flow of information to Mr. Tong and the other common shareholders. Although board members recognized that Engineous was not in a strong position to sell and although Mr. Tong urged the board to wait until after the roll out of Engineous' new enterprise product because it would likely significantly improve the company's sale value, the board refused to wait.

The board members justified that refusal by expressing concern about a potential cash flow shortage in the future, and yet awarded substantial executive bonuses to company officers, including the individual defendants. The complaint further alleged that the preferred stock board members, including the individual defendants, voted to set aside funds to reward employees and executives who supported the merger

that favored preferred shareholders and to buy general releases from certain key employees.

Dassault initially made an offer of $35 million to $40 million for Engineous. Mr. Dunn, a member of the board representing preferred shareholders, proposed that the board accept the sale price, while Mr. Tong proposed that the board wait for a competing offer from Siemens. Mr. Tong expected that an additional bidder would offer a higher price. The complaint alleged that the board, however, showed little interest in attempting to negotiate a higher sale price, but rather were more interested in proceeding to a closing that would benefit the preferred shareholders.

The complaint alleged that Mr. Krongard stated that particular terms offered by Dassault -- including the speed at which the preferred shareholders would collect the sale proceeds, the size of the escrow, and the timing of the closing -- were of paramount importance. Those terms did not, however, assist the common shareholders or protect the value of the common shareholders' interests in Engineous. In addition, according to the complaint, throughout the merger and acquisition process, the individual defendants Ms. Wylie and Mr. Krongard interfered with Mr. Tong's right, as a director representing common shareholders and as a common shareholder himself, to interact with participants and gather information about ongoing developments.

Dassault acquired Engineous by merger with ENG for approximately $40 million. The complaint alleged that several board members made false representations to common shareholders to represent that the deal accorded with their fiduciary responsibilities when, in fact, the individual defendants "were considering their own self-interest first." The complaint also asserted that had defendants acted in accord with their fiduciary responsibilities, the ultimate valuation of Engineous would have been higher which would have benefitted the common shareholders.

Further, according to the complaint, "in closing this transaction in the manner described above, and as they did, the Defendants were not acting in the best interests of the Company and all its shareholders, but rather in their own self-interest, causing harm to Mr. Tong and the Common Shareholders." As relief, the Orange County complaint sought a declaration that the Engineous board's actions constituted breaches of fiduciary duty. The complaint also sought compensatory damages suffered as a result of defendants' wrongdoing.

The individual defendants filed an answer dated 19 September 2011. Defendant ENG filed a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure on 29 September 2011.

In the federal action, on 7 October 2011, Mr. Tong filed a stipulation of dismissal with prejudice of his claims against Engineous and the individual defendants for fraudulent inducement to contract and negligent misrepresentation, as well as his claims against Engineous for breach of contract and against Dassault for tortious interference with the contract to pay the carve-out payment.

On 24 October 2011, the individual defendants in the Orange County action filed an amended answer adding an affirmative defense that "[p]laintiff Tong's claims against the Individual Defendants are barred by the doctrines of *res judicata* and claim splitting, given that Plaintiff Tong filed a prior action against the Individual Defendants . . . and that action was dismissed with prejudice." The answer contended that "[u]nder the doctrines of *res judicata* and claim splitting, the prior disposition of the Federal Action operates as a bar on Plaintiff Tong's present action against the Individual Defendants, and thus Plaintiff Tong's claims are subject to dismissal as a matter of law." The individual defendants then moved for judgment on the pleadings as to Mr. Tong's claims on 30 November 2011.

The trial court granted ENG's motion to dismiss on 26 March 2012. On 25 May 2012, the trial court also granted the individual defendants' motion for judgment on the pleadings as to Mr. Tong's claims. The court concluded "that issues Tong now seeks to litigate in the Present Action were raised by the pleadings in the [federal action] and *res judicata* applies. Rather than asserting different injuries arising from independent successive acts, Tong complains that Individual Defendants set out on a concerted course of action designed to complete the Merger, including buying Tong's consent through false pretenses and at the same time extinguishing the rights of common shareholders, including Tong's. While other shareholders . . . were not party to the [federal action] and are not then subject to *res judicata*, Tong's claims are barred by his dismissal of the [federal action] with prejudice."

On 5 August 2012, the remaining plaintiffs other than Mr. Tong filed a notice of voluntary dismissal without prejudice. Mr. Tong filed a notice of appeal from the order granting judgment on the pleadings on 7 August 2012.

Motion to Dismiss Appeal

[1] We first address defendants' motion to dismiss Mr. Tong's appeal. Defendants contend that this Court must dismiss the appeal under *Hill v. West*, 177 N.C. App. 132, 627 S.E.2d 662 (2006). This Court has, however, repeatedly limited *Hill* to the specific, unusual facts present in that

case. The circumstances present in *Hill* are not found in this case and, therefore, *Hill* is not controlling here.

In *Hill*, the plaintiffs filed a negligence action arising out of a traffic accident. *Id.* at 133, 627 S.E.2d at 662-63. The trial court entered an order granting two defendants' Rule 12(b)(6) motion to dismiss and a subsequent order granting summary judgment to three other defendants, with claims against one defendant remaining unresolved. *Id.* at 133-34, 627 S.E.2d at 663. This Court dismissed the plaintiffs' appeal from the partial summary judgment order as interlocutory, noting in addition that the plaintiffs had failed to include a statement of grounds for appellate review in violation of the Rules of Appellate Procedure. *Id.* at 133, 627 S.E.2d at 663.

On remand, the trial court entered a consent order that purported to be a voluntary dismissal pursuant to Rule 41(a)(1) of the Rules of Civil Procedure of the claims against the remaining defendant. *Hill*, 177 N.C. App. at 135, 627 S.E.2d at 664. The order, however, included a special provision stating that the trial court " 'specifically order[ed], with the consent of all parties, that if this case is remanded for trial, all claims against [the remaining defendant] may be reinstated as the Plaintiffs deem necessary and that the prior dismissals without prejudice will not be pled as a bar to said claims.' " *Id.* In other words, contrary to Rule 41(a)(1), the claims against the remaining defendant could be reinstated at any time without regard to the one-year limitation contained in Rule 41(a)(1).

When the plaintiffs then appealed the summary judgment order a second time, this Court first noted that the plaintiffs had again violated the Rules of Appellate Procedure by failing to include a statement of the grounds for appellate review. *Hill*, 177 N.C. App. at 134, 627 S.E.2d at 633. Relying on *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005), the Court found no basis for suspending the Rules of Appellate Procedure under Rule 2. *Hill*, 177 N.C. App. at 134, 627 S.E.2d at 663-64.

The Court then pointed out, in addition, that the unique consent order was a "manipulat[ion of] the Rules of Civil Procedure in an attempt to appeal the 2003 summary judgment that otherwise would not be appealable" and was not a final judgment within the meaning of Rule 54 of the Rules of Civil Procedure. *Id.* at 135, 627 S.E.2d at 664. Based on both the appellate rules violation and the attempt to manipulate the Rules of Civil Procedure, this Court dismissed the second appeal. *Id.* at 136, 627 S.E.2d at 664.

In subsequent cases, this Court has declined to dismiss appeals under *Hill* under circumstances identical to those in this case. In *Curl v. Am. Multimedia, Inc.*, 187 N.C. App. 649, 654, 654 S.E.2d 76, 80 (2007), this Court limited *Hill*'s holding "to the facts of that case," noting that "*Hill* did not attempt to distinguish its holding from the significant body of case law holding contra" and that "the holding in *Hill* was apparently based in part on the appellants' 'manipulative' behavior and failure to follow the Rules of Appellate Procedure[.]" *See also Goodman v. Holmes & McLaurin Attorneys at Law*, 192 N.C. App. 467, 472, 665 S.E.2d 526, 530 (2008) (declining to dismiss appeal based on *Hill* even though appeal followed voluntary dismissal without prejudice of claims surviving trial court's order because plaintiff followed Rules of Appellate Procedure).

This Court also rejected an identical argument based on *Hill* in *Duval v. OM Hospitality, LLC*, 186 N.C. App. 390, 651 S.E.2d 261 (2007). This Court explained: "The stipulation of dismissal did not contain any additional language purporting to give plaintiff any time beyond that permitted by Rule 41(a)(1) to pursue her claim against Days Inn. The procedural posture of this case does not cause us to believe that counsel are 'manipulating the Rules of Civil Procedure in an attempt to appeal' an order that should not be appealable. We therefore conclude that *Hill* is inapposite and does not compel us to dismiss this appeal as interlocutory." *Id.* at 394, 651 S.E.2d at 264 (quoting *Hill*, 177 N.C. App. at 135, 627 S.E.2d at 644).

This case is indistinguishable from *Curl*, *Goodman*, and *Duval*, and for the reasons set out in those cases is not controlled by *Hill*. We, therefore, deny defendants' motion to dismiss this appeal.

Motion for Judgment on the Pleadings

[2] Turning to the merits of this appeal, "[t]his Court reviews *de novo* a trial court's ruling on motions for judgment on the pleadings. Under a *de novo* standard of review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *Reese v. Mecklenburg Cnty.*, 200 N.C. App. 491, 497, 685 S.E.2d 34, 38 (2009) (internal citation omitted).

Defendants argued and the trial court agreed that Mr. Tong's filing of the federal action as well as his claims in this action constituted "claim-splitting." As our Supreme Court has explained, "the common law rule against claim-splitting is based on the principle that all damages incurred as the result of a *single wrong* must be recovered in one lawsuit." *Bockweg*, 333 N.C. at 492, 428 S.E.2d at 161. Under the rule, "subsequent actions which attempt to proceed by asserting a new legal

theory or by seeking a different remedy are prohibited under the principles of *res judicata*." *Id.* at 494, 428 S.E.2d at 163.

In this case, there is no question that Mr. Tong's claims in the federal action and his claims in this action all arose out of the same factual context involving the negotiation and consummation of the merger between Engineous and Dassault. The trial court found claim-splitting because of this commonality of facts, noting that the two actions shared at least 21 common factual allegations. That approach, however, amounts to the analysis urged by Justice Meyer in his dissent in *Bockweg*. Justice Meyer contended that res judicata should have barred the Bockwegs' claims because they arose out of a " 'single core of operative facts.' " *Id.* at 498, 428 S.E.2d at 165 (Meyer, J., dissenting) (quoting *Alexander v. Chicago Park Dist.*, 773 F.2d 850, 854 (7th Cir. 1985)).

The *Bockweg* majority, however, rejected that approach. In *Bockweg*, the plaintiffs had brought a federal lawsuit alleging, among other things, that the defendants were negligent in their failure to monitor Ms. Bockweg's nutrition during her hospital stay, causing her to have brain damage, and that they also were negligent in their failure, during that hospital stay, to diagnose and treat a pelvic infection that caused the loss of Ms. Bockweg's reproductive organs. *Id.* at 488, 428 S.E.2d at 159. The plaintiffs voluntarily dismissed without prejudice the claim as to the loss of Ms. Bockweg's reproductive organs against certain defendants. *Id.* The brain damage claim then proceeded to trial in federal court, with the jury rendering a verdict in the defendants' favor. *Id.* at 489, 428 S.E.2d at 159.

Within one year of their taking a voluntary dismissal of the claims relating to the loss of Ms. Bockweg's reproductive organs, the plaintiffs refiled that action in state court. *Id.* After an appeal and remand not relevant here, the trial court denied the defendants' motion for summary judgment based on res judicata, and the defendants appealed. *Id.*, 428 S.E.2d at 159-60.

The Supreme Court affirmed the trial court, noting first that "[w]here a plaintiff has suffered multiple wrongs at the hands of a defendant, a plaintiff may normally bring successive actions, or, at his option, may join several claims together in one lawsuit." *Id.* at 492, 428 S.E.2d at 161 (internal citations omitted). The defendant had argued, however, that the Supreme Court should adopt the transactional approach set out in the Restatement (Second) of Judgments § 24 (1982), pursuant to which "all issues arising out of a transaction or series of transactions must be tried together as one claim." *Bockweg*, 333 N.C. at 493, 428 S.E.2d at 162 (internal quotation marks omitted).

The Supreme Court in *Bockweg* declined to adopt the transactional approach, but observed that the cases relied upon by the defendants "make it clear that subsequent actions which attempt to proceed by asserting a new legal theory or by seeking a different remedy are prohibited under the principles of *res judicata*." *Id.* at 494, 428 S.E.2d at 163. The Court held that even under that test, the plaintiffs' claims were not barred because the "[p]laintiffs did not merely change their legal theory or seek a different remedy. *Rather, plaintiffs are seeking a remedy for a separate and distinct negligent act leading to a separate and distinct injury.*" *Id.* (emphasis added). This conclusion was true even though both negligent acts arose out of, as Justice Meyer noted, "a single core of operative facts" and involved "two tightly intertwined theories of medical negligence." *Id.* at 497, 428 S.E.2d at 164 (Meyer, J., dissenting).

In this case, as in *Bockweg*, Mr. Tong did not merely change his legal theory or seek a different remedy for a single wrong. Mr. Tong's claims in the federal action involved claims arising out of his position as an employee. The wrong alleged involved false promises of a payment of $300,000.00 intended to induce Mr. Tong to sign an employment agreement with Dassault. In contrast, the current action involves a wrong inflicted upon Mr. Tong in his capacity as a common shareholder -- the individual defendants allegedly breached their duty to all the common shareholders, including Mr. Tong, by not seeking a merger deal that benefitted all shareholders and not just the preferred shareholders.

We find this case materially indistinguishable from *Bockweg* in which two separate acts of negligence arose out of a common set of facts. Likewise, here, claims of (1) fraudulent and negligent misrepresentations to an employee, and (2) a breach of fiduciary duty to a common shareholder, arose out of a common set of facts. But, also as in *Bockweg*, Mr. Tong is seeking, in this case, a remedy for a "separate and distinct [tortious] act leading to a separate and distinct injury." *Id.* at 494, 428 S.E.2d at 163. Under *Bockweg*, Mr. Tong could have brought suit alleging both sets of claims, but he was not required to do so. As the Supreme Court concluded in *Bockweg*, "the doctrine of *res judicata* is not applicable to bar [plaintiff's] present action." *Id.* at 497, 428 S.E.2d at 164.

Defendants, however, point to this Court's application of *Bockweg* in *Skinner v. Quintiles Transnational Corp.*, 167 N.C. App. 478, 606 S.E.2d 191 (2004). In *Skinner*, this Court emphasized that our courts "have not adopted the 'transactional approach' to *res judicata* in which all issues arising out of a single transaction or series of transactions must be tried together as one claim." *Id.* at 483, 606 S.E.2d at 194. The Court

concluded nonetheless that even under the *Bockweg* test, the plaintiff's claims in her state court action were barred by the entry of summary judgment in a prior federal court action. *Id.* at 484, 606 S.E.2d at 195.

In the federal court action, the *Skinner* plaintiff had alleged that the defendant violated the Americans with Disabilities Act when it terminated her employment in retaliation for her filing an EEOC charge. *Id.* at 483, 606 S.E.2d at 194. In the state court action, the plaintiff alleged that the defendant's termination of her employment violated North Carolina's Retaliatory Employment Discrimination Act. *Id.* In other words, as this Court concluded, "[i]t is clear that each of plaintiff's two claims are based upon her termination by defendant and that the instant action merely presents a new legal theory as to why plaintiff was terminated by defendant." *Id.* at 483-84, 606 S.E.2d at 194.

Thus, *Skinner* involved a single wrong -- the termination of the plaintiff's employment -- for which the plaintiff sought recovery under two different legal theories. Here, in contrast, Mr. Tong alleges two separate wrongs. Nothing in *Skinner* suggests that res judicata applies to bar Mr. Tong's claims in this case.

Defendants also point to *Fickley v. Greystone Enters., Inc.*, 140 N.C. App. 258, 536 S.E.2d 331 (2000), and *Moody v. Able Outdoor, Inc.*, 169 N.C. App. 80, 609 S.E.2d 259 (2005). In *Fickley*, this Court held that the plaintiffs -- who had each leased property from the defendant landlord -- should have asserted their claims against the defendants for retaliatory eviction and unfair and deceptive trade practices as a compulsory counterclaim in their landlord's summary ejectment proceedings against the tenants because "the determinative question in both actions is whether [the plaintiffs] breached their respective lease agreements, making defendants' termination of the lease agreements valid." 140 N.C. App. at 261, 536 S.E.2d at 333. In *Moody*, this Court found claim-splitting when the "plaintiff [had] brought three actions for breach of the same contract[,]" a single, three-year lease agreement. 169 N.C. App. at 85, 609 S.E.2d at 262.

These two cases fall squarely within the principle set forth in *Gaither Corp. v. Skinner*, 241 N.C. 532, 536, 85 S.E.2d 909, 912 (1955), and recognized in *Bockweg*, 333 N.C. at 494, 428 S.E.2d at 162, that res judicata applies "in the context of a second suit for damages under an entire and indivisible contract" because " 'for the breach of an entire and indivisible contract only one action for damages will lie.' " *Id.* (quoting *Gaither*, 241 N.C. at 536, 85 S.E.2d at 912). This case does not, however, involve claims under an entire and indivisible contract and, therefore, *Gaither*,

Fickley, and *Moody* provide no basis for affirming the trial court's order in this case.

Bockweg is the controlling authority. Because this case involves a separate wrong from the wrong asserted in the federal action, the trial court erred in concluding that the doctrines of claim-splitting and res judicata applied. Consequently, we reverse the order granting defendants' judgment on the pleadings.

Reversed and remanded.

Judges McGEE and ROBERT C. HUNTER concur.

THOMAS C. WETHERINGTON, PETITIONER
v.
N.C. DEPARTMENT OF CRIME CONTROL & PUBLIC SAFETY; NORTH CAROLINA HIGHWAY PATROL, RESPONDENT

No. COA13-405

Filed 17 December 2013

1. Police Officers—highway trooper's dismissal—no just cause—alleged violation of Truthfulness policy

The superior court did not err in concluding that petitioner highway trooper's conduct did not constitute just cause for dismissal based on an alleged violation of respondent's Truthfulness policy. The findings did not support respondent's characterization of petitioner's statements as an elaborate lie full of fabricated details.

2. Appeal and Error—cross-appeal—no need to address alternative basis

Although petitioner filed a cross-appeal as an alternative basis to conclude that there was no just cause for petitioner highway trooper's termination, the Court of Appeals did not need to address it in light of its holding as to the previous issue.

Appeal by Petitioner and Respondent from order entered 14 December 2012 by Judge Howard E. Manning, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 22 October 2013.

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

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

Richard Hattendorf for the Fraternal Order of Police, amicus curiae.

Richard C. Hendrix for the North Carolina Troopers Association, amicus curiae.

McGEE, Judge.

Thomas C. Wetherington ("Petitioner") was employed as a trooper with the North Carolina State Highway Patrol ("Respondent") on 29 March 2009. A complaint was filed against Petitioner on 21 May 2009 with the Internal Affairs unit of Respondent, alleging that Petitioner had violated Respondent's Truthfulness policy. Respondent dismissed Petitioner on 4 August 2009 for violating the Truthfulness policy.

Petitioner filed a petition for a contested case hearing in the Office of Administrative Hearings on 23 October 2009, challenging his dismissal. The administrative law judge (the "ALJ"), following a hearing, concluded that the "decision to dismiss Petitioner for violations of Respondent's truthfulness policy" was supported by the evidence. The State Personnel Commission (the "SPC"), over a dissent, entered a final decision and order adopting the ALJ's decision on 2 February 2011. Petitioner filed a "Petition for Judicial Review and Notice of Appeal" on 25 February 2011 from the final decision of the SPC in Superior Court, Wake County.

The superior court reversed the final decision of the SPC on 14 December 2012. The superior court concluded that Petitioner's "unacceptable personal conduct did not rise to the level to constitute just cause for dismissal as a matter of law." The superior court also concluded, as a separate ground, that the decision to dismiss Petitioner was arbitrary and capricious.

Petitioner and Respondent appeal.

I. Respondent's Appeal

[1] Respondent first argues that the "facts and circumstances in this case amount to just cause for the dismissal of Petitioner."

A. Standard of Review

When this Court reviews appeals from superior court reversing the decision of an administrative agency, "our scope of review is twofold,

and is limited to determining: (1) whether the superior court applied the appropriate standard of review and, if so, (2) whether the superior court properly applied this standard." *Mayo v. N.C. State Univ.*, 168 N.C. App. 503, 507, 608 S.E.2d 116, 120, *aff'd per curiam*, 360 N.C. 52, 619 S.E.2d 502 (2005).

B. Analysis

The superior court may reverse or modify the agency's decision

> if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2009).[1]

In the present case, the superior court concluded that: (1) Petitioner's conduct "did not rise to the level to constitute just cause for dismissal as a matter of law" and (2) the decision to dismiss Petitioner was arbitrary and capricious.

The superior court's first conclusion, on just cause for dismissal, refers to an error of law in the SPC's decision. N.C.G.S. § 150B-51(b)(4) (allowing the superior court to reverse an agency's decision on the basis of an error of law). Where "the gravamen of an assigned error is that the agency violated" N.C.G.S. § 150B-51(b)(4), the superior court "engages in *de novo* review." *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 895 (2004). Under the *de novo* standard

1. The General Assembly amended N.C.G.S. § 150B-51 in 2011 to repeal subsections (a) and (a1). 2011 N.C. Sess. Laws ch. 398 § 27. The amended statute applies only to "contested cases commenced on or after" 1 January 2012. 2011 N.C. Sess. Laws ch. 398 § 63. The petition for a contested case hearing in this case was filed 23 October 2009.

of review, the superior court "consider[s] the matter anew[] and freely substitutes its own judgment for the agency's." *Id.* at 660, 599 S.E.2d at 895 (alterations in original).

In the present case, the superior court stated that whether Petitioner's "conduct constitutes just cause for the discipline taken is a question of law and is reviewed *de novo*." As to the first prong of our review in *Mayo*, the superior court applied the appropriate *de novo* standard of review. We proceed to the second prong in *Mayo*, whether the superior court properly applied this standard.

"Determining whether a public employer had just cause to discipline its employee requires two separate inquiries: first, whether the employee engaged in the conduct the employer alleges, and second, whether the conduct constitutes just cause" for the discipline imposed. *Carroll*, 358 N.C. at 665, 599 S.E.2d at 898 (internal quotation marks omitted). "Just cause, like justice itself, is not susceptible of precise definition. It is a flexible concept, embodying notions of equity and fairness, that can only be determined upon an examination of the facts and circumstances of each individual case." *Id.* at 669, 599 S.E.2d at 900 (internal citations and quotation marks omitted).

This Court discussed *Carroll* in *Warren v. N.C. Dep't of Crime Control*, ___ N.C. App. ___, 726 S.E.2d 920, *disc. review denied*, 366 N.C. 408, 735 S.E.2d 175 (2012). We concluded in *Warren* "that the best way to accommodate the Supreme Court's flexibility and fairness requirements for just cause is to balance the equities after the unacceptable personal conduct analysis." *Id.* at ___, 726 S.E.2d at 925.

Respondent contends that, "based on the balance of equity and fairness, and the facts and circumstances of this case, including, but not limited to, the importance of truthfulness in the [Highway] Patrol, the detailed and prolonged nature of the untruth and Petitioner's pattern and practice of being untruthful," there was just cause for dismissal of Petitioner.

i. Whether Petitioner Engaged in the Conduct Respondent Alleges

The facts found by the ALJ and adopted by the SPC that are relevant to this issue are below:[2]

2. The record contains only the odd-numbered pages of the ALJ's decision. However, the complete ALJ decision was in the appendix to Respondent's appellant brief. Parties are reminded to carefully prepare the record.

5. On March 29, 2009, Petitioner, while on duty, observed a pickup truck pulling a boat and made a traffic stop of that truck on US 70 at approximately 10:00 pm. During that traffic stop, Petitioner discovered two loaded handguns in the truck and smelled the odor of alcohol coming from the interior of the truck. The two male occupants of the truck were cooperative and not belligerent. Petitioner took possession of the handguns. At the conclusion of that traffic stop, Petitioner proceeded to a stopped car that had pulled off to the side of the road a short distance in front of the truck and boat trailer.

6. Petitioner testified that he first noticed his [trooper] hat missing during his approach to the car parked in front of the truck. Petitioner heard a crunch noise in the roadway and saw a burgundy eighteen-wheeler drive by.

7. Petitioner testified that after the conclusion [of] his investigation of the stopped car, he looked for his hat. Petitioner found the gold acorns from his hat in the right hand lane near his patrol vehicle. The acorns were somewhat flattened.

. . . .

9. After searching for, but not locating his hat, Petitioner contacted Sergeant Oglesby, his immediate supervisor, and told him that his hat blew off of his head and that he could not find it.

. . . .

11. Trooper Rink met Petitioner on the side of the road of US 70. Trooper Rink asked Petitioner when he last saw his hat. Petitioner said he did not know. Petitioner said that he was going down the road . . . and was putting something in his seat when he realized he did not have his hat. Petitioner then indicated that he turned around and went back to the scene of the traffic stops and that is when he found the acorns from his hat. Petitioner was very upset and Trooper Rink told Petitioner that everybody loses stuff and that if Petitioner did not know what happened to his hat, then he should just tell his Sergeants that he didn't know what happened to it. Petitioner replied that it was a little late for that because he already had told his Sergeant that a truck came by and blew it off of his head.

. . . .

13. The testimony of Trooper Rink provides substantial evidence that Petitioner did not know what happened to his hat, was untruthful to Sergeant Oglesby when he said it blew off of his head, and that Petitioner's untruthfulness was willful.

. . . .

15. The next day, March 30, 2009, Sergeant Oglesby and several other members of the Patrol looked for Petitioner's hat.

16. Sergeant Oglesby had a detailed conversation with Petitioner on the side of the road regarding how the hat was lost. During the conversation, Petitioner remained consistent with his first statement to Sergeant Oglesby from the night of March 29, 2009 as he explained to Sergeant Oglesby that a gust of wind blew his hat off of his head. Petitioner continued stating that the wind was blowing from the southeast to the northwest. Petitioner said he turned back towards the direction of the roadway and saw a burgundy eighteen wheeler coming down the road so he could not run out in the roadway and retrieve his hat. Petitioner then heard a crunch and did not see his hat anymore.

. . . .

18. Petitioner was not truthful to Sergeant Oglesby on March 30, 2009, when he explained how he lost his hat.

. . . .

20. Petitioner testified that, approximately three to four days after the loss of the hat, he suddenly realized that the hat did not blow off of his head, but that he had placed the hat on the light bar of his Patrol vehicle and it blew off of the light bar. Petitioner never informed any supervisors of this sudden realization.

21. Approximately three weeks after the hat was lost, Petitioner received a telephone call from Melinda Stephens, during which Petitioner was informed that her nephew, the driver of the truck and boat trailer on March 29, 2009, had Petitioner's hat.

22. Petitioner informed Sergeant Oglesby that his hat had been found.

23. Petitioner's hat subsequently was returned to Sergeant Oglesby. When returned, the hat was in good condition and did not appear to have been run over.

24. Due to the inconsistencies in Petitioner's statements and the condition of the hat, First Sergeant Rock and Sergeant Oglesby called Petitioner to come in for a meeting. During the meeting, First Sergeant Rock asked Petitioner to clarify that the hat blew off of his head that the hat was struck by a car. Petitioner said yes. First Sergeant Rock then pulled Petitioner's hat out of the cabinet and told Petitioner that his story was not feasible because the hat did not appear to have been run over. At that point, Petitioner broke down in tears and said he wasn't sure what happened to his hat. He didn't know if it was on the trunk lid of the truck, the boat, or behind the light bar, and blew off. Petitioner stated that he told Sergeant Oglesby that the hat blew off his head because he received some bad counsel from someone regarding what he should say about how the hat was lost.

25. During his meeting with First Sergeant Rock and Sgt. Oglesby, Petitioner was untruthful when he told First Sergeant Rock that the hat blew off of his head because by Petitioner's own testimony, three days after losing his hat he realized that he placed it on his light bar. However, three weeks after the incident, in the meeting with First Sergeant Rock and Sergeant Oglesby he continued to claim that the hat blew off of his head. It wasn't until First Sergeant Rock took the hat out and questioned Petitioner more that Petitioner admitted that the hat did not blow off of his head, but blew off of the light bar. Therefore, even if Petitioner was confused on March 29, 2009, as he claims, he still was being untruthful to his Sergeants by continuing to tell them that the hat blew off of his head[.]

. . . .

33. Petitioner's untruthful statements to First Sergeant Rock and Sergeant Oglesby were willful and were made to protect himself against possible further reprimand because of leaving the patrol vehicle without his cover. (citations omitted).

The superior court concluded that evidence supported the finding that Petitioner's "untruthful conduct fell within the category of unacceptable personal conduct under the Administrative Code." Thus, the superior court answered in the affirmative the first inquiry in *Carroll*, whether the employee engaged in the alleged conduct. As to the second inquiry in *Carroll* (the third inquiry in *Warren*), whether the conduct constituted just cause, the superior court answered in the negative.

ii. Determination as to Just Cause

"Unacceptable personal conduct does not necessarily establish just cause for all types of discipline. . . . Just cause must be determined based 'upon an examination of the facts and circumstances of each individual case.' " *Warren*, ___ N.C. App. at ___, 726 S.E.2d at 925 (quoting *Carroll*, 358 N.C. at 669, 599 S.E.2d at 900).

In the present case, Petitioner noticed his hat missing after a traffic stop. Petitioner heard a crunch in the roadway and saw an eighteen-wheeler drive by. While searching for his hat, Petitioner found the gold acorns from his hat in the right hand lane near his patrol vehicle. The acorns had become somewhat flattened. After searching for his hat, Petitioner contacted his immediate supervisor and "told him that his hat blew off of his head and that he could not find it." The ALJ found that Petitioner "was untruthful to Sergeant Oglesby when he said it blew off of his head, and that Petitioner's untruthfulness was willful."

We review this case using the "commensurate discipline approach" described in *Warren*. This Court must consider the attendant facts and circumstances in accordance with *Carroll* and *Warren*. After the unacceptable personal conduct analysis, we must "balance the equities[.]" *Warren*, ___ N.C. App. at ___, 726 S.E.2d at 925. "Although there is no bright line test" to determine whether an employee's conduct establishes just cause for discipline, "we draw guidance from those prior cases where just cause has been found." *Carroll*, 358 N.C. at 675, 599 S.E.2d at 904.

Our Supreme Court in Carroll cited cases including, *inter alia*, *Kea v. Department of Health & Human Servs.*, 153 N.C. App. 595, 570 S.E.2d 919 (2002), *aff'd per curiam*, 357 N.C. 654, 588 S.E.2d 467 (2003) (employee violated work rules, disobeyed direct order from superior, and made crude and offensive sexual advances to a co-worker) and *Davis v. N.C. Dep't of Crime Control & Pub. Safety*, 151 N.C. App. 513, 565 S.E.2d 716 (2002) (highway patrol officer was stopped for speeding and driving while intoxicated).

In *Carroll*, our Supreme Court also considered the petitioner's "extreme emotional stress of knowing that his mother, who suffered from Alzheimer's disease and had recently shown signs of congestive heart failure, was being transported to the hospital[.]" *Carroll*, 358 N.C. at 675, 599 S.E.2d at 904. Granting the "influence of the natural bonds of filial devotion" on the petitioner's emotional state and the fact that others testified they did not take personal offense with anything the petitioner did, our Supreme Court concluded that the findings do not support a conclusion that the conduct amounted to just cause for discipline. *Id.* at 675-76, 599 S.E.2d at 904.

In balancing the equities of the present case, we consider the following facts that the ALJ found and the SPC adopted, in addition to the facts already discussed in this opinion. When Petitioner's superiors confronted him about the inconsistency between his answers and the hat's condition, Petitioner "broke down in tears and said he wasn't sure what happened to his hat. He didn't know if it was on the trunk lid of the [stopped] truck, the boat, or behind the light bar, and blew off."

Petitioner further stated that "he received some bad counsel from someone regarding what he should say about how the hat was lost." Petitioner indicated he was worried about the consequences of conducting a traffic stop without wearing his hat, having been reprimanded in the past for failure to wear his hat during a traffic stop.

Respondent contends in its brief that Petitioner "made up an elaborate lie full of fabricated details" regarding the "specific direction of the wind, the specific color of the truck and the noise he heard when the truck ran over his hat." However, neither the ALJ nor the SPC made findings indicating that the wind, truck's color, or "crunch noise" were untruthful. Rather, the lie or "untruth" lay only in the hat's location when Petitioner misplaced it. The ALJ found that Petitioner "didn't know if it was on the trunk lid of the truck, the boat, or behind the light bar, and blew off." The findings do not support Respondent's characterization of Petitioner's statements as an "elaborate lie full of fabricated details[.]"

The discipline imposed upon Petitioner was dismissal. As the ALJ found, truthfulness "is paramount to the official duties of a law enforcement officer." Respondent's policy on "Truthfulness" states:

> Members shall be truthful and complete in all written and oral communications, reports, and testimony. No member shall willfully report any inaccurate, false, improper, or misleading information.

Respondent contends that "[f]rom this point forward, in every criminal case in which Petitioner is associated, the judicial finding of untruthfulness here and the facts supporting that conclusion must be disclosed to the defendant[,]" citing *Brady v. Maryland*, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 218 (1963) ("suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment").

However, Respondent cites no case to this Court in which the State was required to disclose to a criminal defendant findings of an officer's untruthfulness. Assuming *arguendo*, without deciding, that the State must disclose to future criminal defendants the finding of Petitioner's untruthfulness, Respondent's contention is not entirely accurate. Respondent contends that, after this finding, Petitioner cannot perform the essential job duty of testifying "in court in an effort to hold the violator accountable for his or her actions."

However, Petitioner is not barred from testifying in court. Respondent's argument depends upon at least two assumptions that Respondent does not address: (1) that defense counsel will elect to impeach Petitioner using the finding; and (2) that defense counsel's impeachment will necessarily influence a jury to the point that a jury will disregard the entirety of Petitioner's testimony. The possibility of impeachment and the possibility of the impeachment's success must both occur in order to diminish Petitioner's performance of the duty to testify successfully. Respondent presents no argument that the likelihood of the two possibilities justifies dismissal.

Respondent concedes that a trooper is not always the sole witness to a violation of the law. Respondent points to no other essential job duties that the finding of untruthfulness would diminish or impair. Thus, excepting the above possibilities which may diminish Petitioner's performance of the duty to testify successfully, Petitioner can fulfill the duties of his office in all other respects, despite the existence of this finding.

The dissenting member of the SPC recited the following facts in concluding that Respondent "lacked just cause in this particular matter to dismiss Petitioner":

> (1) Petitioner had just conducted a stressful traffic stop immediately prior to the loss of his hat;
>
> (2) Petitioner did not attach any significance, nor was there any significance, to a hat blowing off a Trooper's head as opposed to his vehicle;

(3) Petitioner found flattened acorns that normally are attached to a State Trooper hat and surmised that the hat had been crushed; and

(4) Petitioner broke down into tears and admitted that he didn't know exactly what happened to the hat when his Sergeant suggested his story was not feasible.

As the superior court observed in its order, the dissenting member of the SPC concluded that "the dismissal of Petitioner did not fit the violation and was not necessary to uphold the integrity of the truthfulness policy. In short, the punishment did not fit the offense." In view of the commensurate discipline approach described in *Warren* and applied in *Carroll*, we agree. Petitioner's conduct in this case did not rise to the level described in *Kea* and *Davis*, *supra*. Rather, Petitioner's conduct and the existence of extenuating circumstances surrounding the conduct make this case comparable to Carroll, in which our Supreme Court concluded that the Commission lacked just cause to discipline the petitioner.

The superior court did not err in concluding that Petitioner's conduct did not constitute just cause for dismissal. Because of our conclusion as to this issue, we do not address Respondent's remaining argument.

II. Petitioner's Appeal

[2] Petitioner filed a cross appeal as "an alternative basis to conclude that there was no just cause for termination[.]" In light of our holding as to the previous issue, we need not address an alternative basis to uphold the superior court's order.

Affirmed.

Judges BRYANT and STROUD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 17 DECEMBER 2013)

BECK ELEC., LLC v. NEIGHBORING CONCEPTS, PLLC No. 13-391	Mecklenburg (12CVS606)	Affirmed in part, reversed and remanded in part.
BINDER v. BINDER No. 13-522	Guilford (04CVD4810)	Affirmed
BRIGMAN v. McFETRIDGE No. 13-741	Cumberland (12CVD8486)	Affirmed
CHURCH v. DECKER No. 13-456	Caldwell (01CVD1391)	Reversed and Remanded
CLARK v. CLARK No. 13-612	Montgomery (97CVD211)	Affirmed
FIELDS v. HARNETT CNTY. No. 13-761	N.C. Industrial Commission (092692) (X10682)	Affirmed
FLOWERS v. WILLIAMS No. 13-535	Buncombe (11CVS4263)	Affirmed
FOX v. CITY OF GREENSBORO No. 13-171-2	Guilford (12CVS4940)	Dismissed
GARMON v. HAGANS No. 13-441	Rowan (11CVS2287)	No error
HOLLY SPRINGS HOSP. v. N.C. DEP'T OF HEALTH No. 13-367	N.C. Dept. of Health & Human Svcs (11DHR12727) (11DHR12794) (11DHR12795) (11DHR12796)	Affirmed
IN RE C.A.S. No. 13-571	Nash (11JT161)	Reversed
IN RE HULL STOREY GIBSON COS. LLC No. 13-198	Property Tax Commission (08PTC240)	Affirmed

IN RE RAZACK No. 13-342	Mecklenburg (11SP8243)	Affirmed
IN RE S.A. No. 13-675	Greene (12JA42)	Affirmed
IN RE T.V.C.D. No. 13-861	Rowan (13JT23)	Vacated
MOORE v. GOODYEAR TIRE & RUBBER CO. No. 12-1212	N.C. Industrial Commission (W25564)	Affirmed
STATE v. ALSTON No. 13-462	Chatham (12CRS2780-83)	Affirmed
STATE v. DYE No. 13-366	Mecklenburg (11CRS230140)	Affirmed
STATE v. EUSTON No. 13-576	Moore (11CRS53422)	Affirmed
STATE v. GIVENS No. 13-465	Mecklenburg (11CRS243717-18) (11CRS243738) (12CRS17119)	Dismissed
STATE v. HAGGINS No. 13-671	Catawba (11CRS3821)	Dismissed
STATE v. HARRIS No. 13-212	Guilford (09CRS96501)	No Error
STATE v. JOHNSON No. 12-932	Johnston (09CRS55301)	Affirmed
STATE v. JONES No. 13-676	Robeson (09CRS50766) (09CRS50971)	No Error
STATE v. OWENS No. 13-321	Forsyth (10CRS58769)	No Error
STATE v. SMITH No. 13-293	Duplin (11CRS50335) (11CRS50343)	Remanded
STATE v. TURNER No. 13-395	Cleveland (08CRS55472)	No Error
STATE v. WHITAKER No. 13-370	Nash (11CRS54048)	New Trial

KRISTIN BERRIER, individually and in her capacity as Administrator of the Estate of JACOB ALEXANDER BERRIER, deceased, and JUSTIN BERRIER, in his capacity as Administrator of the Estate of JACOB ALEXANDER BERRIER, deceased, Plaintiffs

v.

CAREFUSION 203, INC., CAREFUSION CORPORATION, LINCARE INC. d/b/a PEDIATRIC SPECIALISTS, LINCARE HOLDINGS, INC. d/b/a PEDIATRIC SPECIALISTS, JONMARK MAYES, SHELLEY R. BOYD, MASIMO CORPORATION, MASIMO AMERICAS, INC., and QUALITY MEDICAL RENTALS, LLC, Defendants

No. COA13-251

Filed 7 January 2014

1. Jurisdiction—personal jurisdiction—findings of fact—uncontested allegations in complaint—averments in affidavit

The trial court did not err in a medical negligence case by making certain challenged findings of fact in its order denying defendant Quality Medical's motion to dismiss for lack of personal jurisdiction. The uncontested allegations of the amended complaint in conjunction with the averments of the affidavit provided a sufficient basis to uphold the challenged findings of fact.

2. Jurisdiction—personal jurisdiction—finding of fact—not based solely on deposition testimony

The trial court did not err in a medical negligence case by denying defendant Quality Medical's motion to dismiss for lack of personal jurisdiction. While certain challenged deposition testimony was not competent to establish personal jurisdiction over Quality Medical, the trial court did not make any finding of fact solely predicated upon that deposition testimony.

3. Jurisdiction—personal jurisdiction—findings of fact—supported by the evidence

The trial court did not err in a medical negligence case by making findings of fact based upon evidence retrieved from the maintenance records of ventilators serviced by Quality Medical that were not related to the cause of action and denying defendant Quality Medical's motion to dismiss for lack of personal jurisdiction. The maintenance records supported the trial court's finding of fact number 1.

4. Jurisdiction—personal jurisdiction—traditional notions of fair play and substantial justice not offended

The trial court did not err in a medical negligence case by

concluding that the exercise of personal jurisdiction comported with due process. Given the quality and nature of the contacts between defendant Quality Medical and North Carolina, the connection between Quality Medical's contacts with the state and the cause of action, and the interest of North Carolina in protecting its citizens from tortfeasors, the maintenance of the suit in North Carolina did not offend traditional notions of fair play and substantial justice.

Appeal by defendant Quality Medical Rentals, LLC from order entered 14 November 2012 by Judge James C. Spencer in Guilford County Superior Court. Heard in the Court of Appeals 28 August 2013.

Van Laningham Duncan PLLC, by Alan W. Duncan, and Smith Moore Leatherwood LLP, by Richard A. Coughlin and Corinne B. Jones, for plaintiff-appellees.

Carruthers & Roth, P.A., by Robert N. Young, Richard L. Vanore, and Michael J. Allen, for defendant-appellant.

BRYANT, Judge.

Where Quality Medical does not challenge the applicability of our long-arm statute in the exercise of personal jurisdiction and competent evidence supports the trial court's findings of fact and conclusion of law that Quality Medical maintained minimum contacts with North Carolina such that the exercise of personal jurisdiction does not offend the notion of due process, we affirm the order of the trial court.

On 29 September 2011 and later on 3 April 2012, plaintiff Kristin Berrier, both individually and in her capacity as administrator of the Estate of Jacob Alexander Berrier, and Justin Berrier, in his capacity as administrator of the Estate of Jacob Alexander Berrier, filed and then amended a complaint against defendants CareFusion 203, Inc.; CareFusion Corporation; LinCare Inc. d/b/a Pediatric Specialists; LinCare Holdings, Inc. d/b/a Pediatric Specialists; Jonmark Mayes; Shelley R. Boyd; the Masimo Corporation; Masimo Americas, Inc.; and Quality Medical Rentals, LLC. In their amended complaint, plaintiffs sought relief on the basis of negligence from CareFusion, Pediatric Specialists, Mayes, Boyd, Masimo and Quality Medical. Plaintiffs claimed that CareFusion, Pediatric Specialists, Mayes, Boyd, and Masimo were liable for negligent infliction of emotional distress. Claiming breach of an implied warranty of merchantability and unfair and deceptive trade practices, plaintiffs sought relief from CareFusion, Pediatric Specialists,

and Masimo. Plaintiffs claimed that Pediatric Specialists, Mayes, and Boyd committed medical malpractice. Plaintiffs asked that punitive damages be assessed against CareFusion, Pediatric Specialists, Mayes, Boyd, and Masimo.

The allegations set forth in the complaint assert that in December 2007, Jacob Berrier, born 23 September 2007, was diagnosed with spinal muscular atrophy and placed on a ventilator. Other than for short periods of time, Jacob was unable to breathe on his own and was unable to move his head or extremities. On 5 November 2008, Pediatric Services became Jacob's supplier for medical equipment, products, respiratory supplies, and associated home ventilator program services. Pediatric Services provided Jacob with an LTV 950 ventilator and pulse oximeter. The LTV 950 ventilators were designed, manufactured, tested, inspected, marketed, and distributed by CareFusion. In June 2009, Pediatric Specialists entered into a service contract with Quality Medical Rentals, LLC, (Quality Medical) to service and repair LTV 950 ventilators. Quality Medical is a Florida corporation with its principal place of business in Largo, Florida.

Plaintiffs asserted that on 15 June 2009, Pediatric Specialists shipped an LTV 950 ventilator to Quality Medical from Winston-Salem, North Carolina. The LTV 950 ventilator was identified by its serial number – C15775 Ventilator. Quality Medical performed service and maintenance on the C15775 Ventilator on 22 June 2009 and then shipped the C15775 Ventilator back to Pediatric Specialists in Winston-Salem. On 18 July 2009, Pediatric Specialists employee and Center Manager Jonmark Mayes provided the C15775 Ventilator to Jacob. On 8 October 2009, the C15775 Ventilator malfunctioned – it stopped breathing for Jacob and failed to alarm. Jacob's mother was able to provide manual ventilation pending the arrival of EMS, and Jacob was then taken to a hospital where, for several days, he was treated for respiratory distress. The C15775 Ventilator was collected and returned to CareFusion which then returned the C15775 Ventilator to Pediatric Specialists reporting that it was in good mechanical and serviceable condition. Shelley Boyd, an employee of Pediatric Specialists, again delivered and set-up the C15775 Ventilator for Jacob at his home on 29 January 2010. That evening, the C15775 Ventilator once again malfunctioned; it stopped operating. The C15775 Ventilator alarm failed to sound, and the pulse oximeter failed to indicate by alarm that the C15775 Ventilator had stopped operating. When found, Jacob was not breathing and was without a pulse. He was admitted to Moses Cone Hospital's pediatric critical care unit in Greensboro where he died four days later.

On 8 June 2012, Quality Medical filed a motion to dismiss plaintiffs' amended complaint pursuant to Rule 12(b)(2) for lack of personal jurisdiction. In an accompanying memorandum of law, Quality Medical argued that it did not have sufficient minimum contacts with North Carolina in order for the trial court to exercise personal jurisdiction over it in this matter. Following a 19 September 2012 hearing, the trial court entered an order denying Quality Medical's 12(b)(2) motion. In its 14 November 2012 order, the trial court concluded that North Carolina's long arm statute authorized the exercise of personal jurisdiction and that plaintiffs' assertions established the minimum contacts necessary to satisfy the standards of specific jurisdiction. As such, the trial court's exercise of personal jurisdiction over Quality Medical comported with constitutional standards of due process. Quality Medical appeals.

On appeal, Quality Medical raises the following issues: whether the trial court erred by (I) including specific findings of fact in its order denying Quality Medical's motion to dismiss; and (II) concluding that the exercise of personal jurisdiction comports with due process.

Right to appeal

Pursuant to North Carolina General Statutes, section 1-277, "[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 or such party may preserve his exception for determination upon any subsequent appeal in the cause." N.C. Gen. Stat. § 1-277(b) (2011); *see also Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 614, 532 S.E.2d 215, 217 (2000) ("The denial of a motion to dismiss for lack of jurisdiction is immediately appealable." (citation omitted)).

I

Quality Medical argues that in the order denying Quality Medical's motion to dismiss for lack of personal jurisdiction, the trial court erred in making certain findings of fact. More specifically, Quality Medical contends that the trial court erred in making findings of fact based upon (1) unverified allegations in the amended complaint, (2) incompetent deposition testimony, and (3) service and maintenance records not relevant to the ventilator central to this case. We disagree.

Standard of review

The standard of review to be applied by a trial court in deciding a motion under Rule 12(b)(2) depends upon

> the procedural context confronting the court. Typically, the parties will present personal jurisdiction issues in one of three procedural postures: (1) the defendant makes a motion to dismiss without submitting any opposing evidence; (2) the defendant supports its motion to dismiss with affidavits, but the plaintiff does not file any opposing evidence; or (3) both the defendant and the plaintiff submit affidavits addressing the personal jurisdiction issues.

Banc of Am. Sec. LLC v. Evergreen Int'l Aviation, Inc., 169 N.C. App. 690, 693, 611 S.E.2d 179, 182 (2005).

Quality Medical submitted a motion to dismiss plaintiffs' amended complaint for lack of personal jurisdiction. The motion was supported by an affidavit from Quality Medical manager Donald Perfetto and a memorandum of law contending that Quality Medical lacked sufficient minimum contacts with North Carolina for the trial court to exercise personal jurisdiction.

> [I]f the defendant supplements his motion to dismiss with an affidavit or other supporting evidence, the allegations in the complaint can no longer be taken as true or controlling and plaintiff cannot rest on the allegations of the complaint. In order to determine whether there is evidence to support an exercise of personal jurisdiction, the court then considers (1) any allegations in the complaint that are not controverted by the defendant's affidavit and (2) all facts in the affidavit (which are uncontroverted because of the plaintiff's failure to offer evidence).

Id. at 693-94, 611 S.E.2d at 182-83 (citations and quotations omitted).

Where, as here, the trial court holds an evidentiary hearing including depositions and arguments of counsel, "the trial court [is] required to act as a fact-finder, and decide the question of personal jurisdiction by a preponderance of the evidence." *Deer Corp. v. Carter*, 177 N.C. App. 314, 322, 629 S.E.2d 159, 166 (2006) (citation omitted).

> When this Court reviews a decision as to personal jurisdiction, it considers only whether the findings of fact by the trial court are supported by competent evidence in the record; . . . [w]e are not free to revisit questions of credibility or weight that have already been decided by the trial court.

Id. at 321, 629 S.E.2d at 165 (citation and quotations omitted).

(1) Unverified allegations

[1] Quality Medical first argues that the unverified allegations in plaintiffs' amended complaint are not competent evidence and should not have been considered by the trial court.

"Where unverified allegations in the complaint meet plaintiff's initial burden of proving the existence of jurisdiction ... and defendant[s] ... d[o] not contradict plaintiff's allegations in their sworn affidavit, such allegations are accepted as true and deemed controlling." *Inspirational Network, Inc. v. Combs*, 131 N.C. App. 231, 235, 506 S.E.2d 754, 758 (1998) (citation and quotations omitted).

Quality Medical specifically notes the trial court's finding of fact number 10, which states "the allegations of the Plaintiffs in the Amended Complaint, if proven, would constitute a clear source and connection of the cause of action to the contacts of Quality Medical."[1] Quality Medical argues that the trial court impermissibly relied upon the allegations of the amended complaint as the key factor in deciding the "source and connection of the cause of action to the contacts."

In the amended complaint, plaintiffs assert that "[u]pon information and belief, at all times relevant herein, Quality Medical serviced products, materials, and things, including but not limited to the C15775 Ventilator that is the subject of this action, that were used within North Carolina in the ordinary course of business." In its motion to dismiss the amended complaint and the accompanying documents, Quality Medical acknowledges that it is a limited liability company located in Florida, that "the vast majority of [its] business is servicing medical equipment," and that it receives medical equipment and service requests from Pediatric Specialists. It also states that "[i]n July 2009 Pediatric Specialists provided Plaintiffs ventilator # C15775 . . . [and that] Quality Medical serviced ventilator C15775 in Florida in June 2009." The amended complaint alleges that "[a]s a result of the C15775 Ventilator failure, Jacob [Berrier] suffered severe hypoxic injury and brain damage, including

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1. The trial court gave careful consideration to the existence of minimum contacts with the forum state in determining specific jurisdiction based on the following factors:

(1) quantity of the contacts;

(2) the nature and quality of the contacts;

(3) the source and connection of the cause of action to the contacts;

(4) the interest in the forum state; and

(5) convenience of the parties.

hypoxic-ischemic encephalopathy and diffuse cerebral edema, and remained in the Pediatric Critical Care Unit at the Hospital for four days, and then died." On this record, it is clear that the uncontroverted allegations of the amended complaint along with certain acknowledgments in Quality Medical's motion to dismiss and documentation in support thereof provide competent evidence to support the trial court's finding of fact number 10: "[I]f proven, [the allegations] would constitute a clear source and connection of the cause of action to the contacts of Quality Medical." *See Banc of Am. Sec.*, 169 N.C. App. at 693-94, 611 S.E.2d at 182-83; *Inspirational Network*, 131 N.C. App. at 235, 506 S.E.2d at 758.

Quality Medical also challenges other findings of fact on the basis that the trial court relied heavily on unverified allegations in the amended complaint. In challenging these findings of fact, Quality Medical argues that "there is no evidence in the record that [it] had any knowledge of who the final user of any medical equipment would be or where the equipment would be used."

The trial court made pertinent findings of fact that Quality Medical performed service and repairs to medical equipment designed for home oxygen care and respiratory therapy; that some requests for Quality Medical's services came from Pediatric Specialists, which sent equipment from North Carolina to Quality Medical in Florida; and that Quality Medical returned the medical equipment from Florida to Pediatric Specialists in North Carolina. Though the trial court acknowledged Quality Medical's contention that when returning repaired medical equipment Quality Medical had no knowledge of the end user's identity, the trial court found unreasonable if not incredible the proposition that Quality Medical did not know the identity of the end user or that there would be an end user in North Carolina.

> 9. The [Trial] Court does find that the nature and quality of the contacts . . . establish a reasonable expectation on the part of Quality Medical that the serviced and repaired medical equipment received from and returned to North Carolina would be used by medically dependent consumers within the State.

Therefore, the uncontested allegations of the amended complaint in conjunction with the averments of the affidavit provide a sufficient basis to uphold the challenged findings of fact. *See Banc of Am. Sec.*, 169 N.C. App. at 693-94, 611 S.E.2d at 182-83; *Inspirational Network*, 131 N.C. App. at 235, 506 S.E.2d at 758.

(2) Deposition testimony of Shelley Boyd and Jonmark Mayes

[2] Next, Quality Medical argues that the deposition testimony of Pediatric Specialists employee Shelley Boyd and former employee Jonmark Mayes was not competent to establish personal jurisdiction over Quality Medical.

In her deposition testimony, Shelley Boyd, an employee of Pediatric Specialists at the time of her deposition on 29 August 2012, testified that while the center for which she worked sent broken or malfunctioning equipment for repair to Quality Medical, she was unaware if Pediatric Specialists used Quality Medical for repair and maintenance services in 2009 and the beginning of 2010.

Jonmark Mayes, a former employee and center manager of Pediatric Specialists, stated in his deposition testimony that Pediatric Specialists used Quality Medical "the majority of the time" for periodic maintenance of ventilators but failed to be specific as to what period he was referring.

We agree with Quality Medical that the deposition testimony of Boyd and Mayes is not competent standing alone to support the trial court's findings of fact as to personal jurisdiction. However, Quality Medical does not allege and we do not find that the trial court made any finding of fact solely predicated upon the deposition testimony of Boyd or Mayes. Therefore, we review additional evidence that might be deemed competent to support the trial court's findings of fact as to personal jurisdiction.

(3) Service records of ventilators

[3] Quality Medical next argues that the trial court erred in making findings of fact based upon evidence retrieved from the maintenance records of ventilators serviced by Quality Medical that were not related to the cause of action.

The record reflects four maintenance or repair records from Pediatric Specialists of ventilators serviced by Quality Medical between 2008 and 2010. Of the four records, Quality Medical acknowledges and does not otherwise contest the record relating to its service of Ventilator C15775 in June 2009 but contends that the remaining three service reports, which relate to Ventilator C02515, are not relevant to the cause of action against Quality Medical. Quality Medical bases this contention on plaintiffs' failure to claim negligence in the maintenance of Ventilator C02515.

We point out that the question presented is whether competent evidence exists to support the challenged findings of fact. While the

maintenance records do not support one finding, exclusively, the maintenance records do support the trial court's finding of fact number 1:

> 1. . . . [O]n at least four separate occasions between September of 2008 and May [2010], [Quality Medical did] receive LTV950 ventilator medical devices from co-defendant Lincare [(Pediatric Specialists)] sent from North Carolina, on which Quality Medical performed service, maintenance and/or repair in Florida and then returned to Lincare [(Pediatric Specialists)] in North Carolina.

Quality Medical further contends that the service records for LTV950 ventilator serial number Ventilator C02515 are not competent evidence to support findings that in turn support the trial court's conclusion that the exercise of personal jurisdiction over Quality Medical based on specific jurisdiction does not violate due process. We consider this argument more fully in our discussion of issue II.

We note that on appeal, Quality Medical listed findings of fact 1, 2, 5, 6, 7, 8, 9, 10, and 14 as findings it intended to challenge as made in error. In its argument to this Court, Quality Medical directly challenged findings of fact 6, 7, 8, 9, and 10 for the following reasons: lacking sufficient basis; incompetent deposition testimony (though it failed to direct our attention to any finding of fact predicated on the testimony); and relevancy (but, again, failed to direct the attention of this Court to any finding of fact made in error as a result). To the extent that findings of fact 1, 2, and 5 are unchallenged by Quality Medical, those findings are binding on appeal.[2] *See In re Schiphof*, 192 N.C. App. 696, 700, 666 S.E.2d 497, 500 (2008) ("Unchallenged findings of fact are presumed correct and are binding on appeal." (citation omitted)). Finding of fact 14 states in

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2. In its 14 November 2012 order, the trial court made the following findings of fact:

> 1. [(A)] The Court does find from the evidence presented that at least two Lincare personnel in North Carolina were of the opinion that Quality Medical provided maintenance services for Lincare's ventilator medical devices and that Quality Medical did, on at least four occasions between September of 2008 and May of [2010], receive LTV950 ventilator medical devices from co-defendant Lincare sent from North Carolina, on which Quality Medical performed service, maintenance and/or repair in Florida and then returned to Lincare in North Carolina.
>
> (B) The nature and quality of the contacts – Plaintiffs do not suggest that Quality Medical had direct contact with, or even knew the identity of, the ultimate users of the medical equipment which it serviced for its co-defendants Lincare, Inc. and Lincare Holdings, Inc., both d/b/a Pediatric Specialists, providers of home oxygen care and other respiratory therapy services. . . . There is no evidence of Quality Medical having any offices, employees, sales

pertinent part that "specific jurisdiction exists, the cause of action having arisen from or being related to Defendant Quality Medical's contacts with the forum." We will consider this finding as it relates to Quality Medical's arguments presented in issue II.

II

[4] Quality Medical argues that the trial court erred in concluding the exercise of personal jurisdiction comports with constitutional standards of due process. Specifically, Quality Medical contends that it did not purposefully avail itself of the opportunity to do business in North Carolina and that it lacked sufficient contacts with the state to satisfy the standard of specific jurisdiction. We disagree.

In its 14 November 2012 order denying Quality Medical's motion to dismiss, the trial court drew the following conclusion:

> Having considered the five factors used in determining the existence of the minimum contacts necessary to properly allow the exercise of that statutory jurisdiction, the Court finds that Quality Medical, having delivered the repaired and serviced medical equipment into the stream of commerce in North Carolina with the reasonable expectation that the equipment would be used by medically dependent consumers within the State, was "fairly warned" that litigation might result from injuries that were alleged to have arisen out of or were related to its activities in servicing or repairing the equipment and the Court further finds that *specific jurisdiction* exists, the cause of action having arisen from or being related to Defendant Quality Medical's contacts with the State.

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representatives or other agents in North Carolina (its only office is in Florida); it has no property (real or personal) in North Carolina; it has not actively or specifically solicited business or advertised in North Carolina, although it has a website which describes the services it performs at its Florida location; it is not licensed or registered to do business in North Carolina; and it has never previously been involved in litigation in North Carolina; and

2. The Court does find the above-referenced facts to be established by a preponderance of the evidence.

However, there likewise appears to be no serious dispute as to the following additional facts, which the Court also finds to be established by a preponderance of the evidence:

. . .

5. Some of the service requests came from Lincare locations in North Carolina[.]

(emphasis added). "When this Court reviews a decision as to personal jurisdiction, it considers only whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court." *Banc of Am. Secs.*, 169 N.C. App. at 694, 611 S.E.2d at 183 (citation and quotations omitted).

In addressing a challenge to personal jurisdiction over a non-resident defendant, a trial court must employ a two-step analysis. "First, the transaction must fall within the language of the State's 'long-arm' statute. Second, the exercise of jurisdiction must not violate the due process clause of the fourteenth amendment to the United States Constitution." *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 364, 348 S.E.2d 782, 785 (1986) (citation omitted). Quality Medical does not contest whether a basis for jurisdiction exists under North Carolina's long-arm statute, N.C. Gen. Stat. § 1-75.4 (2011), instead contending only that the exercise of personal jurisdiction over it offends constitutional standards of due process.

Long-Arm Statute

The exercise of personal jurisdiction is authorized pursuant to our long-arm statute, General Statutes, section 1-75.4,

> in any action claiming injury to person or property within this State arising out of an act or omission outside this State by the defendant, provided in addition that at or about the time of the injury either:
>
> . . .
>
> b. Products, materials or thing processed, serviced or manufactured by the defendant were used or consumed, within this State in the ordinary course of trade[.]

N.C. Gen. Stat. § 1-75.4(4)(b.) (2011). "Under our 'long arm' statute, North Carolina courts may obtain personal jurisdiction over a non-resident defendant to the full extent permitted by the Due Process Clause of the United States Constitution." *Saxon v. Smith*, 125 N.C. App. 163, 173, 479 S.E.2d 788, 794 (1997) (citation omitted).

Due Process

"To satisfy the requirements of the due process clause, there must exist 'certain minimum contacts [between the non-resident defendant and the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.' " *Tom Togs*, 318 N.C. at 365, 348 S.E.2d at 786 (citing *International Shoe Co. v. Washington*,

326 U.S. 310, 316 (1945)). "The concept of 'minimum contacts' furthers two goals. First, it safeguards the defendant from being required to defend an action in a distant or inconvenient forum. Second, it prevents a state from escaping the restraints imposed upon it by its status as a coequal sovereign in a federal system." *Skinner v. Preferred Credit*, 361 N.C. 114, 122, 638 S.E.2d 203, 210 (2006) (citation omitted). When evaluating whether minimum contacts with the forum exists, a court typically evaluates "the quantity and nature of the contact, the relationship between the contact and the cause of action, the interest of the forum state, the convenience of the parties, and the location of witnesses and material evidence." *Saxon*, 125 N.C. App. at 173, 479 S.E.2d at 794 (citation omitted).[3]

The trial court found that Quality Medical received repair requests for two of the ventilators referred to in the amended complaint, serviced those devices in Florida, and returned the devices to Pediatric Specialists in North Carolina. The trial court found implausible the proposition that Quality Medical did not know what the end use of the ventilators would be or that the end user – a medically dependent consumer – would be located in North Carolina. Based on the record before us, we uphold this finding. The trial court further found that, if proven true, the allegations of the complaint – namely that Quality Medical's negligence in servicing ventilator model LTV950, serial number C15775, resulted in injury, damage, and death – form the basis of the action. This Court has previously acknowledged that our State has a powerful public interest in protecting its citizens against out-of-state tortfeasors. *See id.* at 173, 479 S.E.2d at 794 ("In light of the powerful public interest of a forum state in protecting its citizens against out-of-state tortfeasors, the court has more readily found assertions of jurisdiction constitutional in tort cases."); *see also Cooper v. Shealy*, 140 N.C. App. 729, 537 S.E.2d 854 (2000) (holding the exercise of jurisdiction did not offend due process where the defendant engaged in tortious conduct: alienation of affection and criminal conversation). Though on appeal Quality Medical asserts that North Carolina would be an inconvenient forum in which to litigate this action, it provides no support for this assertion.

Specifically, given the quality and nature of the contacts between Quality Medical and North Carolina, the connection between Quality

3. While we acknowledge Quality Medical's cited authority supporting its position that it did not purposefully avail itself of the privilege of conducting business in North Carolina, we recognize that the cases cited regard contractual relations, not tortious conduct.

Medical's contacts with the State and the cause of action, and the interest of North Carolina in protecting its citizens from tortfeasors, the maintenance of the suit in North Carolina does not offend traditional notions of fair play and substantial justice. *See Tom Togs*, 318 N.C. at 365, 348 S.E.2d at 786; *see also Ciba-Geigy Corp. v. Barnett*, 76 N.C. App. 605, 609, 334 S.E.2d 91, 94 (1985) ("It was clear that the alleged tort would have its damaging effect in North Carolina. Simply because defendant was able to cause the injury without physically coming to this state does not defeat jurisdiction." (citation omitted)). Accordingly, we overrule Quality Medical's challenge to the trial court's exercise of personal jurisdiction.

Affirmed.

Judges STEPHENS and DILLON concur.

MARSHALL KELLY BRITT, JR., AS ADMINISTRATOR OF THE ESTATE OF DANA ROBINSON BRITT, PLAINTIFF
v.
KATHLEEN CUSICK, ET. AL., DEFENDANTS

No. COA13-387

Filed 7 January 2014

Appeal and Error—interlocutory orders and appeals—no substantial right

Defendants' appeal in a medical negligence and wrongful death case from an interlocutory order was dismissed. Defendants' appeal was from a discovery order that barred them from obtaining discovery by one means, but expressly permitted them to both seek the discovery at issue by another means and to move the trial court to modify the order if necessary to further the interests of justice. Under these circumstances, defendants' appeal did not affect a substantial right.

Appeal by defendants from order entered 28 November 2012 by Judge James W. Morgan in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 September 2013.

Conrad, Trosch & Kemmy, P.A., by William Conrad Trosch; and Janet, Jenner & Suggs, LLC, by Kenneth M. Suggs, for plaintiff-appellee.

Parker Poe Adams & Bernstein LLP, by Harvey L. Cosper and John D. Branson, for defendants-appellants.

GEER, Judge.

Defendants Kathleen Cusick, the Charlotte-Mecklenburg Hospital Authority, doing business as Carolinas Healthcare System and doing business as Carolinas Medical Center, and Carolinas Physician Network, Inc., doing business as Charlotte Obstetrics and Gynecologic Associates, appeal from the trial court's order granting the motion of plaintiff Marshall Kelly Britt, Jr., as administrator of the Estate of Dana Robinson Britt, to quash defendants' notice of deposition and his motion for a protective order. Defendants' interlocutory appeal is from a discovery order that barred defendants from obtaining discovery by one means, but expressly permitted defendants to both seek the discovery at issue by another means and to move the trial court to modify the order if necessary to further the interests of justice. Under these circumstances, we hold that defendants' interlocutory appeal does not affect a substantial right, and we, therefore, dismiss the appeal.

Facts

On 30 September 2011, plaintiff filed an action against defendants, asserting claims for medical negligence, wrongful death, and "MISREPRESENTATION[,] FAILURE TO PRODUCE MEDICAL RECORDS/SPOILATION," stemming from Ms. Britt's death following an emergency caesarean section surgery. With respect to the claim that defendants wrongfully failed to produce medical records, the complaint alleged that during the course of plaintiff's law firm's investigation into whether Ms. Britt's death was caused by defendants' negligence, plaintiff's law firm repeatedly requested medical records from defendants that defendants wrongfully failed to produce, either intentionally or as a result of defendants' failure to exercise reasonable care in compiling medical records and delivering them to plaintiff.

Many of the allegations relating to this claim were based upon conversations between one of plaintiff's law firm's paralegals and various employees of defendants. The complaint alleged that plaintiff was entitled to "an inference that Defendants withheld evidence and/or destroyed evidence because that evidence . . . would have been adverse to Defendants." The complaint further alleged that as a result of defendants' failure to produce the requested medical records, in breach of certain statutory duties owed to plaintiff, plaintiff had been damaged in excess of $10,000.00.

On 5 December 2011, defendants filed an answer denying the material allegations of the complaint and a motion to dismiss the wrongful failure to produce medical records claim pursuant to Rule 12(b)(6) of the Rules of Civil Procedure. Apparently, defendants subsequently served a notice of deposition for Beth Ferguson, the paralegal with plaintiff's law firm, although the notice does not appear in the record on appeal. On 20 September 2012, plaintiff filed a motion to quash defendants' notice of deposition and for a protective order pursuant to Rule 26(c) of the Rules of Civil Procedure.

In the motion, plaintiff alleged that Ms. Ferguson had requested Ms. Britt's medical records from defendants and had spoken with employees of defendants about the medical records "[o]n a number of occasions." The motion further alleged that defendants had served plaintiff's counsel with a notice of deposition for Ms. Ferguson, but that allowing an oral deposition of Ms. Ferguson would "inevitably lead to the discovery of [plaintiff's] counsel's mental impressions and thought process." Such a deposition would, plaintiff alleged, constitute an "unreasonable annoyance, embarrassment, oppression, undue burden, and/or expense" and would violate the attorney client and work product privileges. Accordingly, plaintiff asked the court to enter an order quashing the deposition notice and prohibiting defendants from taking Ms. Ferguson's oral deposition or otherwise eliciting testimony regarding privileged information.

On 28 November 2012, the trial court entered an order granting plaintiff's motion to quash defendants' notice of deposition of Ms. Ferguson and motion for a protective order. The order provided that defendants' discovery of Ms. Ferguson was limited as follows: (1) "Plaintiff shall produce Beth Ferguson's testimony in written form to the Defendants;" (2) "[a]fter receiving Ms. Ferguson's written form testimony, the Defendants may ask follow-up written questions to Ms. Ferguson[;]" (3) "Plaintiff shall promptly respond to these follow-up questions;" and (4) "Ms. Ferguson may testify live at trial, but her testimony at trial shall be limited to information produced in her written form testimony and responses to Defendants [sic] follow-up written questions." The order further provided, "This Order may be modified by future Court Order if required in the interest of justice." Defendants appealed the trial court's order to this Court.

Discussion

We must first address this Court's jurisdiction over this appeal. "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). The appealed discovery order in this case is interlocutory because it fails to settle and determine the entire controversy.

"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, "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) (quoting N.C. Gen. Stat. § 1-277(a) (1996)). A substantial right is " 'one which will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment.' " *Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 142, 526 S.E.2d 666, 670 (2000) (quoting *Blackwelder v. State Dep't of Human Res.*, 60 N.C. App. 331, 335, 299 S.E.2d 777, 780 (1983)).

Generally, "orders denying or allowing discovery are not appealable since they are interlocutory and do not affect a substantial right which would be lost if the ruling were not reviewed before final judgment." *Dworsky v. Travelers Ins. Co.*, 49 N.C. App. 446, 447, 271 S.E.2d 522, 523 (1980). As this Court has explained: "Our appellate courts have recognized very limited exceptions to this general rule, holding that an order compelling discovery might affect a substantial right, and thus allow immediate appeal, if it either imposes sanctions on the party contesting the discovery, or requires the production of materials protected by a recognized privilege." *Arnold v. City of Asheville*, 169 N.C. App. 451, 453, 610 S.E.2d 280, 282 (2005).

Although neither of these exceptions apply in this case, defendants argue that their appeal affects a substantial right under *Tennessee-Carolina Transp., Inc. v. Strick Corp.*, 291 N.C. 618, 231 S.E.2d 597 (1977), since the trial court's order, according to defendants, effectively precluded them from discovering highly material evidence through the oral deposition of the only witness with personal knowledge of the relevant matters.

In *Tennessee-Carolina Transportation*, the defendant sold 150 trailers to the plaintiff, and the plaintiff subsequently sued the defendant for breach of an implied warranty of fitness based upon allegations that certain metal in the trailers did not "measure up to the proper degree of hardness." *Id.* at 623, 231 S.E.2d at 600. Prior to trial, the defendant appealed from the trial court's discovery order prohibiting the defendant from taking the deposition of an out-of-state expert witness who, at the

plaintiff's request, had conducted tests on some of the trailers to determine the hardness of the relevant metal. *Id.* at 620-21, 623, 231 S.E.2d at 599, 600.

The Supreme Court held that the appealed order affected a substantial right of the defendant because the order "effectively preclude[d] the defendant from introducing evidence of the 'readings' concerning the hardness of the metal obtained by the tests which [the expert] made" -- evidence that was "highly material to the determination of the critical question to be resolved" at trial. *Id.* at 625, 629, 231 S.E.2d at 601, 603. The Court further noted that nothing in the record indicated that the taking of the expert's deposition would have delayed the trial or would have caused the plaintiff or the expert any unreasonable annoyance, embarrassment, oppression, or undue burden or expense. *Id.* at 629, 231 S.E.2d at 603.

In contrast, here, the trial court's order did not "effectively preclude" defendants from discovering relevant information from Ms. Ferguson. Rather, the trial court's order expressly provided for discovery from Ms. Ferguson, but, because Ms. Ferguson was a paralegal for plaintiff's counsel, delimited the manner of discovery by providing that plaintiff would produce Ms. Ferguson's intended testimony in writing and then she would be required to respond to written questions submitted by defendants. Importantly, however, the order further provided that it "may be modified by future Court Order if required in the interest of justice." Thus, if the written discovery proved inadequate, defendants could then move the trial court to modify the protective order to allow an oral deposition of Ms. Ferguson or other appropriate discovery under the circumstances.

Because defendants have not pursued the discovery authorized by the trial court, they cannot show that this order regulating the manner of discovery, but not prohibiting it, "effectively preclude[d] the defendant[s] from introducing evidence" that was "highly material to the determination of the critical question to be resolved" at trial. *Id.* at 625, 629, 231 S.E.2d at 601, 603.

This Court has previously held that an order denying an overly broad request for discovery does not affect a substantial right under *Tennessee-Carolina Transportation* when the record does not specifically show what "relevant and material information" the appellant was barred from obtaining as a result of the discovery order. *Dworsky*, 49 N.C. App. at 448, 271 S.E.2d at 524. Implicit in *Dworsky* is that the appellant could submit a request that did not amount to a fishing expedition. *Id.*

Here, similarly, defendants have not shown what relevant and material information they would obtain in an oral deposition that they cannot obtain using the procedure adopted by the trial court. While such a showing might be possible after completing the discovery allowed by the trial court, defendants cannot yet make that showing. Accordingly, as in *Dworsky*, *Tennessee-Carolina Transportation* does not apply here. We, therefore, dismiss defendants' appeal as interlocutory. *See also Carolina Overall Corp. v. E. Carolina Linen Supply, Inc.*, 1 N.C. App. 318, 319, 320, 161 S.E.2d 233, 234 (1968) (dismissing, as interlocutory, order denying in part defendant's motion for production and inspection of documents but permitting defendants " 'to come again and re-apply for production and inspection of documents specifying in more and greater detail the items sought to be discovered,' " when order "adequately protected the rights of all parties in this matter and no substantial right of the defendant was prejudiced"). *Cf. Norris v. Sattler*, 139 N.C. App. 409, 413, 533 S.E.2d 483, 486 (2000) (holding interlocutory discovery order barring defendant hospital from ex parte contact with plaintiff's treating physician regarding plaintiff's case did not affect substantial right since order did not preclude defendant from seeking discovery of physician through "multi-varied discovery methods detailed in Rule 26" of Rules of Civil Procedure).

Dismissed.

Chief Judge MARTIN and Judge STROUD concur.

CARTERET COUNTY O/B/O LANNI AMOR V KENDALL, PLAINTIFF
v.
GREGORY S. KENDALL, DEFENDANT

No. COA13-603

Filed 7 January 2014

Child Custody and Support—registration of out-of-state support order—equitable basis for refusal—erroneous

The trial court erred in failing to confirm registration and permit enforcement of the Colorado child support order in the State of North Carolina. The trial court's equitable basis for refusing to enforce the child support order was erroneous as a matter of law.

Appeal by Plaintiff from order entered 8 March 2013 by Judge Paul M. Quinn in Carteret County District Court. Heard in the Court of Appeals 21 October 2013.

Erin B. Meeks for Plaintiff.

No brief filed by Defendant.

DILLON, Judge.

Carteret County, on behalf of Lanni Amor Vero Kendall (Plaintiff), appeals from the trial court's order denying enforcement in North Carolina of a child support order originally entered in Colorado against Plaintiff's ex-husband, Gregory S. Kendall (Defendant). We reverse.

I. Factual & Procedural Background

Plaintiff and Defendant lived in Colorado at the time of their divorce in January 2009. When the divorce decree was entered, the Colorado court also entered an order requiring Defendant to pay child support for their minor child. Defendant subsequently relocated to North Carolina, prompting Plaintiff to seek registration and enforcement of the Colorado child support order in North Carolina. A notice of registration of the Colorado order in North Carolina was issued on 15 October 2012 and served on Defendant on or about 26 October 2012.

Defendant timely filed a request for a hearing to contest enforcement of the Colorado order in North Carolina. The matter was heard in Carteret County District Court on 7 February 2013, at which time

Defendant contended, essentially, that he had wrongfully been required to register as a sex offender in North Carolina and that this error had prevented him from securing employment through which he could earn wages to pay child support. Counsel for Plaintiff countered that Defendant's contention was without merit, as it bore no relation to any of the seven statutorily prescribed defenses available to contest registration and enforcement of the child support order under N.C. Gen. Stat. § 52C-6-607(a). The trial court issued its ruling in open court as follows:

> I'm going to go off the grill on this one and I'll say the same thing I did to you and this might be wrong – what I'm getting ready to do. I'm going to make up an eighth reason, (inaudible), and I'm not going to register the Order here today and . . . they're certainly free to appeal this and they probably will[.]"
>
> . . . .
>
> They're going to appeal this so, again, [Defendant], I feel for your position. I'm going to buy you a little more time on this but uh, eventually this is going to come down on you, okay? So do some scrambling, do whatever you need to do, but from today's standpoint, [we] don't have an angry Plaintiff here, she's moved to Colorado and I'm not going to register the Order. It's very appealable just like uh, another case I did today but I'm going to advocate a little bit for you today. All right. Have a good day.

The trial court subsequently entered a written order on 8 March 2013, finding that "Defendant [did] not raise any of the defenses enumerated in N.C. Gen. Stat. § 52C-6-607(a)" and that "Defendant's evidence [did] not support any of the defenses enumerated in 52C-6-607." Notwithstanding these findings, the trial court concluded as a matter of law that "in light of Defendant's legal challenge to his status as a registered sex offender, equity demands that the Colorado child support order not be registered in the State of North Carolina at this time." From this order, Plaintiff appeals.

II. Analysis

Plaintiff contends that the trial court erred in failing to confirm registration and permit enforcement of the Colorado child support order in the State of North Carolina. We agree.

The trial court's decision to deny enforcement of the child support order constituted a conclusion of law, reviewable by this Court *de novo*

on appeal. *State ex rel. Lively v. Berry*, 187 N.C. App. 459, 462, 653 S.E.2d 192, 194 (2007). Under the *de novo* standard, "we may freely substitute our judgment for that of the [trial] court." *Ayers v. Bd. of Adjustment for Town of Robersonville Through Roberson*, 113 N.C. App. 528, 530-31, 439 S.E.2d 199, 201 (1994).

N.C. Gen. Stat. § 52C-6-607 provides as follows:

> (a) A party contesting the validity or enforcement of a registered order or seeking to vacate the registration has the burden of proving one or more of the following defenses:
>
> (1) The issuing tribunal lacked personal jurisdiction over the contesting party;
>
> (2) The order was obtained by fraud;
>
> (3) The order has been vacated, suspended, or modified by a later order;
>
> (4) The issuing tribunal has stayed the order pending appeal;
>
> (5) There is a defense under the law of this State to the remedy sought;
>
> (6) Full or partial payment has been made; or
>
> (7) The statute of limitations under G.S. 52C-6-604 precludes enforcement of some or all of the arrears.
>
> (b) If a party presents evidence establishing a full or partial defense under subsection (a) of this section, a tribunal may stay enforcement of the registered order, continue the proceeding to permit production of additional relevant evidence, and issue other appropriate orders. An uncontested portion of the registered order may be enforced by all remedies available under the law of this State.
>
> (c) If the contesting party does not establish a defense under subsection (a) of this section to the validity or enforcement of the order, the registering tribunal shall issue an order confirming the order.

N.C. Gen. Stat. § 52C-6-607 (2011). This court has described the defenses enumerated in N.C. Gen. Stat. § 52C-6-607(a) as "narrowly-defined[,]" *Welsher v. Rager*, 127 N.C. App. 521, 525–26, 491 S.E.2d 661, 663–64 (1997), and as an "*exclusive* list of defenses" available to a party

contesting the validity or enforcement of a registered order, *State, By & Through Albemarle Child Support Enforcement Agency ex rel. George v. Bray*, 130 N.C. App. 552, 557, 503 S.E.2d 686, 690 (1998) (emphasis added).

Here, the trial court acknowledged both in open court and in its written order that Defendant had failed to carry his burden with respect to any of the relevant defenses under N.C. Gen. Stat. § 52C-6-607(a). Upon careful examination of the record on appeal and the transcript of the 7 February 2013 hearing, we agree that Defendant has not raised any defenses relevant to contesting enforcement of the child support order. Defendant's primary defense, which the trial court evidently accepted and used as its basis to rule in Defendant's favor, was his purported inability to earn wages due to the fact that he had been improperly required to register as a sex offender. This position – that it would be unfair to obligate him to pay child support under the circumstances – was clearly equitable in nature. We are aware of no authority supporting the proposition that an equitable defense may be raised to defend against enforcement of an out-of-state child support order registered in North Carolina. To the contrary, in *Berry*, this Court specifically held as follows:

> The trial judge erroneously concluded as a matter of law that "enforcement of foreign support orders under Chapter 52C of the General Statutes of North Carolina is an equitable remedy." Chapter 52C provides a legal remedy, not an equitable remedy. Any equitable defenses to the child support obligations that defendant may wish to raise can be raised only in Florida. If defendant is successful in Florida, he could then contest enforcement of the orders "in North Carolina under G.S. 52C-6-607(a)(3) on the grounds that the order has been modified."

187 N.C. App. at 464, 653 S.E.2d at 195 (citations omitted).

Accordingly, we must conclude in the instant case that the trial court's equitable basis for refusing to enforce the child support order was erroneous as a matter of law. Defendant's failure to raise any of the applicable statutory defenses required the trial court to confirm registration of the Colorado child support order such that the order could be properly enforced in North Carolina.

REVERSED.

Chief Judge MARTIN and Judge STEELMAN concur.

EMBARK, LLC AND DAVID B. WHEELER, PLAINTIFFS
v.
1105 MEDIA, INC., DEFENDANT

No. COA13-263

Filed 7 January 2014

1. Jurisdiction—long arm—merger of North Carolina and California companies—employment contract

The trial court properly concluded that jurisdiction existed under North Carolina's long arm statute in a breach of contract case involving a plaintiff who worked from North Carolina and his employer in California. The trial court made sufficient findings supporting the conclusion that plaintiff's performance was "authorized or ratified" by defendant under N.C.G.S. § 1-75.4(5)(b); moreover, the findings also established the requirements for N.C.G.S. § 1-75.4(5)(a) and (c) (the promise of payment for services within the state and the promise to deliver things of value within the state).

2. Jurisdiction—minimum contacts—employment contract—California company and North Carolina employee

Contacts between a California defendant and North Carolina satisfied the constitutional minimum necessary to justify the exercise of personal jurisdiction over defendant under the Due Process Clause. Plaintiff's business in North Carolina was merged with defendant with an employment contract for plaintiff; plaintiff continued to work from North Carolina with defendant's knowledge and approval; and defendant was not just accommodating defendant's choice of residence, but was establishing a division in North Carolina.

3. Jurisdiction—motion to dismiss—nature of claim not clear—ruling deferred

In an employment dispute between plaintiff and defendant after plaintiff's company (Embark) merged with defendant, the trial court did not abuse its discretion by deferring a motion to dismiss Embark's claims where the trial court was not able to determine the precise nature of Embark's cause of action.

Appeal by defendant from order entered 17 October 2012 by Judge C. Philip Ginn in Mitchell County Superior Court. Heard in the Court of Appeals 28 August 2013.

Adams, Hendon, Carson, Crow and Saenger, P.A., by Robert C. Carpenter, for plaintiffs-appellees.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Heather Whitaker Goldstein, Larry McDevitt and David M. Wilkerson, for defendant-appellant.

GEER, Judge.

Defendant 1105 Media, Inc. appeals from an order (1) denying its motion to dismiss for lack of personal jurisdiction as to plaintiff David B. Wheeler's claims and (2) deferring ruling on its motion to dismiss as to plaintiff Embark, LLC's claims. Because the trial court's unchallenged findings of fact support its conclusion that (1) the exercise of personal jurisdiction satisfies the requirements of our State's long arm statute, N.C. Gen. Stat. § 1-75.4 (2011), and (2) 1105 Media had sufficient minimum contacts with the State to satisfy the requirements of due process, we affirm the trial court's order as to Wheeler's claims. We further hold that the trial court did not abuse its discretion in deferring any ruling as to Embark's claims pending additional discovery.

Facts

Plaintiff Wheeler is the president, founder, and sole employee of plaintiff Embark, an event planning company organized in Illinois on 25 September 2007. Defendant 1105 Media is a Delaware corporation with its principal place of business in California. Neal Vitale is the president and Chief Executive Officer of 1105 Media. David Myers is the Vice President of Event Operations at 1105 Media.

On 29 March 2011, Wheeler, Embark, and 1105 Media entered into a contract as a result of which Embark became a division of 1105 Media and Wheeler became an employee of 1105 Media and the head of "Embark Events, a division of 1105 Media." The contract became effective 1 April 2011 and was terminable by either party after 1 January 2012 with 12 months notice. 1105 Media terminated the contract on 31 August 2011 without providing Wheeler or Embark any reason for the termination and refused to pay Wheeler's salary or other benefits after 31 August 2011.

Wheeler and Embark filed an action for breach of contract against 1105 Media on 9 March 2012 in Mitchell County Superior Court. 1105 Media moved to dismiss for lack of personal jurisdiction on 30 April 2012. On 17 October 2012, the trial court entered an order denying 1105

Media's motion to dismiss as to the claims of Wheeler, but withheld ruling on the motion to dismiss as to the claims of Embark.

In support of its decision, the trial court made the following findings of fact. Wheeler, the president and founder of Embark, was a resident of Mitchell County, North Carolina, and had been since August 2010. 1105 Media was at all relevant times a Delaware corporation with its principal place of business in California.

Prior to entering into a contract with 1105 Media, Wheeler, on multiple occasions, told Mr. Vitale, Mr. Myers, and other 1105 Media employees that he lived in and operated Embark from North Carolina. He also provided 1105 Media with Embark business cards that listed Embark's North Carolina address.

The contract between Wheeler, Embark, and 1105 Media was negotiated via email and telephone communications, and Wheeler wrote many of the emails and placed most of the telephone calls from North Carolina. Although Wheeler invited Mr. Myers and Mr. Vitale to North Carolina on several occasions, no officers or agents of 1105 Media ever came to North Carolina to meet with Wheeler or for any other purpose related to the contract. The contract was signed by the parties in Washington, D.C.

The contract was an employment contract between Wheeler and 1105 Media. The trial court found that it was unclear how the contract affected Embark, but, at Mr. Vitale's suggestion, Embark operated as a division of 1105 Media headed by Wheeler. The name of the division, coined by Mr. Myers, was "Embark Events, a Division of 1105 Media, Inc."

During his employment with 1105 Media, Wheeler lived and worked in Mitchell County, North Carolina, where he performed 75% of his duties for 1105 Media. All of his travel originated from North Carolina, and he did not perform any of his duties for 1105 Media at any of their other offices. He maintained an office and home phone number with a North Carolina area code, paid income and property taxes in North Carolina, and maintained a personal North Carolina checking and savings account. He received health care in North Carolina that was covered by 1105 Media's health insurance plan.

1105 Media paid for the rent and telephone bill for Wheeler's office in Mitchell County, and, at Wheeler's request, shipped his work computer to the North Carolina office. 1105 Media paid a monthly allowance of $450.00 for Wheeler's car, which was titled in North Carolina. 1105 Media directly deposited Wheeler's paycheck into his North

Carolina checking account, paid North Carolina payroll taxes, and had an "employer account number" with the North Carolina Employment Security Commission. No one at 1105 Media ever brought up any concerns about Wheeler living and working in North Carolina.

1105 Media marketed Embark Events and Wheeler as part of the 1105 Media brand and operation. It created specific 1105 Media thank you cards for Wheeler that he sent to 1105 Media clients. The cards contained Wheeler's name, the Embark Events logo, and listed the company name as "Embark Events, a division of 1105 Media, Inc." The only address on the card was the North Carolina office address.

Based on its findings, the trial court concluded that North Carolina had jurisdiction over Wheeler's claims against 1105 Media pursuant to North Carolina's Long Arm Statute, N.C. Gen. Stat. § 1-75.4(5), and that 1105 Media had sufficient minimum contacts with North Carolina such that it had purposefully availed itself of the jurisdiction of North Carolina.

The trial court also concluded that it was unclear whether the court had jurisdiction over 1105 Media with respect to Embark's claims. The order, therefore, denied 1105 Media's motion to dismiss as to Wheeler's claims, but withheld ruling as to Embark's claims until the parties completed discovery. 1105 Media appealed the order to this Court.[1]

I

"In order to determine whether North Carolina courts have personal jurisdiction over a nonresident defendant, a court must apply a two-step analysis: 'First, the transaction must fall within the language of the State's "long-arm" statute. Second, the exercise of jurisdiction must not violate the due process clause of the fourteenth amendment to the United States Constitution.' " W*ells Fargo Bank, N.A. v. Affiliated FM Ins. Co.*, 193 N.C. App. 35, 39, 666 S.E.2d 774, 777 (2008) (quoting *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 364, 348 S.E.2d 782, 785 (1986)).

"The standard of review to be applied by a trial court in deciding a motion under Rule 12(b)(2) depends upon the procedural context confronting the court." *Banc of Am. Secs. LLC v. Evergreen Int'l Aviation*,

1. Although the order denying 1105 Media's motion to dismiss is interlocutory, this Court has jurisdiction over the appeal pursuant to N.C. Gen. Stat. § 1-277 (2011) because 1105 Media argued that it lacked minimum contacts with North Carolina. *See Love v. Moore*, 305 N.C. 575, 581, 291 S.E.2d 141, 146 (1982) ("[T]he right of immediate appeal of an adverse ruling as to jurisdiction over the person, under [N.C. Gen. Stat. § 1–277(b)], is limited to rulings on 'minimum contacts' questions, the subject matter of Rule 12(b)(2).")

Inc., 169 N.C. App. 690, 693, 611 S.E.2d 179, 182 (2005). When, as here, both the defendant and the plaintiff submit affidavits addressing personal jurisdiction issues, " 'the court may hear the matter on affidavits presented by the respective parties, . . . [or] the court may direct that the matter be heard wholly or partly on oral testimony or depositions.' " *Id.* at 694, 611 S.E.2d at 183 (quoting N.C.R. Civ. P. 43(e)). "If the trial court chooses to decide the motion based on affidavits, '[t]he trial judge must determine the weight and sufficiency of the evidence [presented in the affidavits] much as a juror.' " *Id.* (quoting *Fungaroli v. Fungaroli*, 51 N.C. App. 363, 367, 276 S.E.2d 521, 524 (1981)).

The standard of review for this Court is " 'whether the findings of fact by the trial court are supported by competent evidence in the record[.]' " *Miller v. Szilagyi*, 221 N.C. App. 79, 82, 726 S.E.2d 873, 877 (2012) (quoting *Bell v. Mozley*, 216 N.C. App. 540, 543, 716 S.E.2d 868, 871 (2011), *disc. review denied*, 365 N.C. 574, 724 S.E.2d 529 (2012)). Here, neither party challenges the sufficiency of the evidence to support the trial court's findings of fact, and therefore, they are " 'presumed to be supported by competent evidence and [are] binding on appeal.' " *Id.* (quoting *Bell*, 216 N.C. App. at 543, 716 S.E.2d at 871).

A. Long Arm Statute

[1] 1105 Media first argues that the trial court erred in concluding that jurisdiction was proper pursuant to North Carolina's Long Arm Statute, N.C. Gen. Stat. § 1-75.4(5), which states, in relevant part, that jurisdiction is proper in any action which:

> a. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this State or to pay for services to be performed in this State by the plaintiff; or
>
> b. Arises out of services actually performed for the plaintiff by the defendant within this State, or services actually performed for the defendant by the plaintiff within this State if such performance within this State was authorized or ratified by the defendant; or
>
> c. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive within this State, or to ship from this State goods, documents of title, or other things of value; . . .

1105 Media argues that the requirements of N.C. Gen. Stat. § 1-75.4(5)(b) were not met because that section requires that any services actually performed in North Carolina be "authorized or ratified by the defendant." According to 1105 Media, since the trial court made no findings as to whether 1105 Media authorized or ratified Wheeler's performance in North Carolina, the trial court's conclusion is not supported by its findings of fact.

However, based on our review of the order, the trial court did make sufficient findings supporting the conclusion that Wheeler's performance was "authorized or ratified." The court found that 1105 Media paid for Wheeler's North Carolina office space, directly deposited Wheeler's paycheck into his North Carolina checking account, paid North Carolina payroll taxes, never brought up any concerns about Wheeler living and working in North Carolina, created specific 1105 Media thank you cards with Wheeler's North Carolina address for him to send to 1105 Media clients, paid the telephone bill for Wheeler's North Carolina office, and shipped a computer to his office. These findings are more than enough to support the conclusion that Wheeler's performance of services in North Carolina for 1105 Media was authorized and ratified by 1105 Media.

In any event, although 1105 Media does not address N.C. Gen. Stat. § 1-75.4(5)(a) or (c), the trial court's findings of fact also establish that the requirements for those subsections of the statute are satisfied. As provided in N.C. Gen. Stat. § 1-75.4(5)(a), 1105 Media promised to pay Wheeler for the services Wheeler was to perform under his employment contract in North Carolina. Likewise, N.C. Gen. Stat. § 1-75.4(5)(c) is met by the trial court's finding that 1105 Media shipped to Wheeler's North Carolina office a work computer and directly deposited Wheeler's salary into his North Carolina bank account. Both the computer and paychecks are "things of value." N.C. Gen. Stat. § 1-75.4(5)(c). *See Lab. Corp. of Am. Holdings v. Caccuro*, 212 N.C. App. 564, 567, 712 S.E.2d 696, 700 (finding payments sent from employer to employee during employment relationship constituted "thing of value" for purposes of long arm statute), *appeal dismissed and disc. review denied*, 365 N.C. 367, 719 S.E.2d 623 (2011).

The trial court, therefore, properly concluded that jurisdiction existed under North Carolina's Long Arm Statute.

B. Minimum Contacts

[2] Under the Due Process Clause, a court may exercise personal jurisdiction over a non-resident defendant only if there exists "sufficient 'minimum contacts' between the nonresident defendant and our

state 'such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.' " *Skinner v. Preferred Credit*, 361 N.C. 114, 122, 638 S.E.2d 203, 210 (2006) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102, 66 S. Ct. 154, 158 (1945)). More specifically, "[i]n each case, there must be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws; the unilateral activity within the forum state of others who claim some relationship with a non-resident defendant will not suffice." *Tom Togs*, 318 N.C. at 365, 348 S.E.2d at 786. Instead, the "relationship between the defendant and the forum must be 'such that he should reasonably anticipate being haled into court there.' " *Id.* (quoting *World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 62 L. Ed. 2d 490, 501, 100 S. Ct. 559, 567 (1980)).

"There are two types of personal jurisdiction. General jurisdiction exists when the defendant's contacts with the state are not related to the cause of action but the defendant's activities in the forum are sufficiently 'continuous and systematic.' Specific jurisdiction exists when the cause of action arises from or is related to defendant's contacts with the forum." *Skinner*, 361 N.C. at 122, 638 S.E.2d at 210 (internal citation omitted). Here, the trial court denied the motion to dismiss as to Wheeler's claims based on specific jurisdiction.

For specific jurisdiction, the focus is on "the relationship among the defendant, this State, and the cause of action." *Tom Togs*, 318 N.C. at 366, 348 S.E.2d at 786. In determining whether minimum contacts exist, our courts examine several factors: " '(1) the quantity of the contacts; (2) the quality and nature of the contacts; (3) the source and connection of the cause of action to the contacts; (4) the interests of the forum state, and (5) the convenience to the parties.' " *Cambridge Homes of N.C. Ltd. P'ship v. Hyundai Constr., Inc.*, 194 N.C. App. 407, 412-13, 670 S.E.2d 290, 295-96 (2008) (quoting *Cooper v. Shealy*, 140 N.C. App. 729, 734, 537 S.E.2d 854, 857-58 (2000)). " 'A contract alone may establish the necessary minimum contacts where it is shown that the contract was voluntarily entered into and has a 'substantial connection' with this State.' " *Banc of Am. Secs.*, 169 N.C. App. at 696, 611 S.E.2d at 184 (quoting *Williamson Produce, Inc. v. Satcher*, 122 N.C. App. 589, 594, 471 S.E.2d 96, 99 (1996)).

In *Better Bus. Forms, Inc. v. Davis*, 120 N.C. App. 498, 499, 462 S.E.2d 832, 833 (1995), this Court held that there was personal jurisdiction over non-resident defendants for breach of a contract to purchase a North Carolina business. The plaintiff in *Better Business* was

a "Florida corporation with an office and place of business in Forsyth County, North Carolina." *Id.* It sold an operating division of its company, which had sales offices in Winston-Salem, North Carolina and Roanoke, Virginia, to a Virginia corporation owned by the defendants. *Id.* After the merger, the North Carolina sales office "continued to do all of the administrative work necessary to service the Winston-Salem operation," and generated half of the company's sales. *Id.* at 501, 462 S.E.2d at 834.

In its due process analysis, this Court noted that the "active negotiations to purchase a North Carolina business, some of which were conducted in North Carolina, demonstrate a purposeful attempt by defendants to avail themselves of the privilege of conducting business in this State." *Id.* at 500, 462 S.E.2d at 834. The Court found it insignificant that one of the individual defendants had never stepped foot in North Carolina or personally conducted or managed any of the North Carolina activities, concluding instead that "jurisdiction here is based on the benefits received by defendants from the underlying contract which has a substantial connection with North Carolina." *Id.* at 501, 462 S.E.2d at 834.

We believe that the facts here parallel those in *Better Business*. The trial court's findings show that 1105 Media voluntarily entered into a contract whereby it created a division of its company that had an office and head of operations in North Carolina. 1105 Media negotiated the contract knowing that Wheeler was a resident of North Carolina and that Embark was operated out of North Carolina.[2] 1105 Media's proposal to make Embark a division of 1105 Media and hire Wheeler to head the division "demonstrate[s] a purposeful attempt by [1105 Media] to avail [itself] of the privilege of conducting business in this State." *Id.* at 500, 462 S.E.2d at 834.

Additionally, 1105 Media's performance during the course of the contract further demonstrates that the contract at issue in this case is materially indistinguishable from the one in *Better Business* that this Court concluded had a substantial connection with North Carolina. 1105 Media treated the North Carolina operation as part of itself: it paid for the North Carolina office rent and telephone and created 1105 Media thank you cards for Wheeler to send to 1105 Media clients that identified

2. Defendant argues that the trial court made no findings as to 1105 Media's knowledge that Wheeler resided in and operated Embark from North Carolina. We disagree. The trial court's finding of fact that Wheeler told 1105 Media's officers that he lived in North Carolina and operated Embark from this State is a sufficient finding regarding 1105 Media's knowledge of those facts.

"Embark Events, a Division of 1105 Media, Inc." as having a North Carolina address. As in *Better Business*, "jurisdiction here is based on the benefits received by defendants from the underlying contract which has a substantial connection with North Carolina." *Id.* at 501, 462 S.E.2d at 834.

Defendant attempts to distinguish *Better Business* on the bases that (1) Embark was incorporated in Illinois and not North Carolina; (2) no events were produced, performed, or contemplated in North Carolina; and (3) no significant revenue was generated from any operations of Embark Events. None of these purported distinctions is material.

Better Business focused not on the purchased business' state of incorporation, but rather on the location of its offices and where it did business. *Id.* at 500-01, 462 S.E.2d at 834. In this case, after entering into the contract with Wheeler and Embark, 1105 Media established a division office in North Carolina and 75% of Wheeler's services for 1105 Media were performed in North Carolina. *Compare id.* ("After the purchase, Graphics Supply's Winston-Salem office continued to do all of the administrative work necessary to service the Winston-Salem operation, including purchasing, shipping, bookkeeping, accounting, and accounts receivable."). Where the events Wheeler arranged for Embark actually took place -- as opposed to where Wheeler's services were rendered -- is no more material than where the *Better Business* clients were located or where their products where shipped.

Finally, although the Court noted in *Better Business* that the defendants did financially benefit from the Winston-Salem office, *id.* at 501, 462 S.E.2d at 834, the Court did not hold that a generation of revenues was necessary. The focus was on "the benefits received by defendants from the underlying contract." *Id.* Here, those benefits were Wheeler's services, 75% of which were rendered in North Carolina. Accordingly, under *Better Business*, the trial court properly concluded that 1105 Media had sufficient minimum contacts with respect to Wheeler's claims. *See also Brickman v. Codella*, 83 N.C. App. 377, 384, 350 S.E.2d 164, 168 (1986) (finding personal jurisdiction over non-resident defendant where defendant's contacts with State "were 'purposefully directed' toward [plaintiff] in order to obtain his financial assistance with a new business venture whereby [defendant] *sought* personal commercial benefit" (emphasis added)).

Moreover, where the cause of action is a breach of contract, the substantial performance of the contract by the plaintiff in the forum state with the defendant's knowledge, permission, or endorsement is

a factor weighing in favor of a finding of specific jurisdiction over the defendant. Here, 1105 Media employed Wheeler as the head of a division of its company and marketed Wheeler and Embark as part of the 1105 Media brand and operation. With 1105 Media's knowledge and, therefore, its permission, Wheeler performed 75% of his duties under the contract from North Carolina. *See Chapman v. Janko, U.S.A., Inc.*, 120 N.C. App. 371, 373, 462 S.E.2d 534, 536 (1995) (finding jurisdiction over nonresident, non-domesticated corporation in action for breach of contract for consultation services by resident plaintiff where plaintiff performed substantial services for corporation in North Carolina and corporation listed plaintiff as a " 'U.S.A. sales rep' " on its own letterhead, even though employer had no employees residing in North Carolina, only contacted plaintiff through telephone, letter, or outside North Carolina, and contacts involved negotiations only); *Dataflow Cos. v. Hutto*, 114 N.C. App. 209, 213, 441 S.E.2d 580, 582-83 (1994) (finding personal jurisdiction over out-of-state defendants for breach of contract where supplies were shipped to defendants from plaintiff's North Carolina office, plaintiff spent considerable time engineering and designing computer system in North Carolina, and defendants sent payments to North Carolina office).

However, 1105 Media vigorously argues that Wheeler was simply a telecommuting employee and that this Court should adopt the reasoning of other courts that have held that when a telecommuting employee brings suit against his out-of-state employer in an action related to the employment relationship, the employer's withholding of state payroll taxes and payment of unemployment insurance to the forum state, alone, is not enough to establish purposeful availment or minimum contacts with that state. In support of this argument, defendant cites *Slepian v. Guerin*, 172 F.3d 58, 1999 WL 109676, 1999 U.S. App. LEXIS 3371 (9th Cir. Mar. 1, 1999) (unpublished).[3]

In *Slepian*, the Court, in considering a telecommuting employee's lawsuit, held it did not have personal jurisdiction over the defendant employer because the defendant's actions toward the forum state amounted to nothing more than an "accommodation of [the plaintiff's] choice of residence." 1999 WL 109676, at *2, 1999 U.S. App. LEXIS 3371, at *7. Here, however, the circumstances do not involve a mere

3. 1105 Media also cites *Waldron v. Atradius Collections, Inc.*, No. 1:10-cv-551, 2010 WL 2367392, 2010 U.S. Dist. LEXIS 145275 (D. Md. June 9, 2010), another unpublished opinion. The district court, however, declined to decide the question of personal jurisdiction and instead simply transferred venue from Maryland to Illinois. 2010 WL 2367392, at *3, 2010 U.S. Dist. LEXIS 145275, at *9-*10.

telecommuting employee and, therefore, we need not consider whether North Carolina should adopt the *Slepian* reasoning.

In this case, the trial court found that Wheeler did not simply work from home, but rather worked out of his "1105 Media office" in Mitchell County, North Carolina -- an office paid for by 1105 Media and constituting a traditional work site of 1105 Media. *See Wait v. Travelers Indem. Co. of Ill.*, 240 S.W.3d 220, 225 (Tenn. 2007) ("An employee telecommutes when he or she takes advantage of electronic mail, internet, facsimile machines and other technological advancements to work from home or a place other than the traditional work site.").

More importantly, the trial court's findings establish that 1105 Media's actions were not merely an accommodation to Wheeler's choice of residence, but rather a result of 1105 Media's own initiative to create an operating division and office in North Carolina in an ongoing and mutually beneficial business relationship. *See Sheets v. Integrated Info. Util. Sys., Inc.*, No. CIV. 98-1328-KI, 1999 WL 417274, at *1, 1999 U.S. Dist. LEXIS 9719, at *2-*3 (D. Or. June 17, 1999) (declining to follow lower court's recommendation in *Slepian* and finding jurisdiction over out-of-state corporation in action for breach of employment contract of telecommuter where employer initiated contact with employee, and employee's residence in forum state was, at least in part, for convenience of employer due to employer's financial concerns and inability to pay for employee's relocation).

Defendant also argues that the trial court erred by failing to make a finding as to which party initiated contact. While this is a relevant factor to the minimum contacts analysis, our Supreme Court has noted that "[n]o single factor controls, but they all must be weighed in light of fundamental fairness and the circumstances of the case." *B. F. Goodrich Co. v. Tire King of Greensboro, Inc.*, 80 N.C. App. 129, 132, 341 S.E.2d 65, 67 (1986). Additionally, "Rule 52(a)(1) [of the Rules of Civil Procedure] does not require the trial court to recite all of the evidentiary facts; it is required only to find the ultimate facts, i.e., those specific material facts which are determinative of the questions involved in the action and from which an appellate court can determine whether the findings are supported by the evidence and, in turn, support the conclusions of law reached by the trial court." *Mann Contractors, Inc. v. Flair with Goldsmith Consultants-II, Inc.*, 135 N.C. App. 772, 774, 522 S.E.2d 118, 120-21 (1999).

In this case, the fact that Wheeler sent out the first email was not a determinative factor in the minimum contacts analysis. The trial court

made sufficient findings of 1105 Media's contacts with the State to support its exercise of jurisdiction. The court was not then required to make findings of fact on issues that would not alter the conclusion. The trial court could reasonably determine that the question of whom initiated the contact was not material in light of the facts of this case, where the parties engaged in a balanced negotiation, the ultimate structure of their business relationship was proposed by 1105 Media, and 1105 Media entered into a contract with the North Carolina plaintiffs knowingly, voluntarily, and for their own economic benefit. We, therefore, hold that the trial court did not err in concluding that 1105 Media had purposeful minimum contacts with North Carolina.

Once a court finds that a defendant has established minimum contacts with the forum State, it must consider those contacts in light of (1) the interests of North Carolina and (2) the convenience of the forum to the parties. We note, however, that "once the first prong of purposeful minimum contacts is satisfied, the defendant will bear a heavy burden in escaping the exercise of jurisdiction based on other factors." *Banc of Am. Secs.*, 169 N.C. App. at 701, 611 S.E.2d at 187.

With respect to North Carolina's interest, "[i]t is generally conceded that a state has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." *Tom Togs*, 318 N.C. at 367, 348 S.E.2d at 787. Here, Wheeler, a resident of North Carolina, has been injured by 1105 Media's alleged breach of contract, the damaging effect of which is felt in this State. *See Ciba-Geigy Corp. v. Barnett*, 76 N.C. App. 605, 609, 334 S.E.2d 91, 94 (1985) (finding that damaging effect of tort felt in North Carolina was a factor supporting exercise of jurisdiction).

As for the convenience of the parties, litigating in North Carolina would not be convenient for 1105 Media, but, by the same token, litigation in another state would not be convenient for Wheeler. The record does "not indicate that any one State would be more convenient to all of the parties and witnesses than another." *Banc of Am. Secs.*, 169 N.C. App. at 700, 611 S.E.2d at 186. *See Climatological Consulting Corp. v. Trattner*, 105 N.C. App. 669, 675, 414 S.E.2d 382, 385 (1992) (holding that although three of defendant's material witnesses were located in Washington, D.C., "this fact is counterbalanced by the fact that plaintiff's materials and offices are located here[,]" and "North Carolina is a convenient forum to determine the rights of the parties").

Finally, with respect to the fairness of this State's exercising jurisdiction, "[i]t is well settled that a defendant need not physically enter

North Carolina in order for personal jurisdiction to arise." *Better Bus.*, 120 N.C. App. at 501, 462 S.E.2d at 834. Moreover, 1105 Media has not "pointed to any disparity between plaintiff[s] and itself which might render the exercise of personal jurisdiction over it unfair." *Tom Togs*, 318 N.C. at 368, 348 S.E.2d at 787.

We, therefore, hold that the contacts in this case rose to the level satisfying the constitutional minimum under the Due Process Clause necessary in order to justify the exercise of personal jurisdiction over 1105 Media. Accordingly, we affirm the trial court's order denying 1105 Media's motion to dismiss Wheeler's claims.

II

[3] Defendant next argues that the trial court erred in limiting its ruling to Wheeler's claims and withholding ruling on 1105 Media's motion to dismiss with respect to Embark's claims. Defendant points out that the jurisdictional analysis does not consider a plaintiff's contacts with North Carolina, but rather "the relationship among the defendant, this State, and the cause of action." *Id.* at 366, 348 S.E.2d at 786. It argues that, as a result, the analysis as to Wheeler should apply equally to 1105 Media.

While under this reasoning, our holding in this opinion would result in the conclusion that 1105 Media's motion to dismiss should have been denied as to both plaintiffs, we do not agree with 1105 Media's analysis. The trial court did not defer ruling as to jurisdiction over Embark's claims because of any confusion over Embark's contacts with North Carolina, but rather because it was unclear about the nature of Embark's cause of action. For specific jurisdiction, the sole basis for personal jurisdiction in this case, the focus is on "the relationship among the defendant, this State, *and the cause of action*." *Id.* (emphasis added). Defendant has not cited any authority suggesting that it was error for the trial court to defer ruling when it had insufficient information regarding the nature of Embark's cause of action. *See also Cambridge Homes of N.C.*, 194 N.C. App. at 412-13, 670 S.E.2d at 295-96 (holding that trial court, in determining minimum contacts, should consider, among other factors, " 'the source and connection of the cause of action to the contacts' " (quoting *Cooper*, 140 N.C. App. at 734, 537 S.E.2d at 858)).

In federal court, deferral of a motion to dismiss for lack of personal jurisdiction pending discovery is within the discretion of the trial court. *Combs v. Bakker*, 886 F.2d 673, 676 (4th Cir. 1989) ("If the existence of jurisdiction turns on disputed factual questions, the court may resolve the challenge on the basis of a separate evidentiary hearing, or may

defer ruling pending receipt at trial of evidence relevant to the jurisdictional question."). This standard of review is consistent with this Court's holding that a trial court may choose either to hear a motion to dismiss for lack of minimum contacts based on affidavits or " 'the court may direct that the matter be heard wholly or partly on oral testimony or depositions.' " *Banc of Am. Secs.*, 169 N.C. App. at 694, 611 S.E.2d at 183 (quoting N.C.R. Civ. P. 43(e)).

Because the trial court was unable to determine based on the affidavits and pleadings the precise nature of Embark's cause of action, we cannot conclude that the trial court abused its discretion in deciding that the motion to dismiss as to Embark should be heard based on deposition testimony that more fully fleshes out that cause of action. Consequently, we also affirm the trial court's order to the extent that it defers ruling on the motion to dismiss as to Embark's claims.

Affirmed.

Judges ROBERT C. HUNTER and McCULLOUGH concur.

THOMAS E. GUST, PLAINTIFF
v.
THE NORTH CAROLINA DEPARTMENT OF REVENUE, DEFENDANT

No. COA13-673

Filed 7 January 2014

Taxation—challenge to assessment—declaratory judgment action—prohibited

An appeal from the dismissal of a declaratory judgment action was itself dismissed by the Court of Appeals because the plain language of N.C.G.S. § 105-241.19 specifically prohibits a taxpayer from filing a declaratory judgment action to contest his tax liability. A taxpayer may challenge the Department of Revenue's tax assessment only by exhausting the statutory remedies set forth in N.C.G.S. §§ 105-241.11 through 105-241.18.

Appeal by plaintiff from the order entered 18 December 2012 by Judge Robert T. Sumner in Cleveland County Superior Court. Heard in the Court of Appeals 6 November 2013.

Attorney General Roy Cooper, by Assistant Attorney General Perry J. Pelaez, for The North Carolina Department of Revenue.

Thomas E. Gust, pro se.

ELMORE, Judge.

Plaintiff appeals from the 18 December 2012 judgment and order dismissing his complaint and petition for declaratory judgment rendered during the 10 December 2012 Civil Session of Cleveland County Superior Court. After careful consideration, we dismiss plaintiff's appeal.

I. Background

The dispute before us initiated when the North Carolina Department of Revenue (the Department) issued a tax assessment against Thomas E. Gust (plaintiff) for his failure to pay individual income taxes for the 2003, 2004, 2005, and 2006 tax years. To contest the tax assessment, plaintiff filed a contested case petition with the Office of Administrative Hearings (OAH) on 8 November 2011. Before OAH issued its determination, plaintiff filed an action for declaratory judgment against the Department in Cleveland County Superior Court on 25 July 2012. The purported purpose of the action for declaratory judgment was to compel the Department to answer the following question: "Which North Carolina General Statute requires a person to file an income tax return with the Department for the same year(s) he is not required to file an income tax return with the Internal Revenue Service?" The trial court dismissed the declaratory action on 18 December 2012 pursuant to Rule 12(b)(1), Rule 12(b)(2), and Rule 12(b)(6) and on the basis that the action was barred by the doctrine of sovereign immunity. It is from the entry of this order that plaintiff appeals.

In an attempt to resolve plaintiff's OAH case, the Department served him with its first set of interrogatories and request for production of documents on 22 March 2012. When plaintiff failed to respond, the Department filed a motion to compel discovery. Plaintiff again refused to provide the requested discovery. As such, the Department filed a motion to dismiss the contested case as a sanction against plaintiff. On 15 August 2012, OAH granted the Department's motion and dismissed plaintiff's action with prejudice as a sanction for his noncompliance with the order compelling his response to discovery.

Plaintiff appealed OAH's dismissal to Wake County Superior Court pursuant to N.C. Gen. Stat. § 105-241.16. On 23 May 2013, Judge Donald

W. Stephens dismissed plaintiff's action with prejudice for want of subject matter jurisdiction. Judge Stephens found that plaintiff had not paid the tax, penalties, and interest due as required by N.C. Gen. Stat. § 105-241.16.

II. Declaratory Judgment

Plaintiff argues that the trial court erred in dismissing his action for declaratory judgment based on the Department's sovereign immunity defense. We are unable to reach the merits of this issue and therefore dismiss it.

Plaintiff avers that under the Uniform Declaratory Judgment Act, N.C. Gen. Stat. § 2-153 *et seq.*, the trial court had jurisdiction to hear his declaratory judgment action. This contention is unsupported by law. Our Supreme Court has held that the "declaratory judgment statutes themselves are not jurisdictional and they do not create or grant jurisdiction where it does not otherwise exist, nor do they enlarge or extend the jurisdiction of the courts over the subject matter or the parties." *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 348, 323 S.E.2d 294, 308 (1984) (citation omitted). In the instant case, the trial court lacked jurisdiction to hear plaintiff's declaratory judgment action for the reasons set fourth below.

A taxpayer may challenge his tax liability pursuant to the procedures laid out in Chapter 105 of our general statutes. Under N.C. Gen. Stat. § 105-241.15 (2011), a taxpayer who disagrees with a notice of final determination issued by the Department may file a contested case hearing with OAH in accordance with Article 3 of Chapter 150B. A taxpayer aggrieved by OAH's determination may seek judicial review of the decision pursuant to N.C. Gen. Stat. § 105-241.16 (2011):

> A taxpayer aggrieved by the final decision in a contested case commenced at the Office of Administrative Hearings may seek judicial review of the decision in accordance with Article 4 of Chapter 150B of the General Statutes. Notwithstanding G.S. 150B-45, a petition for judicial review must be filed in the Superior Court of Wake County and in accordance with the procedures for a mandatory business case set forth in G.S. 7A-45.4(b) through (f). Before filing a petition for judicial review, a taxpayer must pay the amount of tax, penalties, and interest the final decision states is due. A taxpayer may appeal a decision of the Business Court to the appellate division in accordance with G.S. 150B-52.

Notably, N.C. Gen. Stat. § 105-241.19 provides:

> The remedies in G.S. 105-241.11 through G.S. 105-241.18 set out the exclusive remedies for disputing the denial of a requested refund, a taxpayer's liability for a tax, or the constitutionality of a tax statute. **Any other action is barred. Neither an action for declaratory judgment, an action for an injunction to prevent the collection of a tax, nor any other action is allowed.**

N.C. Gen. Stat. § 105-241.19 (2011) (emphasis added).

Here, plaintiff has appealed the trial court's dismissal of his action for declaratory judgment. However, the plain language of N.C. Gen. Stat. § 105-241.19 is clear and unambiguous. It specifically prohibits a taxpayer from filing a declaratory judgment action to contest his tax liability. Instead, it provides that a taxpayer may challenge the Department's tax assessment only by exhausting the statutory remedies set forth in N.C. Gen. Stat. §§ 105-241.11 through 105-241.18. Accordingly, plaintiff was statutorily barred from filing the action for declaratory judgment, and we are unable to rule on the merits of his appeal. For this reason, plaintiff's appeal is dismissed.

Dismissed.

Judges McCULLOUGH and DAVIS concur.

ESTATE OF FRANCES JOYNER, HAZEL HALL, IKE COGDELL, JOHN COGDELL, BERTHA C. CLARK, JOSEPHNE C. SHACKLEFORD, NATHAN COGDELL AND SAMUEL COGDELL, Plaintiffs

v.

JESSIE BELL JOYNER, JESSIE MAE BRITT AND LINWOOD JOYNER, As Co Administrators of the Estate Of Warren Joyner, Defendants

No. COA13-545

Filed 7 January 2014

Intestate Succession—abandonment of spouse—not living together—essential element

The trial court properly granted summary judgment for defendants in an action for a declaratory judgment barring a husband and his heirs from inheriting by intestate succession from his deceased

wife. Even though the couple lived in the same house, plaintiffs alleged constructive abandonment based on the level of care the husband provided for his wife. However, not living with the other spouse at the time of such spouse's death is a necessary element of N.C.G.S. § 31A-1.

Appeal by plaintiffs from an order entered 17 October 2012 by Judge Phyllis M. Gorham in Lenoir County Superior Court. Heard in the Court of Appeals 9 October 2013.

Wooten & Turik, PLLC, by Dal F. Wooten, for plaintiff-appellants.

Holtkamp Law Firm, by Lynne M. Holtkamp, for defendant-appellees.

HUNTER, Robert C., Judge.

Plaintiffs appeal from an order entered 17 October 2012 in Lenoir County Superior Court by Judge Phyllis M. Gorham granting defendants' motion for summary judgment. On appeal, plaintiffs argue there was a genuine issue of material fact with respect to whether Warren Joyner ("Warren") constructively abandoned his wife, Frances Joyner ("Frances"). After careful review, we affirm the trial court's order granting summary judgment.

Background

All plaintiffs in this case are surviving siblings of Frances. Frances died intestate on 17 January 2011 without children and with her husband, Warren, as her only potential heir. Warren died intestate on 6 February 2011, survived only by his mother. Plaintiffs brought this action against the co-administrators of Warren's estate, Jessie Mae Britt and Linwood Joyner, and Warren's mother, Jessie Bell Joyner (collectively "defendants"), seeking a declaratory judgment to bar Warren and his heirs from inheriting from Frances on the ground that Warren actually or constructively abandoned Frances.

Warren and Frances were married for twenty-six years and lived in the same home until Frances's death. They were both disabled; Warren had kidney failure, and Frances was a double amputee with heart failure. Warren was unemployed for the last twenty years of the marriage.

The parties contest the level of care Warren provided for Frances. Plaintiffs claimed in depositions that: (1) Warren would not take Frances to doctors visits without compensation for his time and gas; (2) the couple ceased conjugal contact and Warren openly engaged in

homosexual relationships; (3) Warren moved into a separate bedroom in the home he shared with Frances; and (4) Warren refused to provide food or financial support for Frances for at least the last six years of their marriage. Defendants testified at the summary judgment hearing that Warren was the primary caretaker of Frances and was a loving, caring husband, and that Warren helped Frances around the house, cooked meals for her, checked her blood sugar, and provided her medication.

At the conclusion of deposition presentation and testimony at the hearing on defendants' motion for summary judgment, the trial court granted summary judgment for defendants. Plaintiffs timely appealed.

Discussion

I. Whether Summary Judgment was Proper

Plaintiffs' sole argument on appeal is that the trial court erred in granting defendants' motion for summary judgment. After careful review, we affirm.

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)). When reviewing a grant of summary judgment "evidence presented by the parties must be viewed in the light most favorable to the non-movant." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998). "Summary judgment is appropriate where the movant proves that an essential element of the claim is nonexistent or that the opposing party cannot produce evidence to support an essential element of his claim." *Holloway v. Wachovia Bank & Trust Co., N.A.*, 339 N.C. 338, 351, 452 S.E.2d 233, 240 (1994) (citation omitted).

N.C. Gen. Stat. § 31A-1(a)(3) (2011) states that "[a] spouse who wilfully and without just cause abandons and refuses to live with the other spouse *and is not living with the other spouse at the time of such spouse's death*" loses intestate succession rights in the other spouse. N.C. Gen. Stat. § 31A-1(a)(3), (b)(1) (2011) (emphasis added). Plaintiffs cite *Powell v. Powell*, 25 N.C. App. 695, 699, 214 S.E.2d 808, 811 (1975), and *Meares v. Jernigan*, 138 N.C. App 318, 321, 530 S.E.2d 883, 885-86 (2000), for the proposition that a husband or wife could constructively abandon his or her spouse under section 31A-1 without leaving the marital home. They argue that Warren's failure to provide monetary

and emotional support amounted to constructive abandonment and that he should be divested of his right to intestate succession as a result. However, plaintiffs overlook the fact that *Powell* analyzes abandonment under N.C. Gen. Stat. § 50-16.2(4), which was repealed in 1995, and therefore is no longer controlling. Act of Oct. 1, 1995, ch. 319, sec. 1, 1995 N.C. Sess. 641. *Meares* analyzes section 31A-1(a)(3) and quotes language from *Powell* to support the proposition that a husband or wife could constructively abandon his or her spouse without leaving the marital home, but the decision stops short of reaching all elements in section 31A-1. *Meares*, 138 N.C. App at 321-22, 530 S.E.2d at 886. Our Supreme Court has made clear that abandonment alone is insufficient to deprive a spouse of intestate succession rights under section 31A-1. In *Locust v. Pitt Cnty. Mem'l Hosp., Inc.*, 358 N.C. 113, 118, 591 S.E.2d 543, 546 (2004), the Supreme Court held that "not living with the other spouse at the time of such spouse's death" is a necessary element of section 31A-1.

> Notably, under the wording of the statute, intent to abandon and abandonment even when combined, are insufficient to preclude an abandoning spouse from intestate succession. The abandoning spouse must also "not [be] living with the other spouse at the time of such spouse's death." N.C.G.S. § 31A-1. This Court has held that a spouse may abandon the other spouse without physically leaving the home, thus likely prompting the legislature to include the *additional requirement* in N.C.G.S. § 31A-1. Because *absence from the marital home is an element under the statute*, a determination of spousal preclusion from intestate succession cannot be made until the death of the other spouse.

Id. (emphasis added) (citations omitted). Because it is undisputed that Warren was not "absen[t] from the marital home" at the time of Frances's death, but was merely sleeping in a separate bedroom, plaintiffs failed to meet this required element of section 31A-1. *See id.* Accordingly, we affirm the trial court's entry of summary judgment in defendants' favor. *See Holloway*, 339 N.C. at 351, 452 S.E.2d at 240 ("Summary judgment is appropriate where the movant proves that an essential element of the claim is nonexistent or that the opposing party cannot produce evidence to support an essential element of his claim.").

As plaintiffs failed to cite *Locust* in their brief, we remind counsel of the duty of candor toward the tribunal, which requires disclosure of known, controlling, and directly adverse authority. *See* N.C. Rev. R. Prof. Conduct 3.3(a), (a)(2) (2012) ("A lawyer shall not knowingly: . . . fail

to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel[.]"). While the duty to disclose *Locust* rests upon plaintiffs, defendants also failed to cite the case. We remind counsel of the need to be diligent in finding controlling authority.

Conclusion

Because plaintiffs failed to establish an element of their claim, we affirm the trial court's order granting defendants' motion for summary judgment.

AFFIRMED.

Judges BRYANT and STEELMAN concur.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC., PLAINTIFF-APPELLEE

v.

WADE H. PASCHAL, JR., GUARDIAN AD LITEM FOR HARLEY JESSUP; REGGIE JESSUP; RANDALL COLLINS JESSUP; AND THURMAN JESSUP, DEFENDANTS-APPELLANTS

No. COA13-615

Filed 7 January 2014

1. Venue—motion to change—convenience of witnesses—denied—no abuse of discretion

There was no abuse of discretion in the trial court's order denying defendants' motion to change venue from Wake County in an action to determine insurance coverage after a car accident. Defendants did not demonstrate that the trial court's discretionary ruling denied them a fair trial, or that the ends of justice demanded a change of venue. Although Randolph or Chatham County may have been a more convenient forum for defendants, Wake County appeared to be a more convenient forum for plaintiff.

2. Insurance—underinsured motorist—resident of household

The trial court erred by granting summary judgment for plaintiff in a declaratory judgment action to determine whether Harley, injured in an automobile accident, was covered by the underinsured motorist policy of her grandfather, Thurman. In light of the very particular circumstances in this case, Harley was a resident

of Thurman's household as defined under the policy at the time of the accident.

Appeal by Defendants from orders entered 30 November 2012 and 6 December 2012 by Judge G. Wayne Abernathy in Superior Court, Wake County. Heard in the Court of Appeals 22 October 2013.

Haywood, Denny & Miller, L.L.P., by Robert E. Levin, for Plaintiff-Appellee.

Moody, Williams, Roper & Lee, LLP, by C. Todd Roper, for Defendants-Appellants.

McGEE, Judge.

Sixteen-year-old Harley Jessup ("Harley") was injured on 15 April 2009 when a truck driven by her cousin, Randall Collins Jessup ("Randall"), ran off the road and into a ditch, causing Harley to be ejected from the truck. Harley, through her guardian *ad litem* Wade H. Paschal, Jr. ("Paschal"), and Harley's father, Reggie Jessup ("Reggie"), filed a complaint on 28 March 2012, alleging injury from the accident and medical expenses of $81,087.44. Randall's automobile insurance carrier tendered the $30,000.00 amount of its coverage. The 28 March 2012 complaint also included an underinsured motorist claim against an automobile policy ("the policy") of Harley's paternal grandfather, Thurman Jessup ("Thurman"), which was issued by North Carolina Farm Bureau Mutual Insurance Company, Inc. ("Plaintiff").

Plaintiff initiated the present action by filing a complaint for declaratory judgment on 25 May 2012. Paschal, as guardian *ad litem* for Harley, along with Reggie, Randall, and Thurman were all named defendants. In Plaintiff's complaint, Plaintiff asked the trial court to rule that Harley was not covered by the policy. Plaintiff moved for summary judgment on 4 October 2012. Harley, through Paschal, along with Reggie, Randall, and Thurman, moved on 30 October 2012 to change venue from Wake County to either Chatham County or Randolph County. The motion for change of venue was denied by order filed 30 November 2012. In an order filed 6 December 2012, the trial court concluded that Harley was "not a resident of [Thurman's] household on April 15, 2009, and [was] therefore not entitled to coverage under the policy[.]" Based upon this conclusion, the trial court granted summary judgment in favor of Plaintiff. Paschal, as guardian *ad litem* for Harley, and Reggie and Thurman ("Defendants") appeal from the 30 October 2012 and the 6 December 2012 orders. Defendant Randall Collins Jessup is not a party to this appeal.

At the time of the accident, Thurman owned multiple houses and several hundred acres of farmland. Thurman and Reggie had owned a house together until the house burned in 2005. Harley lived with Reggie in that house for a short period after she was born. Thurman purchased a house at 6846 Brush Creek Road. ("Brush Creek house") in 1983, and lived there until sometime in the early 2000s. Thurman also purchased a house at 6615 Joe Branson Road ("Branson house") in 1997. The Branson house was approximately one mile from the Brush Creek house, and a person could walk from the Branson house to the Brush Creek house without leaving Thurman's property. Reggie and his children, including Harley, moved into the Branson house shortly after Thurman purchased it. In 2002, Thurman purchased a fifty percent interest in a house owned by his girlfriend, Donna Whitehead ("Ms. Whitehead"), located at 398 Browns Crossroads ("Browns Crossroads house"). After purchasing an interest in the Browns Crossroads house, Thurman spent most of his nights sleeping at either the Browns Crossroads house or the Brush Creek house. On rare occasions, Thurman would sleep at the Branson house.

Most of Thurman's mail, including bank statements, was sent to the Brush Creek house, and that is the address Thurman used for most official business, such as his tax returns and voter registration. The Brush Creek house was also where Thurman kept most of his clothing.

At his deposition, Thurman testified he owned over 100 head of cattle, approximately 4,000 hogs, and about 32,000 chickens, which were housed in different areas around his farm, including the Branson house, the Brush Creek house, and surrounding land. Thurman considered his farm to be a "family farm," and several relatives lived and work on the farm. Reggie lived in the Branson house with Harley and her brothers. Harley had lived primarily at that address since she was a very young child. Thurman paid all the bills associated with the Branson house. Those bills were sent to Thurman's Brush Creek house. Reggie did not pay anything to live in the Branson house. Thurman even paid for Reggie's phone service.

For many years, Thurman had taken continued responsibility for multiple family members, and some people not related to him by blood or marriage. For example, at the time of his deposition, Thurman had two children, not related to either him or Ms. Whitehead, living with him. Thurman had taken the two children in nine years earlier because the children's father was often out of the state for work. When the children's father was in town, Thurman allowed him to stay in one of Thurman's houses free of charge. Ms. Whitehead's daughter and her two

children also lived with Thurman and Ms. Whitehead. Harley and her brothers also lived with Thurman at times. Reggie had ongoing trouble with the law, and spent time in jail or prison on occasion. When Harley could not stay with Reggie due to Reggie's legal problems, she stayed with Thurman, at both the Browns Crossroads house and at the Brush Creek house. Around 2005, Harley spent a year living with Thurman because of Reggie's legal troubles. Thurman was appointed as Harley's guardian for that period of time. Harley's mother was not very involved in Harley's life, and did not appear to provide Harley with material assistance or much guidance.

Thurman testified he supported Harley through "every bit" of her life, providing food, clothes, housing, utilities, phone, and other expenses. Reggie drove a truck that belonged to Thurman and if something was needed for the Branson house, such as a washing machine, Thurman bought it. Thurman testified that when Harley was not living with him, he saw her two or three times a week. Harley testified she saw Thurman almost every day. Thurman had keys to all his houses, and felt free to enter them at any time. If Harley needed to go to the doctor or dentist, Thurman took her. When questioned at his deposition, Thurman agreed that Reggie, Harley, and her brothers were all a part of his household.

Plaintiff filed its complaint for declaratory judgment on 25 May 2012 and requested that the trial court "declare whether [Plaintiff's] UIM policy issued to Defendant Thurman Jessup [was] applicable to the claim of Harley Jessup." Harley, through Paschal, and Reggie, answered Plaintiff's complaint on 3 August 2012, and counterclaimed, asking that the trial court "declare the UIM policy issued to defendant Thurman Jessup applicable to the claims of Harley and Reggie arising from the accident on or about April 15, 2009." Plaintiff filed a motion for summary judgment on 4 October 2012. Defendants filed a motion on 30 October 2012 to change venue from Wake County to either Chatham County or Randolph County. The trial court denied Defendants' motion to change venue by order filed 30 November 2012. In an order entered 6 December 2012, the trial court granted Plaintiff's motion for summary judgment, ruling that Harley "was not a resident of the Defendant Thurman Jessup's household on April 15, 2009, and [was] therefore not entitled to coverage under the policy of UIM insurance issued by the Plaintiff to Defendant Thurman Jessup[.]" Defendants appeal.

I.

The issues in this appeal are whether (1) the trial court erred in denying Defendants' motion to change venue and (2) the trial court

erred in granting summary judgment in favor of Plaintiff by ruling that Harley was not a resident of Thurman's household. We affirm in part and reverse and remand in part.

II.

[1] Defendants acknowledge that Wake County was a proper venue for this action. However, Defendants argue the trial court abused its discretion by not changing venue to either Chatham County or Randolph County "for the convenience of witnesses and the promotion of justice." We disagree.

The trial court is given broad discretion when ruling on a motion to change venue for the convenience of witnesses:

> "'[T]he trial court may change the place of trial . . . [w]hen the convenience of witnesses and the ends of justice would be promoted by the change.'" However, the court's refusal to do so will not be disturbed absent a showing that the court abused its discretion. The trial court does not manifestly abuse its discretion in refusing to change the venue for trial of an action pursuant to subdivision (2) of [N.C. Gen. Stat. § 1-83] unless it appears from the matters and things in evidence before the trial court that the ends of justice will not merely be promoted by, but in addition demand, the change of venue, or that failure to grant the change of venue will deny the movant a fair trial.
>
> . . . .
>
> In resolving this issue here, we do not set forth a "bright line" rule or test for determination of whether a trial court has abused its discretion in denying a motion to change venue. Rather, the determination of whether a trial court has abused its discretion is a case-by-case determination based on the totality of facts and circumstances in each case.

United Services Automobile Assn. v. Simpson, 126 N.C. App. 393, 399-400, 485 S.E.2d 337, 341 (1997) (citations omitted). Defendants fail to demonstrate that the trial court's discretionary ruling denying their motion to change venue denied them a fair trial, or that the ends of justice demanded a change of venue. Defendants simply argue that "it [was] more convenient for [Defendants] to litigate this action in either Randolph or Chatham County rather than Wake County." According to Defendants' motion to change venue, "Plaintiff's principal office is in

Wake County, North Carolina and it conducts business in said county." Chatham County borders Wake County, and the courthouses in these two counties are not separated by great distances.

Though Randolph or Chatham County may be a more convenient forum for Defendants, Wake County appears to be a more convenient forum for Plaintiff, and we find no abuse of discretion in the trial court's order denying Defendants' motion to change venue from Wake County. This argument is without merit.

III.

[2] Defendants argue the trial court erred in granting summary judgment in favor of Plaintiff because Harley was covered under the policy. We agree.

Although this is an action for declaratory judgment, because it was decided by summary judgment, we apply the standard of review applicable to summary judgment.

> Summary judgment is appropriate where "there is no genuine issue as to any material fact" and "any party is entitled to a judgment as a matter of law." In ruling on a motion for summary judgment, "the court may consider the pleadings, depositions, admissions, affidavits, answers to interrogatories, oral testimony and documentary materials." All such evidence must be considered in a light most favorable to the non-moving party. On appeal, an order allowing summary judgment is reviewed *de novo*.

Howerton v. Arai Helmet, Ltd., 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004) (citations omitted).

This Court reviews a grant of summary judgment *de novo*, and should affirm the trial court's action if our *de novo* review uncovers any basis to support the grant of summary judgment. We agree with the trial court that the dispositive issue is whether the policy issued by Plaintiff covers Harley as a "family member" as that term is defined in the policy.[1] "Part C1" of the policy: "Uninsured Motorists Coverage," states in relevant part:

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1. Plaintiff and Defendants argue about whether Thurman could be considered a resident of 6615 Joe Branson Road. Determination of the place or places where Thurman resided, however, is only relevant to the extent, if any, that it can assist in determining what constituted Thurman's "household."

> We will pay compensatory damages which an **insured** is legally entitled to recover from the owner or operator of an **uninsured motor vehicle** because of:
>
> 1. Bodily injury **sustained by an** insured **and caused by an accident; and**
>
> 2. **Property damage** caused by an accident.
>
> The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the **uninsured motor vehicle**.
>
> . . . .
>
> "**Insured**" as used in this Part means:
>
> 1. You [the named insured] or any **family member.** [(Emphasis in original)].

The policy includes the following definition of "family member:"

> **"Family member"** means a person related to [the named insured] by blood, marriage or adoption who is a resident of [the named insured's] household. This includes a ward or foster child. [(Emphasis in original)].

Resolution of the matter before us depends on whether Harley was "a resident of [Thurman's] household" under the policy. The policy does not define the words "resident" or "household." It is undisputed that Harley is related to Thurman Jessup by blood, and that she lived at 6615 Joe Branson Road at the time of the accident. The determination of whether Harley was also a resident of Thurman's household, however, is more complicated. The word "resident" is "flexible, elastic, slippery and somewhat ambiguous[,]" meaning anything from "a place of abode for more than a temporary period of time" to "a permanent and established home[.]" *Great American Ins. Co. v. Allstate Ins. Co.*, 78 N.C. App. 653, 656, 338 S.E.2d 145, 147 (1986) (citations and quotation marks omitted). This Court has held that when a term,

> if not defined, is capable of more than one definition [it] is to be construed in favor of coverage. . . . . "When an insurance company, in drafting its policy of insurance, uses a 'slippery' word to mark out and designate those who are insured by the policy, it is not the function of the court to sprinkle sand upon the ice by strict construction of the term. All who may, by any reasonable construction

> of the word, be included within the coverage afforded by the policy should be given its protection. If, in the application of this principle of construction, the limits of coverage slide across the slippery area and the company falls into a coverage somewhat more extensive than it contemplated, the fault lies in its own selection of the words by which it chose to be bound."

Fonvielle v. Insurance Co., 36 N.C. App. 495, 497-98, 244 S.E.2d 736, 738 (1978) (citations omitted).

Determinations of whether a particular person is a resident of the household of a named insured are individualized and fact-specific:

> Cases interpreting the phrase, "residents of the same household," as used in insurance policies, are legion. These cases can be divided into two categories: those involving clauses that exclude from coverage members of the insured's household, and those that extend coverage to such persons. Applying the general rule that coverage should be provided wherever, by reasonable construction, it can be, courts have restrictively defined "household" in those cases where members of the insured's household are excluded from coverage. On the other hand, where members of an insured's household are provided coverage under the policy, "household" has been broadly interpreted, and *members of a family need not actually reside under a common roof to be deemed part of the same household.* As pointed out by this court in *Fonvielle v. Insurance Co.*, . . . construction of such terms as "resident" and "household" in favor of coverage may lead to "the seemingly anomalous result" of a very narrow definition under one set of circumstances and a very broad definition under another.

Davis v. Maryland Casualty Co., 76 N.C. App. 102, 105, 331 S.E.2d 744, 746 (1985) (citations omitted) (emphasis added). Not only are relevant facts considered in making this determination, but intent, as well:

> As observed by our courts, the words "resident," "residence" and "residing" have no precise, technical and fixed meaning applicable to all cases. "Residence" has many shades of meaning, from mere temporary presence to the most permanent abode. It is difficult to give an exact or even satisfactory definition of the term "resident," as the

> term is flexible, elastic, slippery and somewhat ambiguous. Definitions of "residence" include "a place of abode for more than a temporary period of time" and "a permanent and established home" and the definitions range between these two extremes. This being the case, our courts have held that such terms should be given the broadest construction and that all who may be included, by any reasonable construction of such terms, within the coverage of an insurance policy using such terms, should be given its protection.
>
> Our courts have also found . . . that in determining whether a person in a particular case is a resident of a particular household, the intent of that person is material to the question.

Great American, 78 N.C. App. at 656, 338 S.E.2d at 147 (citations omitted). A minor may be a resident of more than one household for the purposes of insurance coverage. *Davis*, 76 N.C. App. at 106, 331 S.E.2d at 746 (citation omitted).

We find the particular factual situations in *Davis* and *Great American* instructive for our analysis. In *Davis*, this Court held:

> Applying these general principles to the case *sub judice*, we believe that the minor plaintiff was as much a resident of her insured father's household as that of her mother. While the father maintained a separate residence from that of the mother, the evidence discloses that there existed between the father and the minor plaintiff a continuing and substantially integrated family relationship. We therefore hold that the trial court correctly concluded that the minor plaintiff . . . was a resident of her insured father's household within the meaning of the insurance policy, and is entitled to coverage thereunder.

Davis, 76 N.C. App. at 106, 331 S.E.2d at 747 (citations omitted). The following facts were considered by this Court in *Great American*, where the issue was whether the defendant was a resident of his parents' household for insurance purposes:

> The forecast of evidence before the trial court showed that at the time of the collision, Sean Wale [the defendant] was an emancipated person who was enlisted in the United States Navy and stationed at Norfolk, Virginia. He

enlisted in November of 1979. At the time he enlisted he gave his parents' home address in Salisbury as his home address. During his enlistment, he had no housing other than his military station. Also, during his enlistment, he visited his parents from time to time and, just prior to the April collision, he had completed a 14-day convalescent leave spent at his parents' home and was returning to his base in Norfolk. At the time of the collision, Sean gave the investigating highway patrolman a home address the same as his parents' home address in Salisbury. In June 1982, when asked by an insurance adjuster where he was, Sean answered, "At home," giving his parents' address. After he got out of the service in August of 1982, Sean stayed with his parents for several weeks while he looked for a place to live.

When Sean left to join the Navy, he removed all of his personal belongings from his parents' home. When he visited his parents on leave, he slept on a living room couch and had no bed or dresser of his own. When he enlisted in the Navy, he never intended to return to his parents' home. He did not consider himself to be a resident of his parents' household at the time of the collision. Sean's parents did not consider Sean to be a resident of their household at the time of the collision.

. . . .

The forecast of evidence before the trial court raises a question as to Sean Wale's intent to remain a resident of his parents' household or to assume that status from time to time. Sean's habit of returning to his parents' home for furloughs and leaves and his returning there after discharge from the Navy tends to show an intent to make his parents' home his own. On the other hand, the forecast is complicated by Sean's own statement that he did not intend to return to that residence after his enlistment; this statement tends to show an opposite intent from that shown by his habits and activities. Thus, a material issue of fact has been raised which must be determined by the finder of fact.

Great American, 78 N.C. App. at 655, 656-57, 338 S.E.2d at 146-47 (citations omitted).

In the present case, evidence before the trial court, considered in the light most favorable to Defendants, tends to show that Thurman was the most constant caregiver in Harley's life. Thurman owned the Branson house where Harley was living at the time of the accident. Thurman did not charge any rent for Reggie, Harley, or her brothers to live there. Thurman had a key to the Branson house, and freely entered it whenever he desired. Thurman paid the utility bills for the Branson house, and bought appliances for the house as needed. The Branson house and the Brush Creek house were connected to each other by contiguous land owned by Thurman. Thurman considered these two houses to be part of his farm, which he considered to be a family farm. To this extent, Harley and Thurman could both be considered residents of Thurman's "family farm." Thurman spent much of his time at the Brush Creek house, and had most of his mail, including important documents, delivered to that address.

Though Thurman apparently did not spend many nights at the Branson house, he did see Harley most every day of the week, and he was a regular participant in Harley's life. Thurman was often the one who took Harley to the dentist or doctor. Thurman paid for the vast majority of Harley's expenses, including necessaries such as food and clothing, as well as lifestyle items, such as Harley's prom dress. In addition, when Harley did not have a parent with whom to live because her father was either in prison or otherwise prohibited from living with Harley, and her mother either could not or would not provide housing and support, Harley lived with Thurman. On these occasions, Thurman handled every responsibility, including helping Harley with her schoolwork and taking her to school. For a period of time when Reggie was incarcerated, Thurman was appointed legal guardian of Harley. A few years before the accident, Harley lived with Thurman for a year due to Reggie's legal troubles.

Finally, in the present case, unlike in *Great American*, both Harley and Thurman considered Harley to be a part of Thurman's household. When we consider all the relevant facts, we hold, in light of the very particular circumstances in this case, that Harley was a resident of Thurman's household as defined under the policy at the time of the accident. We reverse the 6 December 2012 order granting summary judgment in favor of Plaintiff and remand for entry of an order declaring that, at the time of the accident, Harley was a "family member," and thus an "insured," pursuant to the UIM policy issued by Plaintiff to Thurman.

Affirmed in part, reversed and remanded in part.

Judges BRYANT and STROUD concur.

SHOPE v. PENNINGTON

[231 N.C. App. 569 (2014)]

DOLORES MARIE SHOPE, PLAINTIFF
v.
RICHARD WAYNE PENNINGTON, DEFENDANT

No. COA13-525

Filed 7 January 2014

1. Divorce—equitable distribution—payments on marital debt—source of funds—findings

The trial court erred in an equitable distribution action by distributing all of defendant's payments toward the marital debt associated with Pennington Farms to defendant without making the proper findings as to the source of the funds used to make those payments. The matter was remanded for additional findings and for amendment of the distribution of those payments if necessary.

2. Divorce—equitable distribution—unequal award—payments on marital debt reconsidered

An equitable distribution order was remanded for reconsideration of an unequal award where the credit for payments on marital debt was also to be reconsidered.

Appeal by plaintiff from order entered 14 January 2013 by Judge Jacquelyn L. Lee in Lee County District Court. Heard in the Court of Appeals 23 October 2013.

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

Doster, Post, Silverman, Foushee & Post, P.A., by Jonathan Silverman, for defendant-appellee.

HUNTER, Robert C., Judge.

Plaintiff Dolores Shope appeals from an amended equitable distribution order. On appeal, plaintiff argues that the trial court erred by failing to properly distribute the payments defendant made toward the marital debt associated with Pennington Farms and by awarding an unequal distribution in favor of defendant. After careful review, pursuant to *Bodie v. Bodie*, __ N.C. App. __, __, 727 S.E.2d 11, 15 (2012), we reverse the trial court's amended equitable distribution order and remand for additional findings.

Background

Plaintiff and defendant married on 21 November 2002, separated 28 May 2009, and subsequently divorced. At the time of trial, plaintiff was 71 years old, and defendant was 72. Plaintiff worked as a manager at McDonald's in Spring Lake, North Carolina and earned approximately $10.00 per hour. In addition, she received $1,419.40 each month in social security benefits and $282.95 per month from her pension. Defendant operated Pennington Farms, a poultry business located in Carthage, North Carolina. His approximate average monthly gross income was $1,977.00—$1,275.00 earned from the operation of Pennington Farms and $702.00 in social security benefits. It is uncontroverted that the Pennington Farms's business, assets, and liabilities were marital property with the exception of the real property on which the business is located. The real property is defendant's separate property.

On 3 November 2011, the parties entered into an amended pretrial order that identified all the property and debts subject to equitable distribution. In regards to marital debt, the parties agreed that plaintiff had made payments of $11,841.84 towards marital debt associated with a vehicle. Defendant had paid $511,522.69 toward marital debt associated with Pennington Farms after the date of separation from funds "generated from Pennington Farms."

On 10 and 17 November 2011, the trial court held a hearing on the issue of equitable distribution. On 10 May 2012, the trial court entered an equitable distribution order, ultimately determining that an unequal distribution in favor of plaintiff was equitable. In that order, the trial court made the following, pertinent, conclusion:

> 33. That neither party presented evidence as to divisible property and therefore no divisible property is identified, classified, valued or distributed. Plaintiff solely paid the debt for her vehicle (Item 103) after date of separation; however, the decrease in this debt is due to the postseparation actions of [p]laintiff and is not treated as divisible property or debt. Defendant solely paid the marital debts listed in 30B above after date of separation; however the decrease in these debts is due to the postseparation actions of [d]efendant and is not treated as divisible property or debt.

With regard to the parties' acts to preserve the marital property, the trial court noted that "[d]efendant has paid $506,903.69 toward marital debts

associated with Pennington Farms after separation and before the date of trial."

On 24 May 2012, plaintiff filed a Rule 59(e) motion requesting the trial court amend its equitable distribution order or, in the alternative, grant a new trial for three basic reasons. First, plaintiff argued that the trial court erred in failing to classify the decrease in the marital debt associated with Pennington Farms as divisible property pursuant to N.C. Gen. Stat. § 50-20(b)(4)(d). Second, plaintiff contended that defendant actually paid a total of $511,522.69 toward the marital debt, not $506,903.69 as the trial court found. Finally, plaintiff argued that the trial court failed to properly value Pennington Farms.

On 14 January 2013, the trial court entered an order partially granting and partially denying plaintiff's Rule 59 motion. The trial court issued an amended equitable distribution order that reclassified the payments defendant made towards the marital debt associated with Pennington Farms as divisible property, revalued those payments to $511,522.69, and distributed all those payments to defendant. The trial court denied plaintiff's request to revalue Pennington Farms. Finally, the trial court considered the factors listed in N.C. Gen. Stat. § 50-20(c) and concluded that an unequal distribution in favor of defendant was equitable.

Plaintiff timely appealed the amended order.

Arguments

[1] Plaintiff first argues that the trial court erred by distributing all of defendant's payments toward the marital debt associated with Pennington Farms to defendant without making the proper findings. Specifically, plaintiff contends that the trial court found that the funds for those payments were "generated" by Pennington Farms, a marital asset. However, plaintiff alleges that the trial court erred by failing to make any findings as to the source of those funds and by refusing to give her any consideration for defendant's use of marital property. Pursuant to *Bodie*, we agree and remand the matter back to the trial court for the making of additional findings of fact identifying the source of the funds defendant used to make those payments and amend its distribution of those payments in accordance with this opinion.

Our standard of review of a trial court's equitable distribution order is well-established:

> 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) (internal citations omitted).

According to N.C. Gen. Stat. § 50–20(b)(4)(d) (2011), divisible property includes "[i]ncreases and decreases in marital debt and financing charges and interest related to marital debt." "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." *Bodi*e, __ N.C. App. at __, 727 S.E.2d at 15 (emphasis added). Our Courts have recognized that a credit may be used as a means to take into consideration a party's postseparation payments on marital debt. *See Wiencek-Adams*, 331 N.C. at 694, 417 S.E.2d at 453. However, "a spouse is entitled to some consideration for any post-separation use of marital property by the other spouse." *Walter v. Walter*, 149 N.C. App. 723, 731, 561 S.E.2d 571, 576-77 (2002). In other words, if a spouse uses marital property to pay down marital debt, the other spouse is entitled to some consideration for that use.

We find guidance from this Court's recent decision in *Bodie*. In *Bodie*, the trial court found that the plaintiff paid $216,000.00 toward the marital debts. *Id.* at __, 727 S.E.2d at 15. However, the trial court failed to properly classify these payments as divisible property or make any findings regarding the source of those funds. *Id.* The Court noted that:

> Plaintiff has not cited any cases, and we know of none, holding that a spouse is entitled to a "credit" for post-separation payments made using marital funds. As a result, in order to properly evaluate the trial court's treatment of post-separation marital debt payments, the source of the funds used to make the payments should be identified.

Id. In other words, pursuant to *Bodie*, defendant would not be entitled to full credit for those payments toward marital debt if those payments were made using marital funds. Thus, in order for us to determine whether the trial court properly distributed those payments to defendant, the source of funds for defendant's payments must be identified.

In its amended equitable distribution order, the trial court found that:

> The [d]efendant has paid $511,522.69 toward marital debts associated with Pennington Farms after the date of separation and before the date of trial as stipulated to in Schedule M of the pretrial order. The funds for these payments came from the [d]efendant *by virtue of his effort in operating Pennington Farms after the date of separation which generated income to pay these debts*. The Court will consider this divisible property, as defined in G.S. 50-20(b)(4) and (d) in its final judgment. This divisible property is assigned to the [d]efendant.

(Emphasis added). Here, unlike *Bodie*, the trial court properly classified the defendant's payment of debts associated with Pennington Farms as divisible property in its amended equitable distribution order. However, the trial court distributed all of those payments, $511,522.69, to defendant without making specific findings as to the source of those funds. While a trial court may distribute payments unequally, *see Stovall v. Stovall*, 205 N.C. App. 405, 413, 698 S.E.2d 680, 686 (2010), plaintiff would be entitled to some consideration of those payments if the source of those funds was marital property. *See Bodie*, __ N.C. App. at __, 727 S.E.2d at 15. Here, the trial court's identification of the source of those funds is ambiguous. However, given that the average monthly gross income defendant earned from the operation of Pennington Farms was $1,275.00, it seems unlikely that defendant was able to generate over half of a million dollars in debt payments solely on income he earned from his work on the farm. In other words, the numbers do not add up. Consequently, the trial court erred in not making clear findings as to the source of these funds and, if the source included defendant's use of the marital property to generate income, in not giving plaintiff any consideration for that use. Therefore, we remand this matter back to the trial court to make additional findings of fact which identify the source of the funds used to pay down the marital debt associated with Pennington Farms and redistribute those payments if necessary.

[2] Next, plaintiff argues that the trial court abused its discretion by entering an amended equitable distribution award in favor of defendant based on exactly the same distributional factors it relied on in its original equitable distribution order which favored plaintiff. Because defendant may not be entitled to a full credit for the payments he made toward the marital debt associated with Pennington Farms, which would factor in the trial court's determination of whether an unequal distribution was equitable pursuant to N.C. Gen. Stat. § 50-20(c), we remand.

Pursuant to N.C. Gen. Stat. § 50–20(c), an equal division of marital property is equitable. "However, a trial court may consider all the factors listed in § 50–20(c) and find that an equal division of marital property would not be equitable under the circumstances." *Petty v. Petty*, 199 N.C. App. 192, 199, 680 S.E.2d 894, 899 (2009).

One of the statutory factors a trial court must consider is the "[a]cts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue or convert the marital property or divisible property, or both, during the period after separation of the parties and before the time of distribution." N.C. Gen. Stat. § 50–20(c)(11a). In the amended equitable distribution order, when the trial court addressed this factor, it found that it favored defendant because he had paid $506,903.69 toward marital debts. Initially, we note that this figure is not consistent with the trial court's findings. Specifically, the trial court found that defendant paid $511,522.69. Additionally, given that defendant may not be entitled to a full credit for these payments, *see Bodie*, __ N.C. App. at __, 727 S.E.2d at 16, it may be necessary for the trial court to reconsider this factor and determine whether an unequal division in favor of defendant is still justified. Thus, we must reverse and remand the amended equitable distribution order back to the trial court for findings consistent with this opinion.

Conclusion

Because the trial court failed to make findings regarding the source of the funds defendant used to pay the marital debt and refused to give plaintiff any consideration for those payments even though the source of those funds may have come from marital property, we reverse and remand the matter back to the trial court to make findings and redistribute those payments if necessary. In addition, we remand the matter back to the trial court to make findings as to whether an unequal distribution in favor of defendant is still equitable in light of our opinion.

REVERSED AND REMANDED.

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

STATE OF NORTH CAROLINA
v.
ALLEGRA ROSE DAHLQUIST

No. COA13-437

Filed 7 January 2014

1. Sentencing—statutory mitigating factors—age or immaturity at time of offense

The trial court did not err in a second-degree murder, conspiracy to commit murder, and attempted murder case by failing to find the statutory mitigating factor that defendant's age or immaturity at the time of the commission of the offense significantly reduced her culpability for the offense. Evidence of planning, actively participating in the crimes on at least two separate dates, and covering her own tracks all tended to negate defendant's claim that she was unable to appreciate her situation or the nature of her conduct.

2. Sentencing—statutory mitigating factors—support system in community

The trial court did not err in a second-degree murder, conspiracy to commit murder, and attempted murder case by failing to find the statutory mitigating factor that defendant has a support system in the community. Testimony demonstrating the existence of a large family in the community and the support of that family alone was insufficient evidence.

3. Criminal Law—invited error—reliance on evidence from co-defendants' trials

The trial court did not err in a second-degree murder, conspiracy to commit murder, and attempted murder case by erroneously relying on evidence obtained from the trial and sentencing hearing of the co-defendants. Defendant invited any alleged error by repeatedly relying on evidence gained from her testimony at one co-defendant's trial and evidence obtained from the other's sentencing hearing in support of her arguments that the trial court should find the existence of mitigating factors.

Appeal by defendant from judgments entered 15 November 2010 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 24 September 2013.

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

Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for defendant-appellant.

McCULLOUGH, Judge.

Defendant Allegra Rose Dahlquist appeals from judgments entered upon pleading guilty to second-degree murder, two counts of conspiracy to commit murder, and attempted murder. Defendant seeks a new sentencing hearing arguing that the trial court failed to find two mitigating factors and that the trial court erroneously relied on evidence obtained from the trial and sentencing hearing of her co-defendants. After careful review, we find no error.

I. Background

On 16 December 2008, defendant Allegra Rose Dahlquist was indicted for murder and conspiracy to commit murder for events that occurred on 30 November 2008. On 9 February 2010, defendant was indicted for attempted first-degree murder and conspiracy to commit first-degree murder for events that occurred on 25 November 2008.

On 13 August 2010, defendant pled guilty to the following: second-degree murder, two counts of conspiracy to commit murder, and attempted murder. As part of defendant's plea agreement, the State agreed to reduce the first-degree murder charge to second-degree murder. Defendant agreed "to cooperate with Wake County investigators and to testify truthfully and consistently with any statement made to investigators if called upon to do so."[1]

At her 13 August 2010 plea hearing, the State proffered the following as a factual basis for the guilty plea: Defendant, Aadil Kahn ("Kahn")[2], Ryan Hare ("Hare") and Drew Shaw ("Shaw") all attended Apex High School and were friends. Defendant and Hare became involved in a romantic relationship. At some point, their relationship ended, and defendant began a romantic relationship with Matthew Silliman ("Silliman"),

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1. Defendant testified at co-defendant Ryan Patrick Hare's trial. *See State v. Hare*, __ N.C. App. __, 722 S.E.2d 14 (2012) (unpublished).

2. Khan pled guilty to second-degree murder, conspiracy to commit murder, attempted first-degree murder, and conspiracy to commit first-degree murder for the events that occurred on 25 and 30 November 2008. *See State v. Khan*, 366 N.C. 448, 449-50, 738 S.E.2d 167, 168-69 (2013).

the victim. Hare was jealous of the relationship between Silliman and defendant. Eventually, defendant and Hare resumed their relationship in November 2008. Hare began to form a plan to kill Silliman. Sometime in mid-November, Kahn was brought into the conspiracy to kill Silliman. Defendant was brought into the conspiracy one or two weeks prior to 25 November 2008.

On the night of 25 November 2008, defendant and Silliman were riding around Apex in defendant's vehicle. They picked up Hare and Kahn in her vehicle. Once they reached a rural road in Wake County, Hare put a zip tie around Silliman's throat in an unsuccessful attempt to strangle him. Kahn had also planned to taser Silliman, but the taser failed to work.

Thereafter, Silliman was taken to an abandoned house owned by defendant's family. Silliman stayed at this house from 25 November 2008 until his death on 30 November 2008.

Silliman remained at the abandoned house during this time period because defendant, Kahn, and Hare had devised a plan and told Silliman that an individual by the name of Roger was "after him and that [Silliman] needed to get out of town, and they were proposing train departure times for him to leave during that week."

On 29 November 2008, defendant participated in digging a grave for Silliman. On 30 November 2008, defendant picked up Shaw from his residence. Kahn and Hare were already with Silliman. Shaw's role involved waiting outside the abandoned house, holding a baseball bat, in the event that Silliman attempted to escape.

Defendant read Silliman tarot cards and an e-mail in an effort to distract him. While Silliman was distracted, Hare came up behind Silliman and hit him with a hammer but the hammer did not faze Silliman.

At this point, Shaw left the abandoned house and defendant took Shaw back to his residence. Defendant then returned to the house, at which time Silliman had been drinking wine mixed with horse tranquilizers. Silliman became "groggy" and started to fall asleep. Silliman's hands were zip tied in front of him and his feet were zip tied together. Duct tape was put over Silliman's mouth and a plastic bag was placed over his head. Defendant placed a zip tie over the plastic bag around Silliman's neck and Hare tightened the zip tie. Silliman's cause of death was suffocation and asphyxiation.

On 2 December 2008, Shaw confessed to his grandmother that he had been involved in this incident and named defendant, Kahn, and Hare as fellow participants.

On 15 November 2010, defendant was sentenced in the aggravated range to two consecutive terms of 180 to 225 months.

The trial court found and defendant admitted to the existence of the aggravating factor that "defendant took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense." The trial court found as mitigating factors that defendant "aided in the apprehension of another felon," "defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer at an early stage of the criminal process," and "defendant has accepted responsibility for the defendant's criminal conduct." The trial court then determined that the aggravating factors outweighed the mitigating factors and that the aggravated sentence was justified.

Defendant did not give notice of appeal at that time. On 17 December 2012, defendant filed a petition for writ of certiorari to this Court. This petition was granted by order entered on 28 December 2012.

II. Discussion

Defendant advances the following issues on appeal: whether the trial court erred by (A) failing to find two statutory mitigating factors and (B) relying on evidence from Hare's trial and Khan's sentencing hearing to impose an aggravated sentence.

A. Mitigating Factors

Defendant argues that the trial court failed to find two statutory mitigating factors: (1) that defendant's "age, or immaturity, at the time of the commission of the offense significantly reduced defendant's culpability for the offense" pursuant to N.C. Gen. Stat. § 15A-1340.16(e)(4) and (2) that "defendant has a support system in the community" pursuant to N.C. Gen. Stat. § 15A-1340.16(e)(18).

(i). Standard of Review

A "[f]inding that a mitigating factor exists is within the trial judge's discretion[.]" *State v. Kinney*, 92 N.C. App. 671, 678, 375 S.E.2d 692, 696 (1989). "[T]he trial judge has wide latitude in determining the existence of aggravating and mitigating factors, for it is he who observes the demeanor of the witnesses and hears the testimony." *State v. Canty*, 321 N.C. 520, 524, 364 S.E.2d 410, 413 (1988) (citation and quotations omitted).

It is well established that "[t]he defendant bears the burden of proof to establish the existence of mitigating factors." *State v. Thompson*, 314 N.C. 618, 625, 336 S.E.2d 78, 82 (1985) (citation omitted).

> [A] trial court must find a statutory mitigating factor if that factor is supported by uncontradicted, substantial, and credible evidence. To show that the trial court erred in failing to find a mitigating factor, the evidence must show conclusively that this mitigating factor exists, i.e., no other reasonable inferences can be drawn from the evidence. Even uncontradicted, quantitatively substantial and credible evidence may simply fail to establish, by a preponderance of the evidence, any given factor in aggravation or mitigation. While evidence may not be ignored, it can be properly rejected if it fails to prove, as a matter of law, the existence of the mitigating factor.

State v. Richardson, 341 N.C. 658, 674-75, 462 S.E.2d 492, 503 (1995) (citations and quotations omitted).

1. N.C. Gen. Stat. § 15A-1340.16(e)(4)

[1] First, defendant argues that the trial court erred by failing to find a mitigating factor when evidence supporting N.C.G.S. § 15A-1340.16(e)(4), that defendant's "age, immaturity, or limited capacity at the time of the commission of the offense significantly reduced the defendant's culpability for the offense[,]" was supported by uncontradicted and substantial evidence. Specifically, defendant argues that she was only seventeen (17) years old at the time of the crimes and that she presented expert testimony as to "her immaturity, coupled with her depression and susceptibility to control by her peers, especially Ryan Hare."

The mitigating factor listed under N.C.G.S. § 15A-1340.16(e)(4) "includes two inquiries – one as to immaturity (or mental capacity) and one as to the effect of such immaturity upon culpability." *State v. Moore*, 317 N.C. 275, 280, 345 S.E.2d 217, 221 (1986) (citation omitted). "[A]ge alone is insufficient to support this factor. By its use of the term 'immaturity,' the General Assembly contemplated an inquiry which is 'broader than mere chronological age' and which is 'concerned with all facts, features, and traits that indicate a defendant's immaturity and the effect of that immaturity on culpability.' " *State v. Barton*, 335 N.C. 741, 751, 441 S.E.2d 306, 312 (1994) (citations and quotation marks omitted). We emphasize that "[i]t is within the trial judge's discretion to assess the conditions and circumstances of the case in determining whether the defendant's immaturity or limited mental capacity significantly reduced culpability." *State v. Holden*, 321 N.C. 689, 696, 365 S.E.2d 626, 630 (1988).

We find *State v. Holden*, 321 N.C. 689, 365 S.E.2d 626 (1988), to be instructive. In *Holden*, a seventeen (17) year old defendant pled guilty

to the second-degree murder of her infant daughter. The defendant argued that the trial court erred by failing to find the statutory mitigating factor that her immaturity or limited mental capacity at the time of the murder significantly reduced her culpability for the offense. *Id.* at 696, 365 S.E.2d at 630. The Supreme Court held that although there was uncontradicted evidence that the defendant had the emotional maturity of a twelve or thirteen year old and that she had a diminished intellectual capacity and an IQ of 70, evidence of "planning, weighing of options, and covering her own tracks tended to negate defendant's claim that she was unable to appreciate her situation or the nature of her conduct." *Id.* at 696-97, 365 S.E.2d at 630. The *Holden* Court held that the trial court did not abuse its discretion in failing to find that the defendant's culpability was reduced by her immaturity or limited mental capacity. *Id.*

In the present case, defendant was seventeen years old at the time of the crimes. Defendant's expert witness Dr. Moira Artigues, an expert in forensic psychiatry, testified that defendant's emotional maturity level was that of an eleven (11) or twelve (12) year old. Dr. Artigues also testified that defendant had trouble academically and socially, was suffering from depression and anxiety, was "smashed down by life," and was "easy prey" for manipulation by Hare. However, similar to *Holden*, the State's summary of the facts conflicted with defendant's contention that her youth and immaturity reduced her culpability for the crime. The State's summary of the facts tended to show that defendant participated in the planning of the events that occurred on 25 November and throughout 30 November 2008. Defendant actively participated in carrying out the murder of Silliman by such actions as distracting him, placing the zip tie around his neck, and assisting in digging a grave for him. Further, after the murder of Silliman, she attempted to cover her tracks by disposing of his belongings and telling Silliman's family that she did not know Silliman's whereabouts. Evidence of planning, actively participating in the crimes on at least two separate dates, and covering her own tracks all "tend[] to negate defendant's claim that she was unable to appreciate her situation or the nature of her conduct." *Holden*, 321 N.C. at 696-97, 365 S.E.2d at 630.

Based on the foregoing, we hold that defendant has failed to meet her "burden of showing that the evidence compels the finding and that no contrary inference can reasonably be drawn." *State v. Colvin*, 92 N.C. App. 152, 160, 374 S.E.2d 126, 132 (1988). Accordingly, we are unable to hold that the trial court abused its discretion in failing to find the mitigating factor pursuant to N.C.G.S. § 15A-1340.16(e)(4). Defendant's argument is overruled.

2. N.C. Gen. Stat. § 15A-1340.16(e)(18)

[2] Next, defendant argues that the trial court erred by failing to find a mitigating factor where there was uncontradicted and substantial evidence presented as to whether defendant had a "support system in the community" pursuant to N.C. Gen. Stat. § 15A-1340.16(e)(18). We disagree.

Defendant directs us to the following testimony of Dr. Artigues in support of her argument:

> [Defendant] has repaired her relationship with her mother and grandmother. Her mother and grandmother have stood by her through all of this and I think that has demonstrated to [defendant] that they love her. She was able to say to me that she was grateful for them one of the last times I visited her, and that was very different from how she had been speaking about her relationship with them before.

Defendant also argues that Dr. Artigues testified that defendant had received psychiatric treatment after her arrest.

While the foregoing evidence supports the conclusion that defendant has restored her relationship with her family – specifically her mother and grandmother – and that defendant has received some psychiatric treatment, the evidence does not speak to the existence of "a support system in the community." In *State v. Kemp*, 153 N.C. App. 231, 569 S.E.2d 717 (2002), our Court held that "[t]estimony demonstrating the existence of a large family in the community and support of that family alone is insufficient to demonstrate the separate mitigating factor of a community support system." *Id.* at 241-42, 569 S.E.2d at 723. Here, the testimony defendant relies on simply fails to establish, by a preponderance of the evidence, the existence of a community support system as a statutory mitigating factor. Thus, we hold that the trial court did not abuse its discretion and defendant's argument is overruled.

B. Evidence Considered during Sentencing Hearing

[3] Next, defendant argues that during her sentencing hearing, the State failed to present any evidence of her role in the offenses and that the trial court erroneously relied on evidence obtained from the trial of her co-defendant Hare and from the sentencing hearing of her co-defendant Khan to impose an aggravated sentence. Defendant contends that because of this error, she is entitled to a new sentencing hearing. We disagree.

Defendant relies on *State v. Benbow*, 309 N.C. 538, 308 S.E.2d 647 (1983), for the contention that a trial court cannot rely on evidence from another proceeding in fashioning a defendant's sentence. In *Benbow*, the defendant and three other co-defendants robbed and murdered an owner of a warehouse on 28 December 1981. The defendant agreed to testify for the State in the trial of his co-defendants in return for acceptance of a plea to second-degree murder. *Id.* at 540, 308 S.E.2d at 648-49. At the defendant's sentencing hearing, the defendant and the State stipulated to a particular set of facts as an accurate narration of the events leading up to the victim's death. *Id.* at 540, 308 S.E.2d at 649. Defendant's evidence in mitigation consisted of the testimony of several witnesses. The State presented no rebuttal evidence and relied on the evidence presented during the trials of the defendant's co-defendants to support the aggravating factors. *Id.* at 543, 308 S.E.2d at 650. The Supreme Court stated the following:

> We emphasize that a defendant's liability for a crime . . . is determined at the guilt phase of a trial or, as in the case *sub judice*, by a plea. At sentencing the focus must be on the offender's individual culpability. It is therefore proper at sentencing to consider the defendant's actual role in the offense as opposed to his legal liability for the acts of others.
>
> . . .
>
> [A]t any sentencing hearing held pursuant to a plea of guilty, reliance on evidence from the trials of others connected with the same offense is improper absent a stipulation. Even with such a stipulation reliance exclusively on such record evidence from other trials (in which the defendant being sentenced had no opportunity to examine the witnesses) as a basis for a finding of an aggravating circumstance may constitute prejudicial error. In such other trials the focus is necessarily upon the culpability of others and not on the culpability of the defendant being sentenced. Thus, by proper stipulation and in the interests of judicial economy, the sentencing judge may consider the evidence from such other trials, but only as incidental to his present determination of defendant's individual culpability as a factor in sentencing.

Id. at 546-49, 308 S.E.2d at 652-54.

In the present case, however, defendant repeatedly relied on evidence gained from her testimony at Hare's trial and evidence obtained from Khan's sentencing hearing in support of her arguments that the trial court should find the existence of mitigating factors:

> [Defendant's Counsel:] I was in the courtroom, just like the Court was, when I heard her testify to it. . . . and while I was sitting there listening to her testify the lawyer part of me was saying, "Oh, my gosh, Allegra, you don't have to be so graphic about yourself," but she was, because she was absolutely, purely honest to this court and to the jury about her responsibility and about what happened, and the truth is she was the only one that was, and the purity of that exists somewhere in the evil of what happened.
>
> . . . .
>
> [Defendant's Counsel:] I have an exhibit. It's Defendant's Exhibit Number 1. . . . This, Your Honor, is a document that was testified to at trial, or at least maybe at the hearing of Mr. Khan[.]
>
> . . . .
>
> [Dr. Moira Artigues (defendant's witness):] To complete my evaluation [of defendant] I looked at selected discovery materials. This case was unique in that I was able to watch much of Ryan Hare's trial on the WRAL archives[.]
>
> . . . .
>
> [Dr. Moira Artigues:] I was able to watch [the prosecutor in Hare's trial's] closing, and in that he summarized the evidence very well, and what [the prosecutor] concluded was that [defendant] had been manipulated by Ryan Hare[.]
>
> . . . .
>
> [Defendant's Counsel:] You heard her testify at the [Hare] trial they were doing the things that they were doing at the end to [Silliman.] [SIC]
>
> . . . .
>
> [Defendant's Counsel:] But Your Honor, I think if you listen to Dr. Artigues, and if you watched her – which I know you did – when she testified, I know you saw the

> raw emotion and reality and honesty that came out of this young woman – I know you saw it.

Based on the foregoing instances, we hold that defendant is precluded from arguing that the trial court's consideration of such evidence in imposing an aggravated sentence amounted to error. Section 15A-1443(c) of the North Carolina General Statutes provides that "[a] defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct." N.C. Gen. Stat. § 15A-1443(c) (2011). "Thus, a defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review." *State v. Hope*, __ N.C. App. __, __, 737 S.E.2d 108, 111 (2012) (citation omitted). Accordingly, defendant has waived his right to appellate review of this issue.

Affirm.

Judges McGEE and DILLON concur.

STATE OF NORTH CAROLINA
v.
ADRIAN TAREL EPPS, DEFENDANT

No. COA13-495

Filed 7 January 2014

Homicide—first-degree murder—failure to instruct on involuntary manslaughter

The trial court did not err in a first-degree murder case by declining to instruct the jury on involuntary manslaughter. The evidence showed that defendant acted voluntarily in stabbing the victim, thus resulting in his death.

Judge HUNTER, Robert C. dissenting.

Appeal by defendant from judgment entered 25 September 2012 by Judge Hugh B. Lewis in Gaston County Superior Court. Heard in the Court of Appeals 26 September 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Amar Majmundar, for the State.

Michael E. Casterline for defendant-appellant.

STEELMAN, Judge.

Where the evidence at trial showed that defendant acted voluntarily in stabbing McGill, resulting in his death, the trial court did not err in declining to instruct the jury on involuntary manslaughter.

I. Factual and Procedural Background

On 6 May 2011, Adrian Tarel Epps (defendant) was hosting a social event at his house. One of the guests was defendant's cousin, who brought her boyfriend, Antwan McGill (McGill). A fight occurred in the yard between defendant and McGill, and defendant was beaten by McGill. Defendant returned to the house by the screen door to the kitchen. McGill followed defendant to the house. When McGill approached the screen door, defendant stabbed him through the door. McGill was dead on arrival at the hospital emergency room. The coroner found McGill's death to have resulted from a single stab wound.

Defendant was charged with first-degree murder. At the jury instruction conference, defendant requested an instruction on the lesser offense of involuntary manslaughter. The trial court denied that request. The trial court instructed the jury on first-degree murder, second-degree murder, and voluntary manslaughter, as well as the defenses of self-defense and the castle doctrine. On 25 September 2012, the jury found defendant guilty of voluntary manslaughter. The jury also found the existence of two aggravating factors. The trial court found defendant to be a prior felony record level IV, and sentenced defendant to an aggravated range sentence of 121-155 months imprisonment.

Defendant appeals.

II. Involuntary Manslaughter

In his sole argument on appeal, defendant contends that the trial court erred in refusing to instruct the jury on the lesser offense of involuntary manslaughter. We disagree.

A. Standard of Review

"[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osori*o, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law

arising on the evidence." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973), *cert. denied*, 418 U.S. 905, 41 L. Ed. 2d 1153 (1974). "[A] trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial." *Id.* "Where jury instructions are given without supporting evidence, a new trial is required." *State v. Porter*, 340 N.C. 320, 331, 457 S.E.2d 716, 721 (1995).

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). In the instant case, defendant contends that the evidence at trial would have permitted the jury to find defendant guilty of involuntary manslaughter and to acquit him of the other homicide charges.

"The elements of involuntary manslaughter are: (1) an unintentional killing; (2) proximately caused by either (a) an unlawful act not amounting to a felony and not ordinarily dangerous to human life, or (b) culpable negligence." *State v. Fisher*, ___ N.C. App. ___, ___, 745 S.E.2d 894, 901 (2013) (quoting *State v. Hudson*, 345 N.C. 729, 733, 483 S.E.2d 436, 439 (1997)). Thus, for the jury to be given an instruction on involuntary manslaughter, there must have been evidence presented to show that (1) defendant lacked intent, and that (2) the action causing McGill's death either (a) did not amount to a felony and was not ordinarily dangerous to human life, or (b) was the result of culpable negligence.

At trial, the evidence presented was that defendant fought with McGill, and that defendant retreated to the kitchen. The evidence further showed that defendant stabbed McGill through the screen door, that the knife had a 10-12 inch blade, that defendant's arm went through the screen door up to the elbow, and that the stab wound pierced McGill's lung and nearly pierced his heart, and was approximately four and one-half inches deep. Defendant contends that he was intoxicated and barely aware of his actions; that he was afraid for his life and acting to fend off an attack; and that his actions were reckless but not intended to cause death.

Defendant relies on *State v. Debiase*, 211 N.C. App. 497, 711 S.E.2d 436, *disc. review denied*, 365 N.C. 335, 717 S.E.2d 399 (2011). In *Debiase*, defendant and the victim, guests at a party, got into an altercation, which concluded with defendant striking the victim with a bottle, inflicting an injury from which the victim eventually died. We held that:

> despite the fact that Defendant acted intentionally at the time that he struck Mr. Lien with the bottle, the evidence contained in the present record is susceptible to the interpretation that, at the time that he struck Mr. Lien, Defendant did not know and had no reason to believe that the bottle would break or that the breaking of the bottle would inflict a fatal wound to Mr. Lien's neck. Death resulting from such a series of events would, under the previous decisions of this Court and the Supreme Court, permit an involuntary manslaughter conviction.

Debiase, 211 N.C. App. at 506, 711 S.E.2d at 442. We held that the trial court erred by declining to instruct the jury on the lesser-included offense of involuntary manslaughter, and remanded for a new trial.

The facts of the instant case are distinct from those in *Debiase*. In *Debiase*, defendant was holding the bottle during the fight. As a result, the jury was permitted to consider the possibility that his use of the bottle was not intentional. In the instant case, however, defendant was not armed with the knife during the fight, nor was defendant involved in an altercation at the time of the fatal stabbing. Sometime after the fight had ended, defendant was in the kitchen, inside of the house, when McGill approached the screen door. Defendant consciously grabbed the knife, which he had not been previously holding, and stabbed McGill through the screen door.

Defendant cites us to numerous other cases with fact patterns similar to the facts in *Debiase*, reaching the same result. In each of those cases, a defendant instinctively or reflexively lashed out, involuntarily resulting in the victim's death. In the instant case, however, defendant's conduct was entirely voluntary. The evidence in the record shows that defendant's conduct was intentional, and that the stabbing was not an action which was (a) not a felony, or (b) resulting from culpable negligence. Based upon our review of the record, we see no evidence which would have merited an instruction on involuntary manslaughter.

We hold that the trial court did not err by refusing to instruct the jury on the lesser-included offense of involuntary manslaughter.

NO ERROR.

Judge BRYANT concurs.

HUNTER, Robert C., Judge, dissenting.

Based on decisions by this Court and our Supreme Court and taking the evidence in the light most favorable to defendant, I believe the evidence would permit a reasonable jury to find defendant guilty of involuntary manslaughter. Consequently, I would conclude that the trial court committed reversible error in failing to charge the jury on involuntary manslaughter and that defendant is entitled to a new trial.

Background

On 6 May 2011, Adrian Epps ("defendant") and his girlfriend, Jamie Vittatoe ("Ms. Vittatoe"), decided to have a small get-together at their home near the town of Stanley, North Carolina. They invited defendant's cousin Anitra Adams ("Ms. Adams") who invited her boyfriend of two months Antwan Rashard McGill ("Mr. McGill"). After Ms. Adams and Mr. McGill arrived, around 8 or 9 that night, Ms. Adams asked if defendant had any orange juice to mix with vodka. Defendant replied that they did not; instead, he cut up lime wedges for her to squeeze into her drinks. Over the course of the evening, the couples drank alcohol and smoked marijuana. While no one was able to definitively establish how much the parties drank, several of the witnesses testified that both defendant and Mr. McGill were quite intoxicated. In fact, one witness testified that defendant was so intoxicated that he was "stumbling" around and fell down twice. Moreover, several witnesses claimed that Mr. McGill got sick in the bathroom from consuming too much alcohol. According to the postmortem toxicology report, Mr. McGill had a blood alcohol level of .16 and a small amount of Xanax in his system.

At some point during the evening, defendant and Mr. McGill began arguing; the witnesses provided contradictory accounts of the altercation. Defendant contended that the argument started when Mr. McGill made a derogatory comment about Ms. Vittatoe. Defendant and Mr. McGill went outside where a physical fight ensued. Defendant claimed that Mr. McGill pulled his legs out from under him and beat him so severely that defendant passed out twice. When defendant woke up the first time during the fight, he felt "dizzy." At this point, while defendant was still on the ground, Mr. McGill kicked him in the face, and defendant stated that it felt like his face "exploded" and his ears began ringing. When he woke up the second time, defendant alleged that he saw Ms. Adams and Mr. McGill sitting in Ms. Adams's car in the driveway. Defendant went back inside his house through a screen door located off a side porch. Defendant stated that he was in severe pain, his head was "killing" him, he felt lightheaded, and his vision was blurry. Defendant

left the outside door propped open because he believed Mr. McGill and Ms. Adams were leaving. When he entered the kitchen, defendant and Ms. Vittatoe began cleaning the blood out of his mouth. Defendant heard footsteps outside on his driveway. He turned and saw Mr. McGill coming toward the screen door. Fearing that Mr. McGill was coming back to hurt him further or to harm Ms. Vittatoe, defendant ran to the screen door and held it shut. During the struggle, defendant claimed he heard Ms. Adams yell something about a gun. At this point, defendant grabbed the knife he had used earlier to cut limes, turned, and stabbed once through the closed screen door. Defendant testified that he "wasn't trying to pay attention to exactly where [he] might hit [Mr. McGill] at, or how hard [he] might've swung the knife, or anything like that." Defendant went on to allege:

> I wasn't trying to gauge I'm going to hit [Mr. McGill] here with [the knife], I'm going to hit him there with it, I'm going to use this much force, I'm not going to use that much force, I'm going to pull back at this moment of that moment. None of that was going through my head. Only thing was going through my head was I need to protect myself. I was in fear for my life that it was going to either be my life or his life.

Ms. Adams and Devan Williams, a friend of Mr. McGill's, took Mr. McGill to the hospital where he was pronounced dead in the emergency room. According to the pathologist who performed the autopsy, Mr. McGill died as a result of excessive bleeding from a single stab wound in his upper chest.

At trial, defendant requested the trial court instruct on involuntary manslaughter. However, the trial court denied his request because involuntary manslaughter did not "apply" and noted defendant's objection for purposes of an appeal. The jury was instructed on first-degree murder, second-degree murder, voluntary manslaughter, and the defenses of self-defense and defense of habitation. The jury found defendant guilty of voluntary manslaughter. The trial court sentenced defendant to a minimum of 121 months to a maximum of 155 months imprisonment. Defendant appealed.

Argument

Defendant's sole argument on appeal is that the trial court committed reversible error by refusing to instruct the jury on involuntary manslaughter. Specifically, defendant contends that although there was contradictory evidence presented at trial, there was sufficient evidence

presented to permit the jury to find him guilty of involuntary manslaughter. Taking the evidence in a light most favorable to defendant, I agree.

"[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). "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). "In determining whether the evidence is sufficient to support the submission of the issue of a defendant's guilt of a lesser included offense to the jury, courts must consider the evidence in the light most favorable to the defendant." *State v. Debiase*, 211 N.C. App. 497, 504, 711 S.E.2d 436, 441 (internal quotation marks omitted), *disc. review denied*, 365 N.C. 335, 717 S.E.2d 399 (2011). Our Supreme Court has noted that "[c]onflicts in the evidence are for the jury to resolve, not this Court" when deciding whether the trial court erred in not submitting an instruction on involuntary manslaughter. *State v. Lytton*, 319 N.C. 422, 427, 355 S.E.2d 485, 488 (1987). "It is reversible error for the trial court to fail to instruct on a lesser offense when evidence has been introduced which supports the finding of such a lesser offense." *State v. Fisher*, 318 N.C. 512, 524, 350 S.E.2d 334, 341 (1986).

Involuntary manslaughter is a lesser included offense of second-degree murder and voluntary manslaughter. *State v. Thomas*, 325 N.C. 583, 591, 386 S.E.2d 555, 559 (1989). Unlike voluntary manslaughter which requires that a defendant have an intent to kill, *see State v. Wilkerson*, 295 N.C. 559, 579, 247 S.E.2d 905, 916 (1978), "involuntary manslaughter can be committed by the wanton and reckless use of a deadly weapon such as a firearm [*see State v. Wallace*, 309 N.C. 141, 305 S.E.2d 548 (1983)] or a knife [*see State v. Fleming*, 296 N.C. 559, 251 S.E.2d 430 (1979)][,]" *State v. Buck*, 310 N.C. 602, 605, 313 S.E.2d 550, 552 (1984).

Here, the evidence, when taken in the light most favorable to defendant, could support a verdict of involuntary manslaughter based on the theory that defendant killed Mr. McGill as a result of his reckless use of the knife. At trial, defendant's own testimony establishes that he was not trying to intentionally inflict a fatal wound; specifically, defendant testified that he was not aiming at any particular area on Mr. McGill's body or consciously using any specific amount of force. Instead, his testimony indicates that he was acting instinctively and reflexively when he grabbed the knife, turned, and made a single stabbing motion toward Mr. McGill through a closed screen door. While it is uncontroverted that

defendant intentionally used the knife, our Supreme Court has made it clear that the element of intent for purposes of manslaughter is whether the defendant intended to inflict a fatal wound, not whether the use of the weapon was intentional. *See Buck*, 310 N.C. at 607, 313 S.E.2d at 553 (concluding that the trial court erred in not submitting the involuntary manslaughter instruction when "[the] defendant was wielding the butcher knife generally to defend against a felonious assault upon him, [but] the actual infliction of the fatal wound, according to [the] defendant, was not intentional"). While the testimony of other witnesses contradicts defendant's testimony concerning his lack of intent to kill Mr. McGill, their testimony does not matter because the trial court must consider the evidence in a light most favorable to defendant. Thus, the conflict in the evidence was for the jury to resolve, not the trial court by refusing to submit the lesser included offense to the jury. Consequently, I believe that defendant's own description of the events coupled with the fact that Mr. McGill was struck only once through a closed screen door during the altercation was enough to warrant the submission of the involuntary manslaughter instruction to the jury.

Unlike the majority, I believe the facts of this case are similar to those of *Debiase*. There, during an altercation, the defendant struck the victim with a beer bottle; although several of the witnesses claimed that the defendant struck him multiple times, defendant alleged to only have hit the victim once. *Debiase*, 211 N.C. App. at 499-501, 711 S.E.2d at 438-39. The victim died as a result of massive blood loss from a "gaping wound" on his neck. *Id.* at 498, 711 S.E.2d at 437-38. The victim also suffered a second, superficial wound on his head. *Id.* The pathologist who conducted the autopsy contended that both wounds could only have come from a broken beer bottle. *Id.* This suggested that the beer bottle broke at some point during the defendant's altercation with the victim.

At trial, the court refused to give an instruction on involuntary manslaughter. This Court reversed, concluding that the evidence, when taken in the light most favorable to the defendant, had the tendency to show that the defendant did not intend to kill or seriously injure the victim. *Id.* at 504, 711 S.E.2d at 441. In order to reach its conclusion, the Court reviewed numerous decisions of both this Court and our Supreme Court noting, in pertinent part, that:

> despite the fact that [the] [d]efendant acted intentionally at the time that he struck [the victim] with the bottle, the evidence contained in the present record is susceptible to the interpretation that, at the time that he struck [the victim], [the] [d]efendant did not know and had no reason to believe

> that the bottle would break or that the breaking of the bottle would inflict a fatal wound to [the victim's] neck.

Id.

Like *Debiase*, I believe that the evidence in the present case was sufficient to support a reasonable conclusion that Mr. McGill's death resulted from defendant's reckless use of the knife. It is uncontroverted that defendant and Mr. McGill had been engaged in a physical altercation which resulted after both had been consuming alcohol and drugs for several hours. Defendant's own testimony suggests that he reacted instinctively when he believed Mr. McGill was coming to hurt either himself or Ms. Vittatoe. In his testimony, defendant claimed that he struck at Mr. McGill without any conscious effort to hit him in any particular way. Moreover, the way in which he wounded Mr. McGill supports his contention that he was acting unintentionally. During the struggle, defendant swung the knife only once through a closed screen door. As a result, I believe the evidence in the present case was "susceptible," *Debias*e, 211 N.C. App. at 504, 711 S.E.2d at 441, to an interpretation that defendant did not intend to inflict a fatal wound when he swung once at Mr. McGill with the knife.

Moreover, I disagree with the majority's conclusion that *Debiase* is distinguishable because: (1) the altercation between Mr. McGill and defendant was over by the time defendant stabbed Mr. McGill; and (2) defendant had not been holding the knife when the fight began but, instead, grabbed it from the table once they were struggling at the door. While the fight between defendant and Mr. McGill had momentarily ceased at the time defendant entered his kitchen and began cleaning his wounds, Mr. McGill resumed his attack by trying to come in defendant's home. In addition, while the majority is correct that the *Debiase* defendant had the bottle in his hand prior to the altercation intensifying, *id.* at 499-502, 711 S.E.2d at 438-440, our Supreme Court has concluded that a defendant who grabs a weapon during the fight may still be entitled to the involuntary manslaughter instruction. *See Buck*, 310 N.C. at 603-604, 313 S.E.2d at 551-52 (holding that a defendant was entitled to an involuntary manslaughter jury instruction when the defendant's testimony was that he "instinctively" grabbed a butcher knife off a table to scare the victim). Thus, as in *Debiase*, defendant produced sufficient evidence for a reasonable jury to find him guilty of involuntary manslaughter, and the trial court erred in not giving the instruction on it.

In so concluding, I am mindful of other cases in which our Courts have held that a defendant was not entitled to an instruction on

involuntary manslaughter when there was no evidence that the killing was unintentional other than the defendant's own claim that he had not meant to kill and his actions were such that "[f]atal consequences were not improbable." *Fisher*, 318 N.C. at 526, 350 S.E.2d at 342. In *Fisher*, the defendant used a hunting knife during a fight and testified that he used it to "indiscriminately cut[] and jab[]" the victim. *Id.* While the defendant contended he was entitled to an instruction on involuntary manslaughter because the victim's death was accidental, this Court disagreed, noting that

> In this case, the defendant admits that he knowingly slashed and stabbed the deceased with a hunting knife. The defendant's use of a knife indicates a clear intent to inflict great bodily harm or death on the deceased. There can be no claim of accidental injury where one knowingly and willingly uses a knife to slash and stab his victim. Fatal consequences were not improbable in light of the defendant's use of his hunting knife in such a manner. As such, the defendant's actions would not fit within the definition of involuntary manslaughter and therefore the defendant would not qualify for such an instruction.

Id. at 525-26, 350 S.E.2d at 342.

Here, however, the manner in which defendant killed Mr. McGill, a single stabbing motion through a closed screen door during a struggle where both parties were intoxicated and defendant claimed to be "dizzy" and in severe pain, supports the theory that Mr. McGill's death was unintentional. In other words, unlike *Fisher* where the defendant's own actions conflicted with his claim that he did not intend to kill the victim, the manner in which defendant used the knife in the present case does not. Fatal consequences were not necessarily probable based on the manner in which defendant used the knife. Thus, I believe the facts at issue here are distinguishable from those cases because the record contains evidence other than defendant's "mere claim of lack of intent," *Debiase*, 211 N.C. App. at 509, 211 S.E.2d at 444, that supports defendant's contention that he did not intend to kill or injure Mr. McGill in any particular way. Consequently, I believe defendant's actions fit within the definition of involuntary manslaughter when the evidence is taken in the light most favorable to defendant.

Conclusion

In summary, while acknowledging that there was contradictory evidence presented at trial, I must respectfully dissent from the majority

as I believe that the trial court erred in not submitting an instruction to the jury on involuntary manslaughter when taking the evidence in the light most favorable to defendant. Thus, I would hold that defendant is entitled to a new trial.

STATE OF NORTH CAROLINA
v.
WALTER ERIC McKINNEY

No. COA13-384

Filed 7 January 2014

Search and Seizure—search warrant—person visiting house later arrested with contraband—probable cause to search house

The trial court erred in a prosecution involving cocaine and marijuana possession by denying defendant's motion to suppress evidence obtained during a search of an apartment occupied by defendant from which a separate defendant who was later arrested was seen entering and exiting within a short period of time. The evidence included in the search warrant application clearly established probable cause that the separate defendant had been involved in a recent drug transaction, but the mere discovery of contraband on an individual does not provide *carte blanche* probable cause to search any location that may be remotely connected to that individual for additional contraband.

Appeal by defendant from judgment entered 8 October 2012 by Judge Patrice A. Hinnant and order entered 11 October 2012 by Judge William Z. Wood, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 25 September 2013.

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

Appellate Defender Staples Hughes, by Assistant Appellate Defender Jon H. Hunt, for defendant-appellant.

CALABRIA, Judge.

Walter Eric McKinney ("defendant") appeals pursuant to N.C. Gen. Stat. § 15A-979(b) (2011) from an order denying his motion to suppress. We reverse.

On 22 April 2012, Officer Christopher Bradshaw ("Officer Bradshaw") of the Greensboro Police Department ("GPD") received a citizen complaint claiming that there was heavy traffic in and out of an apartment located at 302 Edwards Road in Greensboro ("the apartment"). The tip indicated that people who came to the apartment only stayed a short time. The complainant believed the traffic was related to narcotics, in part because the complainant had witnessed individuals exchanging narcotics in the parking lot with the person who lived in the apartment.

After receiving the tip, Officer Bradshaw went to the apartment and conducted surveillance in an unmarked automobile. Shortly thereafter, he observed an individual arrive in an automobile, enter the apartment, and then leave after approximately six minutes. Officer Bradshaw followed the automobile after it departed. Officer Strader of the GPD, who was driving a marked police vehicle, conducted a traffic stop on the automobile on the basis of minor traffic violations.

The individual driving the vehicle was identified as Roy Foushee ("Foushee"), who had a history of narcotics-related arrests. Subsequently, the officers searched Foushee and the automobile and found $4,258 in cash and a gallon-sized plastic bag containing seven grams of marijuana. Foushee was arrested for possession of marijuana. Subsequent to the arrest, Officer Bradshaw also searched Foushee's cell phone and discovered a series of recent text messages between Foushee and an individual named "Chad." Officer Bradshaw believed that these texts were related to a drug transaction.

Based upon the drugs and cash discovered from Foushee and the information gathered during his investigation, Officer Bradshaw obtained a search warrant to search the apartment. The subsequent search revealed that the apartment contained drugs, drug paraphernalia, and firearms. Officer Bradshaw arrested defendant, who was the occupant of the apartment.

Defendant was indicted for trafficking in cocaine, maintaining a dwelling for keeping and selling controlled substances, possession of both cocaine and marijuana with intent to sell and distribute, felony possession of marijuana, and possession of a firearm by a felon. On 7 September 2012, defendant filed a pretrial motion to suppress the evidence obtained from the search of the apartment, contending that the

warrant obtained by Officer Bradshaw for that search was not supported by probable cause. After a hearing, the trial court denied the motion.

Defendant then entered into a plea agreement whereby the State dismissed the charges of trafficking cocaine and felony possession of marijuana in exchange for defendant's guilty plea to the remaining charges. As part of the plea agreement, defendant specifically reserved his right to appeal the trial court's denial of his motion to suppress. The trial court consolidated all of defendant's charges for judgment and sentenced him to a minimum of 11 months to a maximum of 23 months in the North Carolina Division of Adult Correction. Defendant appeals.

Defendant's sole argument on appeal is that the trial court erred in denying his motion to suppress the evidence obtained during the search of the apartment. Specifically, defendant contends that the warrant obtained by Officer Bradshaw to search the apartment was not supported by probable cause. We agree.

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

Pursuant to N.C. Gen. Stat. § 15A-244, an application for a search warrant must contain "[a]llegations of fact supporting the statement. The statements must be supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe that the items are in the places or in the possession of the individuals to be searched[.]" N.C. Gen. Stat. § 15A-244(3) (2011). "Probable cause need not be shown by proof beyond a reasonable doubt, but rather [by] whether it is more probable than not that drugs or other contraband will be found at a specifically described location." *State v. Edwards*, 185 N.C. App. 701, 704, 649 S.E.2d 646, 649 (2007). "In determining . . . whether probable cause exists for the issuance of a search warrant, our Supreme Court has provided that the 'totality of the circumstances' test . . . is to be applied." *State v. Witherspoon*, 110 N.C. App. 413, 417, 429 S.E.2d 783, 785 (1993) (citations omitted).

> The standard for a court reviewing the issuance of a search warrant is whether there is substantial evidence in the record supporting the magistrate's decision to issue

> the warrant. [T]he duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for . . . conclud[ing] that probable cause existed.

State v. Torres-Gonzalez, ___ N.C. App. ___, ___, 741 S.E.2d 502, 507 (2013) (internal quotations and citations omitted).

In the instant case, Officer Bradshaw's application for a search warrant for defendant's apartment, which was incorporated by reference into the trial court's order denying defendant's motion to suppress, was essentially based upon the following evidence: (1) an anonymous citizen's complaint that the complainant had previously observed suspected drug-related activity occurring at and around the apartment; (2) a brief investigation of that complaint in which Officer Bradshaw witnessed Foushee come to the apartment and then leave after six minutes; (3) the arrest of Foushee, who had a history of narcotics arrests, shortly after he had left defendant's apartment, due to the discovery of a mostly-empty bag of marijuana and a large amount of cash; and (4) text messages between Foushee and an individual named Chad proposing a drug transaction. Defendant contends that the trial court erred by concluding that this evidence established the existence of probable cause.

The evidence included in Officer Bradshaw's search warrant application clearly establishes probable cause that Foushee had been involved in a recent drug transaction. However, the determinative question in this case is whether the application provided a substantial basis to allow the magistrate to conclude that there was probable cause of illegal drugs *at defendant's apartment*. *See Edwards*, 185 N.C. App. at 704, 649 S.E.2d at 649 (Probable cause requires a showing that "it is more probable than not that drugs or other contraband will be found *at a specifically described location*." (emphasis added)).

Our Courts have previously analyzed search warrant applications based upon information similar to Officer Bradshaw's application in the instant case in order to determine if probable cause to search a specific location had been established. In *State v. Campbell*, law enforcement obtained a warrant to search the defendant's residence based upon an affidavit stating that that affiant had probable cause to believe the residence contained drugs. 282 N.C. 125, 130, 191 S.E.2d 752, 756 (1972). To support this statement, the affidavit specifically noted that the affiant possessed narcotics-related arrest warrants for three individuals who were known to sell drugs and that all three of those individuals lived in the location to be searched. *Id.* Our Supreme Court held that the search warrant did not establish probable cause to search the subject premises:

> The affidavit implicates those premises *solely as a conclusion of the affiant.* Nowhere in the affidavit is there any statement that narcotic drugs were ever possessed or sold in or about the dwelling to be searched. Nowhere in the affidavit are any underlying circumstances detailed from which the magistrate could reasonably conclude that the proposed search would reveal the presence of illegal drugs in the dwelling. The inference the State seeks to draw from the contents of this affidavit--that narcotic drugs are illegally possessed on the described premises--does not reasonably arise from the facts alleged.

Id. at 131, 191 S.E.2d at 757.

In *State v. Crisp*, law enforcement also obtained a search warrant to search the defendants' residence based upon an affidavit stating that the affiant had probable cause to believe the defendants had drugs on the property. 19 N.C. App. 456, 457, 199 S.E.2d 155, 155 (1973). To support this statement, the affiant stated that: (1) he had conducted a traffic stop of an individual who lived at the residence and discovered marijuana, both on his person and in his vehicle; and (2) he had conducted surveillance on the residence for a period of three to four months, during which time he observed heavy traffic entering and leaving at all times of the day and night. *Id.* at 457-58, 199 S.E.2d at 156. Relying upon the previously-quoted language in *Campbell*, this Court held that the warrant did not establish probable cause to search the defendants' residence. *Id.* at 458, 199 S.E.2d at 156.

Finally, in *State v. Hunt*, law enforcement obtained a warrant to search the defendant's residence based upon the following facts: (1) law enforcement had received "constant complaints" from citizens regarding narcotics sales at the residence; (2) the complaints specifically noted that there was consistent traffic at the residence whereby incoming vehicles would conduct a short drug transaction, either inside or in front of the residence, and then leave; and (3) the affiant conducted surveillance for one day based upon the complaints and observed numerous vehicles come to the residence, stay about five to eight minutes, and then leave. 150 N.C. App. 101, 102-03, 562 S.E.2d 597, 599 (2002). This Court once again held that the application for the warrant failed to establish probable cause to search the defendant's residence:

> All that the affidavit offers are complaints from citizens suspicious of drug activity in a nearby house. There is no mention of anyone ever seeing drugs on the premises. The

> citizens only reported heavy vehicular traffic to the house. The officer verified the traffic. His verification, as the trial court found, was not a conclusion. What was a conclusion was the determination of the officer, based on his experience and the vehicular traffic, that drug trafficking was taking place. "The inference the State seeks to draw from the contents of this affidavit does not reasonably arise from the facts alleged." *Crisp*, 19 N.C. App. at 458, 199 S.E.2d at 156.

Id. at 107, 562 S.E.2d at 601.

Officer Bradshaw's application in the instant case cannot be materially distinguished from the defective search warrant applications in *Campbell*, *Crisp*, and *Hunt*. His affidavit stated, in relevant part:

> Around 4-22-2012 I received a citizen complaint for 302 Edwards Rd Apt C, Greensboro NC. The citizen advised that there was heavy traffic in and out of this apartment. They advised the traffic made short stays and believed it was narcotic related. They stated that they had actually seen narcotics changing hands in the parking lot with the resident of that apartment.
>
> On 4-22-2012 I established surveillance on the apartment. At 1241 hours I observed a red Pontiac, NC tag ALW-2397 arrive at the apartment. The driver exited the vehicle and entered the apartment. At 1247 hours the driver returned to the vehicle and left the area. A traffic stop was conducted on the vehicle for a violation of a chapter 20 law. During the investigation the driver was arrested for marijuana. He was also in possession of $4258 US currency. The driver, Roy Foushee, had a history of narcotics arrests. The marijuana was found in a large bag and was almost empty.
>
> I searched the driver's cell phone incident to arrest. Looking through his text messages I read several open messages. Most of the messages were related to the sale of narcotics. The last messages that were sent before the traffic stop were from Chad, 910-571-8959..
>
> > Chad- Bra when you come out to get the money can you bring a fat 25. I got the bread-
> >
> > 1212pm

> -can you bring me one more bra
>
> ME- about 45
>
> Chad- ight
>
> Through my training and experience I believe that Mr. Foushee delivered marijuana to the residents at 302 Edwards Rd Apt C.
>
> Based upon the facts described above and my training and experience, I believe that there is probable cause that items to be seized, particularly controlled substances in violation of GS 90-95, and other items listed herein, are in the premises to be searched, as described herein.

This information is insufficient to establish probable cause to search defendant's apartment. Just as in the previous cases, Officer Bradshaw's affidavit "implicates [defendant's] premises *solely as a conclusion of the affiant*." *Campbell*, 282 N.C. at 131, 191 S.E.2d at 757. Neither Officer Bradshaw nor the anonymous citizen ever witnessed any narcotics in or about the apartment. While Officer Bradshaw specifically saw Foushee enter and exit the apartment prior to his arrest, there is nothing in his affidavit which suggests that he saw Foushee carry marijuana or anything else inside or that he brought anything back out upon his exit, despite Officer Bradshaw's conclusion that Foushee was making a delivery at that time. Moreover, while the text messages recovered from Foushee's phone suggest that he recently engaged in a narcotics transaction with an individual named Chad, Chad is never identified or connected with defendant's apartment in any way. Ultimately, "[t]he inference the State seeks to draw from the contents of this affidavit–that narcotic drugs are illegally possessed on the described premises–does not reasonably arise from the facts alleged." *Id.* Thus, the search warrant used to search defendant's apartment was defective because it was not supported by probable cause.

Nonetheless, the State contends that Officer Bradshaw's affidavit was sufficient to provide probable cause under this Court's decision in *State v. McCoy*, 100 N.C. App. 574, 397 S.E.2d 355 (1990). In *McCoy*, law enforcement officers conducted two controlled drug buys between an informant and the defendant in two different hotel rooms, but the defendant vacated the premises before search warrants could be obtained and executed. 100 N.C. App. at 576-77, 397 S.E.2d at 357. Noting that "North Carolina case law supports the premise that firsthand information of contraband seen in one location will sustain a finding to search

a second location," this Court held that there was probable cause to search a third hotel room which was registered to the defendant:

> The facts here show that a suspect, previously convicted of selling drugs, had within a ten-day period rented three different motel rooms, each time for several days, in a city in which he had a local address, and that at two of those locations he had sold cocaine. Based on these facts, it was reasonable to infer that when the suspect occupied the third room, he still possessed the cocaine.

Id. at 578, 397 S.E.2d at 357-58. While the State correctly cites the *McCoy* Court's holding that contraband in one location can create probable cause to search a second location, it misrepresents the breadth of this holding. As both *Campbell* and *Crisp* demonstrate, the mere discovery of contraband on an individual does not provide *carte blanche* probable cause to search any location that may be remotely connected to that individual for additional contraband. *See Campbell*, 282 N.C. at 130-31, 191 S.E.2d at 756-57 (discovery of contraband during traffic stop of the defendant insufficient to provide probable cause to search the defendant's residence) and *Crisp*, 19 N.C. App. at 457-58, 199 S.E.2d at 156 (same). Instead, the State must still establish a reasonable nexus between the discovered contraband and the new location sought to be searched. While in *McCoy*, the State was able to adequately connect the defendant's very recent possession of cocaine in two nearby hotel rooms to the potential contraband in a third room at the same hotel, the mostly empty marijuana bag found on Foushee in the instant case has a much more tenuous connection to defendant's apartment which is insufficient to establish probable cause to search that location. Thus, we find the *McCoy* Court's holding inapplicable to this case.

Pursuant to *Campbell*, *Crisp*, and *Hunt*, we hold that the search warrant for defendant's apartment was not supported by probable cause. Accordingly, the trial court erroneously denied defendant's motion to suppress the evidence uncovered as a result of that search. The trial court's denial of that motion is reversed.

Reversed.

Judges ELMORE and STEPHENS concur.

STATE OF NORTH CAROLINA
v.
JAMAL ANTONIO McRAE

No. COA13-422

Filed 7 January 2014

Kidnapping—underlying felony—larceny—insufficient evidence

The trial court erred by denying defendant's motion to dismiss the charge of first-degree kidnapping. State alleged the specific felony of larceny as the basis for the first-degree kidnapping, but the State failed to prove each element of the larceny, specifically, the value of the goods stolen.

Appeal by defendant from judgment entered 3 September 2012 by Judge Thomas H. Lock in Robeson County Superior Court. Heard in the Court of Appeals 21 October 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Kay Linn Miller Hobart, for the State.

Law Office of Glenn Gerding, by Glenn Gerding for defendant-appellant.

STEELMAN, Judge.

Where the State alleged a particular felony as the basis for first-degree kidnapping, and then failed to prove the elements of that felony, the State failed to present evidence of each element of first-degree kidnapping. The trial court erred in denying defendant's motion to dismiss the kidnapping charge.

I. Factual and Procedural Background

On 26 March 2009, J.M., a 17 year-old high school student, was in her vehicle at a Burger King restaurant. Two men approached her vehicle. One of them, a black man who J.M. identified as Jamal McRae (defendant), was holding a small black handgun. At defendant's urging, J.M. moved into the passenger seat, and defendant climbed into the driver's seat. Another man got into the back seat of the vehicle. Held at gunpoint, J.M. gave defendant directions to go to Fayetteville. Later, at gunpoint, defendant forced J.M. to sexually gratify him. Defendant later forced J.M.

into the trunk of the vehicle, and drove around for 30-45 minutes. J.M. found the trunk release and when she heard the speaker for a drive-through, she got out of the trunk and ran into the Burger King.

Defendant was charged with one count of first-degree rape, two counts of first-degree sexual offense, one count of first-degree kidnapping, one count of robbery with a dangerous weapon, one count of conspiracy to commit robbery with a dangerous weapon, one count of conspiracy to commit kidnapping, and one count of assault with a deadly weapon with intent to kill. At the close of State's evidence, and then the close of all of the evidence, defendant made a motion to dismiss the charges against him. The trial court denied these motions. Defendant was found guilty of all counts. The jury also found four aggravating factors. The trial court arrested judgment on the conviction for conspiracy to commit second-degree kidnapping, and sentenced defendant to the following aggravated active sentences: (1) 420-513 months imprisonment for first-degree rape; (2) 420-513 months for two consolidated first-degree sexual offenses; (3) 144-182 months for first-degree kidnapping; (4) 120-153 months for robbery with a firearm; and (5) 36-53 months for the consolidated charges of assault with a deadly weapon with intent to kill and conspiracy to commit robbery with a firearm. All of these sentences were to run consecutively. The trial court further ordered defendant to register as a sex offender, and to be subject to satellite-based monitoring for the rest of his life.

Defendant appeals.

II. Motion to Dismiss

In his sole argument on appeal, defendant contends that the trial court erred in denying his motion to dismiss the charge of first-degree kidnapping. We agree.

A. Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

" 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

B. Analysis

The indictment charging defendant with first-degree kidnapping alleged that defendant confined, restrained, and removed J.M. from one place to another "for the purpose of facilitating the commission of a felony, larceny of a motor vehicle." Defendant contends that the State failed to present evidence of each element of this underlying felony, and therefore failed to satisfy each of the elements of the offense of first-degree kidnapping.

The State is not required to set forth in an indictment for kidnapping the specific felony that the kidnapping facilitated. *State v. Yarborough*, 198 N.C. App. 22, 26, 679 S.E.2d 397, 403 (2009), *cert. denied*, 363 N.C. 812, 693 S.E.2d 143 (2010). However, "[w]hen an indictment alleges an intent to commit a particular felony, the state must prove the particular felonious intent alleged." *Id.* at 27, 679 S.E.2d at 403 (quoting *State v. White*, 307 N.C. 42, 48, 296 S.E.2d 267, 270 (1982)).

For a larceny to be a felony, the value of the goods stolen must exceed $1,000; otherwise, the larceny is a misdemeanor. N.C. Gen. Stat. § 14-72(a) (2011). Therefore, the value of the goods stolen is an integral element of the crime of felony larceny. *See State v. Owens*, 160 N.C. App. 494, 500, 586 S.E.2d 519, 523-24 (2003).

In the instant case, defendant was charged with the robbery of J.M.'s motor vehicle under the robbery with a dangerous weapon charge. In that indictment, the State alleged that the vehicle had a value of approximately $2,500. However, at trial, the State presented no evidence of the value of the vehicle. Thus, at the close of the its evidence, the State had failed to present evidence of intent to commit felony larceny. The charge of first-degree kidnapping explicitly stated that the kidnapping was for the purpose of felicitating felony larceny, not robbery with a firearm which would not have required proof of the value of the vehicle. The State failed to present evidence of all of the elements of felony larceny, which was necessary to support a conviction of first-degree kidnapping. We therefore hold that the trial court erred in denying defendant's motion to dismiss the charge of first-degree kidnapping.

We reverse defendant's conviction for first-degree kidnapping, and remand these cases to the trial court for resentencing. Since defendant does not contest his other convictions on appeal, we hold that there was no error as to these convictions. N.C. R. App. P. 28(b)(6).

NO ERROR IN PART, REVERSED AND REMANDED IN PART.

Chief Judge MARTIN and Judge DILLON concur.

STATE v. MINYARD

[231 N.C. App. 605 (2014)]

STATE OF NORTH CAROLINA
v.
JAMES ALLEN MINYARD

No. COA13-377

Filed 7 January 2014

1. Sexual Offenses—attempted first-degree sexual offense—motion to dismiss—sufficiency of evidence—overt acts

The trial court did not err by denying defendant's motion to dismiss the charge of attempted first-degree sexual offense. Taken in the totality of the circumstances, the victim's statements provided circumstantial and substantive evidence such that a jury could believe that defendant intended to commit a first-degree sexual offense against the minor child and that overt acts were taken toward that end.

2. Indecent Liberties—motion to dismiss—sufficiency of evidence—multiple sexual acts—purpose of sexual gratification

The trial court did not err by denying defendant's motion to dismiss five counts of taking indecent liberties with a minor. There was no requirement for discrete separate occasions when the alleged acts were more explicit than mere touchings. Circumstantial evidence given by the victim's family and attending physicians provided the scintilla of evidence necessary for the trial court to find that multiple sexual acts were committed. Further, the victim's statements of defendant's alleged actions provided ample evidence to infer defendant's purpose of obtaining sexual gratification.

3. Constitutional Law—failure to conduct sua sponte inquiry into capacity to proceed—voluntarily ingesting intoxicants—waiver of right to be present

The trial court did not err in a multiple sexual offenses case by failing to conduct a *sua sponte* inquiry into defendant's capacity to proceed after he ingested a large quantity of sedative, hypnotic or anxiolytic medications and alcohol. Because defendant voluntarily ingested these substances in a non-capital trial, he voluntarily waived his constitutional right to be present.

4. Discovery—in camera review—failure to disclose victim's medical records—no exculpatory materials

The Court of Appeals conducted an *in camera* review in a multiple sexual offenses case and concluded that the trial court did

not violate defendant's constitutional rights by refusing to disclose the victim's relevant medical records to defendant. No exculpatory materials existed within the relevant medical records.

Appeal by defendant from judgment entered 16 August 2013 by Judge Jerry Cash Martin in Burke County Superior Court. Heard in the Court of Appeals 10 October 2013.

Attorney General Roy Cooper, by Assistant Attorney Sherri Horner Lawrence, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel Shatz, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

James Allen Minyard ("Defendant") appeals from a 16 August 2013 judgment entered after a jury convicted him of (i) attempted first degree sexual offense; (ii) five counts of taking indecent liberties with a minor; and (iii) attaining habitual felon status. Defendant argues the trial court erred by (i) denying Defendant's motion to dismiss the charge of attempted first degree sexual offense; (ii) denying Defendant's motion to dismiss the five counts of taking indecent liberties with a minor; and (iii) by not conducting a *sua sponte* inquiry into Defendant's capacity to proceed. Defendant also asks this Court to review documents inspected *in camera* by the trial court to determine whether Defendant received all exculpatory materials contained therein. After careful review, we hold the trial court did not err.

I. Facts & Procedural History

A Burke County grand jury indicted Defendant on 14 September 2009 for first degree sexual offense and six counts of taking indecent liberties with a minor, D.B. ("Theodore").[1] Defendant was also indicted as a habitual felon on 13 June 2011. The cases proceeded to a jury trial on 13 August 2012 in Burke County Superior Court. At the close of the State's evidence, the trial court dismissed one count of taking indecent liberties with a minor and the charge of first degree sexual offense and allowed the charge of attempted first degree sexual offense and the five

1. Pseudonyms are used to conceal the identities of the juveniles involved in this case.

counts of taking indecent liberties with a minor to proceed to trial. The jury found Defendant guilty of attempted first degree sexual offense, five counts of taking indecent liberties with a minor, and of attaining habitual felon status. The trial court issued concurrent sentences of 225–279 months imprisonment for attempted sexual offense and 121–155 months for the five counts of taking indecent liberties with a minor. The five sentences were consolidated into a single Class C judgment. Defendant entered written notice of appeal on 21 August 2012. The testimony presented at trial tended to show the following facts.

In February 2008, Defendant began dating Theodore's mother ("Pamela") after meeting on an Internet dating website. Pamela testified that her relationship with Defendant began well: the two spent time together, took trips together, and "had a good time." Pamela has three children: a son who was seven years old at the time of trial ("Phillip"), a daughter who was eleven years old at the time of trial ("Paulina"), and Theodore, who was thirteen years old at the time of trial. Pamela testified that Theodore has an IQ of 64, which "meant that he was mildly mentally retarded." Pamela testified that Defendant also had children at the time she met Defendant, including a six-year-old son ("Daniel") and an infant daughter ("Diana") he saw every other weekend.

Defendant and Pamela's relationship was not physically intimate. Pamela testified that "[a]fter several months I would question him a lot about why he never hugged me, why he never kissed me. We never had any intimacy at all." When asked about the lack of intimacy, Pamela stated that Defendant told her "that he had been hurt in the past and that he had already ruined lives by having children and he didn't want to ruin any more."

During their relationship, Pamela testified that Defendant "seemed to love my boys. He would always ask for the boys to come over and spend the night with [Daniel] and two other little boys that he kept a lot." Pamela testified that Theodore and Phillip spent the evening at Defendant's house "often," and at least one night a month while Pamela attended her scrapbooking club. Pamela spent evenings at Defendant's home "on the weekends he would get his daughter . . . because he said he didn't want to be alone with [Diana] because he never wanted something said . . . about him being alone with his daughter." Pamela testified that during her visits with Defendant, she would "sleep on the couch and [one of the little boys he kept] would sleep in his room with him, or if I slept in his bed then he would put pillows between us from my head to my feet." Defendant and Pamela's relationship lasted eighteen months and ended in July 2009, with Pamela telling Defendant "to make up his

mind about me. If he couldn't be intimate and go further in the relationship, then I – that isn't what I wanted."

In March 2008, Pamela was hospitalized for gastric bypass surgery and gave Defendant power of attorney over her children. Pamela's mother ("Grandmother") stayed with Pamela during her surgery, eventually leaving to see her grandchildren at Defendant's home. Grandmother said Defendant "wouldn't let [her] have [Pamela's] children . . . and he said he was going to call the Law on me." When a member of the sheriff's department arrived at Defendant's house, Grandmother testified that she spoke with the sheriff and left after finding out about the power of attorney. Grandmother testified that she liked Defendant at the start of the relationship with Pamela: "I thought that, you know, because they'd get out and go to those races and, you know, to Pizza Hut and have birthday parties with the kids. And I thought he was all right then."

Pamela testified that Theodore asked to stop going to Defendant's house in December 2008. Pamela said Theodore did not tell her why he wished to stop visiting Defendant at that time. In March 2009, Pamela said Theodore told her Defendant touched him. Pamela asked Defendant about touching Theodore, and Pamela testified that Defendant said he only touched Theodore when he helped bathe him. Theodore was present and Pamela testified that Theodore didn't disagree with Defendant's statement. Pamela also said Theodore was nine at the time and did not need her help bathing at that age. Pamela testified that around that time Theodore "started having nightmares and would wake up saying he was scared" and "would go to the bathroom and say that he was bleeding and that he was hurting." Pamela also testified she saw Theodore's bloody stools "two or three times."

In August 2009, Grandmother was watching Theodore during his summer vacation from school. Theodore began experiencing pain going to the bathroom:

> A. He was at my home. He was staying the week with me, so -- before he went back to school. And he had went to the bathroom and he come in there and said that he was hurting. And I asked him what was wrong. And he said that [Defendant] had hurt him in his behind and --
>
> Q. Did he -- did he say anything more particular than that or was that exactly what he said?
>
> A. He just said he entered -- I can't remember the exact words -- but he entered his bottom, his behind.

Q. All right. Did he say anything about touching his private part?

A. Yeah.

Q. What did he say about that?

A. He said he played with his, his front ends (phonetic).

Q. Okay. And when he told you that what was his demeanor like?

A. He was just crying, upset.

Grandmother called Pamela and asked if Theodore recounted these events to her, and Pamela said he had not. Grandmother called the Burke County Department of Social Services ("DSS"). Grandmother also said she was unaware that Defendant and Pamela were no longer dating at that time. Pamela asked Theodore about Grandmother's statements after Grandmother's phone call:

Q. Okay. Did you ever talk to [Theodore] after that?

A. I did.

Q. About [Defendant] touching him?

A. I did.

Q. What did he tell you?

A. He said that [Defendant] would spit in his hand and pull on his weenie, and that he would make him lay on his side and he would stick his weenie up his butt.

Q. Okay. And what did you do once you heard that?

A. I sent [Defendant] a really bad e-mail.

Q. Okay. And did [Theodore] tell you about how many times that happened?

A. He said five or six times.

Pamela contacted Defendant on 12 August 2009 and asked him to leave her alone. Pamela also stated that Defendant said "he did not want me to take [Phillip] out of his life and that I didn't deserve to have him." Pamela said Defendant began requesting reimbursement for repairs Defendant made to the heat pump on her home and that Defendant filed a lawsuit against Pamela seeking $1,279 in reimbursement for his work on the heat pump.

Pamela spoke with DSS on 18 August 2009, and thereafter took Theodore to the Burke County Child Advocacy Center, known as the Gingerbread House ("Gingerbread House"). Shelley Winters ("Ms. Winters"), a forensic interviewer at the Gingerbread House, interviewed Theodore on 19 August 2009. Ms. Winter's interview with Theodore was entered into evidence and played for the jury. Elizabeth Browning ("Ms. Browning"), a sexual assault nurse examiner, examined Theodore on 21 August 2009. Ms. Browning performed a medical exam where she asked Theodore if he had "any concerns about his body." Ms. Browning said:

> He told me that [Defendant] had put his private in his butt and had touched his wee-wee. He told me that he had spit on his finger and touched his . . . his weenie[.] . . . And he said that when he put it in his butt that it hurt. He said that it was big and hairy. He told me not to tell my mama but I did.

Ms. Browning also observed that Theodore had a healed anal fissure. Ms. Browning noted that this was not abnormal and that a number of causes, such as large bowel movements, could create an anal fissure. Ms. Browning also said Theodore stated that the Defendant would be "mean and whooped me . . . in the bedroom in his -- at his house."

Agent Angeline Mary Bumgarner ("Agent Bumgarner") of the Burke County Sheriff's Office worked as a child sex crimes detective and was assigned Theodore's case. Agent Bumgarner reviewed DSS reports concerning Theodore, reviewed video of Theodore's interview with Ms. Winters, reviewed Ms. Browning's medical report, spoke with Pamela, and charged Defendant with six counts of taking indecent liberties with a minor. Defendant was arrested on 21 August 2009. After arrest, Defendant made a statement that Agent Bumgarner read into evidence:

> "I, [Defendant], want to make the following statement: I started dating [Pamela] on February 8, 2008. I was comfortable with her and her kids and they were comfortable with me. Around the first part of March, 2009, [Pamela] contacted me and said [Theodore] told her that I had touched [Theodore], he wouldn't tell how he was touched. I told [Pamela] that I didn't want to be around her or her kids because I was paranoid because I didn't want to lose my own kids. [Pamela] begged me to come back, she would come over but I wouldn't let [Theodore] stay the night unless she was there. Whenever [Pamela's] kids stayed the night, each one had their own areas to sleep; there was a

> bunk bed, [Diana's] bedroom or the couch. Every now and then [Phillip], would sneek (sic) in my room and sleep and I would tell [Pamela] everytime (sic) that happened. I just had [Pamela] served for work that I did for her and money I used from my company to do the work."

Theodore testified at trial, saying that Defendant touched "[m]y butt and my wiener." When asked what part of Defendant's body touched him, Theodore said "[h]is wiener. His wiener." Theodore stated that Defendant's "wiener" touched his "butt" four or five times in Defendant's bedroom. Theodore testified that Defendant used to spank him with a leather belt and told Theodore not tell anyone about the spanking. When the State's counsel asked "how did his weenie touch your bottom?," Theodore answered that he did not remember how it happened. Theodore said Defendant's "weenie" touching his bottom made him sad. Theodore stated that he told Grandmother about Defendant touching him while he was in the bathtub. Theodore also testified that he spoke to Pamela, Grandmother, and to someone at the Gingerbread House about Defendant touching him.

Defendant moved to dismiss all charges at the close of the State's evidence. The trial court allowed the motion to dismiss the charges of first degree sexual offense and one charge of indecent liberties with a child, but allowed the charges of attempted first degree sexual offense and the remaining five charges of indecent liberties with a minor to proceed.

Defendant recounted positive experiences at the start of his relationship with Pamela, such as taking Pamela's children on road trips to Tweetsie Railroad, Grandfather Mountain, and the Blue Ridge Parkway. Defendant testified that he had diabetes, a prior gastric bypass surgery, and erectile dysfunction that affected his relationship with Pamela "horribly." Defendant testified that he took several types of medication to treat his erectile dysfunction and that "none of it worked." Defendant doubled his dosage "in hopes that, you know, I could give her the one thing that she wanted most in me." Defendant said his erectile dysfunction contributed to his breakup with Pamela. Regarding Theodore's pain using the restroom, Defendant testified that Theodore experienced pain using the restroom, suffered from constipation, and experienced large resulting bowel movements. Defendant testified that he had to remove and repair toilets occasionally after Theodore used the restroom, and that he did not believe Theodore received medication to treat the issue. Defendant also said that Grandmother did not like him from "day one."

Defendant testified about a two-week vacation to Dollywood in Pigeon Forge, Tennessee beginning 1 July 2009. Defendant, Pamela, Theodore, Phillip, Paulina, Daniel, Defendant's brother, and Defendant's brother's girlfriend and her children went on the trip. During the trip, Defendant planned to "stop by the chapel there in Pigeon Forge" and marry Pamela. However, Defendant testified that "the closer the time got to us being in that position, something just scared the socks off me and just said, you know, 'Don't do it.' " Defendant and Pamela's relationship ended shortly after in July 2009. Defendant renewed his motion to dismiss at the close of his case.

After the jury began deliberations, Defendant's counsel notified the court that Defendant was "having a little problem." Defendant was asked to "stay vertical" and the trial court told him:

> [Defendant], you've been able to join us all the way through this. And let me suggest to you that you continue to do that. If you go out on us, I very likely will revoke your conditions of release. I'll order you arrested. We'll call emergency medical services; we'll let them examine you. If you're healthy, you'll be here laid out on a stretcher if need be. If you're not healthy, we will continue on without you, whether you're here or not. So do your very best to stay vertical, stay conscious, stay with us.

Before the jury returned, the trial court received a report that Defendant had "overdosed." One of Defendant's witnesses, Evelyn Gantt, told the court that Defendant consumed eight Xanax pills because "[h]e was just worried about the outcome and I don't know why he took the pills." Defendant's counsel and the State did not wish to be heard on the issue and Defendant's pretrial release was revoked. The sheriff was directed to have Defendant examined by emergency medical services ("EMS"), and Defendant was then escorted from the courtroom. The court then made findings of fact:

> The Court finds Defendant left the courtroom without his lawyer.
>
> The Court finds that while the jury was in deliberation -- the jury had a question concerning an issue in the case -- and prior to the jurors being returned to the courtroom for a determination of the question, the Court directed the Defendant to -- who was in the courtroom at that point -- to return to the Defendant's table with his counsel.

Defendant refused, but remained in the courtroom. The Court permitted that.

The Court noticed that after the question was resolved with the juror, that while the jury was out in deliberations working on Defendant's case, the Defendant took an overdose of Xanax. While he was here in the courtroom and while the jury was still out in deliberations, Defendant became lethargic and slumped over in the courtroom.

. . . .

The Court finds that outside of the jury's presence the Court noted that Defendant was stuporous and refused to cooperate with the Court and refused reasonable requests by bailiffs.

. . . .

The Court finds that Defendant's conduct on the occasion disrupted the proceedings of the Court and took substantial amount of time to resolve how the Court should proceed. The Court finally ordered that Defendant's conditions of pretrial release be revoked and ordered the Defendant into the custody of the sheriff, requesting the sheriff to get a medical evaluation of the Defendant.

The Court finds that Defendant, by his own conduct, voluntarily disrupted the proceedings in this matter by stopping the proceedings for a period of time so the Court might resolve the issue of his overdose.

The Court notes that the -- with the consent of the State and Defendant's counsel that the jurors continued in deliberation and continued to review matters that were requested by them by way of question.

The Court infers from Defendant's conduct on the occasion that it was an attempt by him to garner sympathy from the jurors. However, the Court notes that all of Defendant's conduct that was observable was outside of the jury's presence.

The Court notes that both State and Defendant prefer that the Court not instruct jurors about Defendant's absence. And the Court made no reference to Defendant

> being absent when jurors came in with response to -- or in response to question or questions that had been asked.

After the jury entered its verdict, the trial court amended its statement after EMS indicated that Defendant consumed "fifteen Klonopin" and two 40-ounce alcoholic beverages, which the court inferred were from the "two beer cans . . . found in the back of his truck." Defendant was tried and sentenced as a habitual felon on 16 August 2012. Defendant made a motion to dismiss at the close of evidence in his habitual felon proceeding, which was denied. Defendant timely filed his notice of appeal on 21 August 2012.

II. Jurisdiction & Standard of Review

Defendant appeals as of right from a decision of the trial court. N.C. Gen. Stat. §§ 7A-27(b), 15A-1444(a) (2011).

Defendant raises three issues on appeal. The first issue concerns whether sufficient evidence exists showing Defendant attempted to penetrate Theodore's anus with his penis in violation of N.C. Gen. Stat. § 14-27.4(a)(1) (2011). Defendant argues that insufficient evidence existed and that his motion to dismiss was thus improperly denied. The second issue on appeal is whether sufficient evidence exists to show Defendant committed five counts of indecent liberties with a minor in violation of N.C. Gen. Stat. § 14-202.1(a)(1) (2011). Defendant again argues his motion to dismiss these counts was improperly denied. The first two issues are issues of law, and reviewed *de novo*. *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007). Further:

> A motion to dismiss should be denied if there is substantial evidence of each essential element of the charged offense and substantial evidence that the defendant is the individual who committed it. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The court must consider the evidence in the light most favorable to the State. Furthermore, the State is entitled to every reasonable inference to be drawn from the evidence.
>
> Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. The evidence need only give rise to a reasonable inference of guilt in order for

> it to be properly submitted to the jury for a determination of defendant's guilt beyond a reasonable doubt.

State v. Foreman, 133 N.C. App. 292, 298, 515 S.E.2d 488, 493 (1999) *aff'd as modified*, 351 N.C. 627, 527 S.E.2d 921 (2000) (internal citations and quotation marks omitted). "Any contradictions or discrepancies in the evidence are for the jury to resolve and do not warrant dismissal." *State v. Rasor*, 319 N.C. 577, 585, 356 S.E.2d 328, 334 (1987).

The third issue on appeal is whether the court improperly failed to institute, *sua sponte*, a competency hearing during the trial when Defendant became "stuporous and non-responsive" during the trial. 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.").

Lastly, Defendant asks this Court to review sealed documents provided to the trial court for *in camera* review of Theodore's medical and other records to determine if Defendant received all exculpatory evidence. In *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), the United States Supreme Court held that a defendant accused of sexual abuse of a child may "have confidential records of a child abuse agency turned over to the trial court for *in camera* review and release of material information." *State v. Kelly*, 118 N.C. App. 589, 592, 456 S.E.2d 861, 865 (1995) (citing *Ritchie*, 480 U.S. at 39). If the trial court conducts an *in camera* inspection but denies the defendant's request for the evidence, the evidence should be sealed and "placed in the record for appellate review." *State v. McGill*, 141 N.C. App. 98, 101, 539 S.E.2d 351, 355 (2000) (quoting *State v. Hardy*, 293 N.C. 105, 128, 235 S.E.2d 828, 842 (1977)). Further:

> On appeal, this Court is required to examine the sealed records to determine if they contain information that is both favorable to the accused and material to [either his] guilt or punishment. If the sealed records contain evidence which is both "favorable" and "material," defendant is constitutionally entitled to disclosure of this evidence.

Id. at 101–02, 539 S.E.2d at 355 (quotation and citation omitted). We review the trial court's determination of whether a sealed record contains exculpatory evidence *de novo*. *State v. McCoy*, ___ N.C. App. ___, ___, 745 S.E.2d 367, 370 (2013).

Analysis

i. Attempted First Degree Sexual Offense

[1] Defendant argues the trial court erred by denying his motion to dismiss and allowing the State to present evidence to the jury concerning his first charge, attempted first degree sexual offense. We disagree.

N.C. Gen. Stat. § 14-27.4 (2011) provides:

> (a) A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:
>
> (1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim.

A sexual act is defined as "cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body: provided, that it shall be an affirmative defense that the penetration was for accepted medical purposes." N.C. Gen. Stat. § 14-27.1(4) (2011). "The elements of an attempt to commit any crime are: (1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense." *State v. Miller*, 344 N.C. 658, 667, 477 S.E.2d 915, 921 (1996). The State need not present evidence of an actual attempted penetration, but the evidence presented must be sufficient to show the defendant intended to engage in the completed offense. *State v. Dunston*, 90 N.C. App. 622, 624–25, 369 S.E.2d 636, 638 (1988).

Here, the age requirements are satisfied: Defendant was forty-five years old and Theodore was nine years old in March 2009, when Theodore first spoke of Defendant touching him in the bathtub. We next turn to whether there is a scintilla of evidence showing Defendant's intent. In *State v. Buff*, 170 N.C. App. 374, 612 S.E.2d 366 (2005), the defendant argued the State did not put forward sufficient evidence for an attempted second degree sexual offense. *Id.* at 380, 612 S.E.2d at 371. This Court held substantial evidence existed and affirmed the trial court's denial of the motion to dismiss:

> Waters testified that he observed defendant "[go] down her pants" while fondling L.W.'s breast. He then observed defendant remove L.W.'s pants and touch her "private," which was clarified to mean between her legs, but did not observe him insert anything inside her private. As noted previously, L.W. testified that she never consented to any

> type of sexual conduct with defendant, and sufficient evidence as to L.W.'s physical helplessness was offered. Therefore, when taken in the light most favorable to the State, the evidence presented *showed defendant committed several overt acts*, *including touching L.W.'s breast and vaginal area*, *demonstrating intent to commit a sexual act* against L.W.'s will and without her consent. The evidence, therefore, was sufficient to reach the jury as to the charge of attempted second degree sexual offense.

Id. at 380–81, 612 S.E.2d at 371 (emphasis added).

Here, only Theodore's testimony could be considered when the trial court denied the motion to dismiss. *State v. Ludlum*, 303 N.C. 666, 669, 281 S.E.2d 159, 161 (1981) (noting that corroborative testimony cannot be considered "substantive evidence of the facts stated"). The trial court recognized this and re-stated only Theodore's testimony before denying Defendant's motion to dismiss on attempted first degree sexual offense. Theodore's testimony, taken in the light most favorable to the State, shows Defendant "committed several overt acts . . . demonstrating intent to commit a sexual act." *Buff*, 170 N.C. App. at 380, 612 S.E.2d at 371. The act of placing one's penis on a child's buttocks provides substantive evidence of intent to commit a first degree sexual offense, specifically anal intercourse. *See* N.C. Gen. Stat. § 14-27.1(4); *Buff*, 170 N.C. App. at 380–81, 612 S.E.2d at 371.

Defendant points to testimony showing intent in *State v. Mueller*, 184 N.C. App. 553, 647 S.E.2d 440 (2007). In *Mueller*, the defendant took his victim to secluded areas and would "place his penis between her thighs and move back and forth until he ejaculated on her." *Id.* at 563–64, 647 S.E.2d at 448–49. The defendant in *Mueller* repeated this act over several years and also told the victim "he loved her and wanted to have sex with her." *Id.* This Court held the defendant's actions were sufficient for the trial court to find the evidence of intent required for attempt. *Id.* Defendant argues *Mueller* "sharply" contrasts with the present case; however, the distinction is inappropriate. While the acts in *Mueller* and statements by the defendant clearly show the intent necessary for attempt, so too did the State's evidence in *Buff* where "defendant committed several overt acts, including touching L.W.'s breast and vaginal area, demonstrating intent to commit a sexual act." *Buff*, 170 N.C. App. at 380, 612 S.E.2d at 371. Similarly here, while Theodore did not testify that Defendant stated a desire to engage in anal intercourse with him, Defendant's acts themselves provide evidence of the required intent. Intent may be present in the absence of a fully completed act. *See*

State v. Sines, 158 N.C. App. 79, 85, 579 S.E.2d 895, 899, *cert. denied*, 357 N.C. 468, 587 S.E.2d 69 (2003) (holding the requisite intent existed in an attempted statutory sexual offense where the sexual act did not occur). Thus the first element is satisfied.

The next required element is an overt act. Overt acts are sometimes coupled with demands for sexual acts. For example, in *State v. Henderson*, 182 N.C. App. 406, 642 S.E.2d 509 (2007), "[t]he evidence in the instant case tended to show that defendant removed his pants, walked into the room where his seven-or eight-year-old daughter was seated, stood in front of her, and asked her to put his penis in her mouth." *Id.* at 412–13, 642 S.E.2d at 513–14. This was held to be an overt act satisfying the second element of attempt. *Id.*; *see also Sines*, 158 N.C. App. at 85, 579 S.E.2d at 899 ("Defendant's placement of his penis in front of victim's face, coupled with his demand for oral sex, comprise an overt act[.]").

Theodore's testimony does not include statements that Defendant demanded he perform a sexual act. However, the alleged acts themselves are overt acts exceeding mere preparation and statements of intent are not explicitly required. *Buff*, 170 N.C. App. at 380, 612 S.E.2d at 371 ("[T]he evidence presented showed defendant committed several overt acts, including touching L.W.'s breast and vaginal area, demonstrating intent to commit a sexual act."). Thus, Theodore's testimony that Defendant placed his penis on Theodore's buttocks satisfies the second element of attempt.

Lastly, the third element requires that the attempted crime was not consummated. *Miller*, 344 N.C. at 667, 477 S.E.2d at 921. Here, the trial court noted that only corroborative direct testimony showed Theodore's anus was penetrated by Defendant. However, Theodore's testimony by itself provides evidence of at least a non-consummated "sexual act" and satisfies the evidentiary predicate for the third element of attempt.

Taken in the totality of the circumstances, Theodore's statements provide the circumstantial and substantive evidence such that a jury could believe that Defendant intended to commit **a first degree sexual offense against Theodore and that overt acts** were taken toward that end. We therefore hold the trial court did not err in denying Defendant's motion to dismiss the charge of attempted first degree sexual offense.

ii. Indecent Liberties with a Minor

[2] Defendant next argues the State presented insufficient evidence to support five counts of indecent liberties with a minor. Defendant argues that Theodore's statements that Defendant touched his buttocks

with his penis " 'four or five times' only establishes suspicion or conjecture that there were five touchings and not four." Defendant further argues Theodore's testimony was insufficient to establish the touchings occurred in separate incidents. We disagree.

N.C. Gen. Stat. § 14-202.1 (2011) provides:

> (a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:
>
> (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or
>
> (2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

§ 14-202.1 does not require a completed sex act nor an offensive touching of the victim. "Indecent liberties are defined as such liberties as the common sense of society would regard as indecent and improper. Neither a completed sex act nor an offensive touching of the victim are required to violate the statute." *State v. McClary*, 198 N.C. App. 169, 173, 679 S.E.2d 414, 417–18 (2009) (citations and quotation marks omitted). Further:

> The State is required to show that the action by the defendant was for the purpose of arousing or gratifying sexual desire. A variety of acts may be considered indecent and may be performed to provide sexual gratification to the actor. Moreover, the variety of acts included under the statute demonstrate that the scope of the statute's protection is to encompass more types of deviant behavior and provide children with broader protection than that available under statutes proscribing other sexual acts.
>
> . . . .
>
> The requirement that defendant's actions were for the purpose of arousing or gratifying sexual desire may be inferred from the evidence of the defendant's actions.

Id. at 173–74, 679 S.E.2d at 418 (quotation and citation omitted). Similar to first degree attempted sexual offense, "the crime of indecent liberties

is a single offense which may be proved by evidence of the commission of any one of a number of acts." *State v. Hartnes*s, 326 N.C. 561, 567, 391 S.E.2d 177, 180 (1990).

Here, Theodore, a mildly mentally retarded juvenile, testified that Defendant touched his "butt" with his penis four or five times. These alleged actions are ones that "the common sense of society would regard as indecent and improper." *McClary*, 198 N.C. App. at 174, 679 S.E.2d at 418 (citation and quotation marks omitted). The statute is designed to protect children against a broader range of sexually deviant behaviors and Defendant's alleged conduct falls within that ambit. *See id.*

A further issue is whether five total counts were justified by Theodore's testimony. Defendant argues that the "State must show that the defendant took indecent liberties with the child in separate incidents, rather than as part of a single transaction or occurrence." To support this assertion, Defendant points to *State v. Laney*, 178 N.C. App. 337, 631 S.E.2d 522 (2006), where we held that a defendant who put his hands on a victim's breasts and inside the waistband of the victim's pants were one continuous act of touching and not separate and distinct sexual acts warranting multiple charges. *Id.* at 341, 631 S.E.2d at 524–25. In *Laney*, evidence showed that both touchings occurred on the same evening, 21 January 2004. *Id.* at 341, 631 S.E.2d at 524. Theodore's testimony shows neither that the alleged acts occurred either on the same evening or on separate occasions. However, this Court in *State v. Williams*, 201 N.C. App. 161, 689 S.E.2d 412 (2009) noted that no such requirement for discrete separate occasions is necessary when the alleged acts are more explicit than mere touchings:

> [I]n *State v. James*, 182 N.C. App. 698, 643 S.E.2d 34 (2007), this Court, in distinguishing *State v. Laney*, stated that as opposed to mere touching, "multiple sexual acts, *even in a single encounter*, may form the basis for multiple indictments for indecent liberties." *James*, 182 N.C. App. at 705, 643 S.E.2d at 38. Thus, this Court found that a different analytical path should be applied when dealing with "sexual acts" as opposed to touching in the context of charges of indecent liberties. *Id.*

Id. at 185, 689 S.E.2d at 425 (emphasis added); *see also State v. Coleman*, 200 N.C. App. 696, 706, 684 S.E.2d 513, 520 (2009), *rev. denied*, 364 N.C. 129, 696 S.E.2d 527 (2010).

This Court held, in *State v. Garrett*, 201 N.C. App. 159, 688 S.E.2d 118, 2009 WL 3818845 (2009) (unpublished), that a child's corroborated

testimony that a "defendant *touched* her private part, which she identified as her vagina" was sufficient to show *penetration* in a rape case. *Id.* at *4 (emphasis added). The defendant in *Garrett* argued that the child's testimony was "ambiguous" and showed only touching occurred, rather than penetration. *Id.* Here, similar facts exist: circumstantial evidence given by Theodore's family and attending physicians provide the scintilla of evidence necessary for the trial court to find that multiple sexual acts were committed against Theodore. Theodore's in court testimony describes an adult male touching a child while the child bathed and touching his buttocks with his penis "four or five times." The accusations levied by Theodore's in-court testimony are more properly categorized as distinct sexual acts similar to *James*, rather than mere "touchings" as in *Laney*, and thus the multiple counts can be proper.

Next, the requirement of "purpose of arousing or gratifying sexual desire" may be "inferred from the evidence of defendant's actions." *See* N.C. Gen. Stat. § 14-202.1; *McClary*, 198 N.C. App. at 174, 679 S.E.2d at 418 (citation and quotation marks omitted). Theodore's statements of Defendant's alleged actions provide ample evidence to infer Defendant's purpose of obtaining sexual gratification. *Cf. State v. Creech*, 128 N.C. App. 592, 599, 495 S.E.2d 752, 756 (1998) (holding defendant's actions in giving massages to young boys while wearing only his underwear and the child wearing only shorts were "for the purpose of arousing or gratifying sexual desire").

For the above reasons, we hold the Defendant's motion to dismiss the five counts of taking indecent liberties with a child was properly denied.

iii. Defendant's Capacity to Proceed

[3] Defendant argues that the trial court erred by failing to conduct a *sua sponte* competency hearing after he ingested a large quantity of sedative, hypnotic or anxiolytic medications and alcohol. Because Defendant voluntarily ingested these substances in a non-capital trial, he voluntarily waived his constitutional right to be present. Thus, we disagree with Defendant that a *sua sponte* competency hearing was required and hold the trial court committed no error.

"[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) (quotation marks and citation omitted) (emphasis in original); *see also State v. Whitted*, 209 N.C. App. 522, 527–28, 705 S.E.2d 787, 791–92 (2011)

(holding a defendant was denied a fair trial because the trial court did not inquire *sua sponte* into her competency); *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). N.C. Gen. Stat. § 15A-1001(a) (2011) also requires a competency finding before 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.

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 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).

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). While the trial court's competency findings receive 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; *Whitted*, 209 N.C. App. at 529, 705 S.E.2d at 792 ("[D]efendants can be competent at one point in time and not competent at another.").

The appropriate test for a 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) (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.*

A trial court may also remove a defendant for disruptive conduct pursuant to N.C. Gen. Stat. § 15A-1032 (2011):

> (a) A trial judge, after warning a defendant whose conduct is disrupting his trial, may order the defendant removed from the trial if he continues conduct which is so disruptive that the trial cannot proceed in an orderly manner. When practicable, the judge's warning and order for removal must be issued out of the presence of the jury.
>
> (b) If the judge orders a defendant removed from the courtroom, he must:
>
> (1) Enter in the record the reasons for his action; and
>
> (2) Instruct the jurors that the removal is not to be considered in weighing evidence or determining the issue of guilt.
>
> A defendant removed from the courtroom must be given the opportunity of learning of the trial proceedings through his counsel at reasonable intervals as directed by the court and must be given opportunity to return to the courtroom during the trial upon assurance of his good behavior.

Further, a trial court "has inherent power to take whatever legitimate steps are necessary to maintain proper decorum and appropriate atmosphere in the courtroom during a trial" including removing "an unruly defendant." *State v. Brown*, 19 N.C. App. 480, 485, 199 S.E.2d 134, 137, *appeal dismissed*, 284 N.C. 255, 200 S.E.2d 659 (1973).

"[I]n a non-capital trial, the defendant's right to be present is personal and may be waived." *State v. Forrest*, 168 N.C. App. 614, 622, 609 S.E.2d 241, 246 (2005); *see also State v. Wilson*, 31 N.C. App. 323, 327, 229 S.E.2d 314, 317 (1976) (holding the defendant's action of leaving during the jury charge was a voluntary waiver of his right to be present). Additionally, "[a] defendant is not prejudiced by the granting of relief

which he has sought or by *error resulting from his own conduct*." N.C. Gen. Stat. § 15A-1443(c) (2011) (emphasis added).

Other state and federal courts have addressed the issue of a defendant voluntarily ingesting intoxicants and destroying competency. *See* Victor G. Haddox, et. al, *Mental Competency to Stand Trial While Under the Influence of Drugs*, 7 Loy. L.A. L. Rev. 425, 442–43 (1974). In *People v. Rogers*, 309 P.2d 949 (Cal. App. 1957), the defendant intentionally injected himself with large doses of insulin to induce insulin shock and to avoid trial. *Id.* at 955–56. The First District Court of Appeal in California held

> there is ample authority for holding that a statute granting a right to an accused in categorical terms may be waived by the voluntary act of the person entitled. That is this case. *The defendant, by his own actions, induced the condition existing in the afternoon of the fourth day of the trial. This amounted to a waiver of the right to be mentally present* granted by section 1043 of the Penal Code. *If this were not the rule, many persons, by their own acts, could effectively prevent themselves from ever being tried.* A diabetic can put himself in insulin shock by simply taking insulin and then not eating, or by refusing to eat, or can disable himself by failing to take insulin. Surely, the Legislature in adopting section 1043 did not intend such an absurd result.

Id. at 957 (emphasis added); *see also United States v. Latham*, 874 F.2d 852, 865 (1st Cir. 1989) (Selya, J., concurring) ("When nonattendance results from *controllable* circumstance, waiver should generally follow."); *Hanley v. State*, 434 P.2d 440, 444 (Nev. 1967) ("The defendant's voluntary absence waives his right to be present and he cannot thereafter complain of a situation which he created.").

Here, the case was submitted to the jury for deliberations shortly after a lunch break on 15 August 2012. The trial court instructed Defendant to remain in the courtroom unless he needed to speak with his attorney. Defendant asked whether he could go to the courtroom lobby, which the trial court denied. The trial court temporarily recessed from 2:10 p.m. to 2:38 p.m., pending the jury's verdict. At 2:38 p.m., the jury asked for a transcript of Theodore's forensic interview, and Defendant's attorney alerted the trial court that Defendant was "having a little problem." The trial court said "[s]ir, stay with us if you will. If you go out, we're going to have to go on without you. If you want to see what happens here, try to stay vertical." A bench conference occurred between Judge Martin,

the State, and Defendant's counsel, the jury was brought back and told that no such transcript existed, and the jury again departed the courtroom. The trial court then warned Defendant that "[i]f you're not healthy we will continue on without you, whether you're here or not. So do your very best to stay vertical, stay conscious, stay with us."

The jury then asked to review the final ten minutes of the forensic interview DVD. Before the jury returned to the courtroom, Ms. Gantt told the trial court about Defendant's overdose. The trial court then revoked Defendant's bond, had Defendant taken into custody, and ordered an examination of Defendant by emergency medical services. Defendant's counsel and the State both agreed not to make any remarks about Defendant's absence when the jurors returned to the courtroom. The jury returned to the courtroom and watched the final ten minutes of the forensic interview. Defendant's statements to Agent Bumgarner were also published to the jury. The jury also requested to know when Pamela had her surgery, to which the trial court replied "[i]t is your duty to remember the evidence whether called to your attention or not."

The jury was again dismissed, and the trial court made its findings of fact that Defendant had disrupted the proceedings by leaving the courtroom against the instructions of the court and overdosing on drugs. The trial court found that Defendant was "stuporous and refused to cooperate with the Court and refused reasonable requests by bailiffs," but made these findings out of the jurors' presence. The court stated there was "nothing to indicate" the jurors were aware that Defendant was not present, but noted the requirement that the trial court instruct the jurors that Defendant's absence was "not to be considered in weighing evidence or determining the issue of guilt." Defendant's counsel asked that the instruction be given the following morning so that Defendant could re-join the proceedings.

At 4:31 p.m., Defendant's counsel and the State agreed to allow the jury to return to the courtroom and announce their verdict. The jury delivered their verdict finding Defendant guilty of attempted first degree sexual offense and five counts of taking indecent liberties with a minor. Defendant's counsel was directed to inform Defendant of these events and to request Defendant be present for the habitual felon phase the next morning as well as the sentencing phase of defendant's other charges.

The next morning on 16 August 2012 Defendant was present at the proceedings. The trial court informed Defendant he could choose to testify as to being a habitual felon. Defendant stated he was "hoping to testify yesterday," but that "[u]nfortunate circumstances" did not allow

it. The trial court re-stated that the court was considering the habitual felon charge that morning, and Defendant chose not to testify on the habitual felon charge.

The above facts provide ample evidence to raise a bona fide doubt whether Defendant was competent to stand trial. Defendant appeared lethargic, "stuporous," and non-responsive. Such conduct would ordinarily necessitate a *sua sponte* hearing. Evidence of irrational behavior, demeanor at trial, and any prior medical opinion on competence are all relevant to a *bona fide* doubt inquiry. *Staten*, 172 N.C. App. at 678–79, 616 S.E.2d at 655. The inability to "stay vertical" or to obey the commands of court personnel certainly would give rise to such a *bona fide* doubt. Defendant is also correct that competency may fluctuate during the course of a trial. *See Whitted*, 209 N.C. App. at 528–29, 705 S.E.2d at 792; *Shytle*, 323 N.C. at 688, 374 S.E.2d at 575.

However, Defendant *voluntarily* ingested large quantities of intoxicants in a short period of time apparently with the intent of affecting his competency. This more appropriately invokes an analysis of whether Defendant waived his right to be present during the proceedings. A defendant may waive his/her constitutional right to be present at non-capital trial via his/her own *voluntary actions* that squander those rights:

> [W]here the offense is *not capital* and the accused is not in custody, the prevailing rule has been, that if, after the trial has begun in his presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present, and leaves the court free to proceed with the trial in like manner and with like effect as if he were present.

Diaz v. United States, 223 U.S. 442, 455 (1912) (emphasis added); *compare Drope v. Missouri*, 420 U.S. 162, 163–64 (1975) ("We granted certiorari in this case to consider petitioner's claims that he was deprived of due process of law by the failure of the trial court to order a psychiatric examination with respect to his competence to stand trial and by the conduct *in his absence of a portion of his trial on an indictment charging a capital offense*." (emphasis added)). Voluntary waiver of one's right to be present is a separate inquiry from competency, and in a non-capital case, a defendant may waive the right by their own actions, including actions taken to destroy competency.

The State and Defendant both cite *State v. Harding*, 110 N.C. App. 155, 429 S.E.2d 416 (1993). In *Harding*, this Court held the defendant

understood the nature of the proceedings against her and that the defendant's voluntary use of drugs throughout trial did not destroy her mental competency during trial. *Id.* at 166–67, 429 S.E.2d at 423–24. Defendant argues that *Harding* "implies that a greater degree of drug-induced impairment, such as that present in this case, could establish a lack of capacity to proceed." However, in *Harding*, the "defendant was present throughout the proceedings." *Id.* at 166, 429 S.E.2d at 423. The defendant did not "exhibit . . . any signs during trial of being under the influence of any controlled substance." *Id.* Thus, *Harding* never reached the issue of whether a defendant could forfeit his or her right to be present at trial by voluntarily intoxicating himself or herself. *Id.*

Finally, Defendant does not offer evidence that his absence prejudiced the proceedings. Defendant stated an intention to testify but already testified and concluded his case prior to ingesting the intoxicants. Defendant was absent only while the jury was outside the courtroom and deliberating its verdict. Further, any alleged error would have resulted from Defendant's own conduct. *See* N.C. Gen. Stat. § 15A-1443(c).

By voluntarily ingesting intoxicants, Defendant waived his right to be present during a portion of these proceedings. To hold otherwise would create a rule where "many persons, by their own acts, could effectively prevent themselves from ever being tried." *Rogers*, 309 P.2d at 957. Thus we hold the trial court did not err.

IV. Review of *In Camera* Documents

[4] After careful review of the sealed materials, we conclude the trial court did not violate Defendant's constitutional rights by refusing to disclose Theodore's relevant medical records to Defendant. No exculpatory materials existed within the relevant medical records and the trial court did not err in withholding the records. *See Kelly*, 118 N.C. App. at 592, 456 S.E.2d at 865.

IV. Conclusion

Based on the foregoing discussion, we hold the trial court did not err in denying Defendant's motions to dismiss, nor in choosing not to conduct a *sua sponte* competency hearing after Defendant voluntarily intoxicated himself and waived his right to be present during a portion of the proceedings.

NO ERROR.

Judges ELMORE and DAVIS concur.

STATE OF NORTH CAROLINA
v.
JAMES KEVIN MOIR

No. COA13-589

Filed 7 January 2014

Sexual Offenders—sex offender registration—petition for termination—Tier 1 sex offender—Adam Walsh Act

The trial court erred by denying defendant's petition for termination of sex offender registration. Defendant was convicted of an offense qualifying him as a Tier I sex offender under the Adam Walsh Act, and he was eligible for termination from registration in 10 years. Upon remand, the trial court was instructed to re-evaluate its findings. Then, in its discretion, it could grant or deny defendant's petition.

Appeal by defendant from order entered 18 February 2013 by Judge Richard D. Boner in Catawba County Superior Court. Heard in the Court of Appeals 21 October 2013.

Attorney General Roy Cooper, by Associate Attorney General J. Rick Brown, for the State.

Crowe & Davis, P.A., by H. Kent Crowe, for defendant-appellant.

STEELMAN, Judge.

Where defendant was convicted of an offense qualifying him as a Tier I sex offender under the Adam Walsh Act, he was eligible for termination from registration in 10 years. The trial court erred in concluding that defendant was not a Tier I offender.

I. Factual and Procedural Background

On 9 January 2001, James Kevin Moir (defendant) was indicted for first-degree statutory sexual offense and indecent liberties with a child. On 5 September 2001, defendant pled guilty to two counts of indecent liberties with a child in exchange for the dismissal of the first-degree sexual offense charges. On 28 November 2001, defendant was sentenced to 16-20 months imprisonment. This sentence was suspended and defendant was placed on supervised probation for 60 months, and ordered

to pay court costs. Defendant was further required to register as a sex offender. Defendant did so on 15 March 2002. On 25 June 2007, defendant's probation was terminated by the court.

On 22 May 2012, defendant filed a Petition for Termination of Sex Offender Registration in the Superior Court of Catawba County. On 18 February 2013, the trial court denied defendant's petition.

Defendant appeals.

II. Request for Relief

In his sole argument on appeal, defendant contends that the trial court erred as a matter of law in ruling that the relief sought by defendant failed to comply with the federal Jacob Wetterling Act and the federal Adam Walsh Act. We agree.

A. Standard of Review

"Resolution of issues involving statutory construction is ultimately a question of law for the courts. [W]here an appeal presents [a] question[] of statutory interpretation, full review is appropriate, and we review a trial court's conclusions of law *de novo*." *State v. Davison*, 201 N.C. App. 354, 357, 689 S.E.2d 510, 513 (2009) (citations and quotations omitted), *disc. review denied*, 364 N.C. 599, 703 S.E.2d 738 (2010).

B. Analysis

N.C. Gen. Stat. § 14-208.12A provides that:

> (a) Ten years from the date of initial county registration, a person required to register under this Part may petition the superior court to terminate the 30-year registration requirement if the person has not been convicted of a subsequent offense requiring registration under this Article.
>
> ...
>
> (a1) The court may grant the relief if:
>
> (1) The petitioner demonstrates to the court that he or she has not been arrested for any crime that would require registration under this Article since completing the sentence,
>
> (2) The requested relief complies with the provisions of the federal Jacob Wetterling Act, as amended, and any other federal standards applicable to the termination of a

> registration requirement or required to be met as a condition for the receipt of federal funds by the State, and
>
> (3) The court is otherwise satisfied that the petitioner is not a current or potential threat to public safety.

N.C. Gen. Stat. § 14-208.12A (2011). In the instant case, the trial court found that defendant had been subject to registration for at least 10 years, had not been subsequently arrested for or convicted of any offenses that would require registration, and had a low risk of re-offending. However, the trial court then found that:

> 11. Touching of the genital area of a minor with the intent to gratify sexual desire is considered "sexual contact" under the provisions of 18 U.S.C. § 2246(3), and sexual contact is classified as "abusive sexual contact" under 18 U.S.C. § 2244.
>
> 12. Abusive sexual contact is considered to be a Tier II offense under the provisions of 42 U.S.C. § 16911(3)(A)(iv).
>
> 13. The registration for Tier II offenses under the provisions of the Jacob Wetterling Act, 42 U.S.C. § 14071, and the provisions of the Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. § 16911, *et seq.*, is 25 years. This registration period cannot be reduced.
>
> 14. The defendant has not been registered as a sex offender for at least 25 years.

Based upon these findings, the trial court concluded that the termination of defendant's sex offender registration would not comply with the Jacob Wetterling Act, or its amended form, the Adam Walsh Act. The trial court therefore denied defendant's motion.

The federal statute in question, the Adam Walsh Act, provides the following definitions:

> (2) Tier I sex offender
>
> The term "tier I sex offender" means a sex offender other than a tier II or tier III sex offender.
>
> (3) Tier II sex offender
>
> The term "tier II sex offender" means a sex offender other than a tier III sex offender whose offense is punishable by imprisonment for more than 1 year and—

> (A) is comparable to or more severe than the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor:
>
> (i) sex trafficking (as described in section 1591 of Title 18);
>
> (ii) coercion and enticement (as described in section 2422(b) of Title 18);
>
> (iii) transportation with intent to engage in criminal sexual activity (as described in section 2423(a)) of Title 18;
>
> (iv) abusive sexual contact (as described in section 2244 of Title 18);
>
> (B) involves—
>
> (i) use of a minor in a sexual performance;
>
> (ii) solicitation of a minor to practice prostitution; or
>
> (iii) production or distribution of child pornography; or
>
> (C) occurs after the offender becomes a tier I sex offender.

42 U.S.C. § 16911 (2006). We note that this act defines offender status by the offense charged, not by the facts underlying the case. Specifically, we read language such as "whose offense is punishable by imprisonment for more than 1 year[,]" as well as the lists of elements of the offense, as an indication that Tier status as a sex offender is based upon the elements of the offense, not upon the evidence presented as to the facts underlying it. In the instant case, however, the trial court based its ruling upon the facts underlying the plea, not upon the pled offense of indecent liberties.

The trial court's interpretation of federal statute was in error. In the instant case, defendant pled guilty to indecent liberties with a child. In *In re Hamilton*, ___ N.C. App. ___, 725 S.E.2d 393 (2012), we held that a conviction of indecent liberties with a child results in Tier I sex offender status. Pursuant to the Adam Walsh Act, a person convicted of indecent liberties would be subject to 15 years of registration, which may be terminated in ten years as provided in N.C. Gen. Stat. § 14-208.12A. *Id.* at ___, 725 S.E.2d at 399. Similarly, in *In re McClain*, ___ N.C. App. ___, 741 S.E.2d 893 (2013), the parties stipulated, and we held, that a defendant who pled guilty to indecent liberties with a child was a Tier I sex offender. *McClain* at ___, 741 S.E.2d at 896.

We find *Hamilton* and *McClain* determinative of the instant case. Defendant pled guilty to indecent liberties, and was therefore a Tier I sex offender. We hold that the relief he sought complied with the Adam Walsh Act. However, we noted in *Hamilton*:

> the ultimate decision of whether to terminate a sex offender's registration requirement still lies in the trial court's discretion. *See* N.C. Gen. Stat. § 14–208.12A(a1) (providing that a trial court "may" grant a petitioner relief if terms of the statute are met). Thus, after making findings of fact supported by competent evidence on each issue raised in the petition, the trial court is then free to employ its discretion in reaching its conclusion of law whether Petitioner is entitled to the relief he requests.

Hamilton at ___, 725 S.E.2d at 399.

Upon remand, the trial court is instructed to re-evaluate its findings in accordance with this opinion. It may then, in its discretion, grant or deny defendant's petition.

VACATED AND REMANDED.

Chief Judge MARTIN and Judge DILLON concur.

STATE OF NORTH CAROLINA
v.
DOUGLAS DALTON RAYFIELD, II

No. COA13-531

Filed 7 January 2014

1. Appeal and Error—preservation of issues—pretrial motion—objection at trial—basis of objection obvious from context

Defendant preserved for appellate review his argument that the trial court erred by admitting certain evidence. Defendant made a pretrial motion to suppress the evidence, which was denied, and objected at trial to the admission of the evidence. It was clear from the context that trial counsel and the trial judge understood that defendant wished to preserve his earlier objections on the grounds stated therein.

2. Search and Seizure—motion to suppress—stale allegations—victim's allegations—probable cause

The trial court did not err in a sexual offenses case by denying defendant's motion to suppress the evidence seized from his house. Defendant's argument that certain allegations in the detective's affidavit were stale and did not support a finding of probable cause was overruled. The victim's allegations of inappropriate sexual touching by defendant over a sustained period of time allowed the magistrate to reasonably conclude that probable cause was present to justify the search of defendant's residence.

3. Search and Seizure—search warrant—affidavit not based on false and misleading information

The trial court did not err in a sexual offenses case by denying defendant's motion to suppress the evidence seized from his house. Defendant's argument that the search warrant was invalid because the detective's affidavit was based on false and misleading information was overruled. To the extent the detective made mistakes in the affidavit, those mistakes did not result from false and misleading information and the affidavit's remaining content was sufficient to establish probable cause.

4. Search and Seizure—motion to suppress—magistrate—failed to include record of oral testimony

The trial court did not err in a sexual offenses case by denying defendant's motion to suppress the evidence seized from his house. Defendant's argument that the trial court (1) made incomplete findings and (2) failed to make any findings or conclusions as to whether the magistrate substantially violated N.C.G.S. § 15A-245 was overruled. Furthermore, the magistrate did not substantially violate N.C.G.S. § 15A-245(a) in failing to include a record of the detective's oral testimony.

5. Evidence—prior crimes or bad acts—motive or intent—sufficiently similar—not so remote in time

The trial court did not err in a sexual offenses case by admitting into evidence certain pornography found in defendant's home and certain testimony about past sexual misconduct with another victim. The pornography was admissible to show defendant's motive or intent and the trial court did not abuse its discretion by determining that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence. Further, the past sexual misconduct was sufficiently similar and not so remote in time such that

the testimony was relevant and admissible under N.C.G.S. § 8C-1, Rule 404(b).

Appeal by Defendant from order entered 8 September 2011 by Judge Jesse B. Caldwell, III and judgments entered 17 January 2012 by Judge Nathaniel J. Poovey in Gaston County Superior Court. Heard in the Court of Appeals 9 October 2013.

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

Mark Montgomery for Defendant.

STEPHENS, Judge.

Evidence and Procedural History

Douglas Dalton Rayfield, II ("Defendant") was indicted for multiple counts of sexual acts with K.C.,[1] a minor. Defendant was tried before a jury beginning 9 January 2012 in Gaston County Superior Court. The evidence presented at trial tended to show the following:

K.C. was fourteen years old at the time of trial. Her stepfather had known Defendant since childhood, and they were so close that he treated Defendant like a brother. K.C. and Defendant were regularly left unsupervised in her stepfather's house, and Defendant was allowed to transport her to and from various locations without third-party supervision. One day, when K.C. was eight years old, Defendant drove her to his house after working on a car at her stepfather's house. When they arrived at Defendant's residence, he told K.C. to get into a "limo" that was parked in his front yard so they could play a game. Once inside, Defendant told K.C. to pull down her pants. When she did, he touched his penis to her "vagina area." Defendant ejaculated on the seat and told K.C. it was "lotion."

On another occasion, K.C. was playing video games in her room when Defendant walked in and asked her to "help him make lotion." When she refused, Defendant said he would stop "bugging" her if she would help him. He told her to pull down her pants, put his mouth "in my vagina area," and was "licking all over." K.C. left the room to wipe off. When she returned, Defendant had his penis out. She again refused

1. Initials are used to protect the juvenile's identity.

to help him make "lotion." As K.C.'s father pulled into the driveway, Defendant zipped up his pants and left.

On a separate occasion, Defendant drove K.C. from her house to his house to look for a motorcycle part. Defendant brought K.C. to his room and showed her a video of a man having sexual intercourse with a young girl. Defendant told K.C. that he was the man. Defendant then showed K.C. images of a young girl posing "[l]ike a girl really shouldn't be posing" and suggested that K.C. make similar pictures. As the encounter continued, Defendant took off his pants and began "playing with himself." He eventually ejaculated and told K.C. that the ejaculate was not lotion, but actually was "what gets a girl pregnant."

Another time, Defendant groped K.C.'s breast area while they were in the car together. After doing so, he noted that she was "getting bigger."

Defendant twice transported K.C. to a motel. On one occasion, Defendant brought a magazine with pictures of naked men and women for them to view. They looked at the pictures together until K.C.'s mother called Defendant. Defendant told her that they were at Walmart.[2] Another time, Defendant offered to take K.C. to a Girl Scout meeting. Instead of taking her directly to the meeting, Defendant took her to a motel and asked her to "help him" fill a small black vial with ejaculate. He told her that, if she did not help him fill the vial, someone would cut his fingers off. Defendant asked multiple times, and K.C. refused each time. Defendant eventually yielded and drove K.C. to the meeting without proceeding further.

The last encounter between K.C. and Defendant occurred when K.C. was twelve years old. Defendant drove her to his house, and they parked outside. In the car, he showed her a vial and again informed her that he needed her help to fill the vial and keep his fingers from being cut off. This time K.C. said she would help him save his fingers. Defendant took her pants off and performed missionary-style intercourse on her while they were in the car. He ejaculated outside of her vagina and partially filled the vial. When he was finished, he drove K.C. home.

On 18 May 2010, K.C. told the interim counselor at her middle school that Defendant had shown her a video of a young girl performing sexual acts and had touched her inappropriately. K.C. elaborated,

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2. As the State notes in its brief, Defendant erroneously stated on appeal that this incident ended when *K.C.* told her mother that she was at Walmart with Defendant. That is incorrect. The trial transcript indicates that the encounter ended when K.C.'s mother called Defendant, and *he* told her that they were at Walmart.

and the school authorities contacted K.C.'s mother and the local police. The next day, Detective R.E. Bloom appeared before the magistrate and submitted a sworn affidavit and application for a search warrant.

Therein, Detective Bloom asserted that he had responded to a call for service to investigate an allegation of sexual assault. He stated that K.C. had informed another officer of incidents occurring from the time she was eight years old until she was eleven. Detective Bloom also alleged that sexual assaults took place in K.C.'s home, in Defendant's home, and in a Gastonia-based motel. Regarding those places, the affidavit listed either the address or provided a description of the approximate location. The affidavit also stated that Detective Bloom had confirmed K.C.'s statement by collecting evidence that Defendant was at America's Best Motel on 8 May 2010. The affidavit asserted that Defendant had shown K.C. pornographic videos and images in his home. The images were of Defendant having sexual intercourse with an unknown female, who K.C. believed was under ten years old. The affidavit noted that Defendant is a registered sex offender and requested a search warrant for Defendant's home and the magazines, videos, computers, cell phones, and thumb drives located therein. The magistrate issued a search warrant, and police searched Defendant's home and the contraband recovered therefrom between 19 May 2010 and 24 May 2010.

Defendant was charged with four counts of indecent liberties with a child, one count of disseminating obscene material, one count of crime against nature, one count of first-degree statutory sex offense, and one count of first-degree statutory rape. On 6 May 2011, Defendant's counsel filed a motion to suppress the evidence seized during the execution of the search warrant. That motion was denied on 8 September 2011. Defendant's motion to exclude evidence of other crimes, wrongs, or acts was also denied. Items of child pornography and adult pornography were admitted at trial along with the testimony of another person, A.L.,[3] who willingly had sexual intercourse with Defendant when she was fourteen. Defendant was convicted of all the charges and sentenced to imprisonment for no less than 640 months and no more than 788 months.

Discussion

Defendant argues on appeal that the trial court erred in (1) denying his motion to suppress the evidence seized from his house and (2) admitting into evidence certain pornography found in Defendant's home and the testimony of A.L. We find no error.

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3. Initials are used to protect the juvenile's identity.

I. Defendant's Motion to Suppress

In support of his first argument, Defendant claims that (1) the information in the search warrant affidavit was "stale" because as many as three and a half years had passed since Defendant allegedly showed pornography to K.C., (2) the search warrant was based on misleading information, and (3) the search warrant was issued in substantial violation of N.C. Gen. Stat. § 15A-245 (2011). Accordingly, Defendant contends that the evidence found during the search of his home should have been suppressed as "fruit of the poisonous tree." We disagree.

A. Preservation of Appellate Review

[1] As a preliminary matter, we address the State's contention that Defendant did not adequately preserve appellate review of the denial of his motion to suppress because he failed to object at trial. A pretrial motion to suppress is a type of motion *in limine*. *State v. Golphin*, 352 N.C. 364, 405, 533 S.E.2d 168, 198 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). Such a "motion . . . [is] not sufficient to preserve for appeal the question of admissibility of evidence if the defendant does not object to that evidence at the time it is offered at trial." *Id.* In order to preserve an issue for appellate review by objection at trial, the appealing party must present "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) (emphasis added).

In the present case, Defendant made a pretrial motion to suppress the evidence seized from his home. That motion was denied. Defendant renewed the motion at trial, and the motion was again denied. Although Defendant's counsel did not state his grounds for the objection when the evidence was offered at trial, it is clear from the context that he was renewing his earlier objections to the evidence for the reasons stated in his motion to suppress:

> [THE STATE]: Would you open State's Exhibit A?
>
> (The [officer-]witness complied)
>
> . . .
>
> [THE STATE]: What's contained in that box?
>
> [THE OFFICER]: There are numerous periodicals of a sexual nature, magazines. There are several, looks like nine DVDs. There are some printed, looks like images printed off of the Internet of a pornographic sexual nature.

> [THE STATE]: Now, you said those are the same items that you saw in the box there in [Defendant's] residence when the box was seized?
>
> [THE OFFICER]: That's correct.
>
> [THE STATE]: Are there any other photographs or items in that box?
>
> [THE OFFICER]: There are some Polaroids, Polaroid photographs, yes. And like I said, the printed — there are some, looks like computer printed images from off of websites of young females.
>
> . . .
>
> [THE STATE]: Your Honor, we would be moving into evidence the contents of that box. . . .
>
> [COUNSEL FOR DEFENDANT]: Of course, you know[] the nature of my objection, Your Honor. . . .
>
> . . .
>
> THE COURT: Do you wish to be heard about any of that, [counsel for Defendant]? I know that you object to all of it, but.
>
> [COUNSEL FOR DEFENDANT]: I do, and I don't wish to be heard about those exhibits being selected or being published.

Based on this exchange it is clear from the context that trial counsel and the trial judge understood that Defendant wished to preserve his earlier objections on the grounds stated therein. Therefore, we hold that this issue was properly preserved for appellate review.[4]

B. Standard of Review and Legal Background

Our review of the denial of a motion to suppress is "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

4. Defendant argues in the alternative that, if this issue was not properly preserved for appellate review, his trial counsel was ineffective. Because we hold that Defendant's trial counsel properly preserved this issue for appeal, we need not address his argument as to ineffective assistance of counsel.

the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982).

> A valid search warrant application must contain allegations of fact supporting the statement. The statements must be supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe that the items are in the places or in the possession of the individuals to be searched. Although the affidavit is not required to contain all evidentiary details, it should contain those facts material and essential to the case to support the finding of probable cause. This Court has held that affidavits containing only conclusory statements of the affiant's belief that probable cause exists are insufficient to establish probable cause for a search warrant. The clear purpose of these requirements for affidavits . . . is to allow a magistrate or other judicial official to make an independent determination as to whether probable cause exists for the issuance of the warrant under N.C. Gen. Stat. [§] 15A-245(b). [That section] requires that a judicial official may consider only information contained in the affidavit, unless such information appears in the record or upon the face of the warrant.

State v. McHone, 158 N.C. App. 117, 120, 580 S.E.2d 80, 83 (2003) (citation and internal quotation marks omitted).

In preparing an affidavit for this purpose, "[t]he officer making the affidavit may do so in reliance upon information reported to him by other officers in the performance of their duties." *State v. Horner*, 310 N.C. 274, 280, 311 S.E.2d 281, 286 (1984). "Whether an applicant has submitted sufficient evidence to establish probable cause to issue a search warrant is a non[ ]technical, common-sense judgment of laymen applying a standard less demanding than those used in more formal legal proceedings." *State v. Ledbetter*, 120 N.C. App. 117, 121, 461 S.E.2d 341, 344 (1995) (citation and internal quotation marks 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).

C. Staleness

[2] Appealing the denial of his motion to suppress, Defendant first argues that certain allegations in Detective Bloom's affidavit were stale and did not support a finding of probable cause. Specifically, Defendant points out that there is a three-and-one-half-year gap between the alleged

viewing of the pornography in Defendant's house and the time the affidavit was issued. In addition, Defendant contends that other descriptions of sexual conduct with minors described in the affidavit did not have specific time references and, therefore, failed to support a finding of probable cause. We disagree.

"When evidence of previous criminal activity is advanced to support a finding of probable cause, a further examination must be made to determine if the evidence of the prior activity is stale." *State v. McCoy*, 100 N.C. App. 574, 577, 397 S.E.2d 355, 358 (1990).

> Before a search warrant may be issued, proof of probable cause must be established by facts so closely related to the time of issuance of the warrant so as to justify a finding of probable cause at that time. The general rule is that no more than a "reasonable" time may have elapsed. *The test for "staleness" of information on which a search warrant is based is whether the facts indicate that probable cause exists at the time the warrant is issued.* Common sense must be used in determining the degree of evaporation of probable cause. The likelihood that the evidence sought is still in place is a function not simply of watch and calendar[,] but of variables that do not punch a clock.

State v. Lindsey, 58 N.C. App. 564, 565–66, 293 S.E.2d 833, 834 (1982) (citations and internal quotation marks omitted; emphasis added). "[W]here the affidavit properly recites facts indicating activity of a protracted and continuous nature, a course of conduct, the passage of time becomes less significant. The continuity of the offense may be the most important factor in determining whether the probable cause is valid or stale." *McCoy*, 100 N.C. App. at 577, 397 S.E.2d at 358 (citation omitted). In addition, our courts have repeatedly held that "young children cannot be expected to be exact regarding times and dates[.]" *State v. Wood*, 311 N.C. 739, 742, 319 S.E.2d 247, 249 (1984).

Although K.C was generally unable to provide dates to the attesting officers in this case, we hold that her allegations of inappropriate sexual touching by Defendant over a sustained period of time allowed the magistrate to reasonably conclude that probable cause was present to justify the search of Defendant's residence. *See McCoy*, 100 N.C. App. at 577, 397 S.E.2d at 358. "Common sense is the ultimate criterion in determining the degree of evaporation of probable cause." *State v. Jones*, 299 N.C. 298, 305, 261 S.E.2d 860, 865 (1980) (citation omitted). "The significance of the length of time between the point probable cause

arose and when the warrant issued depends largely upon the [nature of the property to be seized] and should be contemplated in view of the practical consideration[s] of everyday life." *Id.* (citation omitted). Another variable to consider when determining staleness is the character of the crime. *State v. Witherspoon*, 110 N.C. App. 413, 419, 429 S.E.2d 783, 786 (1993).

In this case, the affidavit set forth that Defendant showed K.C. pornographic videos and images in his home. The images showed Defendant having sexual intercourse with an unknown female, who K.C. believed was under ten years old. The affidavit went on to state that Defendant was a registered sex offender. It then requested a search warrant for Defendant's home and included magazines, videos, computers, cell phones, and thumb drives in the objects to be searched.

Our Supreme Court has determined that, when items to be searched are not inherently incriminating and have enduring utility for the person to be searched, a reasonably prudent magistrate could conclude that the items can be found in the area to be searched. *Jones*, 299 N.C. at 305, 261 S.E.2d at 865. Here, the items sought by the search warrant — magazines, videos, computers, cell phones, hard drives, gaming systems, MP3 players, a camera, a video recorder, thumb drives, and other pictures or documents — were not incriminating in and of themselves and were of enduring utility to Defendant. *See, e.g.*, *id.* (upholding a search warrant when five months had elapsed between the time the witness saw the defendant's hatchet and gloves and the witness spoke to police because, *inter alia*, the items were not incriminating in and of themselves and had utility to the defendant).

There was no reason for the magistrate in this case to conclude that Defendant would have felt the need to dispose of the evidence sought even though acts associated with that evidence were committed years earlier. Indeed, a practical assessment of the information contained in the warrant would lead a reasonably prudent magistrate to conclude that the computers, cameras, accessories, and photographs were likely located in Defendant's home even though certain allegations made in the affidavit referred to acts committed years before. *See State v. Pickard*, 178 N.C. App. 330, 336, 631 S.E.2d 203, 208 (2006) (holding that the affidavit provided the magistrate with a substantial basis for concluding that probable cause existed to issue a search warrant when the items sought — computers, computer equipment and accessories, cassette videos or DVDs, video cameras, digital cameras, film cameras, and accessories — were not particularly incriminating and were of enduring utility to the defendant). Accordingly, the information contained in the

search warrant was not stale and the magistrate had sufficient evidence to support a determination of probable cause. Defendant's first argument is overruled.

D. False and Misleading Information

[3] Second, Defendant contends that the search warrant was invalid because Detective Bloom's affidavit was based on false and misleading information. We disagree.

The Fourth Amendment's requirement of a factual showing sufficient to constitute "probable cause" anticipates a truthful presentation of facts. *Franks v. Delawar*e, 438 U.S. 154, 164–65, 57 L. Ed. 2d 667, 678 (1978).

> N.C. Gen. Stat. § 15A-978 provides that a defendant can challenge the "validity of a search warrant and the admissibility of evidence obtained thereunder by contesting the truthfulness of the testimony" which showed probable cause for the issuance of the warrant. N.C. [Gen. Stat.] § 15A-978(a)[]. The section defines truthful testimony as testimony which reports in good faith the circumstances relied on to establish probable cause.
>
> A factual showing sufficient to support probable cause requires a truthful showing of facts. Truthful, however, does not mean . . . that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge. . . . Instead, "truthful" means that the information put forth is believed or appropriately accepted by the affiant as true. [Because there is a presumption of validity with respect to the affidavit supporting the search warrant, a] defendant must make a preliminary showing that the affiant knowingly, or with reckless disregard for the truth, made a false statement in the affidavit. Only the affiant's veracity is at issue in the evidentiary hearing. Furthermore, a claim . . . is not established by presenting evidence which merely contradicts assertions contained in the affidavit or shows the affidavit[] contains false statements . . . . Rather, the evidence presented must establish facts from which the finder of fact might conclude that the affiant alleged the facts in bad faith.

State v. Severn, 130 N.C. App. 319, 322, 502 S.E.2d 882, 884 (1998) (citations, certain internal quotation marks, and ellipses omitted). Further, an inadvertent error by an officer making an affidavit, when he or she did not know it was an error, may be immaterial where the affidavit is still sufficient on its face to support a finding of probable cause. *See State v. Steele*, 18 N.C. App. 126, 196 S.E.2d 379 (1973).

In support of his argument that Detective Bloom's affidavit was based on false and misleading information sufficient to invalidate the search warrant, Defendant first notes that the affidavit does not provide the name or address of the motel where K.C. was taken. However, as our Supreme Court stated in *Wood*, children are not expected to remember exact dates and times. 311 N.C. at 742, 319 S.E.2d at 249. Likewise, the fact that K.C. relayed this information to Detective Bloom without specific details regarding the name of the motel or its address is not fatal.

Second, Defendant points out that Detective Bloom did not speak directly to K.C. when determining the information to be used in the affidavit, relying instead on a report from Officer Jeff Bryant and a video interview of K.C. This point is misplaced.

Probable cause for an affidavit may be based on information relayed from one officer to another if that information was reported while the officer performed his or her duties. *Horner*, 310 N.C. at 280, 311 S.E.2d at 286. The affidavit in this case states that, during a call for service, the school resource officer at K.C.'s middle school advised Officer Bryant of K.C.'s allegations. As "[o]bservations of fellow officers engaged in the same investigation are plainly a reliable basis for a warrant applied for by one of their number[,]" it was proper for Detective Bloom to rely on information from Officer Bryant for a probable cause determination. *See id.*

Third, Defendant asserts that Detective Bloom's affidavit contained nothing about a discrepancy between when K.C. claimed to have been taken to the motel and the date that someone named "Douglas Rayfield" registered at America's Best Value Motel. To the extent that there was such a discrepancy, it was not sufficient to invalidate the search warrant.

As we have already noted,

> in the interests of justice and recognizing that young children cannot be expected to be exact regarding times and dates, a child's uncertainty as to time or date upon which the offense charged was committed goes to the weight rather than the admissibility of the evidence.

Wood, 311 N.C. at 742, 319 S.E.2d at 249. In denying Defendant's motion to suppress, the trial court found that Detective Bloom made "honest mistakes and inadvertence" which did not unconstitutionally taint the search warrant. In addition, much of the confusion in the affidavit stemmed from information about the motel name and certain dates. Analyzing the affidavit as a whole, however, Detective Bloom made clear that K.C. was assaulted by Defendant on multiple occasions for three years. It states that (1) Defendant was a good friend of K.C.'s stepfather and (2) that sexual assaults took place in K.C.'s home, Defendant's home, and a nearby motel. Further, the affidavit asserts that K.C. viewed pornographic videos of Defendant and another girl with Defendant in his home. These findings support the trial court's conclusion that probable cause was present to justify a search of Defendant's residence for magazines, videos, computers, hard drives, cameras, and other pictures.

Therefore, to the extent Detective Bloom made mistakes in the affidavit, we conclude that those mistakes did not result from false and misleading information and that the affidavit's remaining content was sufficient to establish probable cause. Accordingly, Defendant's second argument is overruled.

E. The Validity of the Search Warrant Under 15A-245(a)

Section 15A-245(a) provides in pertinent part that:

> [An] issuing official may examine on oath the applicant . . . , but information other than that contained in the affidavit may not be considered by the issuing official in determining whether probable cause exists for the issuance of the warrant unless the information is either recorded or contemporaneously summarized in the record or on the face of the warrant by the issuing official.

N.C. Gen. Stat. § 15A-245(a) (2011).

The magistrate in this case indicated on the search warrant that, in addition to the affidavit, the application was supported by Detective Bloom's sworn testimony. The magistrate did not indicate, however, that the testimony was reduced to writing or recorded. In its order on the motion to suppress, the trial court found that Detective Bloom's oral testimony was not reduced to writing. Thus, the magistrate violated section 15A-245 by neither recording nor contemporaneously summarizing the oral testimony offered by Detective Bloom.

[4] On appeal, Defendant argues that the trial court erred in denying his motion to suppress because the magistrate substantially violated

section 15A-245, requiring that the evidence obtained from his home be suppressed. Alternatively, he contends that this case should be remanded for further findings of fact and conclusions of law due to the trial court's failure to properly address the nature of the magistrate's violation. Because our analysis of Defendant's argument depends on whether the trial court properly addressed the validity of the search warrant, we address that question first.

i. The Trial Court's Order

In his alternative argument, Defendant contends that we should remand this case for a new hearing followed by complete and proper findings of fact and conclusions of law on grounds the trial court (1) made "incomplete" findings and (2) failed to make any findings or conclusions as to whether the magistrate substantially violated section 15A-245. We are unpersuaded.

a. Findings of Fact

As discussed above, this Court is limited to determining whether a trial court's 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) (citation and internal quotation marks omitted). In this case, the trial court made the following pertinent findings of fact in its order denying Defendant's motion to suppress:

> 3. That on the onset date, May 19th, 2010, Detective Bloom appeared before the magistrate and submitted a sworn application and affidavit[ ]in which, among other things, he asserted his history and training in law enforcement. That he had responded to a call for service at [K.C.'s middle school] by a resource officer. That a 12[-]year-old white female, [K.C.], was allegedly sexually assaulted by one Douglas Dalton Rayfield, on multiple occasions. That Detective Bloom spoke with [K.C.], and that the affidavit submitted to the magistrate contains the statement that she advised that the incidents occurred from the time she was 8[ ]years old until she was 11[ ]years old. That she further explained that [Defendant] was[ ]a good friend of her father. That the affidavit submitted with the application[ ] for the search warrant further advised that sexual assaults took place in her home at [the listed address], and at

the home of [D]efendant, [at the listed address[5]]. That the affidavit also submitted that [K.C.] said that a recent sexual assault took place at a motel in the City of Gastonia, behind an old steakhouse at the intersection of[ ]Highway 321 and Interstate 85.

4. That said affidavit[ ]in support of the search warrant further alleged that on May 19th, 2010, during a child advocacy hearing interview, [K.C.] provided details about the assaults. That the affidavit[ ]in support of the search warrant stated that Detective Bloom had confirmed [K.C.'s] statement by collecting information that confirmed that [Defendant] was at America's Best Motel on May 8th, 2010. That the affidavit further sets forth that at [Defendant's] home [Defendant] showed [K.C.] pornographic videos and images of [Defendant] having intercourse with an unknown female, [who K.C.] believed was around 10[ ] years of age. That the affidavit further set forth that [Defendant] was a registered sex offender. That the affidavit further requested the search warrant for [Defendant's] home at [the listed address],[ ]and that [the warrant] would include magazines, videos, computers, cell phones, hard drives, gaming systems, thumb drives, and the like.

5. That Detective Bloom went to the [m]otel on Highway 321, which was America's Best Value. That the name of this [m]otel had been recently changed. That at some time before that it was a Motel 6, by name.

. . .

7. That there are several hotels . . . off of Interstate 85 and Highway 321. That there was a receipt which Detective Bloom obtained from America's Best Value Inn, which reflected that on May the 8th of 2010, that [Defendant] rented a room, asserting that there would be two people in his party, and that he was leaving at 11:00 a.m. on May the 9th, 2010.

. . .

9. That [K.C.] stated that [Defendant's] [m]otel room was messy with clothes all around. That while there she saw a

5. Street addresses have been redacted to protect K.C.'s identity.

> video of the man that she identified as [Defendant] with a girl [who] she contended was about 10[ ]years of age.
>
> . . .
>
> 13. That [K.C.] made a statement that there had been oral sex with [Defendant] some two weeks after her 9th birthday. That she further testified that there was a sexual encounter in a car wash, and that she was afraid of cameras catching them. That at one point [Defendant] offered her $100 to continue with sex acts.
>
> . . .
>
> 23. That questions about the name of the [m]otel where the victim indicated she was with [Defendant] and confusion regarding whether the name of the [m]otel was Knights Inn or America's Best are explained by the fact that the [m]otel's name had recently changed shortly before Detective Bloom visited the[m]otel, and the fact that [K.C.], who reported being at the hotel, is a minor, whose memory for specifics, such as the name of a hotel, cannot be expected to be on par with an adult.

Given those findings, the court denied Defendant's motion to suppress and concluded as a matter of law "[t]hat the totality of the circumstances surrounding the issuance of the said search warrant supports the magistrate's finding of[ ]probable cause upon the aforesaid affidavit of Detective Bloom."

In his brief, Defendant disputes certain elements of findings of fact 7, 9, 13, and 23. Regarding finding 7, Defendant points out that Detective Bloom's testimony contradicts the Court's finding that *two people* were listed on the receipt from the motel. At the suppression hearing, Detective Bloom testified that the receipt did not indicate how many people were in Defendant's party. Defendant also notes that finding of fact 9 contradicts Detective Bloom's affidavit regarding *where* K.C. saw the video of Defendant having sex with a minor. The finding states that it occurred in the motel room while the affidavit asserts that it occurred in Defendant's home. Defendant also argues that portions of finding of fact 13 — which describes certain sexual acts committed by Defendant — are not relevant to the trial court's determination of probable cause because they occurred too long ago.[6] Lastly, Defendant quibbles with the trial

6. We resolved this issue in our discussion regarding staleness, *supra*, and do not address it further.

court's finding that the confusion regarding the name of the motel was resolved because the motel's name had recently changed from "Knights Inn" to "America's Best Inn," asserting that the motel had in fact changed its name from "Motel 6," as stated in the trial court's fifth finding of fact. These arguments are insufficient to overturn the trial court's conclusion regarding probable cause.

"Probable cause need not be shown by proof beyond a reasonable doubt, but rather [it is shown by] whether it is more probable than not that . . . contraband will be found at a specifically described location." *State v. Edwards*, 185 N.C. App. 701, 704, 649 S.E.2d 646, 649 (2007). While Defendant has correctly identified errors in the trial court's findings of fact, he fails to address the Court's myriad other findings as they relate to its conclusion that probable cause to search Defendant's home was present. As discussed above, Detective Bloom's affidavit — summarized by the trial court in findings of fact 3 and 4 — was sufficient on its own to establish probable cause. Therefore, to the extent the trial court's other findings contain errors, they are not so severe as to undercut the court's conclusion of law that probable cause was present to justify the search. In light of the other evidence cited by the trial court in support of its conclusion that probable cause was present to justify the search of Defendant's home, this argument is overruled.

b. Findings and Conclusions Regarding the Substantiality of the Statutory Violation

Section 15A-974(b) provides that

> [t]he court, in making a determination whether or not evidence shall be suppressed under this section, shall make findings of fact and conclusions of law which shall be included in the record, pursuant to [section] 15A–977(f).

N.C. Gen. Stat. § 15A–974 (2011). Pursuant to that section, Defendant contends that the trial court erred by failing to make findings and conclusions regarding "the substantiality of the statutory violation." We disagree.

On the nature of the magistrate's statutory violation, the trial court made the following pertinent findings of fact:

> 15. That in presenting his application in writing to the magistrate, Detective Bloom also gave some oral testimony which was not reduced to writing by either Detective Bloom or the magistrate.

> . . .
>
> 36. That the Court finds that the mistakes and factual discrepancies set forth in [the] affidavit were the result of honest mistakes and inadvertence[] and did not take away from the validity of the consideration of the totality of the circumstances relative to the issuance of [the] warrant.

The trial court also concluded as a matter of law:

> 2. That any violation of law regarding the oral testimony of Detective Bloom not being recorded would constitute a statutory violation and not a constitutional violation of [Defendant's] rights under the Fourth and Fourteenth Amendments to the United States Constitution and the North Carolina Constitution.
>
> . . .
>
> 4. That the totality of the circumstances surrounding the issuance of the . . . search warrant supports the magistrate's finding of probable cause upon the aforesaid affidavit of Detective Bloom.

Contrary to Defendant's argument on appeal, the cited authority — section 15A-974(b) — does not require the trial court to make findings of fact and conclusions of law regarding whether a statutory violation was substantial and, therefore, whether the violation would require suppression of the evidence. Instead, the statute simply states that the trial court must make findings of fact and conclusions of law in support of its order on a motion to suppress.

In this case, the court made findings of fact based on Detective Bloom's affidavit. Those findings are discussed above, and we have already determined that they supported its determination that probable cause was present and were therefore sufficient to justify the court's denial of Defendant's motion to suppress. Accordingly, Defendant's alternative argument is overruled.

ii. The Magistrate's Statutory Violation

Defendant also contends that the magistrate's error in failing to record Detective Bloom's testimony was a *substantial violation* of section 15A-245(a), requiring suppression of the evidence under section 15A-974(b), because (1) the error affected Defendant's constitutional right to have a "neutral and detached magistrate determine probable

cause,"[7] (2) Detective Bloom's unrecorded testimony was used by the trial court for certain of its findings of fact in support of its decision to deny Defendant's motion to suppress, (3) Detective Bloom and the magistrate intentionally "chose to ignore [section 15A-245]" because the statute had been in effect for five years and Detective Bloom was a "seasoned" officer, and (4) "failure to enforce the statute [would] doubtless result in future improper searches" as there would be "nothing to prevent an officer's providing self-serving testimony to create a post hoc justification for the search if it proves fruitful." For support, Defendant cites to *McHone*, where we held that a search warrant application maintained "only" by a *conclusory affidavit* constituted a substantial violation of sections 15A-244 and 15A-974. 158 N.C. App. at 122, 580 S.E.2d at 84. We are unpersuaded.

In pertinent part, the text of Detective Bloom's affidavit reads as follows:

> . . .
>
> [T]he Gaston County Police Department responded to a call for service to [K.C.'s middle school].
>
> [The school resource officer] advised Officer . . . Bryant, of the Gaston County Police Department, that 12[-]year[-]old white female, [K.C.], was allegedly [s]exually [a]ssaulted by [Defendant] on multiple occasions. [K.C.] advised that the incidents occurred from the time she was 8 years old until she was 11 years old. She explained that [Defendant] was a good friend of her father. She advised that the sexual assaults took place in her home, [at the listed address] and at the home of Defendant, [at the listed address]. She also advised that a recent sexual assault took place at a motel in the City of Gastonia behind an old steak house at the intersection of Highway 321 and Interstate 85.
>
> On 05/19/2010, during a [c]hild [a]dvocacy [c]enter interview, [K.C.] provided details about the assaults. Affiant confirmed [K.C.'s] statement by collecting information that

7. On this point, Defendant asserts that "[b]y waiving the requirement of a contemporaneous recording of the detective's statement, the magistrate opened the way for the detective to provide after the fact, self-serving testimony at the suppression hearing to correct and fill in discrepancies in and omissions from his affidavit."

> confirmed [Defendant] was at the America's Best Motel on May 8, 2010. [K.C.] also explained that at [Defendant's] home in his bedroom[, he] showed her pornographic videos/images of [himself] having sexual intercourse with an unknown female[, who K.C.] believed was around the age of 10 years old. It has been also confirmed that [Defendant] is a registered [sex o]ffender.
>
> Based on the information in this affidavit, Affiant respectfully requests that a search warrant be issued for the home, vehicles, common areas, and outbuilding for [Defendant] at [the listed address] so that a complete investigation may be conducted and physical evidence may be collected to assist in the investigation of [s]ex [o]ffense.

Generally, an affidavit in an application for a search warrant is deemed sufficient

> if it supplies reasonable cause to believe that the proposed search for evidence of the commission of the designated criminal offense will reveal the presence upon the described premises of the objects sought and that they will aid in the apprehension or conviction of the offender.

State v. Vestal, 278 N.C. 561, 576, 180 S.E.2d 755, 765 (1971), *cert. denied sub nom.*, *Vestal v. North Carolina*, 414 U.S. 874, 38 L. Ed. 2d 114 (1973). "Probable cause cannot be shown[, however,] by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the underlying circumstances upon which that belief is based[.]" *State v. Campbell*, 282 N.C. 125, 130–31, 191 S.E.2d 752, 756 (1972) (citation and internal quotation marks omitted).

The affidavit in this case is not merely conclusory. It includes (1) background of the circumstances of Detective Bloom's involvement in the case, (2) details of where the sexual assaults took place, (3) details of child pornography that was in Defendant's possession and that had been used during the sexual assaults, (4) the assertion that Defendant is a registered sex offender, and (5) the fact that Defendant resided at the house that was the subject of the search warrant. Further, as we have already pointed out, the information provided by Detective Bloom in his affidavit was sufficient — on its own — for the magistrate to properly make a determination that probable cause was present in this case. Accordingly, the magistrate did not substantially violate section 15A-245(a) in failing

to include a record of Detective Bloom's oral testimony, and, therefore, the trial court did not err in denying Defendant's motion to suppress.[8]

II. Adult Pornography and A.L.'s Testimony

In addition to the arguments addressed above, Defendant contends that the trial court erred in admitting into evidence (1) certain portions of the pornography seized from his home and (2) the testimony of A.L. Defendant asserts that both constitute irrelevant, inadmissible character evidence under Rule 404(b) and are substantially more prejudicial than probative under Rule 403. Defendant also asserts that the evidence admitted under 404(b) merely shows his "propensity" or "disposition" to commit sex crimes and, therefore, is inadmissible. We disagree.

"Rule 404(a) is a general rule of exclusion, prohibiting the introduction of character evidence to prove that a person acted in conformity with that evidence of character." *State v. Bogle*, 324 N.C. 190, 201, 376 S.E.2d 745, 751 (1989). Rule 404(b) is a

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

State v. Coffey, 326 N.C. 268, 278–79, 389 S.E.2d 48, 54 (1990) (emphasis in original). Rule 404(b) provides that while 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," such evidence is 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).

> Though this Court has not used the term *de novo* to describe its own review of 404(b) evidence, we have consistently engaged in a fact-based inquiry under Rule 404(b) while applying an abuse of discretion standard to the subsequent balancing of probative value and unfair prejudice under Rule 403. [W]hen analyzing rulings applying Rules 404(b) and 403, we conduct distinct inquiries

8. Defendant also contends that "[i]t cannot be gainsaid that [Defendant] was prejudiced by the denial of his motion to suppress." Because we have concluded that the trial court did not err in denying Defendant's motion to suppress, this argument is overruled.

> with different standards of review. When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling . . . we look to whether the evidence supports the findings and whether the findings support the conclusions. We review *de novo* the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion.

State v. Beckelheimer, 366 N.C. 127, 130, 726 S.E.2d 156, 158-59 (2012) (italics added).

A. Adult Pornography

The trial court denied Defendant's motion to exclude the adult pornography found in his home because the pornography constituted "relevant" evidence bearing upon Defendant's motive, intent, and common plan or scheme with respect to the alleged crimes. On appeal, Defendant argues that the trial court erred in admitting the adult pornography on those grounds. Defendant contends that there was no evidence that he ever showed K.C. all of the images seen by the jury, the adult pornography was not relevant to any issue other than Defendant's "propensity" or "disposition" to commit sex crimes against girls, and, therefore, the adult pornography should have been excluded under Rule 404(b).

In *State v. Brown*, __ N.C. App. __, __, 710 S.E.2d 265, 269–70 (2011), *affirmed per curiam*, __ N.C. __, 722 S.E.2d 508 (2012), this Court considered the admissibility of pornography showing incestuous sexual acts, referred to as "Family Letters," in a prosecution for sexual offenses committed by a father against his daughters. Noting that a defendant's possession of general pornography was usually considered inadmissible, we pointed out that the Family Letters material "was of an uncommon and specific type of pornography; the objects of sexual desire aroused by the pornography in evidence were few; and the victim was the clear object of the sexual desire implied by the possession [of that material]." *Id.* at __, 710 S.E.2d at 269.

Here the trial court admitted the pornography over Defendant's motion to exclude and contemporaneously instructed the jury that it could consider the pornography only if it determined that the material was relevant to Defendant's motive or intent to commit the alleged criminal conduct. The pornography was found at Defendant's house after a valid warrant was obtained to search the premises, as discussed above, and there was testimony at trial that Defendant showed K.C. both child pornography and adult pornography. For these reasons, the evidence

was admissible under Rule 404(b) as relevant to Defendant's motive or intent.

Nonetheless, the pornography may still be deemed inadmissible under the Rule 403 balancing test, *i.e.*, whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *State v. Summers*, 177 N.C. App. 691, 697, 629 S.E.2d 902, 907 ("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 under Rule 403.") (citation and internal quotation marks omitted), *disc. review denied and appeal dismissed*, 360 N.C. 653, 637 S.E.2d 192 (2006); *see also* N.C. Gen. Stat. § 8C–1, Rule 403 (2011). This 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." *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).

Here, "a review of the record reveals that the trial court was aware of the potential danger of unfair prejudice to [D]efendant and was careful to give a proper limiting instruction to the jury." *State v. Hipps*, 348 N.C. 377, 406, 501 S.E.2d 625, 642 (1998). The trial judge viewed the evidence himself, heard arguments from the attorneys, and ruled on its admissibility as follows:

> Weighing the prejudicial effect of [the pornography], although it is prejudicial to [D]efendant's case, it is not so prejudicial such that the danger of unfair prejudice outweighs the probative value. In conducting the Rule 403 analysis I'll find that this evidence withstands any 403 challenge in that the danger of unfair prejudice does not substantially outweigh the probative value. In exercise of the Court's discretion, however, I am going to limit the number of exhibits that are published to the jury.

At trial, the court limited the number of pornographic magazines that could be viewed by the jury. Moreover, the court gave the appropriate limiting instruction. Indeed, the pornographic evidence admitted in this case corroborated K.C.'s statement that Defendant showed her a video of an adult man having sex with a young girl, as well as pornographic images of both girls and women, and that Defendant suggested K.C. have photos of herself taken. Given the trial judge's careful handling of the process, we conclude that it was not an abuse of discretion for the

trial court to determine that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence and, accordingly, to admit into evidence the pornography found in Defendant's home. Defendant's argument as to this evidence is overruled.

B. A.L.'s Testimony

In addition, Defendant contends that the trial court erred in admitting evidence of past acts of sexual misconduct by Defendant against A.L. Defendant asserts that the evidence was inadmissible under N.C. Gen. Stat. § 8C-1, Rule 404(b) and that the probative value, if any, was substantially outweighed by the danger of unfair prejudice under Rule 403. The crux of Defendant's argument is that the acts of sexual misconduct committed against A.L. have nothing to do with K.C.

Defendant filed a motion *in limine* to exclude evidence of past acts of sexual misconduct against A.L. As noted above, a motion *in limine* is not sufficient to preserve for appeal the question of admissibility of evidence if the defendant does not object to that evidence at the time it is offered at trial. *See State v. Hayes*, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999). Here, the trial court concluded that the evidence of prior acts was admissible under Rule 404(b) as sufficiently similar and not too remote in time. The State then elicited testimony on direct examination from A.L. about sexual misconduct committed by Defendant. Defendant never objected to the admissibility of A.L.'s testimony.

Indeed, in the context of arguing the admissibility of the pornographic magazines, Defense counsel conceded that A.L.'s testimony was proper 404(b) evidence:

> [COUNSEL FOR DEFENDANT]: . . . . Is there any possibility[ ]based on the evidence in this case that any juror could reasonably believe that if my client did the physical acts that [K.C.] has testified to, that he had some intent other than to arouse his own sexual — satisfy his own sexual gratification, or if he touched her, looking at the indecent liberties, that it was for the purpose of sexual gratification. . . . If the jurors believe that he did [the] acts there's really no possibility that they're going to say, well, he did it but we don't know why he did it, he was maybe conducting research or doing — I mean, there's just not a possibility[] because it goes right with the evidence that has been presented by [K.C.] If she [is to be] believed then the only possible intent was to gratify [Defendant's] sexual desires and his purpose as well.

> THE COURT: Are you stipulating to that fact?
>
> [COUNSEL FOR DEFENDANT]: Well, I'm not stipulating to it, Your Honor, I'm just saying that what other possible conclusion could there be. And the State is already going to get in the testimony of [A.L.] under 404(b) as to the prior conduct. I mean, it just seems like this is unnecessary, it's cumulative, and it's a very weak issue that this is necessary evidence to admit.

In addition, the following exchange occurred immediately prior to A.L.'s testimony:

> [COUNSEL FOR DEFENDANT]: For the record, I would object to the recall of Sergeant Dover. But I also have an issue to address with [A.L.].
>
> THE COURT: Okay. What's that issue?
>
> [COUNSEL FOR DEFENDANT]: That issue, Your Honor, is this. When the Court denied my motion to exclude her 404(b) testimony in that same proceeding the Court granted the motion to keep out the conviction that stemmed from that conduct unless my client testified or unless we opened the door during cross[-]examination. *And what I intend to do when she testifies is not challenge in any way her allegation that there was a sexual act, sexual intercourse, that occurred on August 25th, 2001.* That was the basis for the conviction, I'm not contesting that at all. However, in the materials that were handed over from the State when they interviewed her she's made a new claim[ ]that was never made back during that time frame. And I've read all of the discovery. Now she is saying that in addition to that there was an act where they had sexual intercourse in my client's car. So I do want to challenge that because everything I can see that was not the basis of the conviction. *I'm not contesting in any way shape or form that that act happened, however, I do want to challenge that allegation because I don't think that was part of that case. And I believe by doing so I'm not opening the door to the conviction.*

(Emphasis added).

Unlike the objection to the motion to suppress discussed *supra*, it is not clear from this colloquy that counsel for Defendant was objecting

to the admission of A.L.'s testimony under Rule 404(b). Defense counsel clearly objects to the recall of Sergeant Dover, but does not make a similar objection to A.L.'s testimony. Although counsel for Defendant mentioned Rule 404(b) in his objection, it is clear from the context of this exchange that his objection was to obtain a preliminary ruling that his cross-examination of A.L. would not open the door to evidence of Defendant's conviction by challenging the veracity of the car incident with A.L. As Defendant did not object pursuant to Rule 404(b), such objection is not preserved on appeal. *See State v. Lawrence*, 365 N.C. 506, 517–19, 723 S.E.2d 326, 334 (2012); *see also Wood v. Weldon*, 160 N.C. App. 697, 699, 586 S.E.2d 801, 803 (2003) (citation and internal quotation marks omitted) (holding that a defendant cannot "swap horses between courts in order to get a better mount" on appeal). Because Defendant did not argue plain error in the alternative, he may not seek appellate review of this issue.

Assuming *arguendo* that Defendant properly preserved this issue for review, his argument would fail nonetheless. The test for determining the admissibility of evidence of prior conduct is "whether the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of N.C. Gen. Stat. § 8C-1, Rule 403." *State v. Carpenter*, 179 N.C. App. 79, 84, 632 S.E.2d 538, 541 (citation omitted), *rev'd on other grounds*, 361 N.C. 382, 646 S.E.2d 105 (2007). "The determination of similarity and remoteness is made on a case-by-case basis," with the degree of similarity required being that which would lead the jury to the "reasonable inference that the defendant committed both the prior and present acts." *Id.* (citation and internal quotation marks omitted). Additionally, this Court stated that we have been "markedly liberal in admitting evidence of similar sex offenses to show one of the purposes enumerated in Rule 404(b)." *State v. Carpenter*, 147 N.C. App. 386, 392, 556 S.E.2d 316, 320 (2001) (citation and internal quotation marks omitted).

The Supreme Court in *Beckelheimer* upheld a trial court's admission of evidence under Rule 404(b) based on "key similarities" between the sex offense for which the defendant was being tried and a prior sex offense.[9] 366 N.C. at 131, 726 S.E.2d at 159. In so holding, the Court noted the trial court's finding that the victim in the charged crime was

9. In *Beckelheimer*,

> [t]he trial court found that "the age range of [the 404(b) witness] was close to the age range of the alleged victim," a finding supported by the evidence: the victim was an eleven-year-old male cousin of [the]

an eleven–year–old cousin of the defendant, while the 404(b) witness was also a cousin who had been around twelve years old at the time of the prior acts. *Id.* at 131, 726 S.E.2d at 159. Accordingly, the Court "conclude[d] . . . that the similar ages of the victims is more pertinent in [the] case than the age difference between victim and perpetrator." *Id.* at 132, 726 S.E.2d at 160. In addition, the Court upheld the trial court's finding that the location of the occurrence of the acts was similar in that the crime and the 404(b) offense both occurred after the defendant played video games with his victims in his bedroom. *Id.* at 131, 726 S.E.2d at 160. Lastly, the Court emphasized that the crime and the 404(b) offenses had both been "brought about" in the same manner with a similar progression of sexual acts. *Id.* at 131, 726 S.E.2d at 160. Therefore, the Court concluded that the similarities of the victims (*i.e.*, their ages and relationship to the defendant), the similarities of the locations, and the similarities in how the sexual offenses came to occur were sufficient to render the evidence admissible under Rule 404(b). *Id.* at 133, 726 S.E.2d at 160.

Defendant argues that his sexual relationship with A.L. was too remote in time and dissimilar in nature to be admissible under Rule 404. However, A.L was assaulted in the same car as K.C. While A.L. testified that the sex was consensual, A.L was a fourteen-year-old girl at the time of the assault and could not legally consent to sexual intercourse with Defendant. *See* N.C. Gen. Stat. § 14-27.7A (2011). Indeed,

---

> defendant, and the witness was also [the] defendant's young male cousin who was around twelve years old at the time of the alleged prior acts. The trial court found similarities in "the location of the occurrence," a finding also supported by the evidence: [the] defendant and the victim spent time playing video games in [the] defendant's bedroom where the alleged abuse occurred, and [the] defendant and the witness also spent time playing video games together and in [the] defendant's bedroom where the alleged abuse occurred. Finally, the trial court found similarities in "how the occurrences were brought about," a finding supported by the evidence: the victim described two incidents during which the defendant placed his hands on the victim's genital area outside of his clothes while pretending to be asleep; he also described an incident during which [the] defendant lay on him pretending to be asleep, then reached inside the victim's pants to touch his genitals, then performed oral sex on the victim. The witness testified to a similar progression of sexual acts, beginning with fondling outside the clothing and proceeding to fondling inside the pants and then to oral sex; he also described how [the] defendant would pretend to be asleep while touching him.

366 N.C. at 131, 726 S.E.2d at 159. The North Carolina Supreme Court concluded that these similarities were sufficient to support the State's theory of *modus operandi*. *Id.*

contrary to the language in Defendant's brief, this encounter was *not* a "teenage romance."[10]

Defendant also argues that the roughly seven-year time period between the two assaults makes the assault of A.L. irrelevant to the assault of K.C. under Rule 404. However, this Court in *State v. Williamson* pointed out that "a ten-year gap between instances of similar sexual misbehavior [does] not render them so remote in time as to negate the existence of a common plan or scheme." 146 N.C. App. 325, 333, 553 S.E.2d 54, 60 (2001), *disc. review denied*, 355 N.C. 222, 560 S.E.2d 366 (2002). Therefore, the seven-year time gap would not negate the existence of a common plan or scheme in this case.

Lastly, we note that Defendant's interactions with A.L. are sufficiently similar to his interactions with K.C. such that A.L.'s testimony is relevant and admissible under Rule 404(b). Both children were young, white, and female. Defendant sexually assaulted each of them in the same car, a silver Hyundai Tiburon. He also took both children to a motel, where they engaged in sexual activity. While there were no pornographic materials or vials used when Defendant sexually assaulted A.L., he did ask both victims to have their own photos or videos made.

For the reasons stated above, Defendant's arguments are overruled, and we find

NO ERROR.

Judges CALABRIA and ELMORE concur.

10. Defendant repeatedly misstated the age difference between A.L. and Defendant in his brief. When A.L. was fourteen, Defendant was actually a twenty-seven-year-old man despite the fact that he told her he was nineteen.

STATE v. RODELO

[231 N.C. App. 660 (2014)]

STATE OF NORTH CAROLINA
v.
CRECENCIO FELIX RODELO

No. COA13-609

Filed 7 January 2014

1. Search and Seizure—motion to suppress evidence—cocaine—initial warrantless search—lack of standing

The trial court did not err in a trafficking in cocaine by possession case by denying defendant's motion to suppress evidence based on defendant's lack of standing to contest the initial warrantless search of a warehouse.

2. Drugs—trafficking in cocaine by possession—constructive possession—sufficiency of evidence

The trial court did not err in a trafficking in cocaine by possession case by concluding there was sufficient evidence of constructive possession. There were sufficient incriminating circumstances, beyond defendant's mere presence, to support the trial court's conclusion.

3. Constitutional Law—effective assistance of counsel—failure to request instructions

Defendant did not receive ineffective assistance of counsel in a trafficking in cocaine by possession case based on trial counsel's failure to request instructions on lesser-included offenses. The trial court did not err, much less commit plain error, in failing to give the instructions when the evidence showed that defendant was discovered in close proximity to 21.81 kilograms of cocaine, which was substantially more than the 28 grams required to constitute trafficking.

4. Constitutional Law—effective assistance of counsel—failure to object during State's closing arguments

Defendant did not receive ineffective assistance of counsel in a trafficking in cocaine by possession case based on trial counsel's failure to object to statements made by the prosecutor during closing arguments. The prosecutor's statements were either reasonable inferences drawn from the evidence or were not so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*.

STATE v. RODELO

[231 N.C. App. 660 (2014)]

Appeal by Defendant from judgment entered 7 December 2012 by Judge V. Bradford Long in Randolph County Superior Court. Heard in the Court of Appeals 21 October 2013.

Attorney General Roy Cooper, by Assistant Attorney General John R. Green, Jr., for the State.

Unti & Lumsden, LLP, by Margaret C. Lumsden, for Defendant.

DILLON, Judge.

Crecencio Felix Rodelo ("Defendant") appeals from a judgment convicting him of trafficking in cocaine by possession, challenging (1) the trial court's denial of his motion to suppress evidence, (2) the sufficiency of the evidence to support his constructive possession of the cocaine, and (3) trial counsel's failure to request instructions on lesser included offenses or to object to statements made by the prosecutor during closing arguments, contending these failures amounted to ineffective assistance of counsel. We find no error.

The evidence of record tends to show the following: Based on information from a confidential informant regarding the delivery of a shipment of cocaine, agents from the Randolph County Sheriff's Office and from the Drug Enforcement Agency ("DEA") conducted surveillance on a particular warehouse in Randolph County. At approximately 11:00 P.M. on 30 November 2011, agents saw a tractor-trailer, driving without headlights, pull up, release the trailer, and pull into a garage bay of the warehouse. The agents approached the front and rear entrances to the warehouse and heard metallic "clanging" noises inside. One agent knocked on the front door, shouting "Policia." The noises stopped, and the back door to the warehouse opened suddenly. A man, later identified as Nathan Tobias-Tristan, stepped out. Tobias-Tristan told the agents who were stationed outside the rear entrance that he worked in the warehouse, that a friend of his was inside; that there were no illegal drugs inside; and that he consented to a search. Inside the warehouse, agents saw no one in the open, so they threatened to loose a dog, after which Defendant came out of the sleeper area of the tractor-trailer.

The agents discovered a hidden compartment in the tractor-trailer, containing numerous, tightly-wrapped packages, which the agents believed to contain cocaine. There was a chemical smell of cocaine in the warehouse and no indication of any kind of legitimate business. "[S]mall wrappings" were "all over" the tractor-trailer, as well as in the

open area of the Honda SUV parked next to the tractor-trailer. Defendant took one of the agents aside, out of the view of Tobias-Tristan, and told the agent that money was hidden in the tractor-trailer. Two agents went to the Sheriff's office to prepare a search warrant.

Upon searching the warehouse, police discovered $955,000.00 in cash in the tightly-wrapped packages in the tractor-trailer, as Defendant disclosed. They also found cocaine in a Honda Pilot, located in close proximity to the tractor-trailer. The Honda Pilot contained a hidden compartment, but the bundles of cocaine were in plain view. Each bundle weighed approximately one kilogram, the total net weight being 21.81 kilograms. Defendant was convicted of trafficking in cocaine by possession and sentenced to 175 to 219 months incarceration. From this judgment, Defendant appeals.

I: Motion to Suppress

[1] In Defendant's first argument, he contends the trial court erred by denying his motion to suppress evidence based on Defendant's lack of standing to contest the initial warrantless search of the warehouse. We disagree.

"The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Otto*, 366 N.C. 134, 136, 726 S.E.2d 824, 827 (2012) (citation and quotation marks omitted).

"Before defendant can assert the protection afforded by the Fourth Amendment, however, he must demonstrate that any rights alleged to have been violated were his rights, not someone else's." *State v. Ysut Mlo*, 335 N.C. 353, 377, 440 S.E.2d 98, 110, *cert. denied*, 512 U.S. 1224, 129 L. Ed. 2d 841 (1994). "Standing [to assert this protection] requires both an ownership or possessory interest and a reasonable expectation of privacy." *State v. Swift*, 105 N.C. App. 550, 556, 414 S.E.2d 65, 68-69 (1992). However, "[t]he burden of showing this ownership or possessory interest is on the person who claims that his rights have been infringed." *Id.* When a defendant neither asserts "a property nor a possessory interest [in the premise searched]," nor makes a showing of any other "circumstances giving rise to a reasonable expectation of privacy in the premises searched[,] . . . defendant has failed to establish his standing to object." *State v. Jones*, 299 N.C. 298, 306, 261 S.E.2d 860, 865 (1980).

In this case, the trial court found, *inter alia*, that Tristan-Tobias informed one of the officers that he just worked at the warehouse; that

there was someone else inside who was his friend; and that he consented to a search of the warehouse. The trial court further found that no evidence was presented that connected Defendant with the warehouse except his presence. Based on its findings, the trial court concluded:

> The defendant has failed to show that he has any standing to challenge Nathan Tristan-Tobias' consent to search the warehouse in question as the defendant has failed to show any reasonable expectation of privacy in the contents of the warehouse. Moreover, the Court concludes as a matter of law that Nathan Tristan-Tobias was reasonably, apparently entitled to give consent to search the premises at Warehouse Number 8 under the facts set out above. The Motion to Suppress is denied.

We believe the record supports the trial court's findings that Defendant presented no evidence of his "ownership or possessory interest" or of a "reasonable expectation of privacy." *Swift*, 105 N.C. App. at 556, 414 S.E.2d at 68-69. Accordingly, we believe the trial court did not err by concluding that Defendant failed to meet his burden of establishing standing. Moreover, assuming *arguendo* Defendant had standing to contest the search, we do not believe the trial court erred by concluding that it was reasonable for the agents to assume that Tristan-Tobias had the authority to give consent for a search of the warehouse, and the police later secured a search warrant based on probable cause.[1] *State v. Toney*, 187 N.C. App. 465, 469, 653 S.E.2d 187, 190 (2007) (stating, "[i]n the absence of actual authority, a search may still be proper if an officer obtains consent from a third party whom he reasonably believes has authority to consent") (citing *Illinois v. Rodriguez*, 497 U.S. 177, 111 L. Ed. 2d 148 (1990)).

II: Motion to Dismiss

[2] In Defendant's second argument on appeal, he contends the trial court erred by denying his motion to dismiss for lack of substantial evidence of Defendant's constructive possession of the contraband. We disagree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). " 'Upon defendant's motion for dismissal, the question for the Court is

1. The trial court made a number of findings to establish that the agents acted on a reasonable belief that Tristan-Tobias had apparent authority to consent to the search.

whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000) (quotation omitted). "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), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

> Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.

Fritsch, 351 N.C. at 379, 526 S.E.2d at 455 (citation and quotation marks omitted).

Trafficking in cocaine by possession has two elements: (1) knowing possession of cocaine, and (2) the cocaine weighing 28 grams or more. *State v. White*, 104 N.C. App. 165, 168, 408 S.E.2d 871, 873 (1991); *see also* N.C. Gen. Stat. § 90-95(h)(3)(a). "It is well established in North Carolina that possession of a controlled substance may be either actual or constructive." *State v. Jenkins*, 167 N.C. App. 696, 700, 606 S.E.2d 430, 433 (2005) (citation and quotation marks omitted). Constructive possession is not required to be exclusive: "Proof of nonexclusive, constructive possession is sufficient." *State v. McNeil*, 359 N.C. 800, 809, 617 S.E.2d 271, 277 (2005) (citation and quotation marks omitted). "A person is said to have constructive possession when he, without actual physical possession of a controlled substance, has both the intent and the capability to maintain dominion and control over it." *Jenkins*, 167 N.C. App. at 700, 606 S.E.2d at 433 (2005) (citation and quotation marks omitted).

> As the terms "intent" and "capability" suggest, constructive possession depends on the totality of circumstances in each case. No single factor controls, but ordinarily the question will be for the jury. . . . The fact that a person is present in a [vehicle] where drugs are located, nothing else appearing, does not mean that person has constructive possession of the drugs. . . . There must be evidence of other incriminating circumstances to support constructive possession.

State v. James, 81 N.C. App. 91, 93, 344 S.E.2d 77, 79 (1986) (citations omitted). "Where [contraband is] found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession." *State v. Butler*, 356 N.C. 141, 567 S.E.2d 137, 140 (2002). "However, unless the person has exclusive possession of the place where the narcotics are found, the State must show other incriminating circumstances before constructive possession may be inferred." *State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989). Evidence of constructive possession is sufficient to support a conviction if it would allow a reasonable mind to conclude that defendant had the intent and capability to exercise control and dominion over the controlled substance. *State v. Peek*, 89 N.C. App. 123, 365 S.E.2d 320 (1988).

In this case, Defendant was neither in actual, physical possession of the controlled substance, nor did he have exclusive control of the warehouse. Therefore, to support a charge of trafficking by possession, the State was required to submit substantial evidence that Defendant constructively possessed the cocaine in this case. Defendant contends on appeal that the State did not submit substantial evidence of his constructive possession of the cocaine. In support of his position, Defendant cites *State v. Weems*, 31 N.C. App. 569, 230 S.E.2d 193 (1976), for the proposition that the mere presence of a defendant near the location of the contraband is not sufficient to prove control and intent. In *Weems*, we stated that "mere proximity to persons or locations with drugs about them is usually insufficient, in the absence of other incriminating circumstances, to convict for possession[,]" and further that "the mere presence of the defendant in an automobile in which illicit drugs are found does not, without more, constitute sufficient proof of his possession of such drugs." *Id.* at 571, 230 S.E.2d at 194 (citations and quotation marks omitted). In *Weems*, the police "placed a certain automobile under surveillance[,]" "saw three men get into the automobile and drive

away[,]" and "followed and shortly thereafter stopped the car." *Id.* The defendant was a passenger in the right front seat, and the driver was the registered owner of the automobile. *Id.* The third man was in a passenger in the back seat. "Packets of heroin were found hidden in three different locations in the car, two of which were in the front seat area and one in the back seat area." *Id.* The defendant was in close proximity to the heroin hidden in the front seat area, but "[t]here was no evidence [the] defendant owned or controlled the car[,] [and] [t]here was no evidence he had been in the car at any time other than during the short period which elapsed between the time the officers saw the three men get in the car and the time they stopped and searched it." Moreover, there "was no evidence of any circumstances indicating that defendant knew of the presence of the drugs hidden in the car." *Id.* at 571, 230 S.E.2d at 194-95. The *Weems* Court held, on these facts, that because there was "no evidence of any circumstance connecting the defendant to the drugs in any manner whatsoever other than the showing of his mere presence for a brief period in the car as a passenger[,]" there was not substantial evidence of the defendant's constructive possession of the heroin. *Id.* at 571, 230 S.E.2d at 195.

We believe *Weems* is distinguishable from the case *sub judice*, because, here, the State's case rests on more than Defendant's mere proximity to the controlled substance. Defendant hid from the agents when they first entered the warehouse. He was discovered alone in the tractor-trailer where the money was hidden. No one else was discovered in the warehouse. The cocaine was discovered in a Honda Pilot parked, with its doors open, in close proximity to the tractor-trailer containing the cash. The cash and the cocaine in this case were packaged in a similar fashion. "[S]mall wrappings" were "all over" the tractor-trailer, in which Defendant was hiding, as well as in the open area of the Honda SUV parked close to the tractor-trailer. Defendant admitted knowing where the money was hidden. The entire warehouse had a chemical smell of cocaine. In addition, when the police were questioning Tristan-Tobias and Defendant together, Defendant motioned to one of the agents "that he wanted to talk to [the agent]" out of the view of Tristan-Tobias, from which a jury could infer that Defendant knew and planned to reveal something, which Tristan-Tobias did not know, or that Defendant was guilty of a crime and was seeking leniency.

We believe the evidence in this case, *when viewed in the light most favorable to the State*, supports the trial court's conclusion that Defendant was in constructive possession of the cocaine. In other words, there were sufficient incriminating circumstances – beyond Defendant's

mere presence – to support the trial court's conclusion. Accordingly, Defendant's argument is overruled.

III: Ineffective Assistance of Counsel

In Defendant's third argument, he contends he received ineffective assistance of counsel when his attorney failed to ask for an instruction on the lesser included offense of and failed to object to the State's allegedly egregious statements in closing arguments.

"To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense. Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286, *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006) (citations and quotation marks omitted). "Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*

Defendant contends he was provided ineffective assistance of counsel in this case for two reasons: (1) trial counsel failed to request that the jury be instructed on conspiracy to traffic in cocaine and the lesser included offense of possession of cocaine; and (2) trial counsel failed to object to allegedly egregious, improper comments by the State during its closing argument. We address each argument in turn.

A: Instruction on Lesser Included Offenses

[3] First, Defendant contends his trial counsel rendered ineffective assistance by failing to request a jury instruction on conspiracy to traffic in cocaine and the lesser included offense of possession of cocaine. We disagree.

We note that in his brief, Defendant refers to the crime of conspiracy to traffic in cocaine as a lesser included offense of trafficking in cocaine. However, conspiracy to traffic in cocaine is not a lesser included offense of trafficking in cocaine, because the requirement of an agreement, while necessary to sustain a conviction for conspiracy, is not a necessary element of trafficking in cocaine by possession. *State v. Kemmerlin*, 356 N.C. 446, 476, 573 S.E.2d 870, 891 (2002) (stating that "conspiracy is a separate offense from the completed crime that normally does not merge into the substantive offense"). In this case, since the indictment does not contain an allegation of an agreement, it would have been error for the trial court to instruct the jury on conspiracy. Accordingly, we

address Defendant's argument as it relates to the lesser included offense of possession of cocaine.

Here, since Defendant failed to object to the omission of a lesser-included offense jury instruction at trial or to request such an instruction, we must review the instructions under the plain error standard. *State v. Lowe*, 150 N.C. App. 682, 685, 564 S.E.2d 313, 315 (2002). Plain error is "a *fundamental error*, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (internal quotation marks and citation omitted) (emphasis in original). Under plain error analysis, a defendant is entitled to reversal "only if the error was so fundamental that, absent the error, the jury probably would have reached a different result." *State v. Jones*, 355 N.C. 117, 125, 558 S.E.2d 97, 103 (2002).

"[A] lesser included offense instruction is required if the evidence would permit a jury rationally to find [defendant] guilty of the lesser offense and acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 562, 572 S.E.2d 767, 772 (2002) (citations and quotation marks omitted). "Where the State's evidence is clear and positive as to each element of the offense charged and there is no evidence showing the commission of a lesser included offense, it is not error for the judge to refuse to instruct on the lesser offense." *State v. Peacock*, 313 N.C. 554, 558, 330 S.E.2d 190, 193 (1985).

The key difference between the crime of trafficking in cocaine by possession and the lesser-included offense of felony possession of cocaine is weight; that is, trafficking by possession requires evidence of 28 grams or more of cocaine. *State v. White*, 104 N.C. App. 165, 168, 408 S.E.2d 871, 873 (1991). Here, we do not believe the trial court committed plain error in failing to instruct the jury on conspiracy to traffic in cocaine and the lesser included offense of simple possession of cocaine. The evidence shows that Defendant was discovered in close proximity to 21.81 kilograms of cocaine, which is substantially more than the 28 grams required to constitute trafficking. Defendant offered no evidence that he was in possession of only less than 28 grams of cocaine. *See State v. King*, 99 N.C. App. 283, 290, 393 S.E.2d 152, 156 (1990). Accordingly, we conclude the trial court did not err, much less commit plain error, in failing to give these instructions.

B: Failure to Object to Remarks

[4] Defendant lastly argues he was provided ineffective assistance of counsel because trial counsel failed to object to allegedly

egregious, improper comments by the State during its closing argument. We disagree.

"The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002). Our Supreme Court has stated:

> We have frequently held that counsel must be allowed wide latitude in jury arguments in hotly contested cases. Counsel may argue the facts in evidence and all reasonable inferences that may be drawn therefrom together with the relevant law in presenting the case.

State v. Anderson, 322 N.C. 22, 37, 366 S.E.2d 459, 468, *cert. denied*, 488 U.S. 975, 102 L. Ed. 2d 548 (1988).

In this case, Defendant argues that his trial counsel's failure to object to three statements made by the prosecutor during closing arguments constituted ineffective assistance of counsel: (1) the prosecutor's statement that Defendant was "exchanging money and drugs, from one vehicle to another," a proposition which was not established at trial and which would have been consistent with a charge of trafficking by transportation; (2) the prosecutor's statement that Defendant was "trafficking in cocaine and narcotics," when there was no evidence that Defendant also trafficked in narcotics; and (3) the prosecutor's characterization of the business as a place where drugs and money were exchanged, arguing in his brief that "[t]he idea that the business was involved only in trafficking in cocaine and narcotics has no basis in the evidence and is not supported by an inference from the evidence."

We believe these statements by the prosecutor, to which trial counsel failed to object, and which Defendant has made the basis of his ineffective assistance of counsel claim, were either reasonable inferences drawn from the evidence, or were not so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. The prosecutor's statement that Defendant was exchanging drugs and money from one vehicle to another may be reasonable inferred from $955,000.00 in cash in one vehicle and 21.81 kilograms of cocaine in a different vehicle parked, with its doors open, in close proximity. The characterization and description of the warehouse as a being a place for exchange of drugs and money could be reasonably inferred by the rural location of the warehouse close to major highways, the lack of a

business sign or descriptor or evidence of any other business being conducted therein, and the fact that a tractor-trailer containing $955,000.00 in cash pulled into the warehouse to join a car containing 21.81 kilograms of cocaine. Finally, referring to "narcotics," we do not believe, standing alone, was so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. As such, Defendant's argument that trial counsel provided ineffective assistance of counsel by failing to object to these three statements during the prosecutor's closing argument must necessarily fail.

We conclude Defendant had a fair trial, free from error.

NO ERROR.

Chief Judge MARTIN and Judge STEELMAN concur.

STATE OF NORTH CAROLINA
v.
TRAVIS MELTON SHERMAN, DEFENDANT

No. COA13-811

Filed 7 January 2014

Jury—challenges for cause—denied—no error

The trial court did not err in a first-degree murder case by failing to allow defendant's for-cause challenges to two prospective jurors. The court's denial of the for-cause challenge to Mr. Antonelli was logically supported by his response that he was willing to follow the judge's instructions. Further, based on Mr. Brunstetter's testimony, the trial court properly denied the challenge because Mr. Brunstetter could render a fair verdict despite his concerns about the length of the trial.

Appeal by defendant from judgment entered 16 August 2012 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 9 December 2013.

Roy Cooper, Attorney General, by Jonathan P. Babb, Special Deputy Attorney General, for the State.

Glover & Petersen, P.A., by James R. Glover and Ann B. Petersen, for defendant-appellant.

MARTIN, Chief Judge.

Defendant Travis Melton Sherman was charged with the murder of Kenneth Edward Ring in violation of N.C.G.S. § 14-17. A jury found defendant guilty of first-degree murder, and judgment was entered on the verdict sentencing him to life imprisonment without parole. He appeals.

The facts relevant to the sole issue presented on appeal involve two of defendant's for-cause challenges to prospective jurors. First, defendant moved to excuse prospective juror Mark Antonelli for cause because Mr. Antonelli said he would form opinions during the trial. The trial judge, after questioning Mr. Antonelli, denied defendant's motion, and as a result, defendant used a peremptory challenge to excuse Mr. Antonelli.

Next, defendant moved to excuse prospective juror Timothy Brunstetter for cause because he had orders from the United States Marine Corps to report to Quantico, Virginia, before the projected end of the trial. The trial judge denied this motion, and defendant used his sixth and final peremptory challenge to excuse Mr. Brunstetter.

After defendant used all six of his peremptory challenges, he renewed his motion to remove Mr. Antonelli and Mr. Brunstetter for cause. The trial judge again denied both motions, and defendant asked for additional peremptory challenges. The court refused to give defendant additional peremptory challenges. Later, defendant renewed his request for additional peremptory challenges so he could use one to excuse a prospective juror. The judge again denied the request for additional peremptory challenges. Defendant appeals.

On appeal defendant argues only one issue. He maintains that the trial court's failure to allow his for-cause challenges to prospective jurors Mr. Antonelli and Mr. Brunstetter was prejudicial error that requires a new trial. We disagree.

For a defendant to seek reversal of a judgment based on a trial court's refusal to allow his for-cause challenges, the defendant must comply with N.C.G.S. § 15A-1214(h). Compliance with N.C.G.S. § 15A-1214(h) is mandatory and is the only way to preserve for appellate review the denial of a for-cause challenge. *State v. Sanders*, 317 N.C. 602, 608, 346 S.E.2d 451, 456 (1986). Section 15A-1214 requires that

> (h) In order for a defendant to seek reversal of the case on appeal on the ground that the judge refused to allow a challenge made for cause, he must have:
>
> (1) Exhausted the peremptory challenges available to him;
>
> (2) Renewed his challenge as provided in subsection (i) of this section; and
>
> (3) Had his renewal motion denied as to the juror in question.
>
> (i) A party who has exhausted his peremptory challenges may move orally or in writing to renew a challenge for cause previously denied if the party either:
>
> (1) Had peremptorily challenged the juror; or
>
> (2) States in the motion that he would have challenged that juror peremptorily had his challenges not been exhausted.

N.C. Gen. Stat. § 15A-1214(h)–(i) (2011).

A review of the transcript reveals that defendant complied with N.C.G.S. § 15A-1214(h). He moved to excuse Mr. Antonelli for cause, and the court denied that motion. Defendant then used a peremptory challenge to excuse Mr. Antonelli. Defendant also moved to excuse Mr. Brunstetter for cause, and the court denied that motion. As a result, defendant used his final peremptory challenge to excuse Mr. Brunstetter. After defendant used his final peremptory challenge, he renewed his motions to excuse Mr. Antonelli and Mr. Brunstetter for cause, and the court denied both motions. Therefore, defendant has complied with the provisions of N.C.G.S. § 15A-1214(h).

N.C.G.S. § 15A-1212 lists the grounds for challenges for cause to a prospective juror. "We review a trial court's ruling on a challenge for cause for abuse of discretion." *State v. Lasiter*, 361 N.C. 299, 301, 643 S.E.2d 909, 911 (2007). A trial court abuses its discretion when its 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 (1998). When we review a trial judge's ruling we consider only whether it is supported by the record, not whether we agree with the ruling. *Lasiter*, 361 N.C. at 302, 643 S.E.2d at 911. This is a deferential standard of review because a trial judge has the advantage of interacting with a juror. *Id.*

Defendant argues that Mr. Antonelli should have been excused for cause because he responded that he would form opinions during the trial, which would substantially impair his ability to follow and apply the law. Defendant fails to state the statutory ground upon which he is relying for his for-cause challenge, but, for two reasons, it is implied that he is relying on N.C.G.S. § 15A-1212(8), which allows a for-cause challenge when, "[a]s a matter of conscience, . . . [a juror] would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina." N.C. Gen. Stat. § 15A-1212(8) (2011). First, defendant argues that forming opinions during trial would impair Mr. Antonelli's ability to apply the law of North Carolina. Second, defendant cites *Witherspoon v. Illinois*, 391 U.S. 510, 20 L. Ed. 2d 776 (1968), in support of his argument, which the General Assembly codified at N.C.G.S. § 15A-1212(8). N.C. Gen. Stat. § 15A-1212 official commentary (2011). Therefore, while defendant fails to state that he is relying on N.C.G.S. § 15A-1212(8), we infer he is relying on N.C.G.S. § 15A-1212(8) based on his argument.

A review of the transcript reveals the following relevant exchanges:

> MR. DOLAN: Let me ask you this: . . . Can you be sure that you would wait until all of the evidence was presented before you came and started to make any decision in this case?
>
> [MR. ANTONELLI]: I don't think I could guarantee that, but I think I would be able to, but I couldn't guarantee it.
>
> MR. DOLAN: What do you mean you don't think you [can] guarantee it?
>
> [MR. ANTONELLI]: Well, because you form opinions as it goes on and it changes.
>
> MR. DOLAN: And are you saying that you think you would form opinions as the case went on?
>
> [MR. ANTONELLI]: Probably.
>
> . . . .
>
> MR. DOLAN: . . . Are you saying you don't think that you can wait, that you're probably going to form opinions along the way?
>
> [MR. ANTONELLI]: Most likely.

MR. DOLAN: I would move for cause, your Honor.

. . . .

THE COURT: Yes.

Mr. Antonelli, let me follow-up with just a question for you. You've already heard me instruct several times to that one of the rules you have to follow is to [sic] not form or express any opinions about the outcome of this case, and there are a number of important steps that a case must go through. There is the evidence, there is the arguments of counsel, there is my instructions on the law, and then there's deliberation. What we require of jurors is the ability to keep an open mind and not form or express opinions until they get into the jury deliberation room, engage in deliberation with their fellow jurors, consider all of the things I've just described. Do you believe that you could fulfill that duty as a juror?

[MR. ANTONELLI]: Yes, but I believe I would still form an opinion but can still be open-minded.

THE COURT: In the event that you were instructed on the law or persuaded by an argument or persuaded by evidence later in the trial that your opinion was perhaps in error, would you be able to set aside any opinion that you had formed and listen to either of the evidence or the instructions or the argument or the deliberation in views of your fellow jurors? Would you be able to set aside any opinion that you had formed and render a verdict according to the instructions, the law, and the argument and the evidence?

[MR. ANTONELLI]: I believe so. I can't guarantee that, but I believe so.

THE COURT: And when you say you can't guarantee that, what do you mean by that?

[MR. ANTONELLI]: I've never been through this so I don't know how my opinion is going to form . . .

. . . .

THE COURT: Are you willing to follow my instructions to keep an open mind throughout this case?

> [MR. ANTONELLI]: Yes.
>
> THE COURT: I'm going to deny the motion for cause at this time.
>
> MR. DOLAN: I just want to be clear, Mr. Antonelli, and I'm not trying to pick on you. Is it your position that you will form an opinion as the case progresses?
>
> [MR. ANTONELLI]: I would probably say most likely, yeah, I would form an opinion as it was going on, but I can't guarantee that I definitely will.

The above-quoted portion of voir dire demonstrates that the trial court did not abuse its discretion when disallowing the for-cause challenge. The trial judge was in the best position to observe Mr. Antonelli and to weigh and decide the credibility of his responses. The judge's denial of the for-cause challenge to Mr. Antonelli is logically supported by his response that he was willing to follow the judge's instructions. Therefore, the trial court did not err when disallowing defendant's for-cause challenge to Mr. Antonelli.

Next, defendant argues, without citing any statutory authority or case law, that the trial court erred when it denied his for-cause challenge to Mr. Brunstetter because he was a Marine with orders to report to Quantico, Virginia, before the projected end of the trial. We assume that defendant is relying on the catch-all provision of N.C.G.S. § 15A-1212 for his challenge, which allows a for-cause challenge when a juror "[f]or any other cause is unable to render a fair and impartial verdict." N.C. Gen. Stat. § 1212(9).

Our Supreme Court considered whether a prospective juror could render a fair verdict because he was concerned about the estimated time of the trial in *State v. Reed*, 355 N.C. 150, 160, 558 S.E.2d 167, 174 (2002), *appeal after remand*, 162 N.C. App. 360, 590 S.E.2d 477 (2004). The Court concluded that the trial court did not abuse its discretion when it denied the for-cause challenge. *Id.* In reaching this conclusion, the Court noted that trial judges routinely decide whether to excuse a prospective juror because of concerns about the length of a trial. *Id.* Also, in *Reed*, despite the estimated length of the trial, the prospective juror stated that he could be fair to both sides. *Id.*

In this case, the trial court did not abuse its discretion in refusing to allow the for-cause challenge. Mr. Brunstetter twice asserted that despite his orders to report to Quantico, Virginia, he could focus on the trial if

he was selected to be a juror. Also, the trial court was able to observe Mr. Brunstetter when he made these statements. Therefore, based on Mr. Brunstetter's testimony, the trial court properly denied the challenge because Mr. Brunstetter could render a fair verdict despite his concerns about the length of the trial.

No Error.

Judges ERVIN and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
EMANUEL EDWARD SNELLING, JR.

No. COA13-518

Filed 7 January 2014

1. Robbery—with dangerous weapon—jury instruction—presence of a firearm—proper clarification

The trial court did not err in a robbery with a dangerous weapon case in its answer to a jury question about whether the State must prove the actual presence of a firearm on the charge. The trial court's answer properly clarified that the jury must find either that 1) defendant actually possessed a firearm; or 2) victim reasonably believed that defendant possessed a firearm, in which case the jury could infer that the object was a firearm.

2. Sentencing—prior record level—defendant's admission—statutory procedures—inappropriate

The trial court did not err by sentencing defendant as a prior record level III. The trial court did not fail to comply with N.C.G.S. § 15A-1022.1 because within the context of defendant's sentencing hearing, the procedures specified by N.C.G.S. § 15A-1022.1 would have been inappropriate.

3. Sentencing—probation point—no notice of intent—notice not waived

The trial court erred by including a probation point in its sentencing of defendant as a prior record level III. The trial court never determined whether the statutory requirements of N.C.G.S.

§ 15A-1340.16(a6) were met as there was no evidence in the record to show that the State provided sufficient notice of its intent to prove the probation point and the record did not indicate that defendant waived his right to receive such notice.

Appeal by defendant from judgment entered 23 August 2012 by Judge Carl R. Fox in Wake County Superior Court. Heard in the Court of Appeals 20 November 2013.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth N. Strickland, for the State

Attorney Anna S. Lucas, for defendant.

Elmore, Judge.

On 23 August 2012, a jury found Emanuel Edward Snelling, Jr. (defendant), guilty of larceny from the person, robbery with a dangerous weapon, and second degree kidnapping. The trial court sentenced defendant as a prior record level III offender (PRL III) to consecutive terms of active imprisonment of 26 to 41 months (second degree kidnapping) and 84 to 110 months (robbery with a dangerous weapon), with 6 to 8 months (larceny from the person) to be served concurrently. Defendant now appeals and raises as error the trial court's: 1.) failure to answer a jury question and 2.) determination that he was a PRL III. After careful consideration, we conclude that there was no trial error as to the jury question, but we vacate the sentence of the trial court and remand for a new sentencing hearing.

I. Facts

During the deliberation phase of trial, the jury indicated that it had a question about the robbery with a dangerous weapon charge. Initially, the trial court instructed the jury on the sixth and seventh elements of robbery with a dangerous weapon as follows:

> Sixth, that the defendant had a firearm in his possession at the time he obtained the property, or that it reasonably appeared to the victim that a firearm was being used, in which case you may infer that the said instrument was what the defendant's conduct . . . seventh, that the defendant obtained the property by endangering or threatening the life of [victim] with a pistol or firearm.

Thereafter, the trial court realized that the initial instruction was incomplete and told the jury:

> If you'll turn back to the robbery with a firearm, the sixth element, doesn't have the ending language on it and it should read: In – let's see. Read me -- read it again. Sixth, that the defendant had a firearm in his possession at the time he obtained the property or that it reasonably appeared to the victim that a firearm was being used, in which case you may infer that the said instrument was what the defendant's conduct represented it to be. It should have "be" at the end. I've learned there aren't any English majors on the Pattern Jury Instructions committee. Anybody have any questions about that remaining language? Okay. Thank you.

A short time later, the jury posed this question to the trial court: "does the [S]tate have to prove physical presence of a pistol for the seventh bullet of robbery with a firearm or is it simply that she had to believe the presence of a pistol and feel threatened?" Over defendant's objection, the trial court responded:

> TRIAL COURT: When I read the instruction for number six, that the defendant had a firearm in his possession at the time he obtained the property or that he was reasonably or reasonably appeared to the victim that a firearm was being used, in which case you *may infer that the said instrument was what the defendant's conduct represented it to be. That carries over into any reference to a pistol in the instructions*, so number seven, when it refers to a pistol, you can take it in context of the fact that the statement about a firearm and the representation of a firearm from number six. Okay, six. Does that answer the question?
>
> JUROR NO. 6: I believe so.

(Emphasis added). Thereafter, the jury continued deliberating and reached a unanimous verdict of guilty as to all charges. At sentencing, the parties stipulated that defendant had 6 prior record level points and was thus a PRL III. It is also undisputed that 1 of the 6 points was assigned to defendant because he was on probation (the probation point) at the time these offenses were committed. At no time did the trial court: 1.) advise defendant of his rights to prove mitigating factors and have a jury decide the existence of the probation point; or 2.) determine

whether written notice was given to defendant by the State of its intent to seek the probation point.

II. Analysis

a.) Answer to Jury Question

[1] Defendant first argues that the trial court erred in its answer to a jury question about whether the State must prove the actual presence of a firearm on the charge of robbery with a dangerous weapon. We disagree.

> On appeal, this Court considers a jury charge contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by an omitted instruction. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

Hammel v. USF Dugan, Inc., 178 N.C. App. 344, 347, 631 S.E.2d 174, 178 (2006) (citations and quotation marks omitted). The trial court has the duty to "declare and explain the law arising on the evidence relating to each substantial feature of the case." *State v. Hockett*, 309 N.C. 794, 800, 309 S.E.2d 249, 252 (1983) (citation and quotation omitted).

In support of his argument that the trial court failed to answer the jury's question, defendant relies on *Hockett*, which also involved a robbery with a dangerous weapon charge. *Id.* In *Hockett*, the jury asked the trial court during its deliberation if "the threat of harm or force with a deadly weapon [is] the same as actually having or using a weapon?" *Id.* Instead of answering the jury's question or reviewing the elements of the charge, the trial court instructed the jury to continue its deliberation. *Id.* at 801-02, 309 S.E.2d at 252-53. Our Supreme Court ruled that because "the jury did not understand . . . how the presence or absence of a gun would affect the degree of guilt[,]" the trial court's failure to answer the jury's question of law was prejudicial error. *Id.* at 802, 309 S.E. 2d at 253.

Defendant's reliance on *Hockett* is misplaced. Unlike in *Hockett*, the trial court in the present case answered the jury's legal question, and the jury indicated that it understood the trial court's answer. The

trial court told the jury to interpret element numbers six and seven of the robbery with a dangerous weapon charge in tandem rather than as mutually exclusive requirements. Specifically, the trial court's answer properly clarified that the jury must find either that 1.) defendant actually possessed a firearm; or 2.) victim reasonably believed that defendant possessed a firearm, in which case the jury could infer that the object was a firearm. *See State v. Lee*, 128 N.C. App. 506, 510, 495 S.E.2d 373, 376 (1998) ("The State need only prove that the defendant represented that he had a firearm and that circumstances led the victim reasonably to believe that the defendant had a firearm and might use it."); *see also State v. Bartley*, 156 N.C. App. 490, 496, 577 S.E.2d 319, 323 (2003) ("Proof of armed robbery requires that the victim reasonably believed that the defendant possessed . . . a firearm in the perpetration of the crime[;]" *State v. Fleming*, 148 N.C. App. 16, 22, 557 S.E.2d 560, 564 (2001) ("If there is some evidence that the implement used was not a firearm . . . a permissive inference[] [permits] but does not require the jury to infer that the instrument used was in fact a firearm[.]"). Thus, the trial court did not err in its answer to the jury.

b.) Sentencing Procedure Pursuant to N.C. Gen. Stat. 15A-1022.1

[2] Defendant also argues that the trial court erred in sentencing defendant as a PRL III because it failed to comply with N.C. Gen. Stat. § 15A-1022.1 (2011). We disagree.

"[We review alleged sentencing errors for] 'whether [the] sentence is supported by evidence introduced at the trial and sentencing hearing.' " *State v. Deese*, 127 N.C. App. 536, 540, 491 S.E.2d 682, 685 (1997) (quoting N.C. Gen. Stat. § 15A-1444(a1) (Cum. Supp. 1996)). However, "[t]he 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). The PRL 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 PRL II offender has between 2-5 points, whereas a PRL III offender has at a minimum of 6 and no more than 9 points. *Id.* A sentencing error that improperly increases a defendant's PRL is prejudicial. *State v. Hanton*, 175 N.C. App. 250, 260, 623 S.E.2d 600, 607 (2006).

Under N.C. Gen. Stat § 15A-1340.14 (b)(7) (2011), a defendant shall be assigned one point "[i]f the offense was committed while the offender was on supervised or unsupervised probation[.]" "[T]he jury shall determine whether the point should be assessed[,]" unless the defendant

admits to it. N.C. Gen. Stat. § 15A-1340.16 (2011). In such cases, the point will be treated as though it was found by the jury. *Id.* These admissions are generally constrained by the procedures set out in N.C. Gen. Stat. 15A-1022.1, which mandates that the trial court

> address the defendant personally and advise the defendant that: (1) He or she is entitled to have a jury determine the existence of any aggravating factors or points under G.S. 15A-1340.14(b)(7); and (2) He or she has the right to prove the existence of any mitigating factors at a sentencing hearing before the sentencing judge.

N.C. Gen. § 15A-1022.1 (2011). However, these procedural requirements are not mandatory when "the context clearly indicates that they are inappropriate." *Id.*

In *State v. Marlow*, the defendant was sentenced at a PRL II. *State v. Marlow*, ___ N.C. App. ___, ___, 747 S.E.2d 741, 748 (2013). One of his points was determined pursuant to N.C. Gen. Stat. § 15A-1340.14(b)(7) because of a conviction while he was on probation. *Id.* Even though the trial court did not make any of the inquiries mandated by N.C. Gen. Stat. § 15A-1022.1, this Court held that "conducting a statutorily mandated colloquy with [the defendant] . . . would have been inappropriate and unnecessary" where: 1.) the defendant stipulated to his prior record level; 2.) the defendant's counsel could have "inform[ed] [the defendant] of the repercussions of conceding certain prior offenses[;]" 3.) the "defendant had the opportunity to interject had he not known such repercussions[;]" and 4.) the additional point was a mere "routine determination" by the trial court based on the circumstances. *Id.* at ___, 747 S.E.2d at 747-48.

Similarly, in the case at bar, it is uncontested that defendant stipulated to being on probation when he committed larceny from the person, robbery with a dangerous weapon, and second degree kidnapping. The prosecutor and defendant's counsel signed the prior record level worksheet "agree[ing] with the defendant's prior record level[.]" At sentencing, defendant stipulated that he was a PRL III: two points for a Class H Felony conviction, three points for three class one misdemeanors, and one probation point. Defendant admitted at trial that he was on probation at the time these offenses occurred, and his attorney also alluded to defendant's probation during sentencing. Moreover, the trial court spoke at sentencing, without resistance from defendant, about his having "just been placed on probation" when he committed these offenses. Thus, the trial court ruled that defendant's PRL was stipulated

by the parties resulting in six prior record points at a PRL III. Despite defendant's numerous opportunities to oppose the finding of the probation point, he did not. Under the circumstances, the determination of defendant's probation point was routine and a non-issue. Accordingly, we hold that within the context of defendant's sentencing hearing, the procedures specified by N.C. Gen. Stat. § 15A-1022.1 would have been inappropriate. *See Marlow*, *supra*.

c.) Sentencing Procedure Pursuant to N.C. Gen. Stat. § 15A-1340.16(a6)

[3] In his final argument on appeal, defendant avers that the trial court erred in sentencing defendant as a PRL III because it failed to comply with N.C. Gen. Stat § 15A-1340.16(a6). We agree.

N.C. Gen. Stat. § 15A-1340.16(a6) requires the State

> to provide a defendant with written notice of its intent to prove the existence of one or more aggravating factors under subsection (d) of this section or a prior record level point under G.S. 15A-1340.14(b)(7) at least 30 days before trial or the entry of a guilty or no contest plea. A defendant may waive the right to receive such notice. The notice shall list all the aggravating factors the State seeks to establish.

N.C. Gen. Stat. § 15A-1340.16(a6) (2011). The statute is clear that unless defendant waives the right to such notice, the State must provide defendant with advanced written notice of its intent to establish: 1.) any of the twenty aggravating factors listed in N.C. Gen. Stat. § 15A-1340.16(d); or 2.) a probation point pursuant to N.C. Gen. Stat. 15A-1340.14(b)(7). *Id.* The trial court shall determine if the State provided defendant with sufficient notice or whether defendant waived his right to such notice. N.C. Gen. Stat. § 15A-1022.1 (2011).

Here, the trial court never determined whether the statutory requirements of N.C. Gen. Stat. § 15A-1340.16(a6) were met. Additionally, there is no evidence in the record to show that the State provided sufficient notice of its intent to prove the probation point. Moreover, the record does not indicate that defendant waived his right to receive such notice. Thus, the trial court erred by including the probation point in its sentencing of defendant as a PRL III. This error was prejudicial because the probation point raised defendant's PRL from a PRL II to a PRL III. *See Hanton*, *supra*.

III. Conclusion

In sum, the trial court did not err in its answer to a jury question about whether the State must prove the actual presence of a firearm on the charge of robbery with a dangerous weapon. Similarly, the trial court did not err in failing to conduct a statutorily mandated colloquy with defendant pursuant to N.C. Gen. Stat § 15A-1022.1. However, the trial court committed prejudicial error by including the probation point in sentencing defendant as a PRL III without determining if the State provided sufficient notice of its intent to seek the probation point or whether defendant waived such statutory requirements per N.C. Gen. Stat. § 15A-1340.16(a6). As such, we vacate defendant's sentence and remand to the trial court for resentencing in accordance with this opinion.

Remanded for new sentencing hearing.

Judges McCULLOUGH and DAVIS concur.

STATE OF NORTH CAROLINA
v.
LARRY STUBBS

NO. COA13-174

Filed 7 January 2014

Constitutional Law—1973 sentence of life with the possibility of parole—not cruel and unusual

Defendant's 1973 sentence of life imprisonment with the possibility of parole for second-degree burglary was reinstated after he was paroled in 2008 and convicted of impaired driving in 2010. Although defendant argued that the original sentence was excessive under evolving standards of decency and the Eighth Amendment, the sentence was severe but not cruel or unusual in the constitutional sense because it allowed for the realistic opportunity to obtain release before the end of his life. The trial court erred by concluding that defendant's life sentence violated the prohibitions of the Eighth Amendment to the United States Constitution and the case was remanded for reinstatement of the original sentence.

Judge STEPHENS concurs by separate opinion.

Judge DILLON concurs by separate opinion.

Appeal by the State from judgment entered 5 December 2012 by Judge Gregory A. Weeks in Cumberland County Superior Court. Heard in the Court of Appeals 5 June 2013.

Attorney General Roy Cooper, by Assistant Attorney General Daniel P. O'Brien, for the State.

Sarah Jessica Farber for defendant-appellee.

BRYANT, Judge.

Where the trial court erred in concluding that defendant's sentence of life in prison with the possibility of parole was a violation of the Eighth Amendment, we reverse and remand the trial court order modifying defendant's original sentence.

On 7 May 1973, a complaint and warrant for arrest was issued against seventeen-year-old defendant Larry Connell Stubbs in Cumberland County.

> [The complainant alleged that on that day, defendant] unlawfully, willfully, and feloniously and burglariously [sic] did break and enter, at or about the hour of two o'clock AM in the night . . . the dwelling house of [the victim] located at 6697 Amanda Circle, Fayetteville, N.C. and then and there actually occupied by the said [victim], with the felonious intent [defendant], [sic] the goods and chattels of the said [victim], in the said dwelling house then and there being, then and there feloniously and burglariously [sic] to steal and carry away, said items stolen and carried away, one table lamp, one General Electric Record Player; one Magnus Electric Organ; One Portable General Electric 19" television set; . . . one man's suit color black, the personal property of [the victim], and valued at $394.00.

In addition to first-degree burglary and felonious larceny, defendant was charged with and later indicted on the charge of rape. On 6 August 1973, defendant pled guilty to second-degree burglary and assault with intent to commit rape. The State dismissed the charge of felonious larceny.

On the charge of second-degree burglary, the trial court accepted defendant's plea, entered judgment, and sentenced defendant to an active term for "his natural life."[1] On the charge of assault with intent to commit rape, the trial court sentenced defendant to an active term of fifteen years to run concurrently with his life sentence.

On 11 May 2011, defendant filed a pro se motion for appropriate relief (MAR) in the Cumberland County Superior Court asking that his sentence of life in prison on the charge of second-degree burglary be set aside, that he be resentenced, and after awarding time served as credit toward the new sentence, that he be released from prison. As a statutory basis for the relief requested, defendant cited N.C. Gen. Stat. § 15A-1415(b)(7), "Grounds for appropriate relief which may be asserted by defendant after verdict; limitation as to time", and G.S. § 15A-1340.17, "Punishment limits for each class of offense and prior record level" pursuant to the Structured Sentencing Act codified at §§ 15A-1340.10, *et seq*. Defendant's contention was that his original sentence was grossly disproportionate to the maximum sentence he could receive for the same crime if sentenced today. Sentenced to an active term for his natural life for second-degree burglary, defendant maintained that if he had been sentenced under the Structured Sentencing Act, effective 1 October 1994, his term would have been between twenty-nine and forty-four months. "Because there has been a 'significant change' in the law," defendant asserted that his life sentence should now be considered cruel and unusual punishment. Defendant petitioned the Superior Court to resentence him based on "evolving standards of decency under the Eighth Amendment of the United States Constitution which prohibits cruel and unusual punishment being inflicted[,] as does [] Article I, section 27 of the North Carolina Constitution." Defendant also petitioned to proceed *in forma pauperis*.

On 10 October 2011, Senior Resident Superior Court Judge Gregory A. Weeks filed an order in which he concluded that defendant's "Motion for Appropriate Relief [was] not frivolous, [had] merit, that a summary disposition [was] inappropriate, and that a hearing [was] necessary." The court appointed the Office of North Carolina Prisoner Legal Services to represent defendant.

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1. Pursuant to N.C. Gen. Stat. § 148-58, effective in 1973, "Time of eligibility of prisoners to have cases considered," "any prisoner serving sentence for life shall be eligible [to have their cases considered for parole] when he has served 10 years of his sentence." N.C. Gen. Stat. § 148-58 (1973) (amended in 1973, effective 1 July 1974, to provide that the period a prisoner sentenced to life imprisonment must serve before being eligible for parole would be changed from ten to twenty years) (repealed 1977).

On 13 August 2012, the State filed its Memorandum Opposing Defendant's Motion for Appropriate Relief. In its memorandum, the State addressed defendant's motion as a request for retroactive application of the Structured Sentencing Act and a challenge to his life sentence pursuant to the Cruel and Unusual Punishments Clause of the Eighth Amendment to the United States Constitution. The State maintained that defendant was not entitled to the relief sought: the Structured Sentencing Act was applicable to criminal offenses occurring on or after 1 October 1994; and "[t]o the extent that [] Defendant's argument challenges his sentence pursuant to the Cruel and Unusual Punishments Clause of the Eighth Amendment to the United States Constitution," Eighth Amendment jurisprudence proscribes a different analysis than the one proposed by defendant. The State further asserted that our State Appellate Courts have rejected arguments similar to the one defendant presented.

On 15 August 2012, defendant, through appointed counsel, filed a Memorandum Supporting Defendant's Motion for Appropriate Relief. Acknowledging our North Carolina Supreme Court's holding which declined to retroactively apply the sentencing provisions codified under the Structured Sentencing Act, *see State v. Whitehead*, 365 N.C. 444, 722 S.E.2d 492 (2012), defendant asserted that he was entitled to relief "because his sentence of Life Imprisonment for his conviction of Second Degree Burglary in 1973 is unconstitutionally excessive under evolving standards of decency and the Eighth Amendment to the United States Constitution . . . and Article I, Section 27 of the North Carolina Constitution." Defendant asserted that "[t]o gauge evolving standards of decency, the [United States] Supreme Court looks to legislative changes and enactments." Defendant also asserted that "[t]he [Structured Sentencing Act] is the most current expression of North Carolina's assessment of appropriate and humane sentences, and [] is an objective index of sentence proportionality for Eighth Amendment analysis purposes." "As of today, Defendant has served **nearly forty years** in prison for his Second Degree Burglary conviction. This is nearly ten times the length of time that any defendant could be ordered to serve today." Defendant contended that his sentence was excessive, that it violated the United States Constitution and the North Carolina Constitution "making it necessary to vacate Defendant's life sentence and to resentence him to a term of years that is not disproportionate, cruel, or unusual."

Following a 13 August 2012 hearing, the trial court on 5 December 2012 entered an order in which it found that on 6 August 1973, defendant

pled guilty to second-degree burglary and assault with intent to commit rape. Defendant had been sentenced to life in prison for second-degree burglary along with a concurrent sentence of fifteen years imprisonment for assault with intent to commit rape. Defendant completed his sentence for assault with intent to commit rape in 1983 and was currently incarcerated solely for his second-degree burglary conviction. "As of 30 November 2012, [defendant] has been in the custody of the North Carolina Department of Public Safety for this crime for more than thirty-six years." The court found that defendant was paroled in December 2008 and that while on parole, he was charged with and convicted of driving while impaired. Subsequent to his conviction, defendant's parole status was revoked, and he was returned to incarceration. The trial court concluded that under "evolving standards, [defendant's] sentence violated the Eighth Amendment and is invalid as a matter of law." The trial court granted defendant's motion for appropriate relief and vacated the judgment entered 6 August 1973 as to the second-degree burglary conviction, resentencing defendant to a term of thirty years. Defendant was given credit for 13,652 days spent in confinement. The trial court further ordered that the North Carolina Department of Public Safety Division of Adult Correction release defendant immediately.

The State filed with this Court petitions for a writ of certiorari to review the 5 December 2012 trial court order and a writ of supersedeas to stay imposition of the trial court's order pending appeal. Both petitions were granted.[2]

On appeal, the State brings forth the issue of whether the Superior Court erred by ruling that defendant's 1973 sentence of life imprisonment

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2. We acknowledge with appreciation the responsiveness of the State and defense counsel in providing this Court with memoranda of additional authority regarding a question presented by this Court at oral argument reflecting on our jurisdiction to hear this appeal. We also note that because one panel of this Court has previously decided the jurisdictional issue by granting the State's petition for a writ of certiorari to hear the appeal, we cannot overrule that decision. *N.C.N.B. v. Virginia Carolina Builders*, 307 N.C. 563, 567, 299 S.E.2d 629, 631-32 (1983) ("[O]nce a panel of the Court of Appeals has decided a question in a given case that decision becomes the law of the case and governs other panels which may thereafter consider the case. Further, since the power of one panel of the Court of Appeals is equal to and coordinate with that of another, a succeeding panel of that court has no power to review the decision of another panel on the same question in the same case. Thus the second panel in the instant case had no authority to exercise its discretion [against] reviewing the trial court's order when a preceding panel had earlier decided to the contrary."). However, separate concurring opinions further address the issue of jurisdiction to hear this appeal.

with the possibility of parole for a second-degree burglary conviction is now in violation of the Eighth Amendment to the United States Constitution, vacating defendant's 1973 judgment, and resentencing him. The State argues on appeal that (A) the trial court lacked jurisdiction over the original judgment and (B) that it incorrectly interpreted the precedent of the Supreme Court of the United States.

"Our review of a trial court's ruling on a defendant's MAR is 'whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court.' " *State v. Peterson*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, (No. COA12-1047) (2013) (quoting *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982)).

A

The State argues that the trial court lacked jurisdiction over the original judgment. Specifically, the State contends that defendant's motion for appropriate relief was made pursuant to N.C. Gen. Stat. § 15A-1415 but that no provision of section 15A-1415 granted the trial court jurisdiction to modify the original sentence. We disagree.

A trial court loses jurisdiction to modify a defendant's sentence, "subject to limited exceptions, after the adjournment of the session of court in which [the] defendant receive[s] this sentence[,] [a]lthough a trial court may properly modify a sentence after the trial term upon submission of a [Motion for Appropriate Relief (MAR)][.]" *Whitehead*, 365 N.C. at 448, 722 S.E.2d at 495 (citations omitted). Section 15A-1415 of the North Carolina General Statutes lists "the only grounds which the defendant may assert by a motion for appropriate relief made more than 10 days after entry of judgment[.]" N.C. Gen. Stat. § 15A-1415(b) (2011).

At the 13 August 2012 hearing on defendant's MAR, defendant contended that he was entitled to relief pursuant to N.C. Gen. Stat. § 15A-1415(b)(8). In its 5 December 2012 order, the trial court concluded that its authority over the 6 August 1973 judgment was allowed pursuant to N.C.G.S. § 15A-1415(b)(4) & (b)(8).

Pursuant to General Statutes, section 15A-1415, a defendant may assert by MAR made more than ten days after entry of judgment the following grounds:

> (4) The defendant was convicted or sentenced under a statute that was in violation of the Constitution of the United States or the Constitution of North Carolina.

. . .

> (8) The sentence imposed was unauthorized at the time imposed, contained a type of sentence disposition or a term of imprisonment not authorized for the particular class of offense and prior record or conviction level was illegally imposed, or is otherwise invalid as a matter of law.

N.C.G.S. § 15A-1415(b)(4) & (b)(8).

The gravamen of the argument presented in defendant's MAR submitted to the trial court is that because "his sentence of Life Imprisonment for his conviction of Second Degree Burglary in 1973 is unconstitutionally excessive under evolving standards of decency and the Eighth Amendment to the United States Constitution . . . and Article I, Section 27 of the North Carolina Constitution," the trial court had jurisdiction over the 6 August 1973 judgment to consider whether defendant's sentence was "invalid as a matter of law." N.C.G.S. § 15A-1415(b)(8); *see also* N.C.G.S. § 15A-1415(b)(4). We agree and therefore, overrule the State's challenge to the trial court's jurisdiction.

B

The State further contends that the trial court misapplied United States Supreme Court precedent, applying the wrong test to determine whether an Eighth Amendment violation has occurred. We agree in part.

The Eighth Amendment to the United States Constitution states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted[,]" U.S. Const. amend. VIII, and is made applicable to the States by the Fourteenth Amendment, *id.* amend. XIV. The Constitution of North Carolina similarly states, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted." N.C. Const. art. I, § 27. Despite the difference between the two constitutions, one prohibiting "cruel and unusual punishments," the other "cruel or unusual punishments," "[our North Carolina Supreme Court] historically has analyzed cruel and/or unusual punishment claims by criminal defendants the same under both the federal and state Constitutions." *State v. Green*, 348 N.C. 588, 603, 502 S.E.2d 819, 828 (1998) (citations omitted), *superseded by statute on other grounds as stated in In re J.L.W.*, 136 N.C. App. 596, 525 S.E.2d 500 (2000).

"The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . [T]he words of the Amendment are not

precise, and [] their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100-01, 2 L. Ed. 2d 630, 642 (1958) (citation omitted). "The [Eighth] Amendment embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . , against which we must evaluate penal measures." *Estelle v. Gamble*, 429 U.S. 97, 102-03, 50 L. Ed. 2d 251, 259 (1976) (citation and quotations omitted).

In *Estelle v. Gamble*, the United States Supreme Court observed that when the Court initially applied the Eighth Amendment, the challenged punishments regarded methods of execution. *Id.* at 102, 50 L. Ed. 2d at 258. However, "the Amendment proscribes more than physically barbarous punishments." *Id.* at 102, 50 L. Ed. 2d 259.

> To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to the evolving standards of decency that mark the progress of a maturing society. This is because the standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.

Graham v. Florida, 560 U.S. ___, ___, 176 L. Ed. 2d 825, 835 (2010) (citations, quotations, and bracket omitted).

> [T]he Eighth Amendment's protection against excessive or cruel and unusual punishments flows from the basic precept of justice that punishment for a crime should be graduated and proportioned to the offense. Whether this requirement has been fulfilled is determined not by the standards that prevailed when the Eighth Amendment was adopted in 1791 but by the norms that currently prevail. The Amendment draws its meaning from the evolving standards of decency that mark the progress of a maturing society.

Kennedy v. Louisiana, 554 U.S. 407, ___, 171 L. Ed. 2d 525, 538 (citations and quotations omitted) *opinion modified on denial of reh'g*, 554 U.S. 945, 171 L. Ed. 2d 932 (2008).

> The concept of proportionality is central to the Eighth Amendment. . . .
>
> The Court's cases addressing the proportionality of sentences fall within two general classifications. The first

> involves challenges to the length of term-of-years sentences given all the circumstances in a particular case. The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty.

Graham, 560 U.S. at ___, 176 L. Ed. 2d at 835-36.

As to the first classification, in which the Court considers whether a term-of-years sentence is unconstitutionally excessive given the circumstances of a case, the Court noted that "it has been difficult for [challengers] to establish a lack of proportionality." *Id.* at ___, 176 L. Ed. 2d at 836. Referring to *Harmelin v. Michigan*, 501 U.S. 957, 115 L. Ed. 2d 836 (1991), as a leading case on the review of Eighth Amendment challenges to term-of-years sentences as disproportionate, Justice Kennedy delivering the opinion of the *Graham* Court acknowledged his concurring opinion in *Harmelin*: "[T]he Eighth Amendment contains a 'narrow proportionality principle,' that 'does not require strict proportionality between crime and sentence' but rather 'forbids only extreme sentences that are "grossly disproportionate" to the crime.' " *Graham*, 560 U.S. at ___, 176 L. Ed. 2d at 836 (quoting *Harmelin*, 501 U.S. at 997, 1000–1001, 115 L. Ed. 2d at 836 (Kennedy, J., concurring in part and concurring in judgment)). *Accord Rummel v. Estelle*, 445 U.S. 263, 288, 63 L. Ed. 2d 382 (1980) (Powell, J., dissenting (The scope of the Cruel and Unusual Punishments Clause extends . . . to punishments that are grossly disproportionate. Disproportionality analysis . . . focuses on whether, a person deserves such punishment . . . . A statute that levied a mandatory life sentence for overtime parking might well deter vehicular lawlessness, but it would offend our felt sense of justice. The Court concedes today that the principle of disproportionality plays a role in the review of sentences imposing the death penalty, but suggests that the principle may be less applicable when a noncapital sentence is challenged.")).

In *Harmelin*, 501 U.S. 957, 115 L. Ed. 2d 836, the defendant challenged his sentence of life in prison without possibility of parole on the grounds that it was "significantly" disproportionate to his crime, possession of 650 or more grams of cocaine. The defendant further argued that because the sentence was mandatory upon conviction, it amounted to cruel and unusual punishment as it precluded consideration of individual mitigating circumstances. *Id.* at 961, 115 L. Ed. 2d at 843 n.1. In an opinion delivered by Justice Scalia, a majority of the Court held that the sentence was not cruel and unusual punishment solely because it was mandatory upon conviction. In addressing the defendant's alternative

argument, that his sentence of life in prison without possibility of parole was significantly disproportionate to his crime of possessing 650 or more grams of cocaine, a majority of the Court concluded that the defendant's sentence did not run afoul of the Eighth Amendment; however, the Court revealed varied views as to whether the Eighth Amendment includes a protection against disproportionate sentencing and if so, to what extent. *See also Ewing v. California*, 538 U.S. ___, 155 L. Ed. 2d 108 (2003) (holding that the defendant's sentence of twenty-five years to life for felony grand theft under California's "three strikes and you're out" law did not violate the Eighth Amendment's prohibition on cruel and unusual punishments). *Cf. Solem v. Helm*, 463 U.S. 277, 77 L. Ed. 2d 637 (1983) (holding that South Dakota's sentence of life without possibility of parole for uttering a "no account" check after the defendant had previously been convicted of six non-violent felonies was disproportionate to his crime and prohibited by the Eighth Amendment).

We return our attention to *Graham v. Florida* which sets out the second classification of Eighth Amendment proportionality challenges as "implement[ing] the proportionality standard by certain categorical restrictions on the death penalty." *Graham*, 560 U.S. at ___, 176 L. Ed. 2d at 836. But, rather than a challenge to a capital sentence, the *Graham* Court was presented with a categorical challenge to a term-of-years sentence: whether the imposition of life in prison without the possibility of parole for a nonhomicide crime committed by a sixteen-year-old juvenile offender violated the Eighth Amendment. In its reasoning, the Court made the following observation:

> [L]ife without parole is the second most severe penalty permitted by law. . . . [L]ife without parole sentences share some characteristics with death sentences that are shared by no other sentences. . . . [T]he sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence.

Id. at ____, 176 L. Ed. 2d at 842. The Court concluded that the severity of a sentence imposing life without parole for a person who was a juvenile at the time his nonhomicide offense was committed is a sentencing practice that is cruel and unusual. *Id.* at ___, 176 L. Ed. 2d at 845. However, the Court went on to note that this sentencing preclusion may not lessen the duration of a sentence.

> A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give [the] defendant[] . . . some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance. *It bears emphasis . . . that while the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. . . . The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life.*

Id. at ___, 176 L. Ed. 2d at 845-46 (emphasis added).

As a means of obtaining release from incarceration, our North Carolina General Assembly has created by statute a Post-Release Supervision and Parole Commission. N.C. Gen. Stat. § 143B-720 (2011). With the exception of those sentenced under the Structured Sentencing Act, the Commission has "authority to grant paroles . . . to persons held by virtue of any final order or judgment of any court of this State . . . ." *Id.* § 143B-720(a). Furthermore, the Commission is to assist the Governor and perform such services as the Governor may require in exercising his executive clemency powers. *Id.* We note that in *State v. Whitehead*, 365 N.C. 444, 722 S.E.2d 492 (2012), a case reviewing the retroactive application of a less severe sentencing statute, our Supreme Court also drew attention to the powers of the Post-Release Supervision and Parole Commission.

> In 2005, 2007, 2009, and 2011, the General Assembly directed the Post–Release Supervision and Parole Commission to determine whether inmates sentenced under *previous sentencing standards* have served more time in custody than they would have served if they had received the maximum sentence under the SSA. [Defendant's sentence appears to fall within the purview of this directive.]. . . In addition, wholly independent of the Commission's grant of authority, the state constitution empowers the Governor to "grant reprieves, commutations, and pardons, after conviction, for all offenses ... upon such conditions as he may think proper." N.C. Const. art. III, § 5(6).

Id. at 448, 722 S.E.2d at 496 n.1 (emphasis added).[3]

The *Whitehead* Court considered a trial court order granting a defendant's MAR requesting that his life sentence imposed following a guilty plea entered 29 July 1994 and imposed pursuant to the Fair Sentencing Act for a homicide occurring 25 August 1993 be modified by retroactively applying the sentencing provisions of the Structured Sentencing Act applicable to offenses committed on or after 1 October 1994. *Id.* Vacating and remanding the judgment and order of the trial court, our Supreme Court stated that "[c]riminal sentences may be invalidated for cognizable legal error demonstrated in appropriate proceedings. But, in the absence of legal error, it is not the role of the judiciary to engage in discretionary sentence reduction." *Id.* at 448, 722 S.E.2d at 496.

In the matter before us, we note that on 7 May 1973, the date of the offense for which defendant was charged with committing the offense of second-degree burglary, he was seventeen years old.[4] On 6 August 1973, the date defendant pled guilty to second-degree burglary, defendant was eighteen. Defendant was sentenced to incarceration for "his natural life." Pursuant to our General Statutes in effect at that time, any prisoner serving a life sentence was eligible to have his case considered for parole after serving ten years of his sentence. N.C.G.S. § 148-58. The record is not clear how often defendant was considered for parole. However, after serving over thirty-five years, defendant was paroled in December 2008. In 2010, defendant was convicted of driving while impaired. He was sentenced and served 120 days in jail. Thereafter, his parole was revoked and his life sentence reinstated.

"[L]ife imprisonment with possibility of parole is [] unique in that it is the third most severe [punishment]." *Harmelin*, 501 U.S. at 996, 115 L. Ed. 2d at 865. Nevertheless, in the body of case law involving those who commit nonhomicide criminal offenses even as juveniles, sentences allowing for the "realistic opportunity to obtain release before the end of [a life] term" do not violate the prohibitions of the Eighth Amendment. *Graham*, 560 U.S. at ___, 176 L. Ed. 2d at 850. Defendant's sentence

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3. While this quote from *Whitehead*, 365 N.C. at 448, 722 S.E.2d at 496 n.1, is a footnote, we think it is relevant to the instant case wherein defendant, like the defendant in *Whitehead*, was sentenced under a "previous sentencing standard," and defendant would have fallen within the directives of the Parole Commission.

4. At the time of his offense, North Carolina General Statutes, Chapter 7A, Article 23, entitled "Jurisdiction and Procedure Applicable to Children," defined "Child" as "any person who has not reached his sixteenth birthday." N.C. Gen. Stat. § 7A-278(1) (1973). As defendant was seventeen at the time of his offense, he did not come within the aegis of the Chapter 7A, Article 23.

allows for the realistic opportunity to obtain release before the end of his life. In fact, defendant was placed on parole in December 2008 prior to his 2010 conviction for the offense of driving while impaired, which led to the revocation of his parole and reinstatement of his life sentence. As our Supreme Court has not indicated a preference for discretionary sentence reduction, *see Whitehead*, 365 N.C. at 448, 722 S.E.2d at 496 ("[I]t is not the role of the judiciary to engage in discretionary sentence reduction."), and our General Assembly has directed the Post–Release Supervision and Parole Commission to review matters of proportionality, *see* N.C.G.S. § 143B-720; *Whitehead*, 365 N.C. at 449, 722 S.E.2d at 496 n.1, we hold that the trial court erred in concluding defendant's life sentence violated the prohibitions of the Eighth Amendment to the United States Constitution. *See Rummel v. Estelle*, 445 U.S. 263, 283-84, 63 L. Ed. 2d 382, 397 (1980) ("Perhaps . . . time works changes upon the Eighth Amendment, bringing into existence new conditions and purposes. We all, of course, would like to think that we are moving down the road toward human decency. Within the confines of this judicial proceeding, however, we have no way of knowing in which direction that road lies. Penologists themselves have been unable to agree whether sentences should be light or heavy, discretionary or determinate. This uncertainty reinforces our conviction that any nationwide trend toward lighter, discretionary sentences must find its source and its sustaining force in the legislatures, not in the [] courts." (citations and quotations omitted)). It should be stated that by all accounts based on today's sentencing standards, defendant's sentence cannot be viewed as anything but severe. Since 1973 at the age of eighteen, defendant has been incarcerated for all but less than two years. There is no record of an appeal from the 1973 conviction, and the record before us does not provide details of the circumstances which led to defendant's arrest or the injury to the victim. Regardless, we must address only what is, as opposed to what is not, before us. Upon review of the arguments presented and cases cited, defendant's outstanding sentence of life in prison with possibility of parole for second-degree burglary, though severe, is not cruel or unusual in the constitutional sense. *See Green*, 348 N.C. at 603, 502 S.E.2d at 828. Accordingly, we reverse the Superior Court's 5 December order modifying defendant's original sentence and remand to the trial court for reinstatement of the original 6 August 1973 judgment and commitment.

Reversed and remanded.

Judge STEPHENS concurs by separate opinion.

Judge DILLON concurs by separate opinion.

STEPHENS, Judge, concurs.

Because I believe that this Court is bound *in this case* by the decision of this Court's petition panel regarding jurisdiction, I concur with the majority opinion. However, because the petition panel's ruling on jurisdiction was erroneous and violated our precedent, I write separately.

In support of its determination that this panel is bound by the decision of a petition panel of this Court that we have subject matter jurisdiction to grant the State's petition for writ of *certiorari*, the majority cites our Supreme Court's opinion in *N.C.N.B. v. Virginia Carolina Builders*, 307 N.C. 563, 567, 299 S.E.2d 629, 631-32 (1983) ("[O]nce a panel of the Court of Appeals has decided a question in a given case that decision becomes the law of the case and governs other panels which may thereafter consider the case. Further, since the power of one panel of the Court of Appeals is equal to and coordinate with that of another, a succeeding panel of that court has no power to review the decision of another panel on the same question in the same case."); *see also* Restatement (Second) of Judgments § 11, cmt. c (1982) ("Whether a court whose jurisdiction has been invoked has subject matter jurisdiction of the action is a legal question that may be raised by a party to the action or by the court itself. When the question is duly raised, the court has the authority to decide it. *A decision of the question is governed by the rules of res judicata and hence ordinarily may not be relitigated in a subsequent action.* Thus, a court has authority to determine its own authority, or as it is sometimes put, " 'jurisdiction to determine its jurisdiction.' ") (citation omitted; emphasis added).

However, I would note that the decision of the petition panel to grant *certiorari* in this matter directly violated the precedent set forth in a previous published opinion of this Court on the same issue. *See In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). In *State v. Starkey*, immediately after entering judgment on a jury's verdict, the trial court entered an order *sua sponte* granting its own motion for appropriate relief ("MAR") regarding the defendant's sentence. 177 N.C. App. 264, 266, 628 S.E.2d 424, 425, *cert. denied*, __ N.C. __, 636 S.E.2d 196 (2006). The trial court found that the defendant's sentence violated "his rights under the Eighth and Fourteenth Amendments to the United States Constitution." *Id.* On appeal in *Starkey*, we considered two issues: "(I) whether the State has a right to appeal from the entry of [an] order

granting the trial court's motion for appropriate relief; and (II) whether this Court [could] grant the State's [p]etition for [w]rit of [*c*]*ertiorari*.") *Id.* (italics added).

As noted in that case, "the right of the State to appeal in a criminal case is statutory, and statutes authorizing an appeal by the State in criminal cases are strictly construed." *Id.* (citation, internal quotation marks, and brackets omitted). Two sections of our General Statutes touch on the State's possible right of appeal here: that discussing appeals by the State in general and those covering appeals from MARs specifically. My careful review, along with a plain reading of *Starkey*, reveals no authority for the State's purported appeal or petition for writ of *certiorari* here.

As for the State's right to appeal generally, our General Statutes provide:

> (a) Unless the rule against double jeopardy prohibits further prosecution, *the State may appeal*[1] *from the superior court to the appellate division:*
>
> (1) When there has been a decision or judgment dismissing criminal charges as to one or more counts.
>
> (2) Upon the granting of a motion for a new trial on the ground of newly discovered or newly available evidence but only on questions of law.
>
> (3) When the State alleges that the sentence imposed:
>
> a. Results from an incorrect determination of the defendant's prior record level under [section] 15A-1340.14 or the defendant's prior conviction level under [section] 15A-1340.21;

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1. As this Court has noted,

> [a]ppeal is defined in [section] 15A-101(0.1): "Appeal. — When used in a general context, the term 'appeal' also includes appellate review upon writ of *certiorari*." Applying this definition to [section] 15A-1445, we hold the word "appeal" in the statute includes "appellate review upon writ of *certiorari*." Otherwise, the legislature would have used such language as "the [S]tate shall have a right of appeal." By way of contrast, the legislature in setting out when a defendant may appeal, uses the phrase "is entitled to appeal as a matter of right." N.C. Gen. Stat. [§] 15A-1444(a).

State v. Ward, 46 N.C. App. 200, 204, 264 S.E.2d 737, 740 (1980) (italics added).

> b. Contains a type of sentence disposition that is not authorized by [section] 15A-1340.17 or [section] 15A-1340.23 for the defendant's class of offense and prior record or conviction level;
>
> c. Contains a term of imprisonment that is for a duration not authorized by [section] 15A-1340.17 or [section] 15A-1340.23 for the defendant's class of offense and prior record or conviction level; or
>
> d. Imposes an intermediate punishment pursuant to [section] 15A-1340.13(g) based on findings of extraordinary mitigating circumstances that are not supported by evidence or are insufficient as a matter of law to support the dispositional deviation.
>
> (b) The State may appeal an order by the superior court granting a motion to suppress as provided in [section] 15A-979.

N.C. Gen. Stat. § 15A-1445 (2011) (emphasis added). As observed in *Starkey*, an appeal from the grant of a defendant's MAR as occurred here implicates none of these conditions:

> The relief granted by the trial court might be considered to have effectively dismissed [the] defendant's charge of having attained the status of an habitual felon or imposed an unauthorized prison term in light of [the] defendant's status as an habitual felon. However, it is the underlying judgment and not the order granting this relief from which the State must have the right to take an appeal. The State does not argue and we do not find that the underlying judgment dismisses a charge against defendant or that the term of imprisonment imposed was not authorized. The State therefore has no right to appeal from the underlying judgment and this appeal is not one "regularly taken." This appeal must be dismissed.

Starkey, 177 N.C. App. at 267, 628 S.E.2d at 426 (citation omitted).

The mention of an appeal "regularly taken" refers to subsection 15A-1422(b) of our General Statutes, which covers motions for appropriate relief: "The grant or denial of relief sought pursuant to [section] 15A-1414 is subject to appellate review only in an appeal regularly taken." N.C. Gen. Stat. § 15A-1422(b) (2011). In turn, section 15A-1414

covers errors which may be asserted in MARs filed within ten days following entry of a judgment upon conviction, N.C. Gen. Stat. § 15A-1414 (2011), while section 15A-1415(b) specifies the "[g]rounds for appropriate relief which may be asserted by [a] defendant" outside that ten-day time period. N.C. Gen. Stat. § 15A-1415(b) (2011). Because Defendant here filed his MAR more than ten days after entry of judgment upon his convictions, section 15A-1422(c) applies to the matter before us:[2]

> The court's ruling on a motion for appropriate relief pursuant to [section] 15A-1415 is subject to review:
>
> (1) If the time for appeal from the conviction has not expired, by appeal.
>
> (2) If an appeal is pending when the ruling is entered, in that appeal.
>
> (3) *If the time for appeal has expired and no appeal is pending, by writ of certiorari.*

N.C. Gen. Stat. § 15A-1422(c) (emphasis added). Here, the time for appeal had long passed, and there was no appeal pending when the MAR was ruled upon, rendering subsections (1) and (2) inapplicable.

As for the availability of appellate review via writ of *certiorari*, this Court in *Starkey* held:

> Review by this Court pursuant to a [p]etition for [w]rit of [*c*]*ertiorari* is governed by Rule 21 of the North Carolina Rules of Appellate Procedure. Pursuant to Rule 21, this Court is limited to issuing a writ of *certiorari*:
>
> to permit review of the judgments and orders of trial tribunals when [1] the right to prosecute an appeal has been lost by failure to take timely action, or [2] when no right of appeal from an interlocutory order exists, or [3] for review pursuant to [section] 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief.
>
> The State recognizes that its petition does not satisfy any of the conditions of Rule 21 and asks this Court to invoke

2. Nothing in *Starkey* or the relevant statutes suggests that the timing of the filing of an MAR (*i.e.*, within or outside the ten-day period) would have any effect on the reasoning of the Court in dismissing the State's purported appeal. Neither section 15A-1414 nor section 15A-1415 would permit the appeal by the State in the case before us.

> Rule 2 of the North Carolina Rules of Appellate Procedure and review the trial court's order.

Starkey, 177 N.C. App. at 268, 628 S.E.2d at 426 (citation and internal quotation marks omitted; italics added). This Court declined "the State's request to invoke Rule 2 and den[ied] the State's [p]etition for [w]rit of [*c*]*ertiorari*." *Id.*[3] (italics added). As noted *supra* and as was the case in *Starkey*, none of the circumstances permitting this Court to grant a writ of *certiorari* are presented in the matter before us.

The order entered by this Court on 13 December 2012 cites three authorities which purportedly give this Court jurisdiction to grant the State's petition: N.C. Const. art. IV, § 12(2), N.C. Gen. Stat. § 7A-32(c) (2011), and *State v. Whitehead*, 365 N.C. 444, 722 S.E.2d 492 (2012). However, none of those authorities actually support the conclusion that this Court has subject matter jurisdiction in the State's appeal.

The cited constitutional provision merely states that "[t]he Court of Appeals shall have such appellate jurisdiction as the General Assembly may prescribe." N.C. Const. art. IV, § 12(2). In turn, section 7A-32(c) provides:

> The Court of Appeals has jurisdiction, exercisable by one judge or by such number of judges as the Supreme Court may by rule provide, to issue the prerogative writs, including mandamus, prohibition, certiorari, and supersedeas, in aid of its own jurisdiction, or to supervise and control the proceedings of any of the trial courts of the General Court of Justice, and of the Utilities Commission and the Industrial Commission. *The practice and procedure shall be as provided by statute or rule of the Supreme Court, or, in the absence of statute or rule, according to the practice and procedure of the common law.*

N.C. Gen. Stat. § 7A-32(c) (emphasis added). The 13 December 2012 order states that this Court has jurisdiction to grant the State's petition in order "to supervise and control the proceedings of any of the trial courts of the General Court of Justice[.]" *Id.* However, the plain

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3. Although the language used by this Court in *Starkey* suggests that the panel *could* have invoked Rule 2 and granted the petition, Rule 21 is jurisdictional, *see* N.C. Gen. Stat. § 7A-32(c) (2011), and thus cannot be obviated by invocation of Rule 2. *See Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008) (noting that "in the absence of jurisdiction, the appellate courts lack authority to consider whether the circumstances of a purported appeal justify application of Rule 2").

language of the statute states that this jurisdiction is circumscribed by "statute[,] *rule of the Supreme Court*, . . . [*or*] *the common law*." *Id.* (emphasis added). There is no statute or common law principle giving us jurisdiction to grant the State's petition. Further, as discussed *supra*, Rule 21 of our Rules of Appellate Procedure, set forth by our Supreme Court, does not permit this Court to grant petitions of *certiorari* in the circumstances presented here.

Finally, *Whitehead* is inapposite. That opinion was issued by our Supreme Court which, in contrast to the purely statutory and rule-based jurisdiction and power of this Court, has independent constitutional " 'jurisdiction to review upon appeal any decision of the courts below.' " 365 N.C. at 445, 722 S.E.2d at 494 (quoting N.C. Const. art. IV, § 12(1) ("The Supreme Court shall have jurisdiction to review upon appeal any decision of the courts below, upon any matter of law or legal inference.")). The Supreme Court stated that it "will not hesitate to exercise *its* rarely used *general supervisory authority* when necessary . . . ." *Id.* at 446, 722 S.E.2d at 494 (citation and internal quotation marks omitted; emphasis added). I find it telling that the Supreme Court, exercising *its* constitutional general supervisory authority, allowed the State's petition for writ of *certiorari* in *Whitehead* to review the identical issue as is raised in the case at bar, with *no* prior review by this Court. This suggests that the State's procedure in *Whitehead*, to wit, seeking review of the trial court's MAR decision via petition for writ of *certiorari* directly to the Supreme Court, is the proper route for this appeal.

In sum, this Court's published opinion in *Starkey* is binding precedent which mandates that we dismiss the State's purported appeal and deny its petition for writ of *certiorari*. *See In re Appeal from Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37. This Court lacks jurisdiction to review the State's arguments by direct appeal, writ of *certiorari*, or any other procedure. Accordingly, while I am compelled by the law of this case to concur with the majority opinion that we are bound by the decision of the petition panel to reach the merits of the State's arguments, I would urge our Supreme Court, which is not so bound, to review the jurisdictional basis for this Court's decision.

DILLON, Judge, concurring in separate opinion.

I agree with the majority opinion. However, I write to address the jurisdiction question raised by the parties and discussed in footnote 3 of the majority opinion. I believe that the "law of the case" principle, referenced in that footnote, generally compels a panel of this Court to follow

the decisions of another panel made in the same case. However, I do not believe a panel is compelled to follow the "law of the case" where the issue concerns subject matter jurisdiction. *See McAllister v. Cone Mills Corporation*, 88 N.C. App. 577, 364 S.E.2d 186 (1988). In *McAllister* we held that a superior court judge had the authority to determine whether it had subject matter jurisdiction to consider a matter after another superior court judge, in a prior hearing, had denied a motion to dismiss the matter based on lack of subject matter jurisdiction, stating that "[i]f a court finds at any stage of the proceedings that it lacks jurisdiction over the subject matter of a case, it must dismiss the case for want of jurisdiction." *Id.* at 579, 364 S.E.2d at 188. Therefore, I believe we are compelled to make a determination whether the panel of this Court which granted the State's petition for writ of certiorari – which is the basis for our panel's jurisdiction - had the authority to do so.

The North Carolina Constitution states that this Court has appellate jurisdiction "as the General Assembly may prescribe." N.C. Const. Article IV, Section 12(2). Our General Assembly has prescribed that this Court has jurisdiction "to issue . . . prerogative writs, including . . . certiorari . . . to supervise and control the proceedings of any of the trial courts. . . ." N.C. Gen. Stat. § 7A-32(c) (2011).[1] The General Assembly further has prescribed that the "practice and procedure" by which this Court exercises its jurisdiction to issue writs of certiorari is provided, in part, by "rule of the Supreme Court." *Id.* The Supreme Court has enacted the Rules of Appellate Procedure, which includes Rule 21, providing that writs of certiorari may be issued by either this Court or the Supreme Court in three specific circumstances, none of which applies to the State's appeal in this case.

Defendant argues that the subject matter jurisdiction of this Court to issue writs of certiorari is limited to the three circumstances listed in Rule 21. The State argues that Rule 21 is not intended to limit the subject matter jurisdiction of this Court but is simply a "rule" establishing a "practice and procedure," and that Rule 2 – which allows this Court to "suspend or vary the requirements of any of these rules" – provides an avenue by which this Court may exercise the jurisdiction granted by the General Assembly in N.C. Gen. Stat. § 7A-32 to issue writs of certiorari for matters not stated in Rule 21. There is language in decisions of this

1. This language employed by the General Assembly is similar to the language in our Constitution defining the jurisdictional limits of our Supreme Court, which includes the authority of "general supervision and control over the proceedings of the other courts." N.C. Const. art. IV, § 12(1).

Court which *suggests* that our authority to grant writs of certiorari is limited to the three circumstances described in Rule 21. *See*, *e.g.*, *State v. Pimental*, 153 N.C. App. 69, 77, 568 S.E.2d 867, 872 (2002) (*dismissing* a petition for writ of certiorari, stating that since the appeal was not within the scope of Rule 21, this Court "does not have the authority to issue a writ of certiorari"). However, there is language in other decisions which *suggests* that this Court may invoke Rule 2 to consider writs of certiorari in circumstances not covered by Rule 21. *See*, *e.g.*, *State v. Starkey*, 177 N.C. App. 264, 268, 628 S.E.2d 424, 426 (2006) (*denying* a petition for writ of certiorari by refusing to invoke Rule 2).

I believe that our approach in *Starkey* – suggesting that our subject matter jurisdiction to issue writs of certiorari is not limited to the circumstances contained in Rule 21 – is correct. Our Supreme Court and this Court has recognized the authority of our appellate courts to issue writs of certiorari in circumstances not contained in Rule 21. *See*, *e.g.*, *State v. Bolinger*, 320 N.C. 596, 601-02, 359 S.E.2d 459, 462 (1987) (holding that a defendant may obtain appellate review through a writ of certiorari to challenge the procedures followed in accepting a guilty plea, notwithstanding that the defendant does not have the statutory right to appellate review); *see also State v. Carriker*, 180 N.C. App. 470, 471, 637 S.E.2d 557, 558 (2006) (holding that a challenge to procedures in accepting a guilty plea is reviewable by *certiorari*). Additionally, in Rule 1 of the Rules of Appellate Procedure, our Supreme Court stated that the appellate rules "shall not be construed to extend or limit the jurisdiction of the courts of the appellate division[.]" *Id.*

Accordingly, I believe that the panel of this Court which considered the State's petition for a writ of certiorari had the authority to grant the writ, notwithstanding that an appeal by the State from an order granting a defendant's motion for appropriate relief is not among the circumstances contained in N.C.R. App. P. 21; and, therefore, we are bound by the decision of that panel.

ELIZA ANN WESTLAKE, PLAINTIFF-APPELLEE
v.
EDWIN ALBERT WESTLAKE, DEFENDANT-APPELLANT

No. COA13-755

Filed 7 January 2014

1. Notice—motion to dismiss—timely—no prejudice

There was no error in an equitable distribution, child custody and child support action where defendant filed a motion for contempt for custodial interference and plaintiff's motion to dismiss the contempt motion for failure to state a claim was granted. Although defendant contended that plaintiff failed to provide sufficient notice of her motion to dismiss, both statute and case law indicated plaintiff's motion was timely. Furthermore, defendant did not show that he was prejudiced, even assuming that plaintiff's motion to dismiss was not timely served.

2. Contempt—custodial interference—failure to state a claim

The trial court erred in a domestic action by granting plaintiff's motion to dismiss for failure to state a claim defendant's motion for contempt for custodial interference. Construing defendant's motion liberally and treating the allegations as true, defendant alleged facts sufficient to support his motion for contempt.

3. Notice—inconvenient form—notice of determination not given—no prejudice

Defendant contended the trial court erred in determining that North Carolina was an inconvenient forum in a domestic action without first providing appropriate notice that the issue was being determined and without first allowing the parties to submit information. Even if defendant had a statutory right to submit information and was thus entitled to notice, he failed to show that he was not allowed to submit information, or that he would have submitted additional information had he received advanced notice.

4. Child Custody and Support—inconvenient form—statutory factors—not considered

The trial court erred by determining that North Carolina was an inconvenient forum without first considering all of the statutory factors listed in N.C.G.S. § 50A-207(b).

5. Child Custody and Support—inconvenient forum—stay

The trial court erred in an inconvenient forum determination by dismissing defendant's motion for reconsideration instead of staying the proceedings. On remand, if the trial court decides to decline jurisdiction, it must stay the case upon condition that a child-custody proceeding be promptly commenced in another designated state.

6. Child Custody and Support—North Carolina as inconvenient forum—continuation of payments

The trial court did not err in an inconvenient forum determination by ordering the resumption of defendant's child support payments instead of staying the proceedings. Defendant offered no authority to support his contentions that the resumption of payments was inconsistent with finding North Carolina to be an inconvenient forum, and that defendant should have had the opportunity to be heard. Furthermore, defendant did not seek to offer evidence relevant to child support and did not point to arguments he would have presented to the trial court if he had had the chance.

On writ of certiorari from order entered 1 June 2012 by Judge Ronald L. Chapman in District Court, Mecklenburg County and appeal by Defendant from order entered 6 November 2012 by Judge Ronald L. Chapman in District Court, Mecklenburg County. Heard in the Court of Appeals 10 December 2013.

Krusch & Sellers, P.A., by Rebecca K. Watts, for Plaintiff-Appellee.

Thurman, Wilson, Boutwell & Galvin, P.A., by John D. Boutwell, for Defendant-Appellant.

McGEE, Judge.

Eliza Ann Westlake ("Plaintiff") filed a complaint on 31 July 2008 against Edwin Albert Westlake ("Defendant") seeking, *inter alia*, equitable distribution, child custody, and child support. The trial court entered an "Order for Permanent Custody and Temporary Child Support" on 22 March 2010.

On 16 April 2012, Defendant filed an "Emergency Motion for Contempt for Interstate Custodial Interference." Plaintiff filed a motion to dismiss, which the trial court granted in an order entered 1 June 2012, dismissing Defendant's motion for "failure to state a claim upon which relief can be granted."

Defendant filed a motion for reconsideration on 25 May 2012, which the trial court dismissed with prejudice in an order entered 6 November 2012. The trial court concluded that "North Carolina is no longer a convenient forum for the parties and it is no longer appropriate for [the trial court] to exercise jurisdiction." The trial court also concluded that "Defendant's Motion for Reconsideration does not state any grounds upon which relief can be granted."

Defendant, acting *pro se*, filed notice of appeal from the 6 November 2012 order. Defendant subsequently filed a petition for writ of certiorari from the 1 June 2012 order. In our discretion, we grant Defendant's petition to review the 1 June 2012 order.

I. Defendant's Motion for Contempt

A. Notice of Plaintiff's Motion to Dismiss

[1] Defendant first contends Plaintiff failed to give Defendant sufficient notice of her motion to dismiss. Defendant's "motion for contempt for interstate custodial interference" was set for hearing 14 May 2012. That day, Plaintiff filed a motion to dismiss Defendant's motion. The certificate of service indicates Plaintiff served the motion to dismiss on Defendant via hand delivery on 14 May 2012. The trial court entered an order on 1 June 2012, dismissing Defendant's motion for failure to state a claim upon which relief could be granted.

Defendant acknowledges the North Carolina Rules of Civil Procedure permit a party to raise the "defense of failure to state a claim upon which relief can be granted . . . at the trial on the merits." N.C. Gen. Stat. § 1A-1, Rule 12(h)(2) (2011). "Unquestionably, a motion to dismiss for failure to state a claim upon which relief may be granted, under Rule 12(b)(6), can be made as late as trial upon the merits." *Bodie Island Beach Club Ass'n, Inc. v. Wray*, ___ N.C. App. ___, ___, 716 S.E.2d 67, 75 (2011). Therefore, both statute and case law indicate Plaintiff's motion was timely.

Nevertheless, Defendant requests this Court to hold that "when such a motion to dismiss is not an oral motion but is in the form of a written motion . . . it should be subject to the notice requirements of Rule 6(d)[.]" This we decline to do. Furthermore, even assuming *arguendo* that Plaintiff's motion to dismiss was not timely served on Defendant, Defendant has not shown that he was prejudiced. "The party asserting error must show from the record not only that the trial court committed error, but that the aggrieved party was prejudiced as a result." *Lawing v. Lawing*, 81 N.C. App. 159, 162, 344 S.E.2d 100, 104 (1986); *see also*

N.C. Gen. Stat. § 1A-1, Rule 61 (2011). Defendant asserts only that he "was not given sufficient time to prepare[.]" Defendant does not argue he would have taken any action differently or made any additional arguments at the hearing if he had been served earlier. Defendant thus has not shown reversible error on this basis.

B. Merits of Plaintiff's Motion to Dismiss

[2] Defendant next argues the trial court erred in dismissing his motion for contempt. The trial court dismissed Defendant's motion for contempt "for failure to state a claim upon which relief can be granted."

"The system of notice pleading affords a sufficiently liberal construction of complaints so that few fail to survive a motion to dismiss." *Lea v. Grier*, 156 N.C. App. 503, 507, 577 S.E.2d 411, 415 (2003). "Accordingly, when entertaining a motion to dismiss, the trial court must take the complaint's allegations as true and determine whether they are sufficient to state a claim upon which relief may be granted under some legal theory." *Id.* (internal quotation marks omitted). "This rule . . . generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery." *Id.* (alterations in original).

"An order providing for the custody of a minor child is enforceable by proceedings for civil contempt, and its disobedience may be punished by proceedings for criminal contempt, as provided in Chapter 5A, Contempt, of the General Statutes." N.C. Gen. Stat. § 50-13.3(a) (2011). In small print on the first page of his motion for contempt, Defendant listed "§ G.S. 5A-23, § G.S. 14-320.1, § G.S. 50-13.1."

In his motion, Defendant referenced the "Order for Permanent Custody and Temporary Child Support" entered 22 March 2010 and made the following allegations:

> 3. The Order (for Permanent Custody and Temporary Child Support) cited above states that [Plaintiff] is the primary custodial parent and provides for visitation of [Defendant] with his two minor children on a schedule contained therein.
>
> 4. The Order has at all times since its entry remained in full force and effect and [the trial court] retains jurisdiction over the Order and all matters related thereto.
>
> 5. Plaintiff[] moved the parties' minor children to Pensacola, in Escambia County, Florida on July 15th, 2011

> without obtaining [Defendant's] consent or the permission of [the trial court] to allow the move.
>
> . . . .
>
> 7. [Plaintiff] has repeatedly obstructed [Defendant's] visitation with his children, as early as March 3rd, 2010, less than two months after the Order went into effect[.]

Defendant requested the following relief:

> 1. That the [trial court] cites [Plaintiff] for Contempt for Interstate Custodial Interference of [the trial court's] Order for Permanent Custody for moving the minor children out-of-state with the willful intent to violate the existing Custody Order.
>
> 2. That an extended Hearing be calendared on the earliest date possible to address additional Contempt by [] Plaintiff of the Custody Order and to Modify the Custody Order in consideration of changed circumstances.
>
> 3. That an Order of Enforcement be issued immediately to provide for enforcement of the existing Custody Order and Visitation Schedule contained therein, pending the Hearing for Modification of the Custody Order.
>
> 4. Any remedy which would also be appropriate to the proceedings herein, as a conclusion of law or that is incorporated herein by reference, including criminal proceedings, as they relate to § G.S. 14-320.1.

"[W]hen the allegations in the complaint give sufficient notice of the wrong complained of[,] an incorrect choice of legal theory should not result in dismissal of the claim if the allegations are sufficient to state a claim under some legal theory." *Haynie v. Cobb*, 207 N.C. App. 143, 149, 698 S.E.2d 194, 198 (2010) (quoting *Stanback v. Stanback*, 297 N.C. 181, 202, 254 S.E.2d 611, 625 (1979)).

Defendant's motion indicates he sought to make the following claim for civil contempt:

> Failure to comply with an order of a court is a continuing civil contempt as long as:
>
> (1) The order remains in force;

> (2) The purpose of the order may still be served by compliance with the order;
>
> (2a) The noncompliance by the person to whom the order is directed is willful; and
>
> (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.

N.C. Gen. Stat. § 5A-21(a) (2011).

"The [motion] must be liberally construed, and the court should not dismiss the [motion] unless it appears beyond a doubt that the [movant] could not prove any set of facts to support his claim which would entitle him to relief." *Block v. County of Person*, 141 N.C. App. 273, 277-78, 540 S.E.2d 415, 419 (2000). Construing Defendant's motion liberally and treating the allegations as true, Defendant alleged facts sufficient to support his motion for contempt. Thus, the trial court erred in granting Plaintiff's motion and in dismissing Defendant's motion. For the same reasons discussed above in this section, the trial court also erred in dismissing with prejudice Defendant's motion for reconsideration.

II. Convenience of Forum

A. Notice

[3] Defendant contends the trial court erred in determining "North Carolina was an inconvenient forum without first providing appropriate notice that such issue was being determined and without first allowing the parties to submit information."

The trial court "shall allow the parties to submit information" before determining whether North Carolina is an inconvenient forum. N.C. Gen. Stat. § 50A-207(b) (2011). Defendant contends this "statutory right to submit information implies that the parties will be given advance notice of the hearing so that they will be prepared to submit such information."

Even assuming *arguendo*, without deciding, that Defendant's contention is accurate, Defendant has not shown he was not allowed to submit information, or that he would have submitted additional information had he received advanced notice. The transcript does not show the trial court refused any information Defendant offered. In his brief, Defendant gives no information that he would have submitted on the convenience of the forum. Defendant thus has not shown error on this basis.

B. Statutory Factors

[4] Defendant next contends the trial court erred in "determining that North Carolina was an inconvenient forum without first considering all of the statutory factors listed in N.C.G.S. § 50A-207(b)." We agree.

Before determining whether it is an inconvenient forum, the trial court "shall consider whether it is appropriate for a court of another state to exercise jurisdiction." N.C.G.S. § 50A-207(b).

> For this purpose, the court shall allow the parties to submit information and 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.G.S. § 50A-207(b). "The factors listed in N.C.G.S. § 50A-207(b) are necessary when the current forum is inconvenient[.]" *Velasquez v. Ralls*, 192 N.C. App. 505, 509, 665 S.E.2d 825, 827 (2008); *see also In re M.M.*, ___ N.C. App. ___, 750 S.E.2d 50, COA13-600 (5 November 2013).

The transcript and record indicate no consideration by the trial court of the factors listed in N.C.G.S. § 50A-207(b). Defendant has shown error on this basis. On remand, the trial court is to comply with the requirements of N.C.G.S. § 50A-207(b).

III. Staying the Proceedings

[5] Defendant next argues the trial court erred in dismissing his motion for reconsideration instead of staying the proceedings.

N.C. Gen. Stat. § 50A-207(c) (2011) states:

> If a court of this State determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a child-custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper.

Id. (emphasis added).

In *In re M.M.*, *supra*, this Court considered a similar issue. The trial court "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." *Id.* at ___, 750 S.E.2d at ___, slip op. at 7-8. "It is well established that the word 'shall' is generally imperative or mandatory." *Id.* at ___, 750 S.E.2d at ___, slip op. at 7. This Court remanded the case with instructions that, if the trial court determines it should decline jurisdiction and "makes sufficient findings to support its determination that North Carolina is an inconvenient forum[,]" the trial court must stay the case "upon condition that a child custody proceeding be promptly commenced in" Michigan. *Id.* at ___, 750 S.E.2d at ___, slip op. at 8.

Likewise, in the present case, the trial court effectively dismissed the case in North Carolina. The trial court concluded that "North Carolina is no longer a convenient or appropriate forum to hear matters between these parties." On remand, if the trial court decides to decline jurisdiction, the trial court must stay the case "upon condition that a child-custody proceeding be promptly commenced in another designated state[.]" N.C.G.S. § 50A-207(c); *see also In re M.M.*, *supra*.

IV. Child Support Payments

[6] Defendant argues the trial court erred in ordering the resumption of Defendant's child support payments. The trial court, on 6 November 2012, ordered Defendant "to resume payment of child support consistent with the prior Orders in this matter, including all arrearages."

Defendant contends the trial court erred in ordering the resumption of child support payments instead of staying the proceedings. The

implication in this argument seems to be that ordering the resumption of child support payments is somehow inconsistent with finding North Carolina to be an inconvenient forum. However, Defendant provides no citation to authority to support this argument.

Defendant further contends the trial court erred in ordering the resumption of child support payments "without first giving [Defendant] an opportunity to be heard." Again, the transcript reveals no instance in which Defendant sought to offer evidence relevant to a determination on child support and the trial court denied Defendant this opportunity. Furthermore, assuming that Defendant was denied an opportunity, Defendant on appeal points to no arguments that he would have presented to the trial court. Defendant thus has not shown error on this basis.

V. Conclusion

On remand, the trial court is to comply with the requirements of N.C.G.S. § 50A-207. Should the trial court determine North Carolina is an inconvenient forum for this matter, the trial court is to make findings showing consideration of the factors set forth in N.C.G.S. § 50A-207(b). If the trial court determines it should decline jurisdiction and makes sufficient findings to support its determination that North Carolina is an inconvenient forum, the trial court must stay the case "upon condition that a child-custody proceeding be promptly commenced in another designated state[.]" N.C.G.S. § 50A-207(c); *see also In re M.M.*, *supra*.

Reversed and remanded.

Judges HUNTER, Robert C. and ELMORE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 7 JANUARY 2014)

BETHEA v. US AIRWAYS, INC. No. 13-740	N.C. Industrial Commission (381629)	Affirmed
BURGESS v. DORTON No. 13-509	Union (11CVS2342)	No error in part; Affirmed in part.
CARPENTER v. McKINNEY No. 13-516	Guilford (10CVS10123)	Dismissed
CITIBANK, S. DAKOTA, N.A. v. GABLE No. 13-780	Wayne (09CVD1731)	Affirmed
I.B.S.A., INC. v. BUILDER'S SUPPLY INC. No. 13-552	Johnston (11CVS3878)	Affirmed
IN RE A.U.B.M. No. 13-786	Wake (11JT338)	Affirmed
IN RE C.A.G. No. 13-928	Sampson (12JA94)	Affirmed
IN RE C.L.C. No. 13-732	Guilford (10JT328-329)	Affirmed
IN RE C.T.L. No. 13-574	Guilford (11JT441-444)	Affirmed
IN RE H.J.A. No. 13-507	Mecklenburg (08JT326) (09JT368)	Affirmed
IN RE L.P. No. 13-643	Cumberland (12JA222)	Affirmed
IN RE S. No. 13-751	Wilkes (07JT142)	Affirmed
IN RE WHATLEY No. 13-837	Mecklenburg (12SPC66)	Vacated
JEFFREYS LEASING CO. v. GILLANI No. 13-598	Wayne (11CVS2501)	Affirmed

JUDGE v. N.C. DEP'T OF PUB. SAFETY No. 13-688	N.C. Industrial Commission (TA-21612)	Affirmed
MUCKLE v. DOLGENCORP, LLC No. 13-653	N.C. Industrial Commission (X33108)	Reversed
PERRY v. CRADDOCK No. 13-510	Dare (07CVS902)	No Error in Part; Reversed and Remanded in Part
PHILADELPHUS PRESBYTERIAN FOUND., INC., v. ROBESON CNTY. BD. OF ADJUST. No. 13-777	Robeson (12CVS2097)	Affirmed
STATE v. AVENT No. 13-665	Edgecombe (12CRS2258)	No Error
STATE v. BLACKWELL No. 13-196	Robeson (07CRS51866-67)	NO ERROR in part; DISMISSED in part
STATE v. BLALOCK No. 13-712	Stokes (08CRS50460) (08CRS51385-86) (08CRS52513-14) (12CRS50942-43) (12CRS51294)	08CRS52513-14 08CRS51385-86, and 08CRS50460-VACATED 12CRS050942-43, 12CRS051294-AFFIRMED
STATE v. BROOKS No. 13-663	Wake (11CRS228136)	No Error
STATE v. EDDINGS No. 13-474	Buncombe (11CRS63582-83) (12CRS112)	NO ERROR, in part; AFFIRMED, in part.
STATE v. FLOYD No. 13-396	Mecklenburg (07CRS234510-16)	No Error
STATE v. LINEBERGER No. 13-733	Catawba (12CRS53434)	No error in part; judgment arrested in part and remanded for resentencing.
STATE v. LOCKLEAR No. 13-301	Robeson (08CRS53464)	No Prejudicial Error

STATE v. MacMORAN No. 13-758	Mecklenburg (12CRS981)	No Error
STATE v. NWANGUMA No. 13-274	Durham (11CRS60616)	Reversed
STATE v. PEAY No. 13-579	Mecklenburg (11CRS232023)	No Error
STATE v. QUICK No. 13-289	Guilford (10CRS78622)	No Error
STATE v. ROBINSON No. 13-500	Robeson (07CRS52689) (07CRS52691) (07CRS52693)	No Error
VALLADARES v. TECH ELECTRIC CORP. No. 13-705	N.C. Industrial Commission (X67511)	Affirmed
VENERIS v. DOMTAR PAPER CO., LLC No. 13-649	N.C. Industrial Commission (770306)	Affirmed
WILLIAMS v. WILSON CNTY. BD. OF EDUC. No. 13-481	N.C. Industrial Commission (TA-22046)	Affirmed

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR—Continued

SCHOOLS AND EDUCATION—Continued

a virtual charter school application. Where an agency, such as the State Board of Elections in this case, has not acted and is under no direction to act, there exists no contested case and no authority for a hearing in the Office of Administrative Hearings. **N.C. State Bd. of Educ. v. N.C. Learns, Inc., 270.**

Teacher—denial of career status—right to seek judicial review—A probationary teacher who has been denied career status had the right to seek judicial review of the board of education's decision in accordance with the standards set forth in N.C.G.S. § 150B-51. **Joyner v. Perquimans Cnty. Bd. of Educ., 358.**

Teacher—denial of tenure—arbitrary—The superior court properly reversed a board of education's decision to deny tenure to a teacher where there was not a rational basis in the record for the board's decision. The teacher's evaluations were replete with statements extolling her performance, while any signs or indicia of negative performance were far more difficult to glean from the record, aside from vague and unsubstantiated concerns from a board member with a possible conflict of interest who was not present at the hearing that followed the denial of tenure. **Joyner v. Perquimans Cnty. Bd. of Educ., 358.**

Teacher—denial of tenure—judicial review—whole record test—The superior court was correct in applying the "whole record test" in reviewing a board of education decision to deny a teacher career status (tenure). The appeal concerned whether the record evidence supported the board's decision and whether the board's decision was arbitrary or capricious. **Joyner v. Perquimans Cnty. Bd. of Educ., 358.**

SEARCH AND SEIZURE

Driving while impaired—compelled blood sample—no warrant—exigent circumstances—The trial court did not err in a driving while impaired case by improperly denying defendant's motion to suppress evidence from a blood sample taken without a search warrant or defendant's consent. Under the totality of the circumstances, the facts of this case gave rise to an exigency sufficient to justify a warrantless search. **State v. Dahlquist, 100.**

Motion to suppress—magistrate—failed to include record of oral testimony—The trial court did not err in a sexual offenses case by denying defendant's motion to suppress the evidence seized from his house. Defendant's argument that the trial court (1) made incomplete findings and (2) failed to make any findings or conclusions as to whether the magistrate substantially violated N.C.G.S. § 15A-245 was overruled. Furthermore, the magistrate did not substantially violate N.C.G.S. § 15A-245(a) in failing to include a record of the detective's oral testimony. **State v. Rayfield, 632.**

Motion to suppress—stale allegations—victim's allegations—probable cause—The trial court did not err in a sexual offenses case by denying defendant's motion to suppress the evidence seized from his house. Defendant's argument that certain allegations in the detective's affidavit were stale and did not support a finding of probable cause was overruled. The victim's allegations of inappropriate sexual touching by defendant over a sustained period of time allowed the magistrate to reasonably conclude that probable cause was present to justify the search of defendant's residence. **State v. Rayfield, 632.**

WORKERS' COMPENSATION—Continued

WORKERS' COMPENSATION—Continued