NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 232

21 JANUARY 2014

4 MARCH 2014

RALEIGH
2016

CITE THIS VOLUME

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CASES REPORTED WITHOUT PUBLISHED OPINIONS

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

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ANDERSON v. SEASCAPE AT HOLDEN PLANTATION, LLC

[232 N.C. App. 1 (2014)]

YORIO AND WIFE, DEBORAH L. YORIO; JOSEPH ZALMAN AND WIFE, VALERIE ZALMAN; EUGENE E. ZIELINSKI AND WIFE, REBECCA R. ZIELINSKI, PLAINTIFFS
v.
SEASCAPE AT HOLDEN PLANTATION, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY, F/K/A SEASCAPE AT HOLDEN PLANTATION, INC.; THE COASTAL COMPANIES, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY, D/B/A MARK SAUNDERS LUXURY HOMES; EASTERN CAROLINAS' CONSTRUCTION & DEVELOPMENT LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY, F/K/A EASTERN CAROLINAS' CONSTRUCTION & DEVELOPMENT CORPORATION; COASTAL CONSTRUCTION OF EASTERN NC, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY, F/K/A COASTAL DEVELOPMENT & REALTY BUILDER, INC.; MAS PROPERTIES, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY; MARK A. SAUNDERS, CAPE FEAR ENGINEERING, INC., A NORTH CAROLINA CORPORATION; EXECUTIVE BOARD OF SEASCAPE AT HOLDEN PLANTATION PROPERTY OWNERS ASSOCIATION, INC.; ERIC JOHNSON; CURT BOLDEN; HELEN STEAD; TONY BRADFORD CHEERS; CARROLL LIPSCOMBE; SEAN D. SCANLON; DANIEL H. WEEKS; RICHARD GENOVA; SUSAN LAWING; DEAN SATRAPE; GRACE WRIGLEY; BRUNSWICK COUNTY; BRUNSWICK COUNTY INSPECTION DEPARTMENT; ELMER DELANEY AYCOCK; HAROLD DOUGLAS MORRISON; ANTHONY SION WICKER; DAVID MEACHAM STANLEY, DEFENDANTS

No. COA13-799

Filed 21 January 2014

1. Appeal and Error—interlocutory orders and appeals—denial of motion to intervene—substantial right

Although intervenor SeaScape Property Owners' Association, Inc. appealed from an interlocutory order that denied its motion to intervene, it affected a substantial right and was immediately appealable.

2. Appeal and Error—motion to dismiss appeal—subject matter jurisdiction—stipulation

Plaintiffs' motion to dismiss the appeal for lack of subject matter jurisdiction on the basis that intervenor SeaScape Property Owners' Association, Inc. lacked authority, and therefore standing, to pursue the appeal was denied. The parties stipulated that the trial court had subject matter jurisdiction over the present action.

3. Parties—motion to intervene—necessary party

The trial court erred by denying SeaScape Property Owners' Association, Inc.'s (POA) motion to intervene because it had a right to intervene under N.C.G.S. § 1A-1, Rule 24 (a)(2). To the extent that plaintiffs' claims were derivative, the POA was a necessary party because the derivative claims were brought in its name.

Appeal by Intervenor SeaScape at Holden Plantation Property Owners Association, Inc. from Order entered 24 January 2013 by Judge Thomas H. Lock in Superior Court, Brunswick County. Heard in the Court of Appeals 19 November 2013.

Whitfield Bryson & Mason, LLP, by Daniel K. Bryson, for plaintiffs-appellees.

Young Moore and Henderson, P.A., by Robert C. deRosset, and Graebe Hanna & Sullivan, PLLC, by Christopher T. Graebe, for defendants Mark A. Saunders and MAS Properties, LLC.

Hamlet & Associates, PLLC, by H. Mark Hamlet, for Coastal Construction of Eastern NC, LLC.

Wall Templeton & Haldrup, PA, by Mark Langdon, for Seascape at Holden Plantation LLC, The Coastal Companies LLC, Eastern Carolinas Construction and Development LLC.

Cranfill Sumner & Hartzog, LLP, by Patrick Mincey, for Cape Fear Engineering, Inc.

Teague Campbell Dennis & Gorham, LLP, by Henry W. Gorham, for Elmer Delany Aycock, Harold Douglas Morrison, Anthony Sion Wicker, and David Meacham Stanley.

Chestnutt, Clemmons & Peacock, P.A., by Gary H. Clemmons, for defendants Eric Johnson, Curt Bolden, Tony Bradford Cheers, Carroll Lipscombe, Grace Wrigley, Helen Stead, Susan Lawing, Dan Weeks, Richard Genova, Dean Satrape, Sean D. Scanlon, and The Executive Board of Seascape at Holden Plantation Property Owners Association, Inc.

Ward and Smith, P.A., by Ryal W. Tayloe and Allen N. Trask, III, for Intervenor-Appellant Seascape at Holden Plantation Property Owners Association, Inc.

STROUD, Judge.

The SeaScape at Holden Plantation Property Owners Association, Inc. appeals from an order entered 24 January 2013 denying its motion to intervene. We reverse and remand.

I. Background

This action concerns a planned community in Brunswick County called SeaScape at Holden Plantation ("SeaScape Community"). The SeaScape Community was developed by SeaScape at Holden Plantation, LLC ("SeaScape LLC"), and its member-manager, Mark Saunders, both defendants here. Plaintiffs claim that the SeaScape Community "derives much of its value from the substantial common elements available for the owners' use, including a marina, a clubhouse, and ponds and natural areas throughout the property." Plaintiffs' claims arise from the construction of some of these common areas, including a marina and two ponds as well as the "failure to construct promised amenities, including without limitation, tennis courts, walking and biking trails, harbormaster house, intracoastal pier with gazebo, and observation towers" and failure to properly construct and maintain roadways and drainage. The developer had some of these common areas constructed and then conveyed them to the SeaScape Property Owners' Association, Inc. (POA), a non-profit corporation. Plaintiffs are property owners within the SeaScape Community and members of the POA. Under the POA's articles of incorporation, the developer has the unilateral authority to appoint and remove members of the POA Board of Directors.

On 5 October 2012, plaintiffs filed a verified complaint, motion for temporary restraining order, and motion for preliminary injunction. This initial complaint listed the POA as a defendant. The complaint alleged that two of the common ponds, the marina, and some of the roads had various construction defects resulting in excessive repair costs and diminution of property value, among other damages. Plaintiffs have alleged that the common areas at issue were defectively constructed by several LLCs operated by Mr. Saunders.

The complaint raised claims for breach of contract, breach of implied warranties, unfair and deceptive business practices, and constructive fraud against SeaScape LLC and the construction LLCs allegedly operated by Mr. Saunders, as well as piercing the corporate veil to impose liability on Mr. Saunders individually. Plaintiffs also alleged breach of fiduciary duty, negligence, unfair and deceptive business practices against Mr. Saunders individually. The complaint also raised negligence and breach of contract claims against Cape Fear Engineering, Inc. for its designs of several common elements. Plaintiffs further claimed that the POA Board of Directors and the individual board members had breached their fiduciary duties to plaintiffs and engaged in a civil conspiracy with the developer. Finally, plaintiffs claimed that Brunswick County and several individual inspectors were negligent in their inspections, had

engaged in a civil conspiracy with the developer, and acted in a manner that constituted unfair and deceptive business practices.

Before the POA filed an answer, plaintiffs filed an amended complaint on 26 October 2012, which included essentially the same claims but did not include the POA as a defendant. On 27 November 2012, the POA filed a motion to intervene "as a party Plaintiff." It claimed that it was the owner of the property that plaintiffs have alleged was defectively constructed. It contended that some of the interests asserted by plaintiffs were actually interests owned by the POA. It attached a draft complaint, largely copying plaintiffs' claims against the developer, the construction companies, Cape Fear, and the Brunswick County defendants. The superior court denied the POA's motion to intervene by order entered 24 January 2013. The POA filed written notice of appeal to this Court on 13 February 2013.

II. Appellate Jurisdiction

[1] We must first address the issue of appellate jurisdiction. We conclude that the appeal is interlocutory, but that the appealed order affects a substantial right and is therefore immediately appealable. Further, we deny plaintiffs' motion to dismiss the appeal for lack of subject matter jurisdiction.

The trial court's order denying the POA's motion to intervene is interlocutory, as it does not dispose of the entire case. *See High Rock Lake Partners, LLC v. North Carolina Dept. of Transp.*, 204 N.C. App. 55, 60, 693 S.E.2d 361, 366 ("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." (citation, quotation marks, and ellipses omitted)), *disc. rev. denied*, 364 N.C. 325, 700 S.E.2d 753 (2010). "Normally, interlocutory orders are not immediately appealable." *Highland Paving Co., LLC v. First Bank*, ___ N.C. App. ___, ___, 742 S.E.2d 287, 290 (2013) (citation omitted). Nevertheless,

> an interlocutory order may be immediately appealed (1) if the order is final as to some but not all of the claims or parties and the trial court certifies there is no just reason to delay the appeal pursuant to N.C. R. Civ. P. 54(b) or (2) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review.

Stinchcomb v. Presbyterian Medical Care Corp., 211 N.C. App. 556, 560, 710 S.E.2d 320, 323, *disc. rev. denied*, 365 N.C. 338, 717 S.E.2d 376 (2011).

The POA argues that the trial court's denial of its motion to intervene affects a substantial right. "Whether a party may appeal an interlocutory order pursuant to the substantial right exception is determined by a two-step test. The right itself must be substantial and the deprivation of that substantial right must potentially work injury to [appellant] if not corrected before appeal from final judgment." *Wood v. McDonald's Corp.*, 166 N.C. App. 48, 55, 603 S.E.2d 539, 544 (2004) (citations, quotation marks, and brackets omitted).

Under the facts presented here, we conclude that the trial court's order affects a substantial right of the POA. *Cf. United Services Auto. Ass'n v. Simpson*, 126 N.C. App. 393, 395, 485 S.E.2d 337, 339 (concluding that an order denying the appellants' motion to intervene affected a substantial right), *disc. rev. denied*, 347 N.C. 141, 492 S.E.2d 37 (1997); *Alford v. Davis*, 131 N.C. App. 214, 216, 505 S.E.2d 917, 919 (1998) (concluding that the denial of a motion to intervene affected a substantial right). This action concerns property owned by the POA. To the extent that the parties contend that there are derivative claims at issue, they were derivative of rights possessed by the POA. Unless it is brought into the action, the POA would lose its ability to challenge plaintiffs' standing to bring an action on its behalf, which is a major issue in contention here. *See Swenson v. Thibaut*, 39 N.C. App. 77, 100, 250 S.E.2d 279, 294 (1978) (observing that "certain defenses which are properly asserted before trial on the merits of the action are peculiar to the corporation alone, and may be properly raised *only* by the nominal defendant who, for purposes of those matters, ceases to be a nominal defendant and becomes an actual party defendant."), *app. dismissed and disc. rev. denied*, 296 N.C. 740, 740, 254 S.E.2d 181, 181-83 (1979). We conclude that the order denying the POA's motion to intervene affects a substantial right and is immediately appealable.

[2] Plaintiffs have also filed a motion to dismiss the appeal for lack of subject matter jurisdiction on the basis that the POA lacks authority, and therefore standing, to pursue the appeal. This argument is misplaced. The only action currently pending and the action into which the POA moved to intervene is that filed by plaintiffs. The parties stipulated that the trial court had subject matter jurisdiction over the present action—the action filed by plaintiffs—and we see no reason to conclude otherwise. Therefore, we deny plaintiffs' motion to dismiss the appeal.

III. Motion to Intervene

[3] The POA argues that the trial court erred in denying its motion to intervene because it had a right to intervene under N.C. Gen. Stat. § 1A-1,

Rule 24(a) (2011), and, alternatively, the trial court abused its discretion in denying the POA's motion to intervene permissively under Rule 24(b). We hold that the POA had a right to intervene as a necessary party under Rule 24(a)(2). Because we conclude that the POA has a right to intervene under Rule 24 (a)(2), we do not address the issue of a statutory right to intervene or permissive intervention.

A. Standard of Review

"We review *de novo* the trial court's decision denying intervention under Rule 24(a)(2)." *Charles Schwab & Co., Inc. v. McEntee*, ___ N.C. App. ___, ___, 739 S.E.2d 863, 867 (2013) (citation omitted). "Under a *de novo* review, [this] [C]ourt considers the matter anew and freely substitutes its own judgment for that of the trial court." *Johns v. Welker*, ___ N.C. App. ___, ___, 744 S.E.2d 486, 488 (2013) (citation, quotation marks, and brackets omitted).

B. Analysis

"Rule 24 of the North Carolina Rules of Civil Procedure determines when a third party may intervene as of right or permissively." *Virmani v. Presbyterian Health Services Corp.*, 350 N.C. 449, 458, 515 S.E.2d 675, 682 (1999), *cert. denied*, 529 U.S. 1033, 146 L.Ed. 2d 337 (2000). Under Rule 24, a person has a right to intervene in two circumstances:

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

N.C. Gen. Stat. § 1A-1, Rule 24(a) (2011).

"The prospective intervenor seeking such intervention as a matter of right under Rule 24(a)(2) must show that (1) it has a direct and immediate interest relating to the property or transaction, (2) denying intervention would result in a practical impairment of the protection of that interest, and (3) there is inadequate representation of that interest by existing parties." *Virmani*, 350 N.C. at 459, 515 S.E.2d at 683.

> When a complete determination of the controversy cannot be made without the presence of a party, the court must cause it to be brought in because such party is a necessary party and *has an absolute right to intervene in a pending*

> *action.* Hence, refusal to permit a necessary party to intervene is error.

Strickland v. Hughes, 273 N.C. 481, 485, 160 S.E.2d 313, 316 (1968) (emphasis added). Our Supreme Court held under the prior N.C. Gen. Stat. § 1-73 that a trial court erred in denying the owner of property at issue, a necessary party, the opportunity to participate. *Griffin & Vose v. Non-Metallic Minerals Corp.*, 225 N.C. 434, 436, 35 S.E.2d 247, 249 (1945).[1] Moreover, to the extent that plaintiffs' claims are derivative, the POA is a necessary party because the derivative claims are brought in its name. *Swenson*, 39 N.C. App. at 98, 250 S.E.2d at 293.

"A necessary party is one who is so vitally interested in the controversy that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence." *Moore Printing, Inc. v. Automated Print Solutions, LLC*, ___ N.C. App. ___, ___, 718 S.E.2d 167, 172 (2011). The POA is the owner of the property that plaintiffs have alleged was defectively constructed and is in need of repair. Plaintiffs have specifically requested an injunction prohibiting the POA from expending its funds to repair the marina, as plaintiffs assert that the other defendants should be held responsible for these expenses. Plaintiffs assert that several of their claims are derivative claims brought on behalf of the POA. No valid judgment can be entered without the participation of the POA. *See Karner v. Roy White Flowers, Inc.*, 351 N.C. 433, 440, 527 S.E.2d 40, 44 (2000) (concluding that "[a]n adjudication that extinguishes property rights without giving the property owner an opportunity to be heard cannot yield a "valid judgment."); *Swenson*, 39 N.C. App. at 98, 250 S.E.2d at 293. Therefore, regardless of whether plaintiffs' claims are derivative or individual, valid or inadequate, as a necessary party, the POA has a right to intervene under Rule 24. *See Virmani*, 350 N.C. at 459, 515 S.E.2d at 683; *Strickland*, 273 N.C. at 485, 160 S.E.2d at 316; *Swenson*, 39 N.C. App. at 98, 250 S.E.2d at 293.

We also note that the parties all seem to assume in their briefs that the plaintiffs' claims at issue are derivative claims brought on behalf of the POA. The only issue which the trial court has ruled upon and which is raised by this appeal is the POA's right to intervene, and we have addressed only that issue. We express no opinion on the legal sufficiency

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1. Both of these cases were decided before the Rules of Civil Procedure came into effect. However, our Supreme Court has noted that "[t]he rules of intervention as set out in N.C.G.S. § 1A-1 make no substantive change in the rules as previously set out in N.C.G.S. § 1-73." *River Birch Associates v. City of Raleigh*, 326 N.C. 100, 128 n.10, 388 S.E.2d 538, 554 n.10 (1990).

of plaintiff's claims or of the POA's complaint, the assertion that the claims are actually derivative and pled as such, or the POA's argument that derivative claims were not properly brought. These other legal issues and the proper role of the POA in the action may be addressed by the trial court on remand if and when they are raised by the parties.

IV. Conclusion

For the foregoing reasons, we hold that the POA is entitled to intervene as a matter of right under Rule 24. Therefore, we reverse the trial court's order denying the POA's motion to intervene and remand for further proceedings.

REVERSED and REMANDED.

Judges McGEE and BRYANT concur.

CYNTHIA A. BAILEY, PETITIONER
v.
DIVISION OF EMPLOYMENT SECURITY, NORTH CAROLINA DEPARTMENT OF COMMERCE, RESPONDENT

No. COA13-452

Filed 21 January 2014

Administrative Law—adoption of agency findings—but not conclusions

The trial court erred by reversing the decision of the Employment Security Division of the Department of Commerce (DOC) where it had adopted all of DOC's findings, which as a matter of law supported DOC's ruling that petitioner had engaged in misconduct.

Appeal by respondent from order entered 14 January 2013 by Judge C. Philip Ginn in Buncombe County Superior Court. Heard in the Court of Appeals 26 September 2013.

Adams Hendon Carson Crow & Saenger, P.A., by John C. Hunter, for petitioner-appellee.

North Carolina Department of Commerce, Division of Employment Security, by Timothy M. Melton, for respondent-appellant.

STEELMAN, Judge.

Where the trial court adopted all of the findings of fact made by DOC, which as a matter of law supported DOC's ruling that petitioner engaged in misconduct, the trial court erred in reversing the decision of DOC.

I. Factual and Procedural Background

Cynthia A. Bailey (plaintiff) was employed by Pro Temps Medical Staffing (Pro Temps). On 11 December 2011, plaintiff's employment with Pro Temps was terminated. On 1 January 2012, plaintiff filed a claim for unemployment benefits. An Adjudicator found that plaintiff was assigned to monitor a patient who was on suicide watch; that plaintiff was found sleeping on the job; and that plaintiff was discharged due to this misconduct and was disqualified from receiving unemployment benefits. On 2 April 2012, plaintiff appealed *pro se* to the Appeals Referee.

On 1 May 2012, the Appeals Referee heard the appeal. The Appeals Referee affirmed the Adjudicator's determination, and held that plaintiff was discharged due to misconduct, and therefore was disqualified from receiving unemployment benefits. The Appeals Referee further found that while plaintiff was sleeping, the suicide-watch patient had been wandering the halls of the hospital. On 31 May 2012, plaintiff appealed *pro se* to the North Carolina Department of Commerce, Division of Employment Security (DOC).

On 26 September 2012, DOC adopted the facts found by the Appeals Referee, concluded that the Appeals Referee correctly applied the law, and affirmed the decision that plaintiff was disqualified from receiving unemployment benefits. On 26 October 2012, plaintiff filed a petition for judicial review to the Superior Court of Buncombe County.

On 15 January 2013, the trial court entered its order on judicial review, and held that plaintiff was not disqualified to receive unemployment benefits.

DOC appeals.

II. Standard of Review

"In cases appealed from administrative tribunals, we review questions of law *de novo* and questions of fact under the whole record test." *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 386, 628 S.E.2d 1, 2 (2006). A determination that an employee has engaged in misconduct under N.C. Gen. Stat. §§ 96-14 and 96-15 is a conclusion of law. *See e.g. Williams*

v. Burlington Indus., Inc., 318 N.C. 441, 456, 349 S.E.2d 842, 851 (1986) (referring to "the referee's conclusion that petitioner was discharged for misconduct").

> [I]n cases appealed from an administrative tribunal under [Article 3 of North Carolina's Administrative Procedure Act], it is well settled that the trial court's erroneous application of the standard of review does not automatically necessitate remand, provided the appellate court can reasonably determine from the record whether the petitioner's asserted grounds for challenging the agency's final decision warrant reversal or modification of that decision under the applicable provisions of N.C.G.S. § 150B-51(b).

N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 665, 599 S.E.2d 888, 898 (2004).

> When the issue on appeal is whether a state agency erred in interpreting a statutory term, an appellate court may freely substitute its judgment for that of the agency and employ *de novo* review. Although the interpretation of a statute by an agency created to administer that statute is traditionally accorded some deference by appellate courts, those interpretations are not binding. The weight of such [an interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

N.C. Sav. & Loan League v. N.C. Credit Union Comm'n, 302 N.C. 458, 465-66, 276 S.E.2d 404, 410 (1981) (citations and quotations omitted).

III. Trial Court's Standard of Review

In its first argument, DOC contends that the trial court disregarded the standard of review set out in N.C. Gen. Stat. § 96-15(i). We agree.

N.C. Gen. Stat. § 96-15, concerning the procedure as to claims for unemployment benefits, provides that, in any judicial review of a decision by DOC:

> the findings of fact by the Division, if there is any competent evidence to support them and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall

> be confined to questions of law. Such actions and the questions so certified shall be heard in a summary manner and shall be given precedence over all civil cases.

N.C. Gen. Stat. § 96-15(i) (2013).

In the instant case, the Appeals Referee found that:

> 3. According to the employer's policies and procedures, of which the claimant knew or should have known, if an employee is found to be asleep or giving off the appearance of sleep while he/she is supposed to be performing job duties, then said employee may be subjected to an immediate discharge from employment.
>
> 4. On the claimant's final day of employment, she [claimant] was found asleep in a patient's room. The claimant was supposed to be providing sitter duties for said patient.
>
> 5. The above-mentioned patient was on "suicide watch" and left the room while the claimant was asleep.
>
> 6. A nurse woke up the claimant and informed her [claimant] that the patient she was to be watching over was outside of his room at the nurses' station.
>
> 7. The claimant was discharged from this job for sleeping during her work shift while she was supposed to be performing her job duties.

The Appeals Referee concluded that:

> the claimant fell asleep while she was supposed to be watching over a patient as a certified nursing assistant/sitter. The employer's policies allow for an employee to turn down patients and/or shifts if he or she thinks it would not be prudent or possible to perform job duties whether that decision is based on one's comfort level or level of fatigue. The claimant did not turn down providing sitting duties for the above-noted patient during her agreed to work shift. The claimant's actions were a willful disregard of the employer's interests and a disregard of the standards of behavior that the employer rightfully expected of the claimant. As such, the claimant was discharged for misconduct in connection with the work.

On appeal from the Appeals Referee, DOC held that:

> As the ultimate fact-finder in cases involving contested claims for unemployment insurance benefits, the undersigned concludes that the facts found by the Appeals Referee were based on competent evidence and adopts them as its own. The undersigned also concludes that the Appeals Referee properly and correctly applied the Employment Security Law (G.S. §96-1 et seq.) to the facts as found, and the resultant decision was in accordance with the law and fact.

On appeal from DOC, the trial court found simply that "There is competent evidence in the record to support the findings of fact made by the Division." However, the trial court then concluded that plaintiff's conduct was not "misconduct" which would merit disqualification, holding:

> The Division's conclusion of law as set out in the Memorandum of Law Section of the Division's Decision is in error as a matter of law in that Petitioner's actions were not, "conduct evincing a willful or wanton disregard of the employer's interest as is found in the deliberate violations or disregard of standards of behavior which an employer has a right to expect of an employee or has been explained orally or in writing to an employee or conduct evincing carelessness or negligence of such degree or recurrence as to manifest an intentional and substantial disregard of the employer's interest or of the employee's duties or obligations to the employer," and were not, therefore, "misconduct" as that term is defined and used in N.C. Gen. Stat. § 96-14(2).

N.C. Gen. Stat. § 96-14 defines misconduct as:

> intentional acts or omissions evincing disregard of an employer's interest or standards of behavior which the employer has a right to expect or has explained orally or in writing to an employee or evincing carelessness or negligence of such degree as to manifest equal disregard.

N.C. Gen. Stat. § 96-14(2) (2011)[1].

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1. N.C. Gen. Stat. § 96-14 was repealed by Session Laws 2013-2, s.2(a), effective 1 July 2013, and replaced by N.C. Gen. Stat. § 96-14.1 *et seq*. However, § 96-14 was effective during the proceedings before the trial court, and we will therefore apply the definition expressed therein.

The findings of fact of the Appeals Referee were adopted by DOC, and in turn by the trial court upon appeal. These findings explicitly stated that Pro Temps had a policy that employees found sleeping were subject to immediate discharge, and that employees who believed themselves unable to perform had the option to turn down patients or shifts, and that plaintiff knew or should have known about these policies. Further, these findings stated that plaintiff was found sleeping when she had been assigned to a patient on suicide watch, having chosen not to turn down the shift. These findings all support the conclusion that plaintiff had engaged in misconduct, and do not support a conclusion to the contrary.

Nonetheless, the trial court, despite adopting these findings in their entirety, concluded that no misconduct had occurred. Its conclusion is in direct contradiction to the findings it adopted, and is therefore without a basis in the law.

We hold that the trial court erred as a matter of law in making conclusions of law which were not supported by its findings of fact, and reverse and remand this matter to the trial court for entry of an order affirming the decision of DOC.

IV. Other Arguments

Because we have held that the trial court erred as a matter of law in reversing the decision of DOC, we need not address DOC's other arguments.

REVERSED AND REMANDED.

Judges HUNTER, ROBERT C. and BRYANT concur.

IN THE MATTER OF T.H., T.H., A.S., J.S., M.W., A.W.

No. COA13-433

Filed 21 January 2014

1. Juveniles—disposition hearing—mother's motion to intervene as a matter of right

The trial court correctly denied a mother's motion to intervene in a juvenile disposition hearing as a matter of right where her parental rights to the four adopted juveniles had been severed. Moreover, her motion was defective for failure to include a pleading asserting a claim or defense as required by N.C.G.S. § 1A-1, Rule 24(c).

2. Juveniles—disposition hearing—permissive intervention denied—parental rights previously terminated

The trial court did not abuse its discretion by denying a mother's motion for permissive intervention in the juvenile disposition hearing for some of her children where her parental rights had previously been terminated.

3. Juveniles—disposition hearing—appeal—outside statutory categories

The appeal of a mother in a juvenile disposition hearing was dismissed as to four of her children who had been surrendered to adoption where the mother did not come within any category of persons afforded a statutory right to appeal from a juvenile matter pursuant to N.C.G.S. §§ 7B-1001 and 7B-1002.

4. Juveniles—dependent—lack of caregivers

The trial court did not err by adjudicating two children as dependent juveniles where the legal custodian of the juveniles, their maternal grandmother, was deceased; there were no appropriate family members to care for the juveniles; respondent, the children's mother, did not present herself as a potential caregiver at the adjudicatory hearing; and no alternative caregivers were presented.

5. Juveniles—temporary permanent plan—rendered harmless by subsequent order

The trial court did not err when, in a juvenile adjudicatory order, it made findings of fact and conclusions of law regarding a "temporary permanent plan" for the juveniles. Any error was rendered harmless by the trial court's entry of a permanent plan in its dispositional order.

6. Juveniles—permanent disposition plan—notice

The mother of juveniles for whom a permanent plan was entered at a disposition hearing was provided notice when the court entered a "temporary permanent" plan at adjudication, she and her attorney attended and participated in the dispositional hearing, and she did not object to the lack of formal notice.

7. Juveniles—disposition—non-relative placement

The trial court did not abuse its discretion in a juvenile disposition by making a non-relative placement or in its conclusions. It is apparent from the trial court's exhaustive findings of fact that the trial court considered several relative placements but no suitable option was available.

8. Juveniles—conclusions—reunification efforts not needed—supported by findings

The uncontested findings in a juvenile disposition supported the trial court's conclusions that reunification efforts would be inconsistent with the juveniles' health, safety and need for a permanent home within a reasonable period of time and were not required.

9. Juvenile—disposition plan—visitation by mother not specified

The trial court erred in a juvenile disposition where its visitation plan did not specify the time, place, and conditions under which visitation by the mother could be exercised. The trial court made no finding that the mother had forfeited her right to visitation or that it was in the best interests of the children to deny visitation.

Appeal by respondent from adjudication order entered 3 May 2012 by Judge Charlie Brown and disposition order entered 9 January 2013 by Judge Lillian B. Jordan in Rowan County District Court. Heard in the Court of Appeals 8 October 2013.

Cynthia Dry for petitioner-appellee Rowan County Department of Social Services.

Jeffrey L. Miller for respondent-appellant mother.

Administrative Office of the Courts, by Associate Counsel Deana K. Fleming, for guardian ad litem.

BRYANT, Judge.

Where respondent-mother fails to establish an immediate and direct interest in four juveniles — Tracy, Todd, Mary, and Ann[1] —following the surrender of her parental rights as to them in a prior proceeding, we affirm the trial court's ruling that respondent-mother may not intervene in the juveniles' dispositional hearing as a matter of right. Where respondent-mother does not come within any category of persons afforded a right to appeal a juvenile matter arising from Subchapter I of Chapter 7B, as such appeal relates to the four juveniles adopted from respondent-mother, respondent-mother lacks standing to appeal. Accordingly, we must dismiss respondent-mother's appeal as to those four juveniles. Because there was sufficient evidence to support the trial court's findings of fact and those findings support the trial court's conclusion that Ashley and John were dependent, we affirm that determination. Where respondent-mother was on notice that the trial court would enter a permanent plan for her two children, respondent-mother participated in the dispositional hearing to establish a permanent plan, and did not object to the lack of notice, the trial court did not err in establishing a permanent plan. Where the trial court's unchallenged findings of fact support its conclusion that reunification efforts would be inconsistent with the juvenile's health, safety, and need for a permanent home, we affirm the trial court's conclusion that reunification efforts are not required at this time. Where the trial court failed to establish an appropriate schedule for respondent-mother to visit her children, we remand the matter to the trial court for entry of such a schedule.

Respondent-mother Claire Wilson ("Claire")[2], the biological mother of the juveniles, appeals from orders: (1) adjudicating the juveniles dependent; (2) denying her motion to intervene; (3) ordering a permanent plan of adoption for Tracy, Todd, Mary, and Ann; and (4) ordering a permanent plan of custody or guardianship for Ashley and John. After careful review, we affirm in part, remand in part, and dismiss in part Claire Wilson's appeal.

On 27 January 2012, the Rowan County Department of Social Services ("DSS") filed a petition alleging that Tracy, Todd, Ashley, John, Mary, and Ann were dependent juveniles. DSS stated that on 27 January 2012, Janice Lake ("Janice"), the maternal grandmother of the juveniles,

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1. Pseudonyms are used throughout this opinion to protect the juveniles' privacy and for ease of reading.

2. Pseudonyms are used to protect the identity of respondent-mother, her adult relatives and caretakers of the children.

was murdered. Janice had adopted Tracy, Todd, Mary, and Ann in 2009 and in 2004 had been granted custody of Ashley and John. In its petition, DSS alleged that there were no appropriate family members to care for the children and subsequently, took custody of the juveniles by non-secure custody order. On 2 February 2012, the trial court appointed the juveniles a guardian ad litem.

An adjudicatory hearing was held on 29 March 2012. The trial court adjudicated the children "dependent juveniles" and ordered that legal custody, as well as authority over placement and visitation, remain with DSS. Additionally, the trial court stated the following:

> It is in the best interests of the juveniles for the temporary permanent plan of [John and Ashley] to be custody or guardianship with a relative or other court approved caretaker. The temporary permanent plan for [Ann, Mary, Todd, and Tracy] should be adoption.

On 2 October 2012, several of the juveniles' relatives filed a joint motion to intervene in the juvenile proceedings. The relatives stated that they were willing and able to provide care for the juveniles and that it was in the best interests of the juveniles to be placed with family members. On 8 October 2012, Mr. and Mrs. Alfred, who were the court approved placement providers for all of the juveniles, also filed a motion to intervene. Mr. and Mrs. Alfred argued that they should be "permitted to intervene because it would be in the best interests of all the children to have [Mr. and Mrs. Alfred] involved as parties in their case, since [Mr. and Mrs. Alfred] [] have developed such strong bonds with the children and are providing their daily care."

On 10 October 2012, Claire filed a motion to intervene. The motion related solely to Tracy, Todd, Mary, and Ann, the four juveniles adopted by Janice. Claire noted that she was the biological mother of the juveniles and legally their sister since the children had been adopted by Claire's mother. Claire denied the material allegations made by Mr. and Mrs. Alfred in their motion to intervene and requested that the juvenile petition be terminated, the juveniles placed with her, or in the alternative, members of her family, and that Mr. and Mrs. Alfred's motion to intervene be denied.

A dispositional hearing was conducted on 8, 9, and 26 November 2012. The trial court denied all motions to intervene. The court found that no relative was able to provide proper care and supervision for the juveniles and that placement with "any of the identified relatives" was contrary to the best interests of the juveniles. The trial court specifically

found that it was contrary to the best interests of the juveniles for them to return to Clarie's home. The trial court made findings regarding Todd's repeated attempts to harm himself and others, as well as his auditory and visual hallucinations, and placed him in a residential psychiatric facility, with placement with Mr. and Mrs. Alfred if possible once his treatment was complete. The remaining juveniles were placed with Mr. and Mrs. Alfred. The court set the permanent plan for Tracy, Todd, Mary and Ann as adoption and the permanent plan for Ashley and John as custody or guardianship with Mr. and Mrs. Alfred. Claire appeals.

On appeal, Claire raises the following issues: whether (I) the trial court erred in denying her motion to intervene; (II) there was sufficient grounds to support the conclusion the children were dependent juveniles; (III) there were sufficient grounds to cease reunification efforts; (IV) the trial court erred in establishing a permanent plan for the juveniles; and (V) the written order failed to establish a proper visitation plan.

I. Motion to Intervene

[1] Claire first argues that the trial court erred by denying her motion to intervene as a matter of right, pursuant to our Rules of Civil Procedure, Rule 24(a)(2). We disagree.

"This Court reviews a trial court's decision granting or denying a motion to intervene pursuant to N.C. Gen. Stat. § 1A–1, Rule 24(a)(2), on a *de novo* basis." *Bailey & Assoc., Inc. v. Wilmington Bd. of Adjustment*, 202 N.C. App. 177, 185, 689 S.E.2d 576, 583 (2010) (citation omitted).

As to whether our Juvenile Code, codified in Chapter 7B of our North Carolina General Statutes, and specifically, Subchapter I, "Abuse, Neglect, Dependency," address intervention, the briefs submitted to us reference only section 7B-1103, which allows a person or agency to "intervene in a pending abuse, neglect, or dependency proceeding *for the purpose of filing a motion to terminate parental rights*." N.C. Gen. Stat. § 7B-1103(b) (2011) (emphasis added).[3] We find no other statute within

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3. We note that effective 1 October 2013, within Subchapter I, "Abuse, Neglect, Dependency," section 7B-401.1 states that "[e]xcept as provided in G.S. 7B-1103(b), the court shall not allow intervention by a person who is not the juvenile's parent, guardian, custodian, or caretaker but may allow intervention by another county department of social services that has an interest in the proceeding. This section shall not prohibit the court from consolidating a juvenile proceeding with a civil action or claim for custody pursuant to G.S. 7B-200." N.C. Gen. Stat. § 7B-401.1 (effective 1 October 2013).

this subchapter specifically referencing intervention. Therefore, we look to our Rules of Civil Procedure for authority governing intervention.

> The General Assembly has set out the judicial procedure to be used in juvenile proceedings in Chapter 7B of the General Statutes. This Court has previously held that [t]he Rules of Civil Procedure, while they are not to be ignored, are not superimposed upon these hearings. Instead, the Rules of Civil Procedure apply only when they do not conflict with the Juvenile Code and only to the extent that the Rules advance the purposes of the legislature as expressed in the Juvenile Code.

In re L.O.K., 174 N.C. App. 426, 431—32, 621 S.E.2d 236, 240 (2005) (citations and internal quotation omitted).

Rule 24 of our Rules of Civil Procedure governs intervention, both intervention of right and permissive intervention. *See* N.C. Gen. Stat. § 1A-1, Rule 24 (2011). Rule 24(a)(2), "Intervention of right," states, in pertinent part, that

> [u]pon timely application anyone shall be permitted to intervene in an action . . . .
>
> When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

N.C.G.S. § 1A-1, Rule 24(a)(2).

Permissive intervention pursuant to Rule 24(b)(2), states, in part, that

> anyone may be permitted to intervene in an action.
>
> When an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or State governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, such officer or

> agency upon timely application may be permitted to intervene in the action.

N.C.G.S. § 1A-1, Rule 24(b)(2).

Statute 7B-100, entitled "Purpose," of our Juvenile Code, Subchapter I, states that Subchapter I "shall be interpreted and construed so as to implement the following purposes and policies . . . [t]o develop a disposition in each juvenile case that reflects consideration of the facts, the needs and limitations of the juvenile, and the strengths and weaknesses of the family." N.C. Gen. Stat. § 7B-100(2) (2011). We construe this provision to permit intervention pursuant to Rule 24. *See generally*, *In re Baby Boy Scearce*, 81 N.C. App. 531, 541, 345 S.E.2d 404, 410 (1986) (where this Court, when considering permissive intervention under Chapter 7A, the predecessor to Chapter 7B, sanctioned the use of permissive intervention where it determined that intervention "was necessary to elicit full and accurate information pertaining to the welfare of the child." (citation omitted)).

In its 9 January 2011 disposition order, the trial court acknowledges that prior to receiving evidence as to the dispositional hearing, it considered motions to intervene, including the motion filed by Claire. The trial court concluded that "[n]o person seeking to intervene may be allowed to intervene as of right."

> This Court has stated that where no other statute confers an unconditional right to intervene, the interest of a third party seeking to intervene as a matter of right under N.C.G.S. § 1A–1, Rule 24(a)
>
> > must be of such direct and immediate character that he will either gain or lose by the direct operation and effect of the judgment.... [sic] One whose interest in the matter in litigation is not a direct or substantial interest, but is an *indirect*, inconsequential, *or a contingent* one cannot claim the right to defend.

Virmani v. Presbyterian Health Servs. Corp., 350 N.C. 449, 459, 515 S.E.2d 675, 682—83 (1999) (citations and quotations omitted).

In her brief to this Court, Claire contends that

> [t]o the extent [I] [am] considered only as a legal 'sister' of [the] four children, [I] was entitled to intervene as a party in the proceedings as a matter of right so that [I] could adequately present and represent the otherwise

> unrepresented family member interest and arguments for maintaining a family placement, family relationship, and potential for a family reunification with the four juveniles . . . and so as to assure [I] may have a proper legal voice in this appeal and any subsequent juvenile court proceedings.
>
> [I] [have] a direct interest in the family relationships with each of the juveniles which can be protected and represented adequately only if [I] (or some family member) is allowed to participate as a full party to the juvenile proceedings. The adoption of the juveniles by strangers to the family would forever sever the family ties and legal relationships of [me] and [my] relatives with the children.

Initially, we note Claire's acknowledgment that as to four of the children subject to this action, she has no parental rights. In an unchallenged finding of fact, the trial court stated that Janice adopted Tracy, Todd, Mary, and Ann in 2009. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.") (citations omitted). Pursuant to N.C. Gen. Stat. § 48-1-106,

> [a] decree of adoption severs the relationship of parent and child between the individual adopted and that individual's biological or previous adoptive parents. After the entry of a decree of adoption, the former parents are relieved of all legal duties and obligations due from them to the adoptee, . . . and the former parents are divested of all rights with respect to the adoptee.

N.C. Gen. Stat. § 48-1-106(c) (2011). Thus, Claire's parental rights to Tracy, Todd, Mary, and Ann — the four juveniles adopted by Janice — have been severed. Claire has also been divested of all rights and relieved of all legal duties and obligations with respect to these four juveniles. *See id.*

Furthermore, Claire's motion to intervene fails to provide any indication that she has the authority to defend or assert "the otherwise unrepresented family member interest [or can present] . . . arguments for maintaining a family placement, family relationship, and potential for a family reunification with the four juveniles[.]" *See Virmani*, 350 N.C. at 459, 515 S.E.2d at 683 (holding that a party cannot directly intervene where its interest is at best indirect). We find that Claire's motion to intervene failed to assert a claim or defense that can act as

a basis for intervening in this action. Pursuant to our Rules of Civil Procedure, Rule 24, "[a] person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought." N.C. Gen. Stat. § 1A-1, Rule 24(c) (2011).

Given that Claire's parental rights to the four adopted juveniles have been severed, her motion to intervene in the juvenile's dispositional hearing failed to present any direct or immediate interest such that she was entitled to intervene in the juvenile's dispositional hearing as a matter of right. *See* N.C.G.S. § 1A-1, Rule 24(a)(2); *Virmani*, 350 N.C. at 459, 515 S.E.2d at 682-83. Moreover, Claire's motion was defective for failure to include a pleading asserting a claim or defense as required by Rule 24(c). *See Kahan v. Longiotti*, 45 N.C. App. 367, 371, 263 S.E.2d 345, 348 (1980) ("[A] motion to intervene . . . must be accompanied by a proposed pleading."), *overruled on other grounds by Love v. Moore*, 305 N.C. 575, 291 S.E.2d 141 (1982). Accordingly, we affirm the trial court's denial of Claire's motion to intervene as a matter of right.

[2] We also note that in addition to its conclusion denying intervention as a matter of right, the trial court denied Claire's motion to intervene on the basis of permissive intervention. In considering the use of permissive intervention as authorized under the juvenile code as codified in Chapter 7A, the predecessor to the juvenile code as codified in Chapter 7B, this Court has sanctioned its use where it "was necessary to elicit full and accurate information pertaining to the welfare of the child." *In re Baby Boy Scearce*, 81 N.C. App. at 541, 345 S.E.2d at 410 (citation omitted).

In *Baby Boy Scearce*, the foster parents sought to intervene in an action in which a biological father sought physical and legal custody of a child. The trial court concluded that the foster parents' right to intervene "derives from the child's right to have his or her best interests protected." *Id.* Other factors considered by this Court included that intervention "was necessary to elicit full and accurate information pertaining to the welfare of the child," *id.* at 541, 345 S.E.2d at 410 (citation omitted), and that "intervention by the foster parents would not 'prejudice the adjudication of the rights of the original parties.' " *Id.*

Nevertheless, while Claire did not challenge on appeal the trial court's ruling that permissive intervention should be denied as a matter of law, we do not believe the trial court abused its discretion in denying Claire's motion to intervene on the basis of permissive intervention.

While the trial court's order denied Claire's motion to intervene and participate as a party to the dispositional proceedings, we acknowledge the trial court's findings regarding the participation of the juvenile's family members in determining their individual best interests: "from the representations of counsel and the presence of all interested relatives in the courtroom, the court is comfortable that sufficient evidence regarding all possible relative placements will be offered for the court's consideration in determining the best interests of each of the children"; and "[t]he proposed intervenors' interests will not be adversely affected by denying their motions to intervene since they may participate indirectly in the proceedings through their status as witnesses in the disposition and suggested relative placements."

Standing

[3] We next consider a motion to dismiss Claire's appeal as to the four juveniles to whom Claire has surrendered her parental rights. Before the Court, the guardian ad litem ("GAL") asserts that Claire lacks standing to bring forward her appeal in relation to Tracy, Todd, Mary and Ann. We agree, and grant the GAL's motion to dismiss Claire's appeal as to Tracy, Todd, Mary and Ann.

A juvenile matter based on Subchapter I, "Abuse, Neglect, Dependency" of General Statutes Chapter 7B may be appealed by the following parties:

> (1) A juvenile acting through the juvenile's guardian ad litem previously appointed under G.S. 7B-601.
>
> (2) A juvenile for whom no guardian ad litem has been appointed under G.S. 7B-601. If such an appeal is made, the court shall appoint a guardian ad litem pursuant to G.S. 1A-1, Rule 17 for the juvenile for the purposes of that appeal.
>
> (3) A county department of social services.
>
> (4) A parent, a guardian appointed under G.S. 7B-600 or Chapter 35A of the General Statutes, or a custodian as defined in G.S. 7B-101 who is a nonprevailing party.
>
> (5) Any party that sought but failed to obtain termination of parental rights.

N.C. Gen. Stat. § 7B-1002 (2011); *see* N.C. Gen. Stat. § 7B-1001 (2011) (Right to appeal); *see also In re A.P.*, 165 N.C. App. 841, 600 S.E.2d 9

(2004) (holding that a step-grandfather had no standing to appeal even though his name was listed on the petition seeking to adjudicate the child neglected where the step-grandfather was not a caregiver, custodian, or parent of the child).

The trial court's finding of fact that Janice adopted four of Claire's biological children — Tracy, Todd, Mary and Ann — in 2009 is uncontested. *See Koufman*, 330 N.C. at 97, 408 S.E.2d at 731 ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.") (citations omitted). As a consequence, Claire's parental rights to those four juveniles have been severed. *See* N.C.G.S. § 48-1-106 ("[a] decree of adoption severs the relationship of parent and child between the individual adopted and that individual's biological or previous adoptive parents."). Claire was not appointed by the court as a guardian for the four adopted juveniles following Janice's death and no findings of fact support a conclusion that Claire acted as a custodian for the juveniles. *See* N.C. Gen. Stat. § 7B-101(8) (2011) (A "Custodian" is defined as "[t]he person or agency that has been awarded legal custody of a juvenile by a court or a person, other than parents or legal guardian, who has assumed the status and obligation of a parent without being awarded the legal custody of a juvenile by a court.); *see also In re T.B.*, 200 N.C. App. 739, 685 S.E.2d 529 (2009) (holding that the respondent was not a custodian to the child where the record reflected no order awarding either legal or physical custody of the juvenile to the respondent and no evidence supported a finding that the respondent stood *in loco parentis* in relation to the child).

Because Claire does not come within any category of persons afforded a statutory right to appeal from a juvenile matter pursuant to N.C.G.S. §§ 7B-1001 and 7B-1002, Claire lacks standing to appeal the trial court's 3 May 2012 adjudication order and 9 January 2013 juvenile disposition order as those orders pertain to Tracy, Todd, Mary, and Ann — the four children Claire surrendered to adoption. *See* N.C.G.S. § 7B-1002. As a result, we address Claire's arguments arising from her appeal of the 3 May 2012 adjudication order and 9 January 2013 juvenile disposition order only as those orders relate to Ashley and John.

II. Adjudication of Dependency

[4] Claire argues that the trial court erred by adjudicating Ashley and John dependent juveniles within the meaning of N.C. Gen. Stat. § 7B-101. Claire contends that there was insufficient evidence presented at the adjudicatory hearing to meet the clear and convincing standard necessary to conclude the juveniles were dependent. We disagree.

> In all actions tried upon the facts without a jury . . . [sic] the court shall find the facts specifically and state separately its conclusions of law thereon[.] . . . The resulting findings of fact must be sufficiently specific to enable an appellate court to review the decision and test the correctness of the judgment.

In re J.S., 165 N.C. App. 509, 510—11, 598 S.E.2d 658, 660 (2004) (citations and quotations omitted). "The role of this Court in reviewing a trial court's adjudication of [dependency] is to determine (1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact[.]" *In re T.H.T.*, 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007) (citation and quotation omitted). "If such evidence exists, the findings of the trial court are binding on appeal, even if the evidence would support a finding to the contrary." *Id.* (citation omitted).

"Dependent juvenile" is defined in N.C. Gen. Stat. § 7B-101(9) as:

> [a] juvenile in need of assistance or placement because the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or whose parent, guardian, or custodian is unable to provide for the care or supervision and lacks an appropriate alternative child care arrangement.

N.C. Gen. Stat. § 7B-101(9) (2011). "In determining whether a juvenile is dependent, the trial court must address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements." *In re B.M.*, 183 N.C. App. 84, 90, 643 S.E.2d 644, 648 (2007) (citation and quotation omitted). "Findings of fact addressing both prongs must be made before a juvenile may be adjudicated as dependent, and the court's failure to make these findings will result in reversal of the court." *Id.* (citation omitted).

In the instant case, it is not disputed that the legal custodian of the juveniles, Janice, is deceased. The trial court further found that "[a]t the time that the juvenile petition was filed, there were no appropriate family members immediately available to care for the children long-term." This finding is supported by the uncontradicted testimony of Kris Tucker, a DSS social worker, who testified at the adjudicatory hearing that there were no appropriate family members to care for the juveniles. Tucker further testified that although the juveniles were in the care of an aunt and uncle, Mr. and Mrs. Chase, "they are not able to provide ongoing care and are not interested in establishing permanence

for [the juveniles]." Claire did not present herself as a potential caregiver at the adjudicatory hearing, nor were any alternative caregivers presented. Accordingly, we conclude that the trial court did not err by adjudicating Ashley and John as dependent juveniles.

III. Permanent Plan

[5] Claire next argues that the trial court erred when, in the adjudicatory order, it made findings of fact and conclusions of law regarding a "temporary permanent plan" for the juveniles. However, we conclude that any alleged error was rendered harmless by the trial court's entry of a permanent plan in its dispositional order. *See In re J.P.*, ___ N.C. App. ___, ___ S.E.2d ___ (19 November 2013) (COA13-35-2).

[6] Claire additionally argues that the trial court erred by entering a permanent plan for the juveniles at disposition when she did not have the statutorily required notice that the trial court would consider a permanent plan. We disagree.

Claire was provided notice that the trial court intended to consider a permanent plan for the juveniles at disposition when it made a "temporary permanent plan" at adjudication. *See id.* Thus, as in *In re J.P.*, Claire and her attorney attended and participated in the trial court's dispositional hearing and did not object to the lack of formal notice. *Id.* at ___, ___ S.E.2d at ___ (citing *In re J.S.*, 165 N.C. App. 509, 514, 598 S.E.2d 658, 662 (2004) (where this Court stated that a party waives its right to notice under section 7B–907(a) by attending the hearing in which the permanent plan is created, participating in the hearing, and failing to object to the lack of notice). Accordingly, we conclude that Claire waived any objection to lack of formal notice of a hearing on a permanent plan when she made a pre-trial motion to intervene in the dispositional hearing, made arguments before the trial court, was allowed to present witnesses regarding the best interest of the child, and failed to object to the lack of formal notice.

IV. Dispositional Conclusions

Claire next challenges several of the trial court's conclusions of law. Claire does not challenge any of the trial court's findings of fact and, accordingly, they are binding on appeal. *See Koufman*, 330 N.C. at 97, 408 S.E.2d at 731. Our review is therefore limited to whether the trial court's findings of fact support its conclusions of law and disposition. *In re Shepard*, 162 N.C. App. 215, 221-22, 591 S.E.2d 1, 6 (2004).

[7] Claire first challenges the trial court's conclusions of law 2 and 7.

> 2. No relative of the juveniles is able to provide proper care and supervision of all the juveniles in a safe home. Placement with any of the identified relatives is contrary to the best interests of the juveniles.
>
> . . . .
>
> 7. The [DSS] has made reasonable and diligent efforts to secure relative placements for the children. The three relatives identified were not completely able to provide for the children.

Pursuant to N.C. Gen. Stat. § 7B-903(a)(2)(c), when placing a juvenile outside of the home,

> [i]n placing a juvenile in out-of-home care under this section, the court shall first consider whether a relative of the juvenile is willing and able to provide proper care and supervision of the juvenile in a safe home. If the court finds that the relative is willing and able to provide proper care and supervision in a safe home, then the court shall order placement of the juvenile with the relative unless the court finds that the placement is contrary to the best interests of the juvenile.

N.C. Gen. Stat. § 7B-903(a)(2)(c) (2011). This Court has recognized that our statutes give a preference, where appropriate, to relative placements over non-relative, out-of-home placements. *In re L.L.*, 172 N.C. App. 689, 701, 616 S.E.2d 392, 399 (2005). However, before determining whether relative or non-relative placement is in the best interest of the juvenile, the statute first requires the trial court to determine whether the relative in question is *willing and able* to provide proper care and supervision in a safe home. N.C. Gen. Stat. § 7B-903(a)(2)(c). We review a dispositional order only for abuse of discretion. *In re Pittman*, 149 N.C. App. 756, 766, 561 S.E.2d 560, 567 (2002).

Here, the trial court found as fact:

> 8. On March 29, 2012, [Ann, Mary and John] were moved from the home of [Mr. and Mrs. Chase] at the request of the placement. [Mr. and Mrs. Chase] indicated to [DSS] that they thought the placement would be a temporary one and that they could not provide for the children long term. At the time placement was needed . . . the only identified and approved placement was with . . . the younger children's

school principal, and her fiancé [Mr. Alfred]. Placement with [Kimberly Chase, an aunt] was not approved at the time because a fire in her home in late February 2012 had left her without a home, because she had several identified medical issues and medications, and because she had fallen asleep on two occasions while talking with Social Worker Hardison about the children. The [DSS] was concerned that [Kimberly Chase] could not provide the supervision needed for the children. [Claire Wilson] was unable to be approved for placement of the children because she was under investigation by the [DSS] regarding the two children in her home following positive drug screens for cocaine on February 16, 2012 and March 8, 2012.

9. On May 3, 2012, [Tracy, Todd and Ashley] were moved from [Lisa Chase's, an aunt] home because of concerns identified by the [DSS]. These concerns included a lack of sufficient space in the home for the children, the fact that [Lisa Chase] was out of compliance with Rowan Housing Authority regulations by having the children in the home, issues with supervision, excessive tardiness and absences in school, reports from the school . . . that the children would come to school hungry, [Lisa Chase's] tendency to minimize the school behavioral problems of the children, and [Lisa Chase's] transporting of the children in her car without having them properly restrained in safety seats. Social Worker Hardison witnessed the children in the car not properly restrained on three occasions. [Tracy, Todd, and Ashley] were placed with their siblings in the home of [Mr. and Mrs. Alfred]. The children were happy and excited to be placed together in one home again.

. . . .

23. On May 17, 2012, the [DSS] received a request from [Claire Wilson's attorney] to consider certain relatives and family friends for placement of the juveniles. Since the juveniles were all placed together by this time, keeping them together was an important goal of [DSS] in its decision-making. The [DSS] made diligent efforts to study and become familiar with each option presented to it for placement of the children.

. . . .

27. [Lisa Chase] continued to be ruled out as a placement option because of the concerns that led to the removal of the three youngest children from her home on May 3, 2012. . . . [Terra Roberts (Godmother to the juveniles)] was ruled out as a placement because of her inability to provide proper [care and] supervision of the children and because of inadequate space for the children in her home.

28. [Mr. and Mrs. Miles], who live in Guilford County, submitted to a pre-placement assessment by Guilford Count DSS. The assessment was positive, and [they were] willing to have all six children placed with them. The children were not moved to [their] home for several reasons. One, several of the children indicated that they did not know [them] and did not want to move to Greensboro. Two, . . . [a]lthough a past investigation of neglect was not substantiated, it was of some concern to the [DSS] that [Mrs. Miles] told Social Worker Williams on September 5, 2012 that she had no past history with any DSS. Three, the [DSS] has been unable to ascertain after speaking with [Mr. and Mrs. Miles] and other family members exactly how [Mr. Miles] is related to the children. [Mr. Miles] could only indicate that he was somehow related on "his father's side." A few other kinship options . . . were individually ruled out as placement options for failing to return the kinship assessment packets mailed to them by the [DSS] or because they were 19 and 20 years old, too young to take on the responsibility of raising six children.

29. The most positive relative placement option for the children [was Jenetta Thomas]. [Jenetta Thomas is] the children's second cousin. . . . [Jenetta Thomas] stated that she is willing to provide a home for all of the children, but at the time Social Worker Williams visited her she could accommodate only two or three additional children in her home. . . . [Ashley, Mary, and John] were asked about possible placement with [Jenetta Thomas], and they indicated that they do not know [her] well and do not want to live with her in a different county "out in the country."

30. [Betsy Monroe, Jenetta Thomas' sister]. . . was found by [DSS to be] willing and able to take two or three of the children based on space limitations. . . . The children only

> have an acquaintance relationship with [Betsy Miller] at this time.

It is apparent from the trial court's exhaustive findings of fact that the trial court considered several relative placements but no suitable option was available; where potentially available, the court considered it not in the juveniles' best interests to place the juveniles with the relative. Thus, we conclude the trial court did not abuse its discretion by placing the juveniles in a non-relative placement. Accordingly, we hold that the trial court did not err in making conclusions of law 2 and 7.

[8] Claire next challenges conclusions of law 5 and 6:

> 5. Efforts to eliminate the need for placement of the juveniles would be inconsistent with the juveniles' health, safety, and need for a safe permanent home within a reasonable period of time.
>
> 6. Reunification efforts are not required in this matter . . . [as to John and Ashley because] significant safety issues make reunification with a parent within a reasonable time unlikely. [Claire], their mother, has not asked to have the children live with her.

Pursuant to N.C. Gen. Stat. § 7B-507,

> [i]n any order placing a juvenile in the custody or placement responsibility of a county department of social services, whether an order for continued nonsecure custody, a dispositional order, or a review order, the court may direct that reasonable efforts to eliminate the need for placement of the juvenile shall not be required or shall cease if the court makes written findings of fact that:
>
> > (1) Such efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time[.]

N.C. Gen. Stat. § 7B-507(b) (2011).

Here, the trial court found as fact:

> 17. All of the children have been diagnosed with PTSD and anxiety disorder. . . [Ashley] has low cognitive functioning and a language disorder. All of the children . . . receive weekly counseling services for trauma-based disorders.

18. Therapist Jill [Hill] specializes in working with children who have experienced trauma. She has been seeing [Ann, John, Ashley, and Tracy] weekly since early September 2012. Ms. [Hill] has been working with the children on trust-building and establishing a rapport with them. Ms. [Hill] feels that all the children need ongoing counseling based on the traumatic death of [Janice Lake] and the past history of multiple placements, chaos, separation from siblings, and instability. Ms. [Hill]'s focus with the children is on stability and helping them to feel safe. [Ann, John, Ashley, and Tracy] have expressed to Ms. [Hill] that they like where they are living, they feel safe there, they want to stay together, and they want to stay with [Mr. and Mrs. Alfred]. The children speak of each other often during therapy with Ms. [Hill] and appear to have a strong connection with each other. Ms. [Hill] is concerned that moving the children at this point would be very disruptive to their pathway of feeling safe. The children's issues cannot be fixed quickly, and their nervous systems are very fragile.

. . . .

24. [Claire Wilson] continued to be ruled out as a placement because of her positive drug screens and her failure to follow up with drug and mental health treatment.

25. Also relevant to the inquiry of whether or not [Claire Wilson] may be an appropriate long-term placement for the children is the prior neglect and DSS history of the children. [Claire Wilson] has a total of ten children, with only two of those children in her care. Her oldest two children [] were in foster care due to neglect on two separate occasions and eventually were adopted by their maternal great-grandmother . . . in 2009. Custody of [John and Ashley] was granted to [Janice Lake], their maternal grandmother, in 2004[;] [Mary and Ann] were in foster care from 2003 until 2005 and from 2006 until 2009 pursuant to petitions filed and adjudicated for neglect by [Claire Wilson]. [Todd and Tracy] were in the legal custody of the [DSS] due to neglect by [Claire Wilson] from 2006 to 2009. [Mary, Ann, Todd, and Tracy] were adopted by their maternal grandmother, [Janice Lake], in 2009.

> [Claire Wilson] is not requesting that the court consider placing the six children with her. She is in treatment with Daymark Recovery Services[.]

We conclude the uncontested findings of fact support the trial court's conclusions that reunification efforts would be inconsistent with the juveniles' health, safety and need for a permanent home within a reasonable period of time and were not required. Accordingly, we hold that the trial court did not err in making conclusions of law 5 and 6.

VI. Visitation

[9] Claire next argues that the trial court erred regarding its visitation plan for Ashley and John because it failed to specify the time, place, and conditions under which visitation may be exercised. *In re E.C.*, 174 N.C. App. 517, 521—23, 621 S.E.2d 647, 651—52 (2005) (holding that a trial court must include "an appropriate visitation plan in its dispositional order"). We agree.

North Carolina General Statutes, section 7B-905(c) provides that any dispositional order which leaves the minor child in a placement "outside the home shall provide for appropriate visitation as may be in the best interests of the juvenile and consistent with the juvenile's health and safety." N.C. Gen. Stat. § 7B 905(c) (2011). This Court has stated that:

> [i]n the absence of findings that the parent has forfeited their right to visitation or that it is in the child's best interest to deny visitation "the court should safeguard the parent's visitation rights by a provision in the order defining and establishing the time, place[,] and conditions under which such visitation rights may be exercised."

In re E.C., 174 N.C. App. 517, 522-23, 621 S.E.2d 647, 652 (2005) (citation omitted).

Here, the trial court made no finding that Claire had forfeited her right to visitation or that it was in the best interests of Ashley or John to deny visitation. Therefore, the trial court was required to provide a plan containing a minimum outline of visitation, such as the time, place, and conditions under which visitation may be exercised. *Id.* The court provided the following order governing visitation: "The juveniles shall visit regularly with their siblings who live with [Ms. Wilson] and [Ms. Chase], [Kimberly Chase], and [Claire Wilson]. These visits shall begin as soon as possible and shall be supervised by a caregiver selected by the [DSS], including some visits at [Ms. Chase]'s home if possible." The

order does not contain the "minimum outline" required by *In re E.C.* As such, the plan constitutes an impermissible delegation of the court's authority under N.C.G.S. § 7B 905. *See In re Stancil*, 10 N.C. App. 545, 552, 179 S.E.2d 844, 849 (1971) (discussing how the award of visitation rights, which is a judicial function, cannot be delegated to a child's custodian). Therefore, we remand for entry of an order of visitation which clearly defines and establishes "the time, place[,] and conditions" under which Claire may exercise her visitation rights. *In re E.C.*, 174 N.C. App. at 522—23, 621 S.E.2d at 652.

Affirmed in part, remanded in part, and appeal dismissed in part.

Judges McGEE and STROUD concur.

THOMAS G. McMILLAN, JR., ET ALS., PLAINTIFFS
v.
RYAN JACKSON PROPERTIES, LLC, ET ALS., DEFENDANTS

No. COA13-270

Filed 21 January 2014

1. Appeal and Error—standard of review—reasonable cause—attorney fees

The Court of Appeals reviewed the trial court's conclusion as to reasonable cause *de novo* and its ultimate award of attorney fees for an abuse of discretion.

2. Corporations—derivative action—lack of reasonable cause—negligence—no reasonable belief

The trial court did not err in a derivative action by concluding that the action was brought without reasonable cause. Plaintiffs did not have a reasonable belief that there was a sound chance that the derivative action alleging negligence could be sustained.

3. Attorney Fees—derivative action—abuse of discretion

The trial court abused its discretion by awarding attorney fees under N.C.G.S. § 55A-7-40(f). The case was remanded for entry of factual findings to distinguish the portion of attorney fees that were attributable to the defense against the derivative action and for adjustment of the fee award.

Appeal by plaintiffs from order entered 17 September 2012 by Judge Edgar B. Gregory in Guilford County Superior Court. Heard in the Court of Appeals 9 October 2013.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Joseph A. Ponzi and Darrell A. Fruth, for plaintiffs-appellants.

Hicks McDonald Noecker LLP, by David W. McDonald, for defendant-appellee Collins & Galyon General Contractors, Inc.

HUNTER, Robert C., Judge.

Thomas G. McMillan, Jr. and Shawn De'Lace Hendrix ("plaintiffs") appeal the order awarding defendant Collins & Galyon General Contractors, Inc. ("C&G") attorneys' fees. On appeal, plaintiffs argue: (1) the trial court erred by concluding that the action was brought without reasonable cause; and (2) the trial court abused its discretion by awarding attorneys' fees.

After careful review, we affirm the trial court's conclusion that the derivative action was brought without reasonable cause, but remand for redetermination as to how much of the attorneys' fees were incurred in defense of the derivative action.

Background

Ryan Jackson Properties, LLC ("Ryan Jackson") purchased an office building at 220 West Market Street in Greensboro, North Carolina with the plan of converting it into a residential condominium complex. It contracted for the services of C&G, with the contract specifying that C&G was to be "responsible for causing all the Work to be performed as required by the Contract Documents for the Construction of ALTERATIONS TO 220 WEST MARKET STREET." C&G acquired two permits from the city to perform the renovations. The first permit stated that the work was for "Int./Ext. Alterations" and approximated the total cost of this project to be $1,488,100.00. C&G was the sole contractor named in the permit. The second permit stated that the work to be done was "Demolition – Renovation" and the total cost of the project was to be $5,000.00. Again, C&G was the only contractor named.

Each plaintiff purchased one unit in the newly renovated condominium complex in the summer of 2007. Both units were located in the former basement of the building, and both flooded in late July or early August of that same year. Plaintiffs had to move out of their units as a result of the flooding.

Plaintiffs first filed suit against Ryan Jackson and 220 West Market Street Condominium Association, Inc. ("the Condo Association") in March 2009, pursuing claims of breach of the implied warranty of habitability against Ryan Jackson and seeking monetary and injunctive relief from the Condo Association. All parties stipulated to voluntary dismissal without prejudice in November 2009.

On 14 July 2010, plaintiffs filed suit against Ryan Jackson and C&G. They asserted negligence against C&G individually and derivatively on behalf of the Condo Association, a nonprofit corporation of which plaintiffs were members, and claimed that Ryan Jackson breached the implied warranty of habitability and violated N.C. Gen. Stat. § 75-1.1. In support of the derivative action, plaintiffs alleged that the Condo Association "incurred prospective liability and compensatory damages for the costs of repairs to common areas caused by the negligence of [C&G]," based on C&G's "failure to provide proper and adequate waterproofing, dampproofing, and/or drainage for the exterior and common areas of the Real Property." Ryan Jackson did not appear to defend against plaintiffs' claims, thus causing default judgment to be entered against it in the amount of $38,658.04.

C&G did defend the suit and met with plaintiffs several times to discuss the flooding. Plaintiffs contended that the flooding could have come from three potential sources: (1) the exterior water handling system, (2) a dam effect created by the north retaining wall, or (3) a change in topography of the parking lot. Anthony Collins and James Galyon, Jr., C&G's vice president and owner, respectively, filed affidavits with the trial court wherein they averred that: (1) C&G did not agree to perform work on the exterior water handling system, and in fact did not perform any work on it, (2) the north retaining wall appeared in a survey of the property which predated any renovation, and C&G did not modify the wall in any way, and (3) the parking lot is owned by a third party and was never part of C&G's project. Collins and Galyon also averred that C&G did not have exclusive control over the construction project and except for limited circumstances such as windows, doors, and electrical boxes, only contracted to renovate the interior of the building.

C&G filed a motion for summary judgment on 29 April 2011, which was granted 11 July 2011. This Court affirmed the trial court's order dismissing C&G by unpublished opinion filed 3 July 2012. *See McMillan v. Ryan Jackson Properties, LLC*, No. COA11-1318, 2012 WL 2551261 (N.C. App. July 3, 2012) ("*McMillan I*"). C&G moved for an attorneys' fees award pursuant to N.C. Gen. Stat. § 55A-7-40(f) (2013) on 19 August

2011. This matter was heard on 4 September 2012, and the trial court granted C&G's motion for attorneys' fees by order entered 17 September 2012. Plaintiffs timely appealed from that order.

Discussion

1. Standard of Review

[1] Plaintiffs' first argument is that the panel should review the court's initial conclusion as to whether the case was brought without reasonable cause *de novo* and the ultimate awarding of fees for abuse of discretion. We agree.

"It is settled law in North Carolina that ordinarily attorneys fees are not recoverable either as an item of damages or of costs, absent express statutory authority for fixing and awarding them." *United Artists Records, Inc. v. Eastern Tape Corp.*, 18 N.C. App. 183, 187, 196 S.E.2d 598, 602 (1973). Here, the trial court awarded fees pursuant to N.C. Gen. Stat. § 55A-7-40, which governs derivative actions for nonprofit corporations. Under section 55A-7-40(f), the trial court must make a finding that an action was brought "without reasonable cause" before awarding attorneys' fees.

C&G argues that the standard of review on appeal should be abuse of discretion, without reviewing the conclusion as to whether the suit was brought without reasonable cause *de novo*. It cites to a number of cases for the proposition that the general standard of review for an award of attorneys' fees is abuse of discretion. *See Furmick v. Miner*, 154 N.C. App. 460, 462, 573 S.E.2d 172, 174 (2002) ("The allowance of attorney fees is in the discretion of the presiding judge, and may be reversed only for abuse of discretion.") (quotation marks omitted).

However, section 55A-7-40(f) authorizes an award of attorneys' fees only upon a "finding" by the trial court that the derivative action was "brought without reasonable cause." Whether an action is brought without reasonable cause is a conclusion of law, as it involves the exercise of judgment and the application of legal principles. *See In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997). Conclusions of law are reviewed *de novo*. *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004). Therefore, we agree with plaintiffs, and will review the trial court's conclusion as to reasonable cause *de novo* and its ultimate award of attorneys' fees for an abuse of discretion.

II. Reasonable Cause

[2] Plaintiffs next argue that the trial court erred by concluding that the action was brought without reasonable cause. Specifically, plaintiffs

contend that the word "action" in section 55A-7-40(f) should be interpreted to include all claims in the lawsuit, and therefore, the action as a whole must have been brought with reasonable cause because plaintiffs were awarded default judgment against Ryan Jackson. In the alternative, plaintiffs argue that they had reasonable cause to bring the derivative suit on behalf of the Condo Association against C&G. We disagree with plaintiffs' interpretation of section 55A-7-40(f), and we affirm the trial court's conclusion that the derivative action was brought without reasonable cause.

As is discussed above, we review the trial court's conclusion as to whether the action was brought without reasonable cause *de novo*. Under *de novo* review, "the court considers the matter anew and freely substitutes its own judgment" for that of the trial court. *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003).

Section 55A-7-40 governs derivative proceedings under the North Carolina Nonprofit Corporation Act; it controls the method by which the members of a nonprofit corporation may bring an action in the right of that corporation. Under subsection (a) of the statute,

> An action may be brought in a superior court of this State . . . in the right of any domestic or foreign corporation by any member or director, provided that, in the case of an action by a member, the plaintiff or plaintiffs shall allege, and it shall appear, that each plaintiff-member was a member at the time of the transaction of which he complains.

N.C. Gen. Stat. § 55A-7-40(a) (2013). The attorneys' fees provision at issue in this case is found in section 55A-7-40(f); it provides that:

> (f) *In any such action*, the court, upon final judgment and a finding that the action was brought without reasonable cause, may require the plaintiff or plaintiffs to pay to the defendant or defendants the reasonable expenses, including attorneys' fees, incurred by them in the defense of the action.

N.C. Gen. Stat. § 55A-7-40(f) (2013) (emphasis added).

Plaintiffs first argue that the word "action" in section 55A-7-40(f) should be interpreted to include all claims against all parties in a lawsuit, not just the derivative portion therein. Thus, because plaintiffs obtained judgment in their favor against Ryan Jackson on claims they pursued individually, they argue that the action as a whole could not have been brought without reasonable cause, and attorneys' fees should

not have been awarded pursuant to section 55A-7-40(f). In support of this argument, plaintiffs note that under the North Carolina Rules of Civil Procedure, an "action" is commenced by filing a complaint, which may have one or more "claims for relief," N.C. Gen. Stat. § 1A-1, Rules 3, 8 (2013), and that "more than one claim" may be presented in a single "action," N.C. Gen. Stat. § 1A-1, Rule 54 (2013).

We disagree with this interpretation. Plaintiffs seek to attach meaning to the word "action" in section 55A-7-40(f) based on the word's usage in general provisions of the North Carolina Rules of Civil Procedure. However, "where two statutory provisions conflict, one of which is specific or 'particular' and the other 'general,' the more specific statute controls in resolving any apparent conflict." *Furr v. Noland*, 103 N.C. App. 279, 281, 404 S.E.2d 885, 886 (1991). Here, the word "action" in section 55A-7-40(f) is part of the phrase "[i]n any *such* action," with the word "such" referring to the "action[s]" described by subsection (a) of the statute – those which are brought "in the right of any domestic or foreign corporation by any member or director." *See* N.C. Gen. Stat. § 55A-7-40(a), (f). In other words, it is clear that the phrase "[i]n any such action" in section 55A-7-40(f) refers specifically to derivative actions set out by section 55A-7-40, not generic "actions" as the word is used in general portions of the North Carolina Rules of Civil Procedure. C&G could have attempted to recover attorneys' fees on the general "action" as a whole, but would have had to rely on a different statute to do so. *See United Artists Records, Inc.*, 18 N.C. App. at 187, 196 S.E.2d at 602 (noting that attorneys' fees may not be awarded absent specific statutory authority); *see also* N.C. Gen. Stat. § 6-21.5 (2013) (authorizing an attorneys' fee award "[i]n any civil action . . . if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading").

Therefore, in determining whether attorneys' fees were properly awarded under section 55A-7-40(f) here, it is irrelevant that plaintiffs obtained default judgment against Ryan Jackson on their individual claims. Ryan Jackson was not party to the derivative action. The only aspect of the lawsuit that triggered section 55A-7-40(f) was the derivative action brought by plaintiffs on behalf of the Condo Association against C&G for negligence. Thus, we must determine whether this derivative action, not the unrelated individual claims joined in the same lawsuit, was brought without reasonable cause in assessing whether attorneys' fees awarded under section 55A-7-40(f) were appropriate.

At the hearing on attorneys' fees, plaintiffs urged the trial court to apply an interpretation of the phrase "brought without reasonable

cause" in section 55A-7-40(f) used in an analogous context by this Court in *Lowder on Behalf of Doby v. Doby*, 79 N.C. App. 501, 511, 340 S.E.2d 487, 493 (1986). In *Lowder*, the Court construed N.C. Gen. Stat. § 55-55(e), the attorneys' fees provision for derivative suits on behalf of business corporations, which contained identical language to that found in section 55A-7-40(f).[1] *See id.* at 507, 511, 340 S.E.2d at 491, 493. Because no cases defined or explained the "brought without reasonable cause" provision in section 55-55(e), the Court drew analogy to the "lack of probable cause" standard in malicious prosecution cases, where plaintiffs "need only have a 'reasonable belief' that there [was] a 'sound chance' that their claims may be sustained," not "absolute certainty of the legal validity of their claims." *Id.* at 511, 340 S.E.2d at 493. On appeal, both plaintiffs and C&G argue that this standard should be used to interpret the phrase "brought without reasonable cause" under section 55A-7-40(f). We agree. Because the *Lowder* Court construed an identical attorneys' fees provision in the analogous context of business corporation derivative actions, we find its reasoning persuasive. Thus, an action is brought "without reasonable cause" under section 55A-7-40(f) if there is no "reasonable belief" in a "sound chance" that the claim could be sustained.

The trial court here "independently reviewed the proceedings in order to determine whether there was evidence put forward to support plaintiffs' claims" and correctly declined to consider this Court's opinion in *McMillan I* affirming the entry of summary judgment in C&G's favor as dispositive on the issue of whether the derivative action was brought without reasonable cause. However, the trial court and the *McMillan I* Court both reached the same conclusion — that "[p]laintiffs did not have evidence to support the allegations made in the [c]omplaint." Thus, pursuant to *Lowder*, the trial court concluded that the action was brought without reasonable cause because "the record is devoid of evidence that supports any reasonable belief that there was a sound chance that the plaintiffs' claims in this litigation might be sustained."

After our own independent inquiry, we affirm the trial court's conclusion that plaintiffs did not have a "reasonable belief" that there was a "sound chance" that the derivative action alleging negligence could be

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1. Section 55-55(e) provided that "In any such action the court, upon final judgment and a finding that the action was brought without reasonable cause, may require the plaintiff or plaintiffs to pay to the defendant or defendants the reasonable expenses, including attorneys' fees, incurred by them in the defense of the action." *Lowder*, 79 N.C. App. at 507, 340 S.E.2d at 491. The statute has since been replaced by N.C. Gen. Stat. § 55-7-46 (2013) and is substantially rewritten.

sustained.[2] "The elements of negligence are duty owed by defendants to plaintiffs and nonperformance of that duty proximately causing plaintiffs' injury." *Royal v. Armstrong*, 136 N.C. App. 465, 469, 524 S.E.2d 600, 602 (2000). Plaintiffs alleged in their complaint that the Condo Association incurred prospective liability and compensatory damages for the costs of repairs to the common areas as a result of C&G's negligent failure to provide proper and adequate waterproofing, dampproofing, and/or drainage for the exterior and common areas of the property. Plaintiffs argue that they had reasonable cause to bring the derivative action because: (1) the permits issued by the city listed C&G as the contractor on the renovations that it undertook and no other contractors were listed; (2) C&G was a general contractor under N.C. Gen. Stat. § 87-1 (2013) because the amount of work it undertook totaled more than $30,000.00; (3) general contractors owe a duty of reasonable care to anyone who may foreseeably be endangered by their negligence, *Lord v. Customized Consulting Specialty, Inc.*, 182 N.C. App. 635, 643, 643 S.E.2d 28, 32-33 (2007); and (4) prior to the filing of the complaint, a consultant proposed a plan to fix the water leakage, thus indicating the areas that plaintiffs claim to have been the source of the water damage.[3]

Even assuming that this information supports an allegation that C&G was a general contractor which owed a duty to those who could foreseeably be injured by the work it undertook, plaintiffs had no evidence at any point prior to or during the litigation tending to show that work performed by C&G or its agents was the proximate cause of the water damage. The contract between C&G and Ryan Jackson does not indicate that C&G performed any work on the areas of the property which plaintiffs theorized to be the source of the leakage. On the contrary, both Collins and Galyon averred that C&G performed no work on the retaining wall or the parking lot during the renovation, and that aside from the windows, doors, and electrical boxes, neither C&G nor its subcontractors penetrated the exterior of the building at all. Collins specifically averred that Ryan Jackson only wished to contract "some of

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2. The trial court seemed to inquire in part as to plaintiffs' individual claim of negligence against C&G in addition to the derivative action. Specifically, it mentioned the lack of evidence related to the causation of leaks into plaintiffs' condominiums, which would be irrelevant to the derivative action premised on damage to exterior "common areas." As is discussed above, the applicable attorneys' fees statute utilized here, section 55A-7-40(f), applies only to derivative actions.

3. The plan consisted of sealing the water penetration areas, applying a waterproofing membrane, and connecting downspouts to the foundation drain system and the back corner of the lot.

the work" to C&G, and that C&G "did not have exclusive control over construction of the improvements." Faced with these affidavits at the summary judgment phase of the litigation, plaintiffs still could not produce any evidence tending to show the existence of a genuine issue of material fact concerning their claims. The *McMillan I* Court held that "[u]ltimately, plaintiffs fail[ed] to cite any evidence which indicated that [C&G] performed any work on either the retaining wall or the parking lot during the course of the renovations," and "[p]laintiffs failed to present any evidence that the windows, doors and electrical boxes mentioned in Collins's affidavit as the only exterior work performed by [C&G] were the cause of the leaks into plaintiffs' condominiums." *McMillan I* at *4-*5. Given that plaintiffs could not produce any evidence to support their allegation that C&G proximately caused the water damage at summary judgment, it follows that they also had no such evidence when they filed the derivative action almost a year earlier. Without any evidence of causation, a necessary element of the derivative action for negligence, plaintiffs could not have had a "reasonable belief" that there was a "sound chance" that the derivative action could be sustained.

Accordingly, we affirm the trial court's conclusion that the derivative action was brought without reasonable cause under section 55A-7-40(f).

III. Abuse of discretion

[3] Having determined that the trial court did not err in concluding that the derivative action was brought without reasonable cause, we must now review the attorneys' fees awarded by the trial court under section 55A-7-40(f) for abuse of discretion. "An abuse of discretion will be found only when the trial court's decision . . . could not have been the result of a reasoned decision." *Manning v. Anagnost*, __ N.C. App. __, __, 739 S.E.2d 859, 861 (2013) (citation and quotation marks omitted). Here, the trial court awarded the entirety of the attorneys' fees incurred by C&G in defense of the lawsuit as a whole, $36,325.00, which could have included costs incurred in defense of both the derivative action and plaintiffs McMillan's and Hendrix's individual claim of negligence. However, section 55A-7-40(f) only authorizes an award "in the defense of the [derivative] action," not in the defense of an individual negligence claim. Therefore, the trial court abused its discretion by failing to distinguish between costs incurred by C&G in defense of plaintiffs' individual negligence claim and the costs incurred in defense of the derivative action. Accordingly, we remand for entry of factual findings as to what portion of the attorneys' fees are attributable to defense against the derivative action and adjustment of the fee award that is reflective of those findings.

Conclusion

After careful review, we affirm the trial court's conclusion that the derivative action was brought without reasonable cause, and we remand for entry of attorneys' fees based on the costs incurred in defense of the derivative action.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges BRYANT and STEELMAN concur.

NATIONWIDE MUTUAL INSURANCE COMPANY, INC., PLAINTIFF
v.
INTEGON NATIONAL INSURANCE COMPANY AND STATE NATIONAL INSURANCE COMPANY, DEFENDANTS

No. COA13-640

Filed 21 January 2014

Insurance—underinsured motorist's coverage—pro rata distribution among policy providers

The trial court erred in a declaratory judgment action arising out of an insurance coverage question by not applying a *pro rata* distribution of the credit paid by the underinsured motorist's insurance provider to all three underinsured motorist insurance (UIM) policy providers. Because the respective excess clauses were mutually repugnant and the claimant was a Class I insured under all three UIM policies, the trial court was required to allocate credits and liabilities amongst the three UIM policyholders on a *pro rata* basis under *N.C. Farm Bureau v. Bost*, 126 N.C. App. 42.

Appeal by plaintiff from order entered 27 March 2013 by Judge Carl R. Fox in Wake County Superior Court. Heard in the Court of Appeals 23 October 2013.

Cranfill Sumner & Hartzog, LLP, by George L. Simpson, IV, for plaintiff-appellant.

Bennett & Guthrie, PLLC, by Rodney A. Guthrie, for defendant-appellee Integon National Insurance Company.

Pinto Coates Kyre & Bowers, PLLC, by Deborah J. Bowers, for defendant-appellee State National Insurance Company.

HUNTER, JR., Robert N., Judge.

Plaintiff Nationwide Mutual Insurance Company ("Plaintiff") appeals from a 27 March 2013 order granting summary judgment in favor of Integon National Insurance Company ("Integon") and State National Insurance Company ("State National").[1] Upon review, we find the trial court erred by not applying a pro rata distribution of the credit paid by the underinsured motorist's insurance provider to all three underinsured motorist insurance ("UIM") policy providers. We reach this conclusion because the respective excess clauses were (i) mutually repugnant and (ii) because the claimant was a Class I insured under all three UIM policies. Under *North Carolina Farm Bureau v. Bost*, 126 N.C. App. 42, 483 S.E.2d 452 (1997), the trial court was required to allocate credits and liabilities amongst the three UIM policyholders on a pro rata basis if both of these conditions are met. We thus reverse the trial court and remand for the trial court to enter summary judgment for Plaintiff.

I. Facts & Procedural History

This declaratory judgment action arose out of an insurance coverage question allocating proceeds of three separate UIM policies to pay a wrongful death claim. Plaintiff filed its original complaint for declaratory judgment on 8 June 2012, which was amended by consent on 7 December 2012.[2] Integon and State National timely answered Plaintiff's complaint on 10 January 2013 and 17 January 2013 respectively. All parties moved for summary judgment. The summary judgment motions were heard by Judge Carl R. Fox in Wake County Superior Court on 7 March 2013. Judge Fox denied Plaintiff's motion for summary judgment and allowed Defendants' motions on 27 March 2013. Plaintiff filed a timely written notice of appeal on 18 April 2013. Plaintiff and Defendants stipulated to the following facts.

A three-vehicle accident occurred on 23 August 2011, involving the decedent Nelson Lee Clark ("Clark"), the tortfeasor Gaye Holman Ikerd ("Ikerd"), and Lucille Pitts ("Pitts"). Ikerd ran a red light and collided

1. Collectively, Integon and State National will be referred to as "Defendants."

2. The complaint was amended to reflect ownership of the insurance policy held by State National, rather than the originally named party, Direct General Insurance Company. State National is a subsidiary of Direct General Insurance Company.

with Clark's motorcycle. Pitts was driving a separate vehicle that ran over Clark after he was thrown from his motorcycle. Ikerd admitted liability to Clark's estate, and her liability insurer paid the policy limit of $50,000. Pitts was not found liable for the incident.

Clark was insured for UIM coverage under three policies: (1) the Integon policy, number NCV 9474162, issued to Nelson Clark as the named insured and covering the motorcycle that Clark was driving at the time of the accident in the amount of $100,000 per person; (2) the State National policy, number 47 NCQD 118505586, issued to Nelson Clark as the named insured in the amount of $50,000 per person; and (3) a policy issued by Plaintiff, number 6132 019939, to Walter Lee and Nancy Ikard Clark as named insureds in the amount of $50,000 per person. Mr. and Mrs. Clark were the decedent's parents, and he was a resident of their household at the time of the accident. The parties stipulated to the following relevant policy provisions:

> **Nationwide Policy:**
> Policyholder – Named Insured: Walter Lee and Nancy Ikard Clark
>
> UM/UIM limits: $50,000 per person/ $100,000 per accident
>
> Other Insurance
> If this policy and any other auto insurance policy apply to the same accident, the maximum amount payable under all applicable policies for all injuries to an insured caused by an uninsured motor vehicle or underinsured motor vehicle shall be the sum of the highest limit of liability for this coverage under each policy.
>
> In addition, if there is other applicable similar insurance, we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance.
>
> **Integon policy**[3]**:**
> Policyholder – Named Insured: Nelson Clark

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3. The "Other Insurance" clause in the Integon policy contains the word "loss" instead of "share" in the second sentence of the clause. However the Integon policy defines "loss" the same way both other policies define "share": "the proportion that our limit of liability bears to the total of all applicable limits."

UM/UIM limits: $100,000 per person/ $300,000 per accident

OTHER INSURANCE
If this policy and any other auto insurance policy issued to you apply to the same accident, the maximum amount payable under all applicable policies for all injuries caused by an uninsured motor vehicle under all policies shall not exceed the highest applicable limit of liability under any one policy.

If this policy and any other auto insurance policy issued to you apply to the same accident, the maximum amount payable for injuries to you or a family member caused by an underinsured motor vehicle shall be the sum of the highest limit of liability for this coverage under each such policy.

In addition, if there is other applicable similar insurance, we will pay only our share of the loss. Our loss is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance.

State National policy:
Policyholder – Named Insured: Nelson Clark

UM/UIM limits: $50,000 per person/ $100,000 per accident

OTHER INSURANCE
If this policy and any other auto insurance policy apply to the same accident, the maximum amount payable under all applicable policies for all injuries to an insured caused by an uninsured motor vehicle or underinsured motor vehicle shall be the sum of the highest limit of liability for this coverage under each policy.

In addition, if there is other applicable similar insurance, we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance.

All three policies define the term "you" as:

> Throughout this policy, "you" and "your" refer to:
>
> 1. The "named insured" shown in the Declarations; and
>
> 2. The spouse if a resident of the same household.

After reviewing the policies, the pleadings, the parties' motions, the parties' memoranda, and hearing the parties' arguments, Judge Carl Fox granted summary judgment on behalf of Defendants based on Defendants' contention that their policies should be considered primary and Plaintiff's policy should be considered excess. The trial court concluded "as a matter of law that there is no genuine issue of any material fact in this case that the underinsured motorist coverage afforded . . . on those same claims is excess[.]"

II. Jurisdiction & Standard of Review

On appeal, Plaintiff asks this Court to reverse the trial court based upon this Court's holding in *Bost*. 126 N.C. App. at 52, 483 S.E.2d 458–59.

This Court has jurisdiction to review the matter pursuant to N.C. Gen. Stat. § 7A-27(b) (2013). "Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)). " 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

III. Analysis

Plaintiff argues that the holding in *Bost* requires a pro rata distribution of the $50,000 credit supplied by the underinsured motorist Ikerd's insurer. Plaintiff argues that *Bost* requires pro rata distribution because (i) the three policies' "other insurance" sections are mutually repugnant and (ii) claimant Clark was a Class I insured under the three policies, which requires pro rata distribution under *Bost*. Defendants argue that the language used in the UIM policies controls and class designation is not relevant when multiple UIM excess clauses may be read together harmoniously. *See Iodice v. Jones*, 133 N.C. App. 76, 79 & n.3, 514 S.E.2d 291, 293 & n.3 (1999).

For purposes of clarity, we hold that courts resolving UIM credit/liability apportionment disputes amongst multiple providers must make the following inquiry in deciding these cases. First the language used in the excess clause must be identical between the excess clauses of the respective UIM policies, or "mutually repugnant." *See Sitzman v. Gov't Employees Ins. Co.*, 182 N.C. App. 259, 262–64, 641 S.E.2d 838, 840–42 (2007) (noting that identical language is mutually repugnant, requiring that neither is given effect, and applying the rule to non-identical excess clauses). If the language is not identical, the inquiry ends, as the excess policies are not mutually repugnant, and the trial court may apply the facial policy language to determine distribution. *Id.*

If this first prong is satisfied and the policies are repugnant, the second inquiry is to determine whether the respective UIM carriers are in the same class; if so, the trial court must apportion liabilities and credits on a pro rata basis. *Bost*, 126 N.C. App. at 52, 483 S.E.2d at 458–59.

Only after considering the "class" of the claimant do we reach the third step of the inquiry. If separate classes exist, a primary/excess distinction may be drawn despite identical language. *Iodice*, 133 N.C. App. at 79 & n.3, 514 S.E.2d at 294 & n.3. Such identical clauses may allow a finding of non-repugnancy after applying the policies' definitions, specifically relating to ownership identified in the policy. *Id.*

Because this issue was settled in *Bost* and we are bound to follow this holding, we must disagree with Defendants' contention that identical excess clauses as applied to claimants all situated within the same class may be read together "harmoniously." *See In re 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."). As such, we reverse the trial court, and remand to the trial court for a pro rata distribution of the $50,000 credit supplied by Ikerd's insurer.[4] The three tests described above are more fully discussed hereinafter.

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4. If Nationwide is considered "excess," Nationwide pays the full amount of its $50,000 liability limit under the UIM coverage, Integon pays $66,666.67 and State National pays $33,333.33. Integon and State National both divided the $50,000 paid by Ikerd's insurer and received $25,000 each.

A pro rata distribution would net Nationwide a credit of 25 percent of its liability limit, or $12,500. Nationwide would then be liable for $37,500, rather than the full $50,000 of its UIM policy. Integon would pay $75,000 and State National would pay $37,500 under a pro rata distribution.

i. Mutually Repugnant Excess Clauses

The first item in the inquiry is to determine whether or not the respective excess clauses are identical. Identical "excess clauses" are typically deemed mutually repugnant and neither excess clause is given effect. *Integon Nat'l. Ins. Co. v. Phillips*, 212 N.C. App. 623, 630, 712 S.E.2d 381, 386 (2011) ("Due to the excess clauses being identically worded, it is impossible to determine which policy is primary, and thus the excess clauses must be deemed mutually repugnant, with neither clause being given effect." (quotation marks and citation omitted)); *see also* James E. Snyder, Jr., North Carolina Automobile Insurance Law § 33-5 (Supp. 2013). Where identical excess clauses exist, the policies are read as if the identical excess clauses were not present. *Iodice* at 78, 514 S.E.2d at 293 ("Where it is impossible to determine which policy provides primary coverage due to identical 'excess' clauses, 'the clauses are deemed mutually repugnant and neither . . . will be given effect.' " (quoting *N.C. Farm Bureau Mut. Ins. Co. v. Hilliard*, 90 N.C. App. 507, 511, 369 S.E.2d 386, 388 (1988)) (alterations in original)); *Onley v. Nationwide Mut. Ins. Co.*, 118 N.C. App. 686, 690, 456 S.E.2d 882, 884, *disc. review denied*, 341 N.C. 651, 462 S.E.2d 514 (1995).

When mutually repugnant clauses exist, the multiple UIM carriers share both credits and liabilities pro rata, as sharing "the liability in proportion to the coverage but not the credit in a like manner is irrational." *Onley*, 118 N.C. App. at 691, 456 S.E.2d at 885; *see also Harleysville Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 165 N.C. App. 543, 600 S.E.2d 901, 2004 WL 1610050 at *3 (2004) (unpublished) (" 'Where an insured is in the same class under two policies and the 'other insurance' clauses in the policies are mutually repugnant, the claims will be prorated.' " (quoting *Hlasnick v. Federated Mut. Ins. Co.*, 136 N.C. App. 320, 330, 524 S.E.2d 386, 393, *aff'd on other grounds in part and disc. review improvidently allowed in part*, 353 N.C. 240, 539 S.E.2d 274 (2000))).

The converse is also true—when policies are *not* identical in form or effect, they are not mutually repugnant. *Sitzman*, 182 N.C. App. at 264, 641 S.E.2d at 842 (noting the differences between two policies' excess clauses in both form and effect); *see also Hlasnick*, 136 N.C. App. at 330, 524 S.E.2d at 393 ("[T]here is no need to consider the class into which an insured falls or to prorate coverage where, as here, the 'other insurance' clauses are not mutually repugnant, but may be read together harmoniously."). In *Sitzman*, two UIM policies' excess clauses were at issue. The first policy was issued by Geico to the claimant in North Carolina and uses the standard North Carolina excess clause language used by both Plaintiff and Defendants' policies discussed above in Section I *supra*.

182 N.C. App. at 262, 641 S.E.2d at 841. The second policy was issued by Harleysville in Virginia to the claimant's parents. *Id.* at 261, 641 S.E.2d at 840. The policy was interpreted under Virginia law as it was issued in that state. *Id.* at 263, 641 S.E.2d at 842. The Harleysville policy also contained an excess clause that was distinct from the standard North Carolina excess clause:

> [T]he following priority of policies applies and any amount available for payment shall be credited against such policies in the following order of priority:
>
> > First Priority[:] The policy applicable to the vehicle the "insured" was "occupying" at the time of the accident.
> >
> > Second Priority[:] The policy applicable to a vehicle not involved in the accident under which the "insured" is a named insured.
> >
> > Third Priority[:] The policy applicable to a vehicle not involved in the accident under which the "insured" is other than a named insured.

Id. at 263, 641 S.E.2d at 841–42 (alterations in original). This Court explicitly noted the differences between the wording of the Geico and Harleysville policy:

> Unlike the GEICO excess clause, the Harleysville policy does not differentiate between policies based upon ownership of the vehicle in which the insured was riding at the time of the accident. Rather, the Harleysville policy differentiates between the first priority on one hand, and the second and third priorities on the other, based upon whether the policy is applicable to (1) the vehicle involved in the accident or (2) a vehicle not involved in the accident. The Harleysville policy further differentiates between the second and third priorities depending upon whether the insured is a named insured or other than a named insured.
>
> The Harleysville policy does not define the phrase "applicable to [the or a] vehicle." GEICO argues the phrase "applicable to [the or a] vehicle" is synonymous with "covering [the or a] vehicle." Under that interpretation, the vehicle referred to would be the vehicle listed as an insured vehicle under the policy. The bicycle is not listed as an insured vehicle under either policy. Therefore, the GEICO policy would have second priority because it is

> "[t]he policy [covering] a vehicle not involved in the accident [i.e., Plaintiff's 1987 Buick] under which [Plaintiff] is a named insured." GEICO further argues the Harleysville policy has third priority because it is "[t]he policy [covering] a vehicle not involved in the accident [i.e., Plaintiff's parents' vehicles] under which [Plaintiff] is other than a named insured." Under this interpretation, the GEICO policy would have higher priority and would therefore be primary under the Harleysville excess clause. *Accordingly, the GEICO policy would be primary under both the GEICO and Harleysville policies, and the excess clauses would not be mutually repugnant.*

Sitzman, 182 N.C. App. at 264, 641 S.E.2d at 842 (emphasis added) (alterations in original). As such, the excess clauses under consideration were not identical and not mutually repugnant, necessitating no further inquiry.

However, identical policy language is not axiomatically mutually repugnant if the excess clauses at issue do not have the same meaning as applied to the facts of the case. *See Iodice*, 133 N.C. App. at 78, 514 S.E.2d at 293 (agreeing with appellant that the " 'other insurance' clauses in this case, although identically worded do not have identical meanings and are therefore not mutually repugnant"). In *Iodice*, this Court held:

> Because "you" is expressly defined as the named insured and spouse, the Nationwide "excess" clause reads: "[A]ny insurance we provide with respect to a vehicle [Penney] do[es] not own shall be excess over any other collectible insurance." It follows that Nationwide's UIM coverage is *not* "excess" over other collectible insurance (and is, therefore, primary), because the vehicle in which the accident occurred is owned by Penney. The GEICO "excess" clause reads: "[A]ny insurance we provide with respect to a vehicle [Iodice's mother] do[es] not own shall be excess over any other collectible insurance." It follows that GEICO's UIM coverage is "excess" (and is, therefore, secondary), because the vehicle in which the accident occurred is not owned by Iodice's mother. Accordingly, Nationwide provides primary UIM coverage in this case.

Id. at 78–79, 514 S.E.2d at 293 (alterations in original).

Thus, where identically worded policy provisions existed but the actual application of the policies negated mutual repugnancy, this Court

held that the "excess" UIM policy was not entitled to a set-off credit. *Id.* In so holding, however, this Court reaffirmed the class distinction discussed in *Bost* and considered *infra*, stating that a "Class II insured may be treated differently than a Class I insured." *Id.* at 79 n.3, 514 S.E.2d at 293 n.3. *Iodice* thus stands for the proposition that identical language in excess clauses may be read together harmoniously if a claimant is categorized under separate "classes."

A subsequent case, *Hlasnick*, is instructive in prescribing and applying the required three questions in this area of the law. In *Hlasnick*, a husband and wife were injured in an automotive accident caused by a negligent driver. *Id.* at 321–22, 524 S.E.2d at 387–88. The husband was driving a Dodge pick-up truck owned by the car dealership where he worked, and was running a personal errand while his wife was present. *Id.* at 322, 524 S.E.2d at 388. The negligent driver was underinsured, the driver's policy carrier tendered its limits, and the husband and wife sought recovery under their UIM policies. *Id.* The husband's employer had UIM coverage, while both husband and wife each had personal insurance policies that carried UIM coverage. *Id.*

This Court held the policies were not mutually repugnant because the "term 'you' in the different policies refers to different individuals; *and* the 'other insurance' provisions in the policies are not identical," meaning the policies could thus be read together harmoniously. *Id.* at 330, 524 S.E.2d at 392–93 (emphasis added). This Court also noted the claimants fit within separate classes, but held that even had the claimants been within the same class under both UIM policies, the language of the respective excess clauses was not mutually repugnant. *Id.* at 330, 524 S.E.2d at 392 ("By contrast, plaintiffs here are second-class insureds under Federated Mutual's policy, but are first-class insureds under State Farm's policy[.]"). This Court contrasted *Hlasnick* with *Smith v. Nationwide Mutual Ins. Co.*, 328 N.C. 139, 400 S.E.2d 44 (1991), where "there were two policies. The insureds were in the same class under both policies, the term 'you' in each policy referred to the same individual, and the policies contained identical 'other insurance' provisions." *Hlasnick*, 136 N.C. App. at 330, 524 S.E.2d at 392.

Here, the language contained in the "excess clause" is identical in all three policies. *Id.* at 330, 524 S.E.2d at 392–93; *see also Phillips*, 212 N.C. App. at 630, 712 S.E.2d at 386 (noting where identical language exists, a presumption of repugnancy exists). Thus, the first part of the inquiry is satisfied, however our work is not finished. As *Iodice* noted, identically-worded policies may be read together "harmoniously," but that reading is predicated on whether the claimant falls within different "classes"

between the respective policies. 133 N.C. App. at 79 n.3, 514 S.E.2d at 293 n.3; *Hlasnick*, 136 N.C. App. at 330, 524 S.E.2d at 393. Thus, whether we may reach the third portion of our inquiry (whether the identical excess clauses may be read harmoniously) depends on the classes of the UIM providers, as announced in *Bost* and affirmed in *Iodice*, *Hlasnick*, *Harleysville*, *Sitzman*, and *Benton v. Hanford*, 195 N.C. App. 88, 92, 671 S.E.2d 31, 34 (2009).

ii. Class Recognition under Bost

This Court in *Bost* noted a distinction with how liabilities and credits are apportioned according to the class of the "persons insured:"

> [g]enerally, the first class of "persons insured" are the "named insured and, while resident of the same household, the spouse of any named insured and relatives of either, while in a motor vehicle or otherwise." All persons in the first class are treated the same for insurance purposes. When "excess" clauses in several policies are identical, the clauses are deemed mutually repugnant and neither excess clause will be given effect, leaving the insured's claim to be pro rated between the separate policies according to their respective limits.

126 N.C. App. at 52, 483 S.E.2d at 458–59 (internal citations omitted). *Bost* identified and categorized these "classes" in the relevant statute. *Id.* at 52, 483 S.E.2d at 458; N.C. Gen. Stat. § 20-279.21 (2013) (" '[P]ersons insured' means the named insured and while resident of the same household, the spouse of any named insured and relatives of either, while in a motor vehicle or otherwise[.]"). Despite efforts to overturn *Bost*, the class distinction drawn in *Bost* remains today. Defendant Appellant's New Brief, *Harleysville Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 359 N.C. 421, 611 S.E.2d 832 (2005) No. 444PA04, 2004 WL 3120959 at *23–24 ("Accordingly, *Bost* was decided incorrectly and should be overruled. Because the Court of Appeals based its decision in the present case on *Bost*, the Court of Appeals decided the present case incorrectly as well, and its decision in the present case should be reversed.").

Defendants point to decisions decided subsequent to *Bost*, but none of these cases overrule *Bost* and all involve either excess clauses that are not mutually repugnant or distinctions in classes of underinsured motorist policies. *See Sitzman*, 182 N.C. App. at 265, 267, 641 S.E.2d at 843, 844 (finding that the two UIM policies were not mutually repugnant due to different wording and Virginia's choice not to recognize North Carolina's class distinction (citing *Dairyland Ins. Co. v. Sylva*, 409 S.E.2d 127,

128 (Va. 1991)); *Harleysville*, 165 N.C. App. 543, 600 S.E.2d 901, 2004 WL 1610050 at *3 ("While Nationwide points to two decisions by this Court subsequent to *Bost* as supporting its position, each of those cases recognizes that *Bost* controls when, as here, the injured party is a Class I insured under each of the policies at issue."); *Hlasnick*, 136 N.C. App. at 330, 524 S.E.2d at 392-93 ("[P]laintiffs here are second-class insureds under Federated Mutual's policy, but are first-class insureds under State Farm's policy; the term 'you' in the different policies refers to different individuals; and the 'other insurance' provisions in the policies are not identical."); *Iodice*, 133 N.C. App. at 79 n.3, 514 S.E.2d at 293 n.3 (holding *Bost* was distinguishable because the plaintiff in *Bost* was "a Class I insured under both policies" and stating a "Class II insured may be treated differently than a Class I insured").

The one case addressing this issue that does not mention the Class I/Class II distinction is *Benton*, and the facts of that case include a Class I UIM provider and a Class II UIM provider, making the excess and primary distinction this Court drew appropriate. 195 N.C. App. at 97, 671 S.E.2d at 36. In *Benton*, the claimant was injured while a passenger-guest in a vehicle that struck a tree. *Id.* at 90, 671 S.E.2d at 32. Nationwide provided UIM coverage that applied to the vehicle and its occupants involved in the accident, a vehicle owned by the operator. *Id.* at 97, 671 S.E.2d at 36. The claimant also received UIM coverage as a member of his mother's household under a Progressive insurance policy. *Id.* As such, the claimant was a Class II insured under the Nationwide policy (as a passenger-guest) and a Class I insured under his mother's Progressive policy (as a resident-relative). Because the classes of the UIM policies were different, this Court could conduct the analysis laid forth in *Iodice* to find the Nationwide policy was "primary" and the Progressive policy was "excess." *Id.*

The facts of *Bost* were also similar to the present case:

> Carrie Bost was not a named insured under Larry Bost's insurance policy with Farm Bureau. Both Farm Bureau and defendant Allstate insured Carrie Bost as a first class insured because she was a relative and resident of the households of both Larry and Cara Bost. Both policies have "Other Insurance" provisions which are identical, and therefore, the provisions nullify each other, leaving Farm Bureau and defendant Allstate to share the Ezzelle settlement on a pro rata basis.

126 N.C. App. at 52, 483 S.E.2d at 459. Here, the claimant Clark was a Class I insured under all three UIM policies and the three policies all

contained identical language. Clark also held two policies (the Integon policy and the State National Policy) as the named policyholder and was a relative resident of his parents' household, making him a Class I beneficiary of their Nationwide UIM policy. Under *Bost*, the credit paid by Ikerd's insurer must be distributed pro rata amongst Plaintiff and Defendants. Because the policies are (i) identical and (ii) claimant was a member of the same class within the excess clause of all three UIM policies, we cannot reach the third consideration of whether the identical language of the excess clause, as applied, may be read harmoniously amongst the excess clauses. We thus reverse the trial court and remand for a pro rata distribution of the credit.

IV. Conclusion

Because (i) all three policies were mutually repugnant and (ii) the claimant was a Class I insured under all three policies, pro rata distribution of the $50,000 credit provided by Ikerd is required under *Bost*. For the foregoing reasons, the trial court's granting of summary judgment for Defendants is

REVERSED AND REMANDED FOR ENTRY OF SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF.

Judges ROBERT C. HUNTER and CALABRIA concur.

STATE OF NORTH CAROLINA
v.
NAMATH PHILIP BEAM

No. COA13-635

Filed 21 January 2014

1. Drugs—possession of heroin—trafficking in opium or heroin—failure to give requested instruction—no evidence of confusion or mistake

The trial court did not err in a possession of heroin and trafficking in opium or heroin by transportation case by failing to give defendant's requested instruction to the jury. The requested instruction was that the State had to prove defendant knew what he transported was heroin, but defendant did not present any evidence

that he was confused or mistaken about the nature of the illegal drug his acquaintance was carrying.

2. Evidence—police testimony—no plain error

Assuming *arguendo* in a drugs case that it was improper for a officer to testify that defendant drove an acquaintance to the same residence on twenty to twenty-five occasions in the month and a half leading up to defendant's arrest, and that the acquaintance was delivering heroin on each of those occasions, any error did not rise to the level of plain error when considered in light of the limiting instruction and the other evidence presented at trial.

3. Appeal and Error—sealed record—no new trial warranted

The Court of Appeals examined the contents of the sealed record and concluded that there was nothing contained in the envelope that would warrant granting defendant a new trial or any other relief.

Appeal by Defendant from judgment entered 28 September 2012 by Judge W. David Lee in Superior Court, Rowan County. Heard in the Court of Appeals 10 December 2013.

Attorney General Roy Cooper, by Associate Attorney General Laura Askins, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Katherine Jane Allen, for Defendant.

McGEE, Judge.

A jury found Nathan Philip Beam ("Defendant") guilty on 28 September 2012 of possession of heroin and trafficking in opium or heroin by transportation. The actions leading to Defendant's convictions began on 13 April 2011, when the Rowan County Sheriff's Department and other law enforcement agencies entered the home of Joshua Sprinkle ("Sprinkle") pursuant to a search warrant obtained on information that Sprinkle had been dealing illegal narcotics from his residence. In an effort to improve his legal position, Sprinkle agreed to cooperate with authorities by disclosing his heroin source, and by agreeing to set up a delivery with that source. Sprinkle told officers that he had been obtaining heroin from a "Mexican" named "Daniel" who was always driven to Sprinkle's house by the same white man.

At trial, Sprinkle identified "Daniel" from a photograph as Daniel Ponce ("Ponce"). Sprinkle also identified Defendant as the man who always drove Ponce to Sprinkle's house for the transactions. Sprinkle called Ponce on 13 April 2011, and arranged for a delivery of heroin. Later that day, a truck, driven by Defendant and containing Ponce as a passenger, backed into the driveway to Sprinkle's house. Officers approached the truck, and Ponce, sitting in the passenger seat, dropped two bags that he had in his hands onto the floorboard of the truck. The bags were later determined to contain heroin, and a total of 20.2 grams of heroin were recovered from the truck Defendant was driving on 13 April 2011.

Defendant was arrested and charged with multiple drug-related offenses. The jury found Defendant guilty of possession of heroin and trafficking in opium or heroin by transportation on 28 September 2012. Defendant was sentenced to an active sentence of 90-117 months. Defendant appeals.

I.

[1] In Defendant's first argument he contends that the trial court erred in denying one of Defendant's requested instructions to the jury. We disagree.

Specifically, Defendant argues the trial court should have instructed the jury in accordance with a footnote in the pattern jury instructions that, in order to convict Defendant, the State had to prove that Defendant "knew what he transported was [heroin]." In *State v. Coleman*, this Court addressed that footnote:

> Footnote 4 of pattern instructions – criminal 260.17 and 260.30 advises the trial judge to further instruct the jury where defendant contends he did not know the identity of the substance. Footnote 4 of pattern instruction – criminal 260.17 reads, as follows: "If the defendant *contends* that he did not know the true identity of what he possessed, add this language to the first sentence: 'and the defendant knew that what he possessed was [heroin].' " N.C.P.I.—Crim. 260.17 n.4 (emphasis added). Therefore, if given as proposed by defendant, the first sentence of pattern instruction-Crim. 260.17 would read as follows: "First, that defendant knowingly possessed heroin and defendant knew that what he possessed was heroin." N.C.P.I.—Crim. 260.17 n.4.

State v. Coleman, __ N.C. App. __, __, 742 S.E.2d 346, 349 (2013). In *Coleman*, the "defendant's sole defense to the charges of trafficking in heroin by possession and by transportation was that he did not know the box in his possession contained heroin." *Id.* at __, 742 S.E.2d at 350. Recorded statements of the defendant were played at the trial in *Coleman*, where the defendant stated multiple times "that when he was in possession of the box, he believed that it contained only marijuana and cocaine[,]" and not heroin. *Id.* at __, 742 S.E.2d at 349. Because the defendant's sole defense was that he believed the box he was carrying only contained marijuana and cocaine, and that he did not know it also contained heroin, this Court held that the trial court erred in failing to give the additional instruction concerning the defendant's knowledge of the type of contraband he was carrying. *Id.* at __, 742 S.E.2d at 352.

The present case is distinguishable from *Coleman*. The additional instruction in *Coleman* was clearly required so that the jury would not mistakenly convict the defendant of knowingly possessing heroin if they believed his defense that he only knew about the marijuana and cocaine, and had no knowledge that heroin was contained in the box as well.[1] In the case before us, Defendant presented no evidence or argument that he was confused as to the correct identity of the illegal drugs carried by Ponce. Defendant's argument at trial was that he was just driving Ponce, and had no knowledge that Ponce was carrying any illegal drugs whatsoever. Concerning the possession charge, the jury was instructed that the State had to prove beyond a reasonable doubt that Defendant,

> acting either by himself or acting together with another person or persons, knowingly possessed opium, including heroin or any mixture containing opium or heroin, and that the amount which he possessed was 14 grams or more or less than 28 grams, 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 more of these things, it would be your duty to return a verdict of not guilty.

Similarly, the instruction of trafficking required the jury to determine beyond a reasonable doubt that Defendant knowingly transported heroin, or some other form of opium. The jury clearly did not believe Defendant's argument that he did not know Ponce was carrying heroin. Because Defendant did not present any evidence that he was confused or

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1. It is unclear in *Coleman* whether there was any cocaine in the box, or if the defendant was arguing that he believed one of the substances was cocaine when in fact it was heroin.

mistaken about the nature of the illegal drug Ponce was carrying, we hold that the additional instruction Defendant requested was not required. The trial court did not err in denying Defendant's requested instruction.

II.

[2] In Defendant's second argument, he contends the trial court committed plain error in allowing irrelevant and prejudicial testimony at trial. We disagree.

Sprinkle testified that Defendant drove Ponce to Sprinkle's residence on twenty to twenty-five occasions in the month and a half leading up to Defendant's arrest, and that Ponce was delivering heroin on each of those occasions. The following colloquy occurred between the State and Sprinkle:

> Q. I believe it was your prior testimony that every time [Ponce] came to your house, somebody else was driving.
>
> A. Yes, sir.
>
> Q. Who was driving on the other occasions that Mr. Ponce came to your house?
>
> A. On every occasion? On every single occasion he come up?
>
> Q. Yes.
>
> A. Mr. Namath Beam [Defendant].
>
> Q. Okay. On the other occasions when [Defendant] would drive, how would he pull into the driveway there?
>
> A. He would pull past the driveway and then back up.
>
> Q. And was this on every occasion including the ones where you actually conducted the transaction in the driveway?
>
> A. Yes, sir, it is.

The trial court instructed the jury that it should limit its consideration of this testimony to issues concerning Defendant's "motive, opportunity, and plan or . . . lack of mistake with regard to the crimes charged in this case."

Later in the trial, Chief Deputy David C. Ramsey ("Chief Deputy Ramsey") of the Rowan County Sheriff's Office testified that "Sprinkle said that his dealings were directly with [Ponce] but that the white

guy had been in the vehicle and the deal was done in his presence." Defendant did not object to this testimony at trial, but argues on appeal that "it was plain error for the trial court not to strike from the record the above testimony and provide a curative instruction[.]" Following the close of all the evidence, the trial court instructed the jury, including giving the following instruction:

> As I indicated to you earlier, ladies and gentlemen, at the time the evidence was received tending to show that on earlier occasions the defendant drove a vehicle occupied by another passenger to the residence of the witness, Joshua Sprinkle, and that on those occasions the passenger exchanged controlled substances with the witness for cash money, you recall my earlier instruction that that evidence was received solely for the purpose of showing that the defendant had a motive for the commission of the crimes charged in this case, that there existed in the mind of the defendant a plan, scheme, system, or design involving the crimes charged in this case, that the defendant had the opportunity to commit the crimes, and the absence of mistake with respect to the commission of the crimes charged in this case. As I previously instructed you, if you believe this evidence, you may consider it, but only for the limited purposes for which it was received. You may not consider it for any other purpose.

Assuming, *arguendo*, that it was improper for Chief Deputy Ramsey to give the above testimony, when considered in light of the limiting instruction and the other evidence presented at trial, we hold any error did not rise to the level of plain error. This argument is without merit.

III.

[3] In Defendant's final argument, he requests that this Court "examine the sealed records and order a new trial if the records contain relevant, discoverable, impeaching, and/or exculpatory evidence." We find no error.

We have examined the contents of the sealed envelope. We hold that there is nothing contained in the envelope that would warrant granting Defendant a new trial, or any other relief.

No error.

Judges HUNTER, Robert C. and ELMORE concur.

STATE v. CARLTON

[232 N.C. App. 62 (2014)]

STATE OF NORTH CAROLINA
v.
MAURICE ERSEL CARLTON, DEFENDANT

No. COA13-359

Filed 21 January 2014

Criminal Law—charging document—misdemeanor—amendment—changed nature of offense—impermissible

The superior court lacked jurisdiction to try defendant for possession of lottery tickets in violation of N.C.G.S. § 14-290. Even if the original citation was sufficient to charge defendant under N.C.G.S. § 14-291 and the procedures purportedly employed in the district court resulted in an actual amendment to the citation to charge defendant under N.C.G.S. § 14-290, the amendment changed the nature of the offense charged. Accordingly, the amendment was legally impermissible under N.C.G.S. § 15A-922(f).

Appeal by defendant from judgment entered 2 August 2012 by Judge Charles H. Henry in Wayne County Superior Court. Heard in the Court of Appeals 12 September 2013.

Roy Cooper, Attorney General, by David Shick, Associate Attorney General, for the State.

Gerding Blass, PLLC, by Danielle Blass for defendant-appellant.

DAVIS, Judge.

Maurice Ersel Carlton ("Defendant") appeals from his conviction for possession of tickets used in an illegal lottery. On appeal, he argues that the trial court did not have jurisdiction to try him on the possession of lottery tickets offense. After careful review, we vacate the trial court's judgment.

Factual Background

On 11 September 2011, Officer Matthew Fishman ("Officer Fishman") of the Mount Olive Police Department was on patrol and noticed that the right rear brake light on Defendant's vehicle was not functioning properly. Officer Fishman initiated a traffic stop and asked Defendant to step out of the vehicle. He then issued Defendant a warning citation, returned his license and registration, and asked Defendant if "there was

anything in the vehicle . . . that [he] needed to know about." Defendant replied: "[N]o, you're welcome to look."

Officer Fishman conducted a search of the vehicle and located "approximately 10 carbon copy books which contained a white, pink, and yellow copy" and a calculator in the center console of the car. He proceeded to issue Defendant a North Carolina Uniform Citation purporting to charge Defendant with violating N.C. Gen. Stat. § 14-291.[1] The citation simply stated that "[a] person . . . guilty of this offense acts as an agent in this state for a lottery."

The case was first tried before the Honorable Charles P. Gaylor, III in Wayne County District Court on 9 March 2012. Judge Gaylor found Defendant guilty of "operating [a] lottery" in violation of N.C. Gen. Stat. § 14-290 (rather than § 14-291, the statute referenced on the citation) and sentenced him to 45 days imprisonment. Judge Gaylor then suspended the sentence and placed Defendant on unsupervised probation for six months. Defendant appealed his conviction to Wayne County Superior Court.

A jury trial was held on 2 August 2012 in Wayne County Superior Court before the Honorable Charles H. Henry. Immediately prior to the trial, the prosecutor informed Judge Henry that "[t]he State had made a motion at the district court trial to have the charging statute amended . . . [I]t was originally charged as 14-291 and during the district court proceeding the State amended that to 14-290 and that was allowed by the district court judge."[2]

The trial proceeded on the charge of possession of tickets used in the operation of an illegal lottery in violation of N.C. Gen. Stat. § 14-290, and the jury found Defendant guilty of that offense. Judge Henry entered judgment on the jury's verdict and sentenced Defendant to 60 days imprisonment but suspended the sentence and placed him on supervised probation for 18 months. Defendant gave notice of appeal in open court.

Analysis

Defendant argues that the superior court lacked jurisdiction to try him for possession of lottery tickets in violation of N.C. Gen. Stat. § 14-290. We agree.

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1. The citation also charged Defendant with misdemeanor simple possession of marijuana. Because Defendant was found not guilty of this offense by the district court, that charge is not relevant to this appeal.

2. The record on appeal does not contain written documentation of the purported amendment or a transcript of the district court proceedings. The prosecutor's statement to the trial court is the only indication in the record that the district court consented to the State's request to have the citation amended in this fashion.

The confusion in this case arises from the fact that two separate criminal statutes are implicated — N.C. Gen. Stat. § 14-291 (the original charging statute) and N.C. Gen. Stat. § 14-290 (the statute under which Defendant was convicted in both district and superior court).[3] N.C. Gen. Stat. § 14-291, the original charging statute identified in the citation, provides as follows:

> Except as provided in Chapter 18C of the General Statutes or in connection with a lawful raffle as provided in Part 2 of this Article, if any person shall sell, barter or otherwise dispose of any lottery ticket or order for any number of shares in any lottery, or shall in anywise be concerned in such lottery, by acting as agent in the State for or on behalf of any such lottery, to be drawn or paid either out of or within the State, such person shall be guilty of a Class 2 misdemeanor.

N.C. Gen. Stat. § 14-291 (2011).

Thus, in order to successfully prosecute Defendant under § 14-291, the State is required to prove that (1) Defendant acted as an agent in the State (2) for or on behalf of a lottery. *See State v. Heglar*, 225 N.C. 220, 223, 34 S.E.2d 76, 77 (1945) (reversing trial court's denial of defendants' motion to dismiss alleged violation of N.C. Gen. Stat. § 14-291 where there was no evidence that defendants "were agents for others in the operation of a lottery"). An agent is typically defined as an individual who is not merely "a subordinate employee without discretion, but . . . one . . . having some charge or measure of control over the business entrusted

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3. A source of additional confusion lies in the fact that the written judgment mistakenly lists a *third* statute — N.C. Gen. Stat. § 14-291.1 — as the statute prohibiting possession of lottery tickets instead of listing § 14-290. This mistake in the judgment is noted by both parties in their respective briefs but treated as a clerical error. Although § 14-291.1 — like § 14-290 — punishes the possession of tickets used in illegal lotteries, its particular elements are inconsistent with the jury instructions provided by the trial court. Furthermore, entering judgment on a violation of § 14-291.1 would be contrary to the pretrial dialogue in which the prosecutor explained that he was proceeding on a charge of possession of tickets used in an illegal lottery in violation of § 14-290. As such, we agree with the parties that the reference to § 14-291.1 on the written judgment is appropriately deemed a clerical error. *See State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000) (defining clerical error as "[a]n error resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination") (citation and quotation marks omitted)). Therefore, our analysis of this appeal treats Defendant's conviction as arising under § 14-290. Moreover, because we are vacating the judgment for lack of jurisdiction, we need not remand for the correction of this clerical error.

to him or some feature of it . . . ." *Carolina Paper Co. v. Bouchelle*, 19 N.C. App. 697, 699, 200 S.E.2d 203, 205 (citation and quotation marks omitted), *aff'd*, 285 N.C. 56, 203 S.E.2d 1 (1974).

N.C. Gen. Stat. § 14-290, on the other hand, reads as follows:

> Except as provided in Chapter 18C of the General Statutes or in connection with a lawful raffle as provided in Part 2 of this Article, if any person shall open, set on foot, carry on, promote, make or draw, publicly or privately, a lottery, by whatever name, style or title the same may be denominated or known; or if any person shall, by such way and means, expose or set to sale any house, real estate, goods, chattels, cash, written evidence of debt, certificates of claims or any other thing of value whatsoever, every person so offending shall be guilty of a Class 2 misdemeanor which may include a fine not to exceed two thousand dollars ($2,000). Any person who engages in disposing of any species of property whatsoever, including money and evidences of debt, or in any manner distributes gifts or prizes upon tickets, bottle crowns, bottle caps, seals on containers, other devices or certificates sold for that purpose, shall be held liable to prosecution under this section. Any person who shall have in his possession any tickets, certificates or orders used in the operation of any lottery shall be held liable under this section, and the mere possession of such tickets shall be prima facie evidence of the violation of this section. This section shall not apply to the possession of a lottery ticket or share for a lottery game being lawfully conducted in another state.

N.C. Gen. Stat. § 14-290 (2011).

In order to establish a violation of § 14-290, therefore, the State need only establish that Defendant (1) knowingly possessed (2) lottery tickets (3) used in the operation of a lottery. Furthermore, mere possession of such lottery tickets is *prima facie* evidence of a violation of the statute. *Id.* As such, if the jury finds beyond a reasonable doubt that the defendant knowingly possessed the lottery tickets, it may also infer that those tickets were used in the operation of a lottery. *See State v. Dawson*, 23 N.C. App. 712, 714, 209 S.E.2d 503, 505 (1974) (evidence that defendant possessed tickets found on floorboard of his automobile "was sufficient to support the inference that the tickets were those used in the operation of a lottery"), *cert. denied*, 286 N.C. 417, 211 S.E.2d 798 (1975).

Here, Defendant was charged by means of a North Carolina Uniform Citation. A citation may serve as the State's pleading for a misdemeanor prosecuted in district court "unless the prosecutor files a statement of charges, or there is objection to trial on a citation." N.C. Gen. Stat. § 15A-922(a) (2011).

The citation in this case alleged that, on 11 September 2011, Defendant violated N.C. Gen. Stat. § 14-291. The handwritten statement of the offense at the bottom of the citation reads as follows: "G.S. 14-291[.] A person . . . guilty of this offense acts as an agent in this state for a lottery." However, as discussed above, the district court found Defendant guilty of violating N.C. Gen. Stat. § *14-290* and entered judgment on that offense.

It is well established that misdemeanor charging documents may not be amended so as to charge the defendant with committing a different crime. *See* N.C. Gen. Stat. § 15A-922(f) (2011) ("A statement of charges, criminal summons, warrant for arrest, citation, or magistrate's order may be amended at any time prior to or after final judgment *when the amendment does not change the nature of the offense charged.*" (emphasis added)); *State v. Clements*, 51 N.C. App. 113, 116, 275 S.E.2d 222, 225 (1981) ("[A]n amendment to a warrant under which a defendant is charged is permissible *as long as the amended warrant does not charge the defendant with a different offense.*" (emphasis added)).

Assuming, without deciding, that the original citation was sufficient to charge the commission of a criminal offense and that the procedures purportedly employed in the district court resulted in an actual amendment to the original charging instrument — subjects about which we express no opinion, the resolution of Defendant's jurisdictional argument hinges on whether a violation of N.C. Gen. Stat. § 14-290 is a different crime than a violation of N.C. Gen. Stat. § 14-291. Based on our examination and comparison of these two statutes, we conclude that amending Defendant's citation by replacing N.C. Gen. Stat. § 14-291 with N.C. Gen. Stat. § 14-290 as the charging statute would, in fact, effectively charge Defendant with a different offense. Instead of requiring the State to establish that Defendant was acting as a representative in the State for an illegal lottery, such an amendment would merely require proof that Defendant knowingly possessed lottery tickets in order to make out a *prima facie* violation of the statute.

Thus, given the significantly distinct elements of these two crimes, we are compelled to conclude that amending the citation to charge Defendant under § 14-290 — rather than under § 14-291 — would change

the nature of the offense charged. *See State v. Davis*, 261 N.C. 655, 656, 135 S.E.2d 663, 663 (1964) (holding that trial court could not amend warrant to change charging statute where "[e]ach of these statutes creates and defines a separate criminal offense"); *In re Davis*, 114 N.C. App. 253, 256, 441 S.E.2d 696, 698 (1994) (holding that trial court could not amend petition to charge juvenile with different offense than that originally alleged). Therefore, even assuming that the district court did attempt to amend the citation in this manner (as was related by the prosecutor to Judge Henry shortly before the trial in superior court), such an amendment would not have been legally permissible.

Because the district court lacked legal authority to amend the citation to charge Defendant with a violation of N.C. Gen. Stat. § 14-290, the superior court did not have jurisdiction to try Defendant for possession of tickets used in the operation of an illegal lottery in violation of that statute. Accordingly, we must vacate the superior court's judgment.[4] *See State v. Caudill*, 68 N.C. App. 268, 272, 314 S.E.2d 592, 594 (1984) (vacating judgment where superior court did not have jurisdiction because amended offense was "separate and distinct" from offense originally charged).

Conclusion

For the reasons stated above, we vacate the trial court's judgment.

VACATED.

Judges HUNTER, JR. and ERVIN concur.

4. Because we vacate Defendant's judgment for lack of jurisdiction, we need not address Defendant's remaining arguments on appeal.

STATE v. COUNCIL

[232 N.C. App. 68 (2014)]

STATE OF NORTH CAROLINA
v.
RAMIL MARQUE COUNCIL

No. COA13-607

Filed 21 January 2014

1. Evidence—witness's unrelated charge—cross-examination barred—no plain error

Because there was no prejudice, the trial court did not commit plain error in a prosecution for assault and armed robbery by ruling that the victim could not be questioned about an unrelated first-degree murder charge pending against him at the time of his testimony. Moreover, trial counsel's failure to object to the State's motion *in limine* to bar cross-examination of the victim about that charge did not constitute inadequate representation.

2. Confessions and Incriminating Statements—defendant's statements in patrol car—video clips

There was no prejudicial error in an assault and armed robbery prosecution where the trial court did not suppress statements defendant made while being transported in a camera-equipped car and the video clips of those statements. Although the trial court misapprehended the applicable law on the right-to-counsel issue, the error was harmless. Because any error in the admission of the video clips was not prejudicial, any error in the trial court's determination of their relevancy and prejudicial impact was also harmless.

Appeal by Defendant from judgments entered 15 November 2012 by Judge Arnold O. Jones, II in Wayne County Superior Court. Heard in the Court of Appeals 24 October 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Robert C. Montgomery,[1] *for the State.*

Marilyn G. Ozer for Defendant.

STEPHENS, Judge.

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1. On 18 September 2013, the State moved to substitute Special Deputy Attorney General Robert C. Montgomery for Special Deputy Attorney General Tina A. Krasner due to her leaving her position with the Office of the Attorney General. By order entered 22 October 2013, this Court allowed that motion. As Defendant himself notes, Powell's credibility was impeached on several fronts at trial.

Evidence at Trial and Procedural History

Defendant Ramil Marque Council appeals from the judgments entered upon his convictions for one count each of assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWIKISI") and attempted robbery with a dangerous weapon, and two counts of robbery with a dangerous weapon. The evidence at trial tended to show the following: On 28 August 2010, Christopher Powell, Mary Foy, and Angela Wiggins stopped at a convenience store in Mount Olive, North Carolina, to buy beer. Defendant,[2] who was standing in a group of men outside the store, offered to sell Powell some marijuana, and Powell agreed to drive Defendant to another location to complete the drug purchase. When the women came out of the store, Powell instructed Wiggins to sit in the front seat with Foy, who was driving. Powell and Defendant rode in the back seat. Shortly after the group drove away from the store, Defendant brandished a chrome revolver in Powell's face and demanded his money. When Powell replied that Defendant would have to shoot him first, Defendant put the gun to Powell's stomach and shot him. Powell then handed over his money and began screaming that he had been shot.

Upon hearing the pop of the handgun and Powell's cries, Foy slammed on the brakes. Defendant stuck the gun between the headrests of the front seats and demanded money from the women. Foy said that she did not have any money, but Wiggins gave Defendant about $30. Defendant then jumped out of the car and ran away from the scene. Wiggins called 911, and Powell was taken by ambulance to a hospital where he underwent two surgical procedures and remained hospitalized for several weeks. On 31 August 2010, while still in the hospital, Powell identified Defendant in a photographic lineup. Foy also picked out Defendant in a photo lineup, although Wiggins was not able to do so.

In September 2010, Officer Jason Holliday of the Mt. Olive Police Department ("MOPD") arrived at the Duplin County home of Defendant's grandparents to serve a warrant for Defendant's arrest. After being given permission to enter the home, Holliday eventually located Defendant hiding in the attic and placed him under arrest. At some point after Defendant's arrest, MOPD Chief Ralph Schroeder advised Defendant of his *Miranda* rights in the presence of Defendant's mother.[3] Schroeder noted on a juvenile rights form that Defendant had responded that he

2. Defendant was seventeen years old at the time.

3. The record and trial transcript are unclear about exactly how and when Schroeder first came in contact with Defendant or why he decided to involve himself personally in Defendant's case.

understood those rights and had invoked his right to counsel. Schroeder then personally transported Defendant from Mt. Olive to Goldsboro, apparently to the magistrate's office, in a patrol car equipped with an interior camera. Schroeder testified that he had chosen that particular car so that he could record any statements Defendant might make on the way. Defendant and Schroeder talked during the drive. The video recording of those conversations was later divided into six five-minute clips. At trial, over Defendant's objection, the jury was shown clips 3, 4, and 5.

On 15 November 2012, the jury convicted Defendant of all charges against him, and the trial court imposed consecutive terms of 72 to 96 months for the AWDWIKISI charge, 62 to 84 months for the attempted robbery charge, and 62 to 84 months for each of the robbery charges. Defendant gave notice of appeal in open court. On 25 June 2013, Defendant filed a motion for appropriate relief ("MAR") with this Court, alleging that he received ineffective assistance of council ("IAC") at trial. That motion was referred for resolution to this panel by order dated 23 July 2013.

Discussion

In his direct appeal, Defendant brings forward two arguments: that the trial court erred in (1) ruling that Defendant could not cross-examine Powell about Powell's pending first-degree murder charge and (2) failing to suppress statements made by Defendant while he was being transported to jail. In his MAR, Defendant contends that his trial counsel's failure to object to the State's motion to bar mention of Powell's pending criminal charge constituted IAC. Because they are closely related, we address Defendant's first issue on appeal and the issue raised in his MAR together. We find no prejudicial error in Defendant's trial and deny his MAR.

I. Powell's pending criminal charge

[1] Defendant argues that the trial court committed plain error in ruling that Powell could not be questioned about an unrelated first-degree murder charge pending against him at the time of his testimony. Defendant also contends that his trial counsel's failure to object to the State's motion *in limine* to bar cross-examination of Powell about that charge constituted IAC. We disagree with both arguments.

After Powell was shot, he was charged with first-degree murder in another county in connection with an incident unrelated to his encounter with Defendant. During a pretrial conference, the State informed the

trial court of Powell's pending charge and made an oral motion *in limine* to prevent Defendant from questioning Powell about it. Defendant did not object, and the court granted the State's motion. Defendant now argues that the court's ruling violated his constitutional rights.

It is error for a trial court to bar a defendant from cross-examining a State's witness regarding pending criminal charges, even if those charges are unrelated to those for which the defendant faces trial. *State v. Hoffma*n, 349 N.C. 167, 180, 505 S.E.2d 80, 88 (1998). Cross-examination can be used to impeach the witness by showing a possible source of bias in his testimony, to wit, that the State may have some undue power over the witness by virtue of its ability to control future decisions related to the pending charges. *Id.* at 180-81, 505 S.E.2d at 88. However, as Defendant concedes, his failure to object to the trial court's ruling requires him to establish plain error in order to obtain relief. As our Supreme Court has recently reaffirmed,

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

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

To establish IAC,

> a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense. Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (citations and internal quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006). Further, "if a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged error[] the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 249 (1985). Thus, for Defendant to prevail on either his claim of plain error or of IAC, he must show prejudice. This Defendant cannot do.

Here, as noted *supra*, it was error for the trial court to prohibit cross-examination of Powell regarding his pending criminal charge. *See Hoffman*, 349 N.C. at 180-81, 505 S.E.2d at 88. However, Defendant fails to show that this "error had a probable impact on the jury's finding that [D]efendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. As Defendant himself notes, Powell's credibility was impeached on several fronts at trial. During his testimony, Powell revealed that, although he was only seventeen years old at the time Defendant shot him, he used alcohol and had stopped to have one of his companions buy alcohol on the evening of the crime. On cross-examination, Powell admitted to buying and using marijuana previously and, of course, Powell was trying to purchase marijuana from Defendant when he was shot. Defendant's counsel also extensively cross-examined Powell about inconsistencies between Powell's various pretrial statements to police officers and his trial testimony, such as whether he had ever purchased marijuana from Defendant before the evening of the crime and whether Defendant stole money from him at the time of the shooting. In sum, Powell's credibility was substantially impeached as he was shown to be an underage drinker and illegal drug user who gave inconsistent statements regarding a variety of facts connected to the shooting.

Further, we observe that Powell first identified Defendant as the man who shot him on 31 August 2010, only a few days after the crime occurred. Powell did not allegedly commit the murder for which he was later charged until 23 October 2010. Thus, the most crucial piece of Powell's testimony, his original identification of Defendant as the man who shot him, cannot have been influenced in any way by the pending charge. Even had Defendant been able to cross-examine Powell about his pending charge, Powell's original identification of Defendant, which never varied and which was corroborated by Foy's identification of Defendant as the assailant, would have been entirely unaffected. In light of that consistent and definite identification and Foy's testimony that Defendant was the man who shot Powell and robbed her, we see

no reasonable probability that the result of Defendant's trial would have been different if he had been able to cross-examine Powell about Powell's pending criminal charge. Accordingly, we overrule Defendant's first argument and deny his MAR.

II. Defendant's post-arrest statements during transport

[2] Defendant next argues that the trial court erred in failing to suppress both the statements he made while being transported by Schroeder in the camera-equipped car and the video clips of those statements. Defendant contends (1) the admission of the video clips violated his right to counsel and (2) the clips were irrelevant and grossly prejudicial and thus inadmissible under our Rules of Evidence. We conclude that the trial court misapprehended the applicable law on the right-to-counsel issue in considering Defendant's motion to suppress. However, this error was harmless. Because any error in the admission of the video clips was not prejudicial to Defendant, any error in the trial court's determination of their relevancy and prejudicial impact was also harmless.

A. Standard of review

> This Court's review of a trial court's denial of a motion to suppress in a criminal proceeding is strictly limited to a determination of whether the court's findings are supported by competent evidence, even if the evidence is conflicting, and in turn, whether those findings support the court's conclusions of law. If so, the trial court's conclusions of law are binding on appeal.

State v. Veazey, 201 N.C. App. 398, 400, 689 S.E.2d 530, 532 (2009) (citations and internal quotation marks omitted), *disc. review denied*, 363 N.C. 811, 692 S.E.2d 876 (2010). However, the trial court's conclusions of law are reviewed *de novo*. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citation omitted).

B. Defendant's right to counsel

"[D]uring a custodial interrogation, if the accused invokes his right to counsel, the interrogation must cease and cannot be resumed without an attorney being present . . . ." *State v. Golphin*, 352 N.C. 364, 406, 533 S.E.2d 168, 199 (2000) (citations and internal quotation marks omitted), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). To determine whether a defendant's invoked right to counsel has been waived, courts "must ask: (1) whether the [post-invocation interrogation] was police-initiated[] and (2) whether [the defendant] knowingly and intelligently

waived the right." *State v. Tucker*, 331 N.C. 12, 33, 414 S.E.2d 548, 560 (1992) (citation omitted).

Here, Defendant explicitly invoked his right to counsel after being read his *Miranda* rights and before being driven to Goldsboro by Schroeder. At trial, Defendant specifically argued that Schroeder's comments to Defendant during the drive were "an effort to subvert *Miranda*[.]" Accordingly, in ruling on Defendant's motion to suppress, the trial court was required, at a minimum, to resolve the factual issues of (1) whether Defendant reinitiated the conversation, thereby waiving his invoked right to counsel, and (2) whether that waiver was voluntary and knowing. *See id.*

As for which party reinitiated a post-invocation communication, our Supreme Court has noted that

> not every statement obtained by police from a person in custody is considered the product of interrogation. Interrogation is defined as either express questioning by law enforcement officers, or conduct on the part of law enforcement officers which constitutes the functional equivalent of express questioning. The latter is satisfied by any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. However, because the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response. Factors that are relevant to the determination of whether police should have known their conduct was likely to elicit an incriminating response include: (1) the intent of the police; (2) whether the practice is designed to elicit an incriminating response from the accused; and (3) any knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion.

State v. Fisher, 158 N.C. App. 133, 142-43, 580 S.E.2d 405, 413 (2003), *affirmed*, 358 N.C. 215, 593 S.E.2d 583 (2004).

Here, the trial court found that "Schroeder did not ask any direct questions of the Defendant and did not question him concerning the

circumstances involving the alleged robberies or alleged shootings. Any statements made during [the drive] were initiated by [] Defendant." While these findings are supported by the evidence and properly address whether Schroeder engaged in interrogation of Defendant by "express questioning[,]" the trial court made no "determination of whether [Schroeder] should have known [his] conduct was likely to elicit an incriminating response" by considering "(1) the *intent* of the police; (2) whether the practice [wa]s *designed to elicit an incriminating response* from the accused; and (3) any knowledge the police may have had concerning the *unusual susceptibility of [D]efendant to a particular form of persuasion*." *Id.* (emphasis added). This failure is particularly concerning in light of evidence before the trial court that Schroeder, the city police chief, (1) chose to transport Defendant himself, (2) intentionally used a camera-equipped car in case Defendant made a statement, (3) had a prior relationship with Defendant from a youth sports team Schroeder coached, and (4) knew Defendant was only seventeen years old. These facts surely raised questions regarding the three *Fisher* issues.

As noted *supra*, in reviewing the denial of a motion to suppress, it is not our role to make factual findings, but rather, only to consider whether the trial court has engaged in the appropriate legal analysis, made findings of fact which are supported by competent evidence, and made conclusions of law supported by those findings. The trial court failed to make the necessary findings of fact under the first prong of the required analysis regarding Defendant's *Miranda* claim. Accordingly, the denial of Defendant's motion to suppress was error.

Further, even if the trial court had made the necessary findings of fact to support its conclusion that Defendant reinitiated the communication with Schroeder, the court also failed to resolve the second prong of the analysis set forth in *Tucker*: whether Defendant knowingly and intelligently waived his invoked right to counsel. "Whether a waiver is knowingly and intelligently made depends on the specific facts of each case, including the defendant's background, experience, and conduct. Age, although not determinative, can be one of the factors considered as part of the totality of the circumstances." *State v. Quick*, __ N.C. App. __, __, 739 S.E.2d 608, 612 (2013) (citations omitted).

After watching the clips and hearing arguments from counsel, the trial court found them relevant under Rules of Evidence 401 and 403. The Court then stated, "I have to look at the more specific issue as to *whether or not it's a voluntary statement*." (Emphasis added). On the

second issue, the court made the following oral findings of fact and conclusions of law:

> On Clip Two, in watching and listening, [] Defendant initiated the conversation. He wanted Chief Schroeder to take him to Main Street in Mt. Olive. Before that comment was made there had been no discussion at all going on in the car. After a brief pause [] Defendant struck up the conversation again. Then I heard on Clip Two Chief Schroeder on the radio, and then things got quiet once again, which led into Clip Three.
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> At approximately 1 minute and 25 seconds into Clip Three [] Defendant asked Chief Schroeder for a cigarette. At approximately 2 minutes and 44 seconds into Clip Three, again initiated by [] Defendant, [] Defendant made some comments about he might do 5 to 7. Chief Schroeder responded to the effect I can't tell you that; it depends on if the case is pled down. There were no threats, there were no promises, and it did not appear there was any deception. It does not appear any things were said in an effort to obtain a confession from [] Defendant.
>
> Clip Four. [] Defendant continues to voluntarily talk. There's some comment made around the 1 minute mark into the video about staying or running. I don't recall there being any questions asked by Chief Schroeder. And I find that those statements, in the totality of the circumstances, were also voluntarily made by [] Defendant, giving deference to these issues I've addressed, and that I find [] Defendant was not deceived, his *Miranda* rights were honored, there were no physical threats or shows of violence by Chief Schroeder towards [] Defendant, no promises were made to obtain any statement of [] Defendant, [] Defendant was familiar with the criminal justice system by the comments that he made, and it appears his mental condition was clear. In fact, I think it was around this time, between Clips Four and Five, that there was some discussion made of [] Defendant playing football, and Chief Schroeder may have been — as I understand the conversation, coaching football, a youth league or something along those lines.
>
> In Clip Five, around the 1 minute mark into the clip [] Defendant asked Chief Schroeder, do you think all the

> charges are going to stick? Chief Schroeder's response, I can't tell you that. There was a comment then made that it would be up to the attorneys and what type of evidence is presented. There was then a discussion about Shania, Rania and Tremia (all phonetic). That may be some children that [] Defendant's related to or at least has a close relationship with. It didn't appear to me at any time during these clips [] Defendant felt at all threatened. He smoked a cigarette. He brought up things in conversation. At no time do I find Chief Schroeder brought up anything about the case. If anything, he was responding to [] Defendant, and his responses were very general in nature, without promises, without threats, without an attempt to deceive. The entire six clips last 30 minutes. Again, Clips [O]ne and Two, 5 minutes each, take that 10 minutes out; the remaining four clips last approximately 20 minutes. This was a very short period of time during which Chief Schroeder did not ask any direct questions of [] Defendant and did not question him concerning the circumstances involving the alleged robberies or alleged shootings. Any statements made during that 20 minute period of time were initiated by [] Defendant.
>
> In light of *Wilkerson*, *Hardy*, and the totality of the circumstances, I find that [] Defendant's statements were of a voluntary nature, were not coerced, he was not deceived, his *Miranda* rights were honored. The length of the drive was no more than necessary from Mt. Olive to Goldsboro, which if you were to track it it's around about a 15 mile drive, but also involves some driving in town where the speed limit may be 20, 25 or 35 miles per hour, and I'm familiar with those roads, both in Mt. Olive and in Goldsboro. There were no physical threats or shows of violence, no promises were made to obtain any statements, [] Defendant had familiarity with the criminal justice system, and his mental condition appeared to be clear. And in light of all of these, the motion to suppress the video is denied. I find that it is relevant, that it was voluntarily made by [] Defendant and is proper for consideration by this jury in this case.

As the transcript reveals, the court misapprehended the second prong of the *Tucker* analysis: whether Defendant knowingly and

intelligently waived his previously invoked right to counsel. The court made no conclusions of law about the *knowing and intelligent nature of Defendant's waiver of his right to counsel*, but instead concluded only that Defendant's statements were *voluntary*, citing *State v. Wilkerson*, 363 N.C. 382, 683 S.E.2d 174 (2009), *cert. denied*, __ U.S. __, 176 L. Ed. 2d 734 (2010), and *State v. Hardy*, 339 N.C. 207, 451 S.E.2d 600 (1994).

"[T]he voluntariness of a consent or an admission on the one hand, and a knowing and intelligent waiver on the other, are discrete inquiries." *Edwards v. Arizona*, 451 U.S. 477, 484, 68 L. Ed. 2d 378, 385-86 (1981) ("[H]owever sound the conclusion of the state courts as to the voluntariness of [the defendant's] admission may be, neither the trial court nor the [state appellate court] undertook to focus on whether [the defendant] understood his right to counsel and intelligently and knowingly relinquished it. It is thus apparent that the decision below misunderstood the requirement for finding a valid waiver of the right to counsel, once invoked.").

In *Hardy*, the issue before our Supreme Court was whether the defendant's statements were voluntary. The defendant had not been arrested and had never invoked his right to counsel. 339 N.C. at 216-17, 451 S.E.2d at 605-06. While that case discusses many of the factors about which the trial court made findings, it does not discuss knowing and intelligent waiver of the right to counsel. *See Hardy*, 339 N.C. at 222, 451 S.E.2d at 608 ("If, looking to the totality of the circumstances, the confession is the product of an essentially free and unconstrained choice by its maker, then he has willed to confess and it may be used against him; where, however, his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process. Factors that are considered include whether [the] defendant was in custody, whether he was deceived, whether his *Miranda* rights were honored, whether he was held incommunicado, the length of the interrogation, whether there were physical threats or shows of violence, whether promises were made to obtain the confession, the familiarity of the declarant with the criminal justice system, and the mental condition of the declarant.") (citations, internal quotation marks, and brackets omitted).

Here, the trial court's oral findings of fact discuss the length of the drive to Goldsboro; the absence of coercion, threats or promises by Schroeder; and other factors relevant in determining the *voluntariness* of a statement under *Hardy*.[4] The court explicitly made conclusions of

4. *Wilkerson* discusses both waiver of *Miranda* rights (waiver "must be (1) given voluntarily . . . , and (2) made with a full awareness of both the nature of the right being

law regarding voluntariness. However, the trial court failed to make any conclusion as to the central question of whether Defendant's waiver of his invoked right to counsel was knowing and intelligent. Like the trial court's failure to consider whether Schroeder's conduct was likely to elicit an incriminating response, this failure renders denial of Defendant's motion to suppress erroneous. However, as discussed below, we conclude that this error was harmless beyond a reasonable doubt. *See State v. Brown*, 306 N.C. 151, 164, 293 S.E.2d 569, 578, *cert. denied*, 459 U.S. 1080, 74 L. Ed. 2d 642 (1982) ("Error committed at trial infringing upon a defendant's constitutional rights is presumed to be prejudicial and entitles him to a new trial unless the error committed was harmless beyond a reasonable doubt. Overwhelming evidence of guilt may render constitutional error harmless.").

In the video clips shown to the jury, Defendant does not confess to the crimes for which he which was tried. He and Schroeder largely discuss unrelated matters, including snakes, convertibles, and people they both know. The only comments Defendant made which could be viewed as even possibly inculpatory were: (1) wondering whether he "might do 5 to 7" years in prison (presumably a reference to the possible consequences of his arrest), (2) an admission that he had seen and narrowly avoided police officers the night before, (3) an expression that he had intended to stay "on the run" as long as possible, and (4) a question about why police had described him as "armed and dangerous." In sum, the clips contained little relevant evidence, but Defendant's statements were not particularly prejudicial. Thus, even had the video clips been suppressed, in light of the clear and definite testimony from Powell and Foy identifying Defendant as their assailant, we conclude beyond a reasonable doubt that the outcome of Defendant's trial would have been the same.

C. Relevance and prejudicial impact

[3] Defendant also contends that the trial court erred in concluding that the selected video clips were relevant and that their probative value was not substantially outweighed by their prejudicial impact. *See* N.C. Gen. Stat. § 8C-1, Rules 401, 403 (2013). "A defendant is prejudiced by

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abandoned and the consequences of the decision to abandon it"), and the voluntariness of statements by suspects ("To be admissible, a defendant's statement must be the product of an essentially free and unconstrained choice by its maker."). *Wilkerson*, 363 N.C. at 430-31, 683 S.E.2d at 203-04 (citations and internal quotation marks omitted). However, in that case, the defendant had never invoked his right counsel and further, on appeal, contested only the *voluntariness* of his statement. *Id.* at 430, 683 S.E.2d at 203.

errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2013). As noted *supra*, while we agree that the video clips contained relatively little relevant evidence, we also find that they contained little if any prejudicial content. Accordingly, even if the admission of the video clips was error under Rules of Evidence 401 and/or 403, we conclude that there is no "reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial[.]" *Id.* Accordingly, Defendant cannot establish prejudice which would entitle him to relief.

NO PREJUDICIAL ERROR.

Judges GEER and ERVIN concur.

STATE OF NORTH CAROLINA
v.
GREGORY ELDER, DEFENDANT

No. COA13-710

Filed 21 January 2014

Search and Seizure—motion to suppress evidence—statutory authority exceeded—domestic violence protective order—no exigent circumstances

In a case arising from defendant's motion to suppress evidence found in his home when officers served him with an *ex parte* domestic violence protection order (DVPO), the district court exceeded its statutory authority by ordering a general search of defendant's person, vehicle, and residence for unspecified "weapons" as a provision of the DVPO under North Carolina General Statute § 50B-3(a)(13). As defendant's premises were searched without a search warrant and without exigent circumstances, and as the good faith exception does not apply to evidence obtained in violation of the North Carolina Constitution, the evidence seized as a result of the search, which led to the criminal charges for which defendant was convicted, should have been suppressed.

Judge BRYANT dissents in a separate opinion.

Appeal by defendant from judgment entered 18 December 2012 by Judge Linwood O. Foust in Superior Court, Mecklenburg County. Heard in the Court of Appeals 5 November 2013.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Michael E. Bulleri, for the State.

Michele Goldman, for defendant-appellant.

STROUD, Judge.

Defendant appeals judgment entered upon his guilty plea after the denial of his motion to suppress. For the following reasons, we vacate the judgment and remand.

I. Background

On 23 September 2010, based upon an action brought under North Carolina General Statute Chapter 50B by defendant's wife, Stacy Elder, the district court entered an ex parte domestic violence order of protection ("ex parte DVPO") against defendant. In the ex parte DVPO, the district court found that on 22 September 2010, defendant had placed his wife in "fear of imminent serious bodily injury" and had threatened to "torch their son's preschool," among other threats of violence. The district court did *not* make any findings under finding 3 of the "ADDITIONAL FINDINGS"[1] portion of the ex parte DVPO on page 2, which would be a finding listing any "firearms, ammunition, and gun permits" to which defendant was "in possession of, owns or ha[d] access." The district court ordered several of the enumerated forms of relief under North Carolina General Statute § 50B-3, including the following provisions which are relevant for purposes of this case:

> It is ORDERED that:
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> . . . .
>
> 12. the defendant is prohibited from possessing, owning or receiving[,] purchasing a firearm for the effective period of this Order[,] and the defendant's concealed handgun permit is suspended for the effective period of this Order. . . .

1. "ADDITIONAL FINDINGS" are optional findings on the form for the ex parte DVPO, AOC-CV-304 Rev. 8/09.

> 13. the defendant surrender to the Sheriff serving this order the firearms, ammunition, and gun permits described in Number 3 of the Findings on Page 2 of this Order and any other firearms and ammunition in the defendant's care, custody, possession, ownership or control.[2] . . .
>
> . . . .
>
> 15. Other: (specify) . . .
> Any Law Enforcement officer serving this Order shall search the Defendant's person, vehicle and residence and seize any and all weapons found.

See N.C. Gen. Stat. § 50B-3 (2009).

This case arises from defendant's motion to suppress evidence found in his home when the officers served defendant with the ex parte DVPO, and the evidence seized as a result of the search pursuant to the ex parte DVPO led to the criminal charges for which defendant was convicted. The relevant events as found by the trial court are that between 23 September and 26 September officers had attempted several times, without success, to serve defendant with the ex parte DVPO. On 26 September 2010, a deputy sheriff "received a call from the dispatcher indicating that the defendant was at the residence[,]" and so "several deputies" went to the residence. The deputies knocked on the door "for a period of time" with no answer, and "[a]fter about 15 minutes, the defendant came to answer the door, and the defendant opened the door and slid out of the door, closing the door behind him." Defendant then locked the deadbolt on the door. One of the deputies took defendant's "keys from the defendant's pocket and unlocked the door" and the officers entered the home to search the house in accord with "paragraph 15 of the domestic violence order." "[U]pon entry into the residence, a pungent odor of marijuana was smelled by the officers[,]" and ultimately they went downstairs and found marijuana.

At the hearing on the motion to suppress, the officers' testimonies are not consistent on many facts regarding the search of defendant's home, but they all seem to agree that they went to defendant's home not only to serve the ex parte DVPO but also to arrest defendant upon a valid arrest warrant for communicating threats, and defendant was indeed arrested upon this warrant. Yet we also note that the findings do not mention the existence of an arrest warrant for defendant, do not

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2. As we have already noted, nothing was "described in Number 3 of the Findings on Page 2 of this Order[.]"

indicate that the officers arrested defendant based upon the arrest warrant, and do not state that any "firearms, ammunition, [or] gun permits" were seized. But the trial court's findings of fact are uncontested by either party, so they are the facts upon which we rely.[3]

As a result of the items seized during this search, defendant was indicted for possession of drug paraphernalia, maintaining a place to keep controlled substances, and manufacturing a controlled substance. On 8 October 2012, defendant made a motion to suppress "any and all physical evidence and any statements attributed to the defendant by the police as such evidence was obtained as the result of an illegal and unconstitutional search and seizure of the Defendant and his home" because

> the police had neither reasonable suspicion nor probable cause to search his home and no exceptions to the fourth amendment existed. Instead, the search was performed pursuant to an Ex Parte 50B order signed and dated 9/23/2012 by Judge Hoover in the Mecklenburg County District Court. The search authorized in the Ex Parte 50 B Order exceeded the statutory provisions in GS 50B-3.1 and has no other constitutional grounds constituting an exception to the 4th am[]e[n]dment.

Defendant's motion to suppress was denied, and on 18 December 2012, the trial court entered judgment upon defendant's guilty plea of all the charges; the trial court suspended defendant's sentence. Defendant appeals.

II. Standard of Review

> It is well established that the standard of review in evaluating a trial court's ruling on a motion to suppress is that the trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. In addition, findings of fact to which defendant failed to assign error are binding on appeal. Once this Court concludes that the trial court's findings of fact are supported by the evidence, then this Court's next task is to determine whether the trial court's conclusions of law are supported by the findings. The trial court's conclusions of law are reviewed *de novo* and must be legally correct.

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3. The State has not argued any alternative basis in law for the trial court's ruling, such as the arrest warrant, under North Carolina Rule of Appellate Procedure Rule 10(c).

State v. Johnson, ___ N.C. App. ___, ___, 737 S.E.2d 442, 445 (2013) (citation omitted).

III. Motion to Suppress

Defendant contends that his motion to suppress should have been allowed because "[t]he North Carolina [a]nd United States Constitutions [b]oth [r]equired [o]fficers [t]o [o]btain [a] [v]alid [w]arrant [b]efore [e]ntering Mr. Elder's [h]ome." Defendant does not challenge the trial court's factual findings regarding this search but only its legal conclusion that "defendant's rights under the Fourth and Fourteenth Amendment have not been violated and that the officers acted pursuant to a valid Court order, valid at the time the officers followed the order as designated to them[;]" defendant raises this challenge pursuant to both the federal and state constitutions.

The State contends that defendant failed to argue violation of the North Carolina Constitution before the trial court such that his state constitutional challenge is not properly preserved before this Court. We disagree, as we conclude that the State's argument is hyper-technical regarding the portions of the North Carolina Constitution defendant cited; it is clear that defendant argued before the trial court that his North Carolina constitutional rights were violated when law enforcement officers searched his home without a warrant or exigent circumstances. Accordingly, we will address defendant's North Carolina constitutional claim.

The State relies upon the ex parte DVPO as providing sufficient legal authority for this search, since the officers were simply carrying out the directive of the district court's ex parte DVPO, which directed that "[a]ny Law Enforcement officer serving this Order shall search the Defendant's person, vehicle and residence and seize any and all weapons found." The State contends that North Carolina General Statute § 50B-3(a)(13) "provided authority for the district court judge to issue the search provision in question." In the alternative, the State argues that if the ex parte DVPO did not properly authorize the search or if it is not sufficient to serve as a de facto "search warrant," the officers executed the ex parte DVPO under exigent circumstances and in good faith, and thus the exclusionary rule should not apply to exclude the items seized in the search.

The district court order in question is a civil ex parte domestic violence order of protection issued in an action completely unrelated to the current criminal action before us regarding the drug-related charges brought against defendant. The State was not a party to the ex parte

DVPO, and no issues regarding that order are before us on appeal. Accordingly, we consider the ex parte DVPO as a valid district court order which was issued in an unrelated civil action.

Defendant contends that the law does not provide an avenue for converting the ex parte DVPO into a search warrant and despite the State's arguments, North Carolina General Statute § 50B-3(a)(13) does not provide authority for the district court to order a general search of a defendant's home without probable cause and without complying with "the provisions of N.C. Gen. Stat. §§ 15A-241 through -259."

North Carolina General Statute § 50B-3(a) sets out the relief which the district court may grant under Chapter 50B:

> (a) If the court, including magistrates as authorized under G.S. 50B-2(c1), finds that an act of domestic violence has occurred, the court shall grant a protective order restraining the defendant from further acts of domestic violence. A protective order may include any of the following types of relief:
>
> (1) Direct a party to refrain from such acts.
>
> (2) Grant to a party possession of the residence or household of the parties and exclude the other party from the residence or household.
>
> (3) Require a party to provide a spouse and his or her children suitable alternate housing.
>
> (4) Award temporary custody of minor children and establish temporary visitation rights pursuant to G.S. 50B-2 if the order is granted ex parte, and pursuant to subsection (a1) of this section if the order is granted after notice or service of process.
>
> (5) Order the eviction of a party from the residence or household and assistance to the victim in returning to it.
>
> (6) Order either party to make payments for the support of a minor child as required by law.
>
> (7) Order either party to make payments for the support of a spouse as required by law.
>
> (8) Provide for possession of personal property of the parties, including the care, custody, and control of

any animal owned, possessed, kept, or held as a pet by either party or minor child residing in the household.

(9) Order a party to refrain from doing any or all of the following:

a. Threatening, abusing, or following the other party.

b. Harassing the other party, including by telephone, visiting the home or workplace, or other means.

b1. Cruelly treating or abusing an animal owned, possessed, kept, or held as a pet by either party or minor child residing in the household.

c. Otherwise interfering with the other party.

(10) Award attorney's fees to either party.

(11) Prohibit a party from purchasing a firearm for a time fixed in the order.

(12) Order any party the court finds is responsible for acts of domestic violence to attend and complete an abuser treatment program if the program is approved by the Domestic Violence Commission.

(13) Include any additional prohibitions or requirements the court deems necessary to protect any party or any minor child.

N.C. Gen. Stat. § 50B-3.

North Carolina General Statute § 50B-3.1, entitled "Surrender and disposal of firearms; violations; exemptions[]," has additional provisions which are relevant for our purpose of determining the extent of the district court's authority to order a general search of defendant, his vehicle, and his residence for weapons.

(a) Required Surrender of Firearms. -- Upon issuance of an emergency or ex parte order pursuant to this Chapter, the court shall order the defendant to surrender to the sheriff all firearms, machine guns, ammunition, permits to purchase firearms, and permits to carry concealed firearms that are in the care, custody, possession, ownership, or control of the defendant if the court finds any of the following factors:

(1) The use or threatened use of a deadly weapon by the defendant or a pattern of prior conduct involving the use or threatened use of violence with a firearm against persons.

(2) Threats to seriously injure or kill the aggrieved party or minor child by the defendant.

(3) Threats to commit suicide by the defendant.

(4) Serious injuries inflicted upon the aggrieved party or minor child by the defendant.

(b) Ex Parte or Emergency Hearing. -- The court shall inquire of the plaintiff, at the ex parte or emergency hearing, the presence of, ownership of, or otherwise access to firearms by the defendant, as well as ammunition, permits to purchase firearms, and permits to carry concealed firearms, and include, whenever possible, identifying information regarding the description, number, and location of firearms, ammunition, and permits in the order.

. . . .

(d) Surrender.--Upon service of the order, the defendant shall immediately surrender to the sheriff possession of all firearms, machine guns, ammunition, permits to purchase firearms, and permits to carry concealed firearms that are in the care, custody, possession, ownership, or control of the defendant. In the event that weapons cannot be surrendered at the time the order is served, the defendant shall surrender the firearms, ammunitions, and permits to the sheriff within 24 hours of service at a time and place specified by the sheriff. The sheriff shall store the firearms or contract with a licensed firearms dealer to provide storage.

(1) If the court orders the defendant to surrender firearms, ammunition, and permits, the court shall inform the plaintiff and the defendant of the terms of the protective order and include these terms on the face of the order, including that the defendant is prohibited from owning, possessing, purchasing, or receiving or attempting to own, possess, purchase, or receive a firearm for so long as the protective order or any

> successive protective order is in effect. The terms of the order shall include instructions as to how the defendant may request retrieval of any firearms, ammunition, and permits surrendered to the sheriff when the protective order is no longer in effect. The terms shall also include notice of the penalty for violation of G.S. 14-269.8.

N.C. Gen. Stat. § 50B-3.1 (2009).

While North Carolina General Statute § 50B-3(a)(13) provides that the district court may "[i]nclude any additional prohibitions or requirements the court deems necessary to protect any party or any minor child" we cannot read "any" as broadly as the State suggests. N.C. Gen. Stat. § 50B-3(a)(13). We first note that North Carolina General Statute § 50B-3(a)(13) must be read *in pari materia* with the rest of the relevant statutory provisions. *See Redevelopment Commission v. Bank*, 252 N.C. 595, 610, 114 S.E.2d 688, 698 (1960) ("It is a fundamental rule of statutory construction that sections and acts *in pari materia*, and all parts thereof, should be construed together and compared with each other.") North Carolina General Statute § 50B-3.1 contains very detailed provisions specifically addressing the authority of the district court as to the surrender, retrieval, return, and disposal of "all firearms, machine guns, ammunition, permits to purchase firearms, and permits to carry concealed firearms[.]" N.C. Gen. Stat. § 50B-3.1(a). North Carolina General Statute § 3.1 repeatedly uses the word "surrender" to describe what a defendant must do. "Surrender" is defined "to yield to the power, control, or possession of another upon compulsion or demand[.]" Merriam-Webster's Collegiate Dictionary 1258 (11th ed. 2003). Thus, a defendant is required "[u]pon service of the order" to "immediately" yield to the law enforcement officer "all firearms, machine guns, ammunition, permits to purchase firearms, and permits to carry concealed firearms[.]" N.C. Gen. Stat. § 50B-3.1(d). North Carolina General Statute § 50B-3.1 simply does not provide any basis for the district court to order a general search of a defendant's person, vehicle, and residence for unspecified "weapons[.]" *See id.* If a defendant specifically refused a law enforcement officer's direct request, in accord with a court order, to surrender a weapon, this may present another issue, but here no such request was made. The district court exceeded its statutory authority by ordering a general search of defendant's person, vehicle, and residence for unspecified "weapons" as a provision of the ex parte DVPO under North Carolina General Statute § 50B-3(a)(13).

In addition, the State's argument implies that even if the district court lacked statutory authority pursuant to North Carolina General Statute

§ 50B-3(a)(13) to order the search, the ex parte DVPO could still serve as a valid search warrant. "[T]he power of the State to conduct searches and seizures is in derogation of . . . Article One, Section 20 of the North Carolina Constitution[.]" *Brooks, Comr. Of Labor v. Enterprises, Inc.*, 298 N.C. 759, 761-62, 260 S.E.2d 419, 421 (1979).

> Our Supreme Court has held that a governmental search and seizure of private property unaccompanied by prior judicial approval in the form of a warrant is *per se* unreasonable unless the search falls within a well-delineated exception to the warrant requirement involving exigent circumstances. The North Carolina Constitution forbids general warrants whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence. The North Carolina Constitution requires that evidence discovered pursuant to an unreasonable search or seizure be excluded.

State v. Cline, 205 N.C. App. 676, 679, 696 S.E.2d 554, 556-57 (2010) (citations, quotation marks, and brackets omitted).

> It is fundamental that a search warrant is not issued except upon a finding of probable cause. Probable cause means that there must exist a reasonable ground to believe that the proposed search will reveal the presence upon the premises to be searched of the objects sought and that those objects will aid in the apprehension or conviction of the offender.

State v. Lindsey, 58 N.C. App. 564, 565, 293 S.E.2d 833, 834 (1982) (citation and quotation marks omitted).

The district court did not make any findings of fact or conclusions of law in the ex parte DVPO regarding probable cause to believe that the search "will reveal the presence upon the premises to be searched of the objects sought and that those objects will aid in the apprehension or conviction of the offender." *Id.* The district court did not mention "probable cause" because the ex parte DVPO was entered in a civil proceeding, not a criminal matter, and the concept of "probable cause" is simply not applicable to this situation, between two private parties. Although there may be many other reasons that an ex parte DVPO is not a *de facto* search warrant, one reason is that the district court made no determination regarding probable cause for the search. *Id.* Furthermore, without a proper search warrant, unless exigent circumstances existed, the

objects seized during the search must be suppressed. *Cline*, 205 N.C. App. at 679, 696 S.E.2d at 556-57.

The State next contends that exigent circumstances existed because the officers needed to perform a "protective sweep" of the home. The State cites *State v. Stover*, 200 N.C. App. 506, 685 S.E.2d 127 (2009) in support of its argument. In *Stover*, officers went to do a " 'knock and talk' " at a house identified by an informant as the place she had purchased marijuana. 200 N.C. App. at 507, 685 S.E.2d at 129. The officers had no warrant to search the house, but when they approached the house, they smelled "a 'strong odor of marijuana' " and saw the defendant, "whose entire upper torso was out of a window." *Id.* This Court stated:

> *In addition to probable cause*, the situation must have presented exigent circumstances in order to justify the officers' entrance into defendant's house. When Officers Crisp and Brown arrived at the residence and after they smelled marijuana, Officer Crisp heard a noise from the back of the house and saw defendant, whose upper torso was partially out a window. Although defendant states that he simply had responded to a call from his neighbor, Officer Crisp could reasonably believe that defendant was attempting to flee the scene. The officers also stated that they were concerned about possible destruction of evidence, due to the smell of marijuana and defendant's possible attempted flight. These facts sufficiently support a conclusion that exigent circumstances existed at the time the officers gained entrance into defendant's house. We hold, therefore, that both probable cause and exigent circumstances existed when officers entered defendant's residence and conducted a protective sweep. Because the officers legally entered defendant's house and saw the evidence seized in plain view during their protective sweep, the trial court did not err in admitting that evidence.

Id. at 513, 685 S.E.2d 132-33 (emphasis added).

There are some factual similarities between *Stover* and this case: officers approached a house in which they found marijuana, and at some point they smelled the marijuana, *see id.* at 507, 685 S.E.2d at 129, but the similarities end there. The State overlooks a crucial point in *Stover*: this Court first determined that "the officers had probable cause to enter defendant's house" before there was a need for a protective sweep. *Id.* at 513, 685 S.E.2d at 132. Here, the State does not contend, nor did the

trial court conclude, that the officers had probable cause to suspect any particular criminal activity when they approached defendant's home.[4] In addition, the trial court made no findings as to any exigent circumstances or the need for a protective sweep.

At last, the State also contends that even if the ex parte DVPO did not properly authorize the search, and if there were no exigent circumstances to justify it, the "good faith exception" applies. There is no doubt that the officers acted entirely in "good faith" as they served the ex parte DVPO and fulfilled the directives of the district court, which included a general search of the defendant's person, residence, and vehicle. While we agree that the good faith exception might have applied if defendant challenged this search only under the United States Constitution, defendant also challenges this search based upon the North Carolina Constitution, and there is a no good faith exception to the exclusionary rule applied as to violations of the North Carolina Constitution. *See State v. Carter*, 322 N.C. 709, 710-24, 370 S.E.2d 553, 554-62 ("We hold that there is no good faith exception to the requirements of article I, section 20 as applied to the facts of this case . . . . [I]t must be remembered that it is not only the rights of this criminal defendant that are at issue, but the rights of all persons under our state constitution. The clearly mandated public policy of our state is to exclude evidence obtained in violation of our constitution. This policy has existed since 1937. If a good faith exception is to be applied to this public policy, let it be done by the legislature, the body politic responsible for the formation and expression of matters of public policy. We are not persuaded on the facts before us that we should engraft a good faith exception to the exclusionary rule under our state constitution." (citation omitted)). In the Editor's Note of North Carolina General Statute § 15A-974, our legislature responded: "Session Laws 2011-6, s. 2, provides 'The General Assembly respectfully requests that the North Carolina Supreme Court reconsider, and overrule, its

4. We note that while the testimony before the trial court indicates that officers arrested defendant at his home based upon a valid arrest warrant for communicating threats, the trial court did not address this issue at all in its findings of fact and the State makes absolutely no argument that the search of defendant's home was in any way related to his arrest or any other actual or suspected criminal activity. Although it appears from the testimony at the hearing that the officers arrested defendant based upon a valid arrest warrant the State makes no argument that the search the officers conducted was incident to the arrest. We again note that the testimonies of the officers as to the details of the search were not consistent, but we must rely upon the facts as found by the trial court, which do not mention any arrest warrant. Furthermore, we again note, the State has not argued any alternative basis in law for the search. The only arguments before this Court in support of the search are based upon the ex parte DVPO.

holding in *State v. Carter* that the good faith exception to the exclusionary rule which exists under federal law does not apply under North Carolina State law.' " N.C. Gen. Stat. § 15A-974, Editor's Note (2011). The legislature specifically adopted a good faith exception in certain situations regarding statutory violations, but did not address constitutional violations, instead deferring to the Supreme Court in its session laws. *See* N.C. Gen. Stat. § 15A-974(a)(2). At this time, our Supreme Court has not overruled *Carter*, and "[w]e are bound by precedent of our Supreme Court[.]" *State v. Pennell*, ___ N.C. App. ___, ___, 746 S.E.2d 431, 441 (2013). We realize that the legislature recently adopted the session law requesting that the Supreme Court overrule *Carter* in 2011, and it is possible that the Court has not yet had an appropriate opportunity to address this issue. This case could potentially present such an opportunity, should the State petition for discretionary review of this ruling, but we are not permitted to anticipate or predict what the Supreme Court might do; we are bound by the existing precedent of *Carter*. *See id.* Accordingly, there is no good faith exception to the exclusionary rule as to violations of the North Carolina State Constitution.[5] *See Carter*, 322 N.C. 709, 710-24, 370 S.E.2d 553, 554-62.

As defendant's premises were searched without a search warrant and without exigent circumstances, and as the good faith exception does not apply to evidence obtained in violation of the North Carolina Constitution, we conclude that the wrongfully seized evidence should have been excluded; *see Cline*, 205 N.C. App. at 679, 696 S.E.2d at 556-57, accordingly, defendant's motion to suppress should have been allowed.

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5. We note that this Court has stated that it is unclear whether there is a good faith exception to the exclusionary rule for violations of the North Carolina Constitution; however, we believe the language of *Carter* is clear that such an exception does not currently exist. *See State v. Banner*, 207 N.C. App. 729, 732-33 n. 7, 701 S.E.2d 355, 358 n.7 (2010) ("This is known as the good-faith exception. The *Leon* Court explained that suppression of evidence is only required when doing so will further the goal of the exclusionary rule--deterrence. There is disagreement over whether there is such an exception to the North Carolina Constitution. Thus, it is possible that evidence not excluded by the federal constitution might be excluded by the North Carolina Constitution." (Citation and quotation marks omitted.) Footnote seven goes on to provide, "*Compare Carter*, 322 N.C. at 722-24, 370 S.E.2d at 561-62 (refusing to allow a good-faith exception to the North Carolina Constitution with respect to non-testimonial identification orders), with *State v. Garner*, 331 N.C. 491, 506-08, 417 S.E.2d 502, 510-11 (1992) (rejecting the notion that Article I, Section 20 of the North Carolina Constitution provides more protection than the Fourth Amendment to the United States Constitution while approving the use of the inevitable discovery rule (Citation omitted.))."

IV. Conclusion

For the foregoing reasons, we vacate the judgment entered upon defendant's guilty plea and remand this case for entry of an order allowing defendant's motion to suppress.

VACATED and REMANDED.

Judge McGEE concurs.

BRYANT, Judge, dissenting.

In vacating the trial court's judgment entered upon defendant's guilty plea and directing entry of an order allowing defendant's motion to suppress, the majority states that in issuing the 22 September 2010 DVPO order, the district court "exceeded its statutory authority by ordering a general search of the defendant's person, vehicle, and residence for unspecified 'weapons' as a provision of the ex parte DVPO under . . . . § 50B-3(a)(13)." Because I believe the district court acted within its statutory authority, I respectfully dissent.

Pursuant to North Carolina General Statutes, section 50B-3,

> (a) If the court . . . finds that an act of domestic violence has occurred, the court shall grant a protective order . . . . A protective order may include any of the following types of relief: . . . (13) Include any additional prohibitions or requirements the court deems necessary to protect any party or any minor child.

N.C. Gen. Stat. § 50B-3(a)(13) (2013).

In its 22 September 2010 DVPO, the Mecklenburg County District Court ordered law enforcement officers to "search the Defendant's person, vehicle and residence and seize any and all weapons found." The majority goes to great length to explain why it deems the general authority authorized by section 50B-3(a)(13) not broad enough to support the order. Specifically, the majority relies upon section 50B-3.1(a) as providing a limitation to the authority conferred to the court in section 50B-3(a)(13) by statutory construction rule to read statutory provisions *in pari materia*. However, the authority conferred in General Statutes section 50B-3(a)(13) is broader than that of section 50B-3.1. Where section 50B-3.1 provides a procedure for initially determining the likely existence of firearms and the surrender and disposal of firearms, section 50B-3(a)(13) authorizes a trial court to include in its protective orders "any . . .

prohibitions or requirements the court deems necessary to protect any party or any minor child." N.C.G.S. § 50B-3(a)(13).

In addressing whether the 22 September 2010 DVPO order was proper, the trial court made the following findings of fact:

> The domestic violence [protective] order was issued based on a finding by that Court that the defendant had threatened the plaintiff and that the defendant had threatened to get some gasoline and torch their son's preschool, her house, the plaintiff, and her sister's house and also stated that I'm going to get all of you and that "You won't f**king stop me, the police won't f**king stop me."
>
> The findings of fact also include the finding that the defendant had a history of substance abuse and mental illness and that the defendant also made threats to anyone attempting to go into the marital residence.

As noted, there was certainly probable cause to search incident to the lawful arrest for communicating threats, which was not considered by the trial court as a basis for the denial of the motion to suppress; likewise, the State did not argue that the search incident to service of the arrest warrant provided an additional basis. So, I will not further address it.

However, because the district court had authority to order the search of defendant's residence in its 22 September 2010 DVPO pursuant to section 50B-3(a)(13), the law enforcement officers acted properly in response to that authority such that the resulting search and seizure of contraband was proper. For this reason, I would affirm the order of the trial court denying defendant's motion to suppress the seizure of contraband from defendant's residence due to said search and leave undisturbed the trial court's judgment entered pursuant to defendant's plea of guilty to the charges of manufacturing marijuana and possession of drug paraphernalia.

STATE OF NORTH CAROLINA
v.
CHARLES ANTHONY McGRADY

No. COA13-330

Filed 21 January 2014

1. Evidence—expert testimony—"use of force"—scientific knowledge—Rule 702

The trial court did not abuse its discretion and violate defendant's right to present a defense in a first-degree murder trial by excluding expert testimony offered by defendant regarding the doctrine of "use of force." Even assuming that the doctrine of "use of force" constituted scientific knowledge, the court's decision was well-reasoned, especially given the requirements set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, invoked by amended Rule 702 of the North Carolina Rules of Evidence.

2. Evidence—witness testimony—decedent's character—proclivity for violence

The trial court did not err and violate defendant's right to present a defense in a first-degree murder trial by excluding under N.C.G.S. § 8C-1, Rule 404 the testimony of a defense witness who addressed the decedent's alleged proclivity toward violence. The witness's testimony did not constitute evidence of the decedent's character for violence. Furthermore, the testimony failed to show that defendant was aware of any anger issues or the alleged violent nature of the decedent and there was ample direct evidence regarding the altercation between the decedent and defendant.

Appeal by Defendant from judgment entered 8 August 2012 by Judge R. Stuart Albright in Wilkes County Superior Court. Heard in the Court of Appeals 9 October 2013.

Attorney General Roy Cooper, by Assistant Solicitor General Gary R. Govert, for the State.

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

STEPHENS, Judge.

Factual and Procedural Background

This case arises from the death of James Allen Shore, Jr. ("the decedent"), who was shot by Defendant Charles Anthony McGrady in a field near both individuals' homes. Defendant and the decedent are first cousins and were involved in a number of disputes during the decedent's life. On 6 February 2012, Defendant was charged with first-degree murder. The trial began on Monday, 30 July 2012, and continued through the following Wednesday. The evidence presented at trial tended to show the following:

At the time of the shooting, the decedent lived on the western side of Wiles Ridge Road with his fiancée, Tammy Wood ("Wood"), in Hays, North Carolina. Defendant and his girlfriend, Darlene Kellum, lived on the eastern side of the road, opposite the decedent. Defendant's son, Brandon McGrady ("Brandon"), lived approximately 400 feet to the northwest of his father's home. Defendant's aunt and the decedent's mother, Betty Shore, lived on the western side of the road. The area encompassing these homes is approximately nine acres.

In the early morning hours of 20 December 2011, the decedent took his dog for a walk outside his house. Afterward, he returned home upset and told Wood that Defendant had been shining a light on him. Later that morning, around 10:00 a.m., the decedent got up, walked his dog to his mother's house, and told her the same thing. He was wearing a knife on his waist, attached by a rope, and carrying a walking stick. After talking with his mother, the decedent walked back toward his house with his dog. On the way, he came in contact with Defendant and Defendant's son, Brandon, who were riding together in a golf cart to get the mail. Defendant was seated in the driver's seat, and Brandon was seated in the passenger seat. Defendant was carrying a loaded, 9-millimeter Beretta pistol in his right pocket and an audio cassette player in his left hand. Brandon had a loaded AR-15 semi-automatic rifle between his legs.

While Defendant and Brandon were checking the mail, they saw the decedent walking toward the golf cart. Shortly thereafter, Defendant and the decedent started arguing, and Defendant began recording with his cassette player. Speaking to the decedent, Defendant asked, "Do you have anything to add about murdering my family last night?" The decedent responded, "No, I plainly told you." Defendant repeated his question and the decedent told him to "shut the fuck up." More arguing occurred, and Defendant told the decedent to "stay away from us." The decedent responded, "You know I'll whoop your ass and put you on the ground if you try to stab me in the back; now get over here and get

some." Defendant responded by saying, "I'll put you in the grave; in the morgue, in the morgue, motherfucker."

The argument continued, and the decedent put his hands on the golf cart, shaking it. Defendant asked Brandon to give him the AR-15. As Brandon attempted to hand it to his father, the decedent took the AR-15 and stood back, pointing it at Defendant and his son. Brandon got out of the golf cart, but Defendant remained seated. After exchanging more insults with the decedent, Defendant stepped out of the golf cart, pulled out his pistol, and fired approximately seven shots at the decedent in rapid succession.[1] Afterward, Defendant said to the decedent, "What about now, Bozo? What about now, motherfucker, huh?" He then proclaimed that the decedent "attacked us, by God" and returned to his house with his weapons and son.

The decedent died shortly thereafter, at 12:35 p.m. According to the medical examiner, some of the bullets entered the decedent's arm and then reentered his torso, making it difficult to calculate an exact number of shots. Other bullets entered the decedent's back. The medical examiner testified that there were gunshot wounds in the upper part of the decedent's buttocks, going from left to right. There were also two gunshot wounds in the decedent's torso. The lower wound was fatal, resulting from a "straight-on shot" into the decedent's back that went through his lung and into his heart.

Defendant was eventually taken into custody and charged with first-degree murder. At trial, Defendant testified that the decedent was pointing the AR-15 at Brandon's head and he shot the decedent "out of instinct, to protect my son." At the close of all the evidence and after the parties' arguments, the trial court instructed the jury on, *inter alia*, self-defense and defense of a family member. On 8 August 2012, Defendant was convicted of first-degree murder and sentenced to life imprisonment without parole. He gave notice of appeal that same day.

Discussion

Defendant makes two arguments on appeal. First, he contends that the trial court abused its discretion by excluding the expert testimony offered by Defendant regarding the doctrine of "use of force," in violation of his right to present a defense. Second, Defendant asserts that the trial court erred by preventing him from introducing evidence of the decedent's "proclivity toward violence based on his reputation and his previous violent actions." We find no error.

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1. The shots were fired in 1.82 seconds.

[1] *I. Expert Witness Testimony on Use of Force*

> It is well-established that trial courts must decide preliminary questions concerning the qualifications of experts to testify or the admissibility of expert testimony. . . . In this capacity, trial courts are afforded wide latitude of discretion when making a determination about the admissibility of expert testimony. Given such latitude, it follows that a trial court's ruling on the qualifications of an expert or the admissibility of an expert's opinion will not be reversed on appeal absent a showing of abuse of discretion.

Howerton v. Arai Helmet, Ltd., 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004) (citations and quotation marks omitted). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

A. Voir Dire

On 30 July 2012, the State filed a motion *in limine* to exclude the testimony of Dave F. Cloutier. A *voir dire* hearing on that motion was held at trial. During the hearing, Cloutier testified on the "science" of "use of force" as applied to the facts of this case. Specifically, he discussed the concepts of (1) "reaction time," (2) an individual's response to perceived lethal and nonlethal force, (3) "force variables," (4) "preattack cues," and (5) "perceptual narrowing." Cloutier described "reaction time" as "the time it takes [to react] once the brain has perceived a threat — [the perception of such a threat is] usually visual, by the eyes, although it could be with other senses."[2] He defined "force variables" as

> circumstances and events that would . . . influence someone's decision of a use of force that was necessary to overcome a perceived threat. That could include the actual weapons involved, the number of weapons, the number of individuals, the environment, the time of day, the lighting, any number of variables.

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2. He elaborated: "[B]y the time the individual perceives a threat, recognize[s] it as a threat, and makes the decision to begin to use some technique, tactic, or method to either flee or fight[, i]t usually takes the average person about three-quarters of a second to begin to react to some stimulus that they perceive as a threat. So we utilize that reaction time in analyzing these various cases."

"Pre-attack cues" are "those exhibitions by an individual which an individual would actually perceive or view and make the assumption that an attack was likely." For example, "a glaring look in [an individual's] face, a clinched jaw, . . . clinched fist," or bringing a weapon up as if to fire. Finally, "perceptual narrowing" is "the reason people have a tendency to not have a total recall of what actually may have happened [during an altercation]." According to Cloutier, perceptual narrowing could result in difficulty remembering, for example, "the number of shots that may have been fired in an actual lethal encounter."

Regarding his experience and training in the field, Cloutier testified that he had worked in "use of force" since January of 1991. At the time of the trial, he was a "private citizen" who provided "expert witness services in regards to use of force . . . ." Before that, he worked for the North Carolina Department of Justice as an instructor "for subject control and arrest techniques for law enforcement training . . . " and served in the military. He holds a bachelor of science degree in criminal justice from North Carolina Wesleyan College and is a graduate of the FBI National Academy. He has held certifications in (1) firearms instruction, (2) subject control and arrest techniques, (3) specialized subject control, and (4) unarmed self-defense. At the time of trial, however, he was certified only as an "FBI defensive tactics instructor . . . ." Before the trial, Cloutier had been admitted as an expert approximately twenty-two times in state and federal court. Cloutier does not have a Ph.D or any medical degree.

Applying the use of force doctrine to the facts in this case, Cloutier offered the following observations: (1) The decedent exhibited a number of pre-attack cues that might have indicated a forthcoming assault. (2) "[A]ge, gender, size, environment, use of a weapon, type of weapon, number of weapons, and . . . number of subjects" were "use of force variables" present in this case and, along with the pre-attack cues, these factors were "consistent with exhibition by an individual that an attack was likely imminent." (3) The rounds fired at the decedent were fired in "somewhere around 1.8 seconds . . . [, meaning] it's very possible and likely that during the course of firing in that 1.8 seconds that [the decedent] could have, in fact, [reacted and] turned 90 to 180 degrees, or, in fact, could have turned 360 degrees," accounting for the injuries in his side and back. In addition, (4) Defendant was possibly affected by perceptual narrowing.

When Cloutier was questioned about the scientific basis for his opinions, he testified that his knowledge came from published articles in the field of use of force and the training he received "by some of

those authors and studies that I have myself been involved in . . . ." He explained that the "Justice Academy" uses "a number of tests . . . to look at various principles of use of force . . . ." According to Cloutier, this information is regularly relied on by people in the field. When asked to explain the reliability of the information described in his testimony, Cloutier explained:

> The tests, for example, that I have been a part of performing and been involved in with the Justice Academy . . . measure the physiological results of an individual under stress and their reaction time; once they perceive a threat, how long it takes to react and what type of reaction they have. Those results of those studies that we have performed at the Justice Academy are consistent with the studies that have been performed and published on a national basis.

According to Cloutier, these tests have "remained consistent over time." When asked to describe the "known or potential rate of error," however, Cloutier admitted that he did not know.[3]

At the end of the hearing, the trial court sustained the State's objection and excluded Cloutier's testimony in its entirety. The court pointed out that (1) much of Cloutier's report constituted impermissible witness bolstering, (2) certain of Cloutier's opinions were based on medical knowledge that he was not qualified to discuss, (3) Cloutier's opinion on use of force variables would not be helpful to the jury because most individuals are able to recognize pre-attack cues and other use of force variables, and (4) Cloutier is not competent to testify about reaction times. In addition, the court determined that Cloutier's "testimony [was] not based on sufficient facts or data. . . . [,] not the product of reliable principles or methods. . . . [, and] simply a conclusory approach that [could not] reasonably assess for reliability." The court noted that Cloutier's testimony had not been subject to peer review, Cloutier had no knowledge of a potential rate of error regarding any of the use of force factors, and Cloutier did not recognize or apply the variables that could have affected his opinions in the case. As a result, the court concluded that Cloutier's "opinions . . . [were] . . . based on speculation. He[was] just guessing and overlooking a very important part of what could very well affect his opinions in this case." It also found, "[n]otwithstanding all those findings," that the probative value of Cloutier's testimony was "substantially outweighed by the danger of unfair prejudice,

3. Cloutier later stated: "I have not done[a] statistical analysis on any of these studies or read a statistical analysis."

confusion of the issues, or misleading the jury" under Rule 403 of the North Carolina Rules of Evidence.

B. Legal Background

Rule 702 states, in pertinent part, that

> (a) 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, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2013). Rule 702(a) was amended to read as quoted above, effective 1 October 2011. 2011 N.C. Sess. Laws 400, § 1(c) (S.B. 33); 2011 N.C. Sess. Laws 283, § 1.3 (H.B. 542). The earlier version of the rule did not include the criteria listed in subsections (1)–(3), but was otherwise the same. *See id.*

Though our appellate courts have not addressed in detail the significance of the October 2011 amendment to Rule 702, this Court has noted that the current, amended "language . . . implements the standards set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579,[] 125 L. Ed. 2d 469 (1993)." *Wise v. Alcoa, Inc.*, __ N.C. App. __, __ n.1, __ S.E.2d __, __ n.1 (2013); *see also State v. Hudson*, __ N.C. App. __, 721 S.E.2d 763 (2012) (unpublished opinion), *available at* 2012 WL 379936. That observation comports with the bill analysis provided to the Senate Judiciary Committee which reviewed the amendment. *See* Committee Counsel Bill Patterson, 2011–2012 General Assembly, *House Bill 542: Tort Reform for Citizens and Business* 2–3 n.3 (8 June 2011) ("As amended, Rule 702(a) will mirror Federal Rule 702(a), which was amended in 2000 to conform to the standard outlined in *Daubert* . . . ."); *see generally* Fed. R. Evid. 702; *Daubert*, 509 U.S. at 589, 125 L. Ed. 2d at 469. This new language represents a departure from our previous understanding of Rule 702, which eschewed the Supreme Court's decision in *Daubert*. *Howerton*, 358 N.C. at 469, 597 S.E.2d at 693 ("North Carolina

is not, nor has it ever been, a *Daubert* jurisdiction."). Given the changes wrought by our legislature, however, it is clear that amended Rule 702 should be applied pursuant to the federal standard as articulated in *Daubert*.

In the *Daubert* case, the United States Supreme Court defined a gatekeeping role for trial judges. *Daubert*, 509 U.S. at 597, 125 L. Ed. 2d at 485 ("We recognize that [such a role], no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations."). Accordingly, an expert must first base his testimony on "scientific knowledge," which "implies a grounding in the methods and procedures of science," in order for that testimony to be admissible. *Id.* at 590, 125 L. Ed. 2d at 480–81. The Court explained this requirement in detail as follows:

> [T]he word "knowledge" connotes more than subjective belief or *unsupported speculation*. The term applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds. . . . [I]n order to qualify as "scientific knowledge," an inference or assertion *must be derived by the scientific method*.[4] Proposed testimony must be supported by appropriate validation — *i.e.*, "good grounds," based on what is known. In short, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability.

Id. at 590, 125 L. Ed. 2d at 481 (emphasis added). Second, an expert's testimony must assist the trier of fact to understand the evidence or determine a fact in issue. *Id.* at 591, 595, 125 L. Ed. 2d at 481, 483–84. "The focus, of course, must be solely on *principles and methodology*, not on the conclusions that they generate." *Id.* at 595, 125 L. Ed. 2d at 484 (emphasis added).

It is the trial court's responsibility to determine "whether the expert is proposing to testify to (1) scientific knowledge" and whether that knowledge "(2) will assist the trier of fact to understand or determine a fact in issue." *Id.* at 592, 125 L. Ed. 2d at 482. In deciding whether the proffered scientific theory or technique will assist the trier of fact, the trial court may consider, among other things, (1) "whether [a theory

4. The "scientific method" is "[a]n analytical technique by which a hypothesis is formulated and then systematically tested through observation and experimentation." *Black's Law Dictionary* 1463–64 (9th ed. 2009).

or technique] can be (and has been) tested," (2) "whether the theory or technique has been subjected to peer review and publication," (3) "the known or potential rate of error . . . and the existence and maintenance of standards controlling the technique's operation," and (4) whether the theory or technique is generally accepted as reliable in the relevant scientific community. *Id.* at 593–94, 125 L. Ed. 2d at 482–83. This inquiry is "a flexible one," *id.* at 594, 125 L. Ed. 2d at 483–84, and remains reviewable under the abuse of discretion standard. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 147, 139 L. Ed. 2d 508, 519 (1997).

C. Analysis

Defendant argues that the trial court erroneously excluded Cloutier's testimony under Rule 702 and, in doing so, abused its discretion. Specifically, Defendant asserts that "use of force is a science," based on scientific principles and utilized by other experts. He states that concepts like "reaction time" are based on "reliable" studies, which were cited by Cloutier, and points out that Cloutier unearthed a number of "use of force variables that came into play in this situation. . . . Most important[ly], Cloutier explained that [the decedent] could have turned 90 to 180 degrees in 1.8 seconds," the amount of time it took Defendant to fire the shots. Defendant argues that this fact, in particular, could have assisted the jury in determining that Defendant used "defensive force" in the confrontation with the decedent. Defendant also argues that expert testimony "should be liberally admitted" and that the trial court "unfairly interject[ed] itself into the litigation" and disregarded the liberal admission precept. In conjunction with the above argument, Defendant contends that the trial court's decision to exclude Cloutier's testimony violated his constitutional right to present a defense. We disagree.

(1) Rule 702

In *Joiner*, the United States Supreme Court reviewed a trial court's application of the *Daubert* test. 522 U.S. at 136, 139 L. Ed. 2d at 508. The respondent-employee worked as an electrician for the petitioner-employer. *Id.* at 139, 139 L. Ed. 2d at 514. By expert testimony, the employee linked the development of his cancer to his exposure to certain chemicals used by his employer. *Id.* at 139–40, 139 L. Ed. 2d at 514. In providing that testimony, the experts relied on a number of specific scientific studies. *Id.* at 143–44, 139 L. Ed. 2d at 517. Nonetheless, the trial court excluded the proffered testimony on grounds that it did not rise above "subjective belief or unsupported speculation." *Id.* at 140, 139 L. Ed. 2d at 515. On appeal, the circuit court reversed the trial court,

citing a general "preference" for the admission of expert testimony.[5] *Id.* The United States Supreme Court reversed that decision on writ of *certiorari* and affirmed the trial court's original decision to exclude the expert testimony. *Id.* at 141, 139 L. Ed. 2d at 515.

In his argument to the Supreme Court, the employee asserted that the trial court's disagreement with the experts' conclusions was error because the experts had relied on the specific *principles* and *methodology* used in the cited studies, pursuant to the requirements laid down in *Daubert*. *Id.* at 146, 139 L. Ed. 2d at 518. The Supreme Court overruled that argument and stated that, while the focus of a trial court's analysis must be on principles and methodology,

> conclusions and methodology are not entirely distinct from one another. . . . [*N*]*othing* . . . *requires* a [trial court] to admit opinion evidence that is connected to existing data only by the *ipse dixit*[6] of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.

Id. at 146, 139 L. Ed. 2d at 519 (emphasis added). Citing the highly deferential standard afforded to a trial court's decision to exclude or admit expert testimony, the Court concluded that the trial court did not abuse its discretion in excluding the employee's expert testimony and in determining that the analytical gap between the data and the opinion in that case was too great. *Id.*

In this case, just as in *Joiner*, the trial court determined that there was too great an analytical gap between the authorities cited by Cloutier and his offered opinion. Specifically, the court concluded that Cloutier's testimony was not based on sufficient facts or data or the product of reliable principles and methods. The trial court also noted that (1) the testimony served as "simply a conclusory approach that cannot reasonably assess for reliability" and (2) Cloutier had failed to provide any known rate of error or show that any of the referenced studies were the subject of peer review. For those reasons, the trial court determined that Cloutier's testimony was merely "based on speculation" and commented that "[Cloutier] is just guessing and overlooking [variables that] could . . . affect his opinions in this case."

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5. Such "preference" is not unlike the liberal admission precept invoked by Defendant in this case.

6. *Ipse dixit* is Latin for "he himself said it" and defined as "[s]omething asserted but not proved[.]" *Black's Law Dictionary* 905 (9th ed. 2009).

Defendant contests the trial court's conclusions and asserts that it abused its discretion in coming to those conclusions, but does not show how the court's decision was arbitrarily or manifestly unreasonable. Rather, he argues for the reasonableness of a *different* conclusion based on the same evidence.[7] This demonstrates a misunderstanding of the abuse of discretion standard.

The federal courts have traditionally granted "a great deal of discretion" to the trial court when determining whether expert testimony is admissible under *Daubert*. *See*, *e.g.*, *U.S. v. Dorsey*, 45 F.3d 809 (4th Cir. 1995); *Maryland Cas. Co. v. Therm-O-Disc, Inc.*, 137 F.3d 780 (4th Cir. 1998) ("*Daubert* clearly contemplates the vesting of significant discretion in the district court with regard to the decision to admit expert scientific testimony."). As the State points out in its brief, Cloutier provided little data to support the reliability of his proposed methodology. Though Cloutier testified that (1) use of force has been "tested," (2) publications exist in the field,[8] and (3) the theory is "relied upon regularly," he provided no substantive reasons — no specific scientific knowledge, methods, or procedures — to support those assertions. Indeed, unlike the experts in *Joiner*, Cloutier was not even able to cite a single specific study, merely referring to the existence of studies and their authors generally. In addition, when the court asked about the relevant "rate of error," Cloutier admitted that he knew nothing about that factor or how it related to his opinions.

A review of the trial transcript indicates that, in excluding Cloutier's testimony, the trial court properly applied the standard laid down by the Supreme Court in *Daubert*. The court determined that Cloutier's testimony was firmly within the realm of common knowledge and would not be helpful to the jury. The Court pointed out that Cloutier completely lacked medical credentials and provided little evidence regarding the principles or methodology used to come to his conclusions. Therefore, even if we were to assume that the doctrine of "use of force" constitutes scientific knowledge,[9] we see no reason to conclude that the trial court

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7. We also note that Defendant does not address the trial court's determination that the testimony is inadmissible under Rule 403.

8. Cloutier stated that he had read and even participated in some of the studies leading to these publications. Nevertheless, he was completely unable to provide details regarding their content.

9. We do not offer an opinion as to whether it does. We note, however, that Cloutier offered scant evidence to support that fact *in this particular case*. Merely referencing scientific studies and explaining the meaning of apparent scholarly terms like "perceptual narrowing" – without providing a more substantial basis on which to ground one's opinion — does not fit with the *Daubert* Court's intent that expert testimony be based on *scientific knowledge*.

was manifestly unreasonable in determining that Cloutier's knowledge of that doctrine — including the way an individual reacts in a confrontation or the fact that an individual might turn away when a gun is fired — was not helpful to the jury. *See generally Braswell v. Braswell*, 330 N.C. 363, 377, 410 S.E.2d 897, 905 (1991) ("When the jury is in as good a position as the expert to determine an issue, the expert's testimony is properly excludable because it is not helpful to the jury.") (citation omitted). In our view, the court's decision was well-reasoned, especially given the *Daubert* requirements invoked by amended Rule 702. Therefore, Defendant's first argument is overruled, and we affirm the trial court's decision to exclude Cloutier's testimony under Rule 702.

(2) Right to Present a Defense

Defendant also contends that the exclusion of Cloutier's testimony under Rule 702 violated his constitutional right to present a defense under the Sixth Amendment of the United States Constitution and Article I, section 23 of the North Carolina Constitution. We disagree.

The right to present a defense is not absolute. *U.S. v. Prince-Oyibo*, 320 F.3d 494, 501 (4th Cir. 2003). Criminal defendants do not have a right to present evidence that the trial court, in its discretion, deems inadmissible under the rules of evidence. *See id.* (citing *Taylor v. Illinois*, 484 U.S. 400, 410, 98 L. Ed. 2d 798 (1988) ("The accused does not have an unfettered Sixth Amendment right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.") (brackets omitted)). Indeed, only rarely has the Supreme Court "held that the right to present a complete defense [is] violated by the exclusion of defense evidence under a state rule of evidence." *Nevada v. Jackson*, __ U.S. __, __, 186 L. Ed. 2d 62, 66 (2013). Because we have determined that the trial court excluded Cloutier's testimony within the bounds of our rules of evidence, we hold that Defendant's constitutional right to present a defense was not violated. Defendant's second argument is therefore overruled.

II. Character Evidence

[2] Defendant also argues that the trial court erred in excluding the testimony of Dr. Jerry Brittain, who addressed the decedent's alleged proclivity toward violence. We disagree.

A. Voir Dire

At trial, Defendant called Dr. Brittain to the stand as a lay witness. The State objected, and the trial court conducted a *voir dire* examination.

On *voir dire*, Dr. Brittain discussed meetings he held with the decedent in June and July of 2011, approximately one year before the decedent's death. Referencing his notes from those meetings, Dr. Brittain testified that the decedent was angry and frustrated with many "areas" of his life. By his second meeting with the decedent, Dr. Brittain had begun "to surmise" that the decedent was dealing with "aggression," "thoughts of violence," and "conflict that he had with the people that were around him." In that meeting, Dr. Brittain and the decedent discussed "the violence," and Dr. Brittain stressed the need for the decedent to avoid being either the victim or the perpetrator in a confrontation. Dr. Brittain also referred to the decedent as "a very angry man," but noted that he was taking his medication, "ha[d] not perpetrated violence," and, in the decedent's words, was "trying to not become angry and harm someone." When asked about the source of the decedent's anger, Dr. Brittain testified that it "permeated all of his life," but noted that the source was not specifically related to Defendant, who was not discussed during the meetings.

At the conclusion of *voir dire*, the trial court excluded Dr. Brittain's testimony in its entirety on relevance grounds and under Rules 403 and 404(a)(2) of the North Carolina Rules of Evidence.

B. Legal Background and Analysis

Defendant argues that the trial court erred in excluding Dr. Brittain's testimony, "[s]imply put, [because] a violent man is more likely to be the aggressor than a peaceable man." Defendant also argues that this error prevented him from offering important evidence in his defense and, thus, "denied him his constitutional right to present a defense." We are unpersuaded.

(1) Rule 404(a)(2)

Rule 404 provides, in pertinent part, that:

> (a) . . . Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
>
> . . .
>
> (2) . . . Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the

> victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor.

N.C. Gen. Stat. § 8C-1, Rule 404.

Character evidence is evidence of "[t]he peculiar qualities impressed by nature or by habit on the person, which distinguish him from others." *Bottoms v. Kent*, 48 N.C. (3 Jones) 154, 160 (1855). A person's character "can only be known indirectly . . . by inference from acts. A witness called to prove them, can only give the opinion which he has formed by his observations of the conduct of the person under particular circumstances . . . ." *Id.* As distinct from reputation, "character is what a man *is*" and "reputation is what others *say* he is." Kenneth S. Broun, 1 *Brandis & Broun on North Carolina Evidence* 253 (6th ed. 2004) (emphasis in original).

"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). Such evidence may be admitted, however, when testimony regarding a *pertinent character trait* of the victim (here, the decedent) is offered by the defendant in a criminal case. N.C. Gen. Stat. § 8C-1, Rule 404(a)(2). In cases where self-defense is at issue, evidence of a victim's violent or dangerous character may be admitted under Rule 404(a)(2) when "(1) such character was known to the accused, or (2) the [other] evidence of the crime is *all circumstantial* or the nature of the transaction is in doubt." *State v. Winfrey*, 298 N.C. 260, 262, 258 S.E.2d 346, 347 (1979) (emphasis added); *see also State v. Blackwell*, 162 N.C. 672, 78 S.E. 316 (1913) ("[Evidence] is . . . competent to show the character of the deceased as a violent and dangerous man when the [remaining] evidence is *wholly circumstantial* and the character of the encounter is in doubt.") (emphasis added). This is because the evidence of the victim's violent character "tends to shed *some light* upon who was the aggressor since a violent man is more likely to be the aggressor than is a peaceable man." *Winfrey*, 298 N.C. at 262, 258 S.E.2d at 348 (emphasis added).

In this case, the court excluded Dr. Brittain's testimony under Rule 404(a)(2) because the witness "didn't testify as to any trait or character. He was simply testifying as to a fact. . . . He . . . was merely reciting what the facts were when the victim presented himself [during the meetings]." Defendant argues, however, that Dr. Brittain's testimony should have been admitted pursuant to *State v. Everett*, 178 N.C. App. 44,

630 S.E.2d 703 (2006), *affirmed*, 361 N.C. 217, 639 S.E.2d 442 (2007). In that case, the defendant, arguing that she killed the victim in self-defense, presented evidence that the victim had committed a separate violent act. *Id.* at 52, 630 S.E.2d at 708. The trial court excluded that testimony as irrelevant. *Id.* at 50, 630 S.E.2d at 707. We reversed the trial court's decision under *Winfrey* and Rule 404(a)(2) and held that the evidence of the violent act was relevant and admissible, in part, because it was known by the defendant. *Id.* Defendant argues under *Everett* that, "[w]ithout the testimony from Dr. Brittain, the jury was unable to understand how [the decedent] was the aggressor. This evidence established, through specific examples, that [the decedent] was a violent man and likely was the aggressor. The exclusion of this evidence by the trial court was error." We disagree.

Dr. Brittain's testimony — as the trial court noted in excluding it under Rule 404(a) — does not constitute evidence of the decedent's character for violence. When asked about his meetings with the decedent, Dr. Brittain testified to the fact that the decedent was an angry person who had thoughts of violence. He did not, however, testify to his opinion that the decedent was, inherently, a man of violent character or even a violent person as distinguished from others. In fact, contrary to Defendant's argument on appeal, Dr. Brittain affirmed on cross-examination that "there was no evidence that [the decedent] was actually committing any acts of violence[.]" Rather, "[h]e was just generally frustrated at the system." Because Rule 404(a)(2) only allows testimony regarding a pertinent character trait, the trial court did not err in excluding Dr. Brittain's testimony as inadmissible on that basis.

To the extent that Dr. Brittain's testimony could be construed as character evidence, however, we note that this case is distinct from *Everett*. In *Everett*, the evidence of the victim's violent act fulfilled one of the *Winfrey* requirements — it was known by the defendant — and, therefore, increased the likelihood that the defendant acted out of self-defense. Dr. Brittain's testimony met neither requirement. First, it failed to show that Defendant was aware of any anger issues or the alleged violent nature of the decedent. Indeed, Dr. Brittain clearly stated that the source of the decedent's anger was not Defendant and that Defendant was not even discussed. Second, there is ample direct evidence regarding the altercation between the decedent and Defendant. The altercation was recorded on Defendant's tape recorder and was the subject of eyewitness testimony. Such evidence is not circumstantial and, therefore, does not allow the trial court to admit the evidence under Rule 404(a)(2). Accordingly, Defendant's argument is overruled.

(2) Rules 401, 402, and 403

Defendant also argues that the trial court erred in excluding Dr. Brittain's testimony as to Defendant's character for violence because "[the decedent's alleged] violent character is relevant as it relates to whether [he] was the aggressor" and is not unfairly prejudicial under Rule 403 because "[i]ts only prejudice to the State was its relevance to the defense." This argument is without merit.

Rule 401 of the North Carolina Rules of Evidence states that " '[r]elevant 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. Rule 402 provides that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly or by these rules. Evidence which is not relevant is not admissible." N.C. Gen. Stat. § 8C-1, Rule 402 (emphasis added). Rule 403 provides that "[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." N.C. Gen. Stat. § 8C-1, Rule 403. "We review a trial court's decision to exclude evidence under Rule 403 for abuse of discretion." *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008).

Because we have already determined that the trial court properly excluded Dr. Brittain's testimony as not admissible under Rule 404(a)(2), we need not address these alternative bases for exclusion. Nonetheless, we note that Defendant's argument does not provide any reason to believe that Judge Albright acted arbitrarily or was manifestly unreasonable in determining that "any probative value of this evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Defendant's argument is overruled.

(3) Constitutional Right to Present a Defense

As a part of his preceding arguments, Defendant contends that the trial court's exclusion of Dr. Brittain's testimony requires a new trial because it violated his constitutional right to present witnesses in his own defense under Article VI of the United States Constitution and Article 1, Section 23 of the North Carolina Constitution. We disagree.

As we noted in section I(C)(2), the right to present a defense is not absolute and does not apply when a trial court properly deems evidence inadmissible under the rules of evidence. Because we have determined that Dr. Brittain's testimony was properly excluded by the trial court under Rule 404(a)(2), this argument is overruled.

NO ERROR.

Judges CALABRIA and ELMORE concur.

STATE OF NORTH CAROLINA
v.
LUCIUS ELWOOD McLEAN

No. COA13-693

Filed 21 January 2014

Pretrial Proceedings—defense motion for DNA testing—absence of DNA—not significant to defendant's defense

The trial court did not err in an attempted first-degree murder case by denying defendant's motion for DNA testing pursuant to N.C.G.S. § 15A-267(c). The absence of defendant's DNA on the shell casings at issue, if established, would not have had a logical connection or have been significant to defendant's defense that he was in Maryland at the time of the shooting. Furthermore, to the extent that defendant's motion sought to establish a lack of DNA evidence on the shell casings, such a motion was not proper under N.C.G.S. § 15A-267(c).

Appeal by defendant from judgments entered 21 August 2012 by Judge William Z. Wood, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 6 November 2013.

Attorney General Roy Cooper, by Assistant Attorney General Ward Zimmerman, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Andrew DeSimone, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Following final judgments as to the charges against him, Lucius Elwood McLean ("Defendant") appeals a pre-trial order entered 4 March 2010 by Judge Ronald E. Spivey in Guilford County Superior Court. The challenged order denied Defendant's pre-trial motion for DNA testing pursuant to N.C. Gen. Stat. § 15A-267(c) (2013). Defendant contends that the trial court erred as a matter of law in denying his motion because the absence of his DNA on shell casings found at the scene, if established, would have been relevant to the State's investigation and material to his defense. For the following reasons, we find no error and affirm the trial court's order.

I. Factual & Procedural History

On 20 August 2012, Defendant was convicted on two counts of attempted first-degree murder, two counts of assault with a deadly weapon with the intent to kill inflicting serious injury, one count of discharging a firearm into an occupied building, and one count of possession of a firearm after having been convicted of a felony.[1] The evidence presented at trial tended to show the following.

On 16 April 2008, Defendant agreed to rent commercial property located at 2801 Patterson Avenue in Greensboro from Stuart Elium ("Mr. Elium"). Defendant indicated that he needed the property to open an arcade. Defendant gave Mr. Elium a down payment and entered the space. Mr. Elium testified that Defendant arrived at their meeting in a "bronzish Jaguar."

Immediately next door to Defendant's property was an established night club operated by Reginald Green ("Mr. Green") called "Club Touch." Mr. Green also rented from Mr. Elium. Club Touch generally operated between 10 p.m. and 2 a.m. and served liquor. Derry George ("Mr. George") was the club's manager. Robert Willis ("Mr. Willis") and Mark Stephens ("Mr. Stephens") worked security.

On 17 April 2008, Mr. George arrived for work between 7 and 8 p.m. and noticed a group of men sitting outside the club next to Defendant's property. When Mr. George went inside Club Touch, he noticed that a break-in had occurred and that equipment had been stolen. Mr. George called the police, who investigated the break-in and questioned the men sitting outside Defendant's property. The men told the police that they were waiting on someone to come let them into Defendant's building.

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1. Defendant stipulated to a prior felony conviction at trial.

An hour or so later, Defendant arrived on the scene and spoke to Mr. George about the incident. Mr. George testified that Defendant's men were upset about being questioned in connection to the break-in, so Mr. George wanted to let Defendant know that there were no hard feelings. Defendant was cordial to Mr. George and the two talked about Defendant's plan for opening a business next door. Defendant told Mr. George that he wanted to open a "2 to 6"—meaning that Defendant's establishment would be open from 2 a.m. to 6 a.m. and be a place where Club Touch's patrons could go after the club closes. After their conversation, Mr. George telephoned Mr. Green to inform him of Defendant's plans and expressed concern that Defendant's proposed business might affect Club Touch's liquor license.

At around 10 p.m. that same night, Defendant and his men placed balloons and a sign outside their building that read "The Party is Here" and played music loudly from their establishment. Mr. George indicated that Defendant arrived that evening in a "gold-colored" Jaguar. Mr. George and Mr. Willis testified that as the night was coming to an end, Defendant and his men approached Club Touch and yelled, "We're hood around here" and "It's hood out here. Going to be real."

The next morning, Mr. Green called Mr. Elium to discuss what had happened. Thereafter, Mr. Elium informed Defendant that their rental arrangement was not going to work out. Mr. Elium returned Defendant's money, reclaimed the keys to the property, and assisted Defendant in vacating the premises.

On 20 April 2008, at approximately 2:45 a.m., multiple cars arrived at Club Touch, circled around the back of the club, and pulled up to the entrance. Among the cars was Defendant's gold Jaguar. Mr. George, Mr. Willis, and Mr. Stephens were all standing at the front door.

Mr. George, Mr. Willis, and Mr. Stephens testified that Defendant emerged from the gold Jaguar and asked for the owner of the club. During a heated exchange, Defendant stated, "It's real" and "If I can't have my club open, y'all can't have y'all's open." Mr. Willis testified that upon hearing these words, he laughed at Defendant. Thereafter, Defendant stated, "Man, it's real out here . . . you think I'm playing." Defendant then popped his trunk, retrieved a long black SKS rifle, and said, "Oh, you're not scared." Defendant then cocked the gun and stated, "Oh, you're really not going to run." At that point, Mr. George and Mr. Willis retreated into the Club for cover, and Mr. Stephens retreated to his pickup truck in the parking lot.

Thereafter, multiple shots were fired into the club from outside the entryway. Mr. George was shot in the hand and in the side of his body. Mr. Willis was shot in the leg. Another man from Defendant's entourage opened fire on the club with a handgun. After opening fire on the club, Defendant and his entourage fled the scene.

Police arrived on the scene around 3:15 a.m. and began their investigation. Six 7.62 caliber shell casings consistent with an SKS rifle and twelve .45 caliber shell casings were recovered from the crime scene. The guns were never found. In the days that followed, Mr. George, Mr. Willis, and Mr. Stephens all identified Defendant as the shooter in a photo array with near certainty. They testified to the same in open court.

On 24 April 2008, police stopped Defendant's sister in the gold Jaguar and seized the vehicle. During an inventory of the vehicle, police recovered a live 7.62 caliber bullet from underneath the passenger seat. No identifiable fingerprints were found on the bullet. After processing the vehicle, the police called Defendant's sister to retrieve it. However, Defendant's sister failed to pick the vehicle up and it was released to a local auto dealer.

On 10 July 2008, police received information that Defendant had been spotted at a local apartment complex. Acting on this information, the police were able to locate and stop Defendant, who was driving the same gold Jaguar.[2] Thereafter, Defendant was arrested and taken into custody.

Prior to trial, Deputy Sheriff James Swaringen ("Deputy Swaringen") was transporting Defendant from the courthouse to the jail when he overheard a conversation Defendant had with another prisoner. Deputy Swaringen testified that Defendant stated, "I can't believe they have me over here for this. I shot the guy in the calf and there wasn't even an exit wound and they've had me sitting up here for 35 months for this? They're just trying to see if I crack being up here so long."

On 20 January 2010, Defendant moved the trial court pursuant to N.C. Gen. Stat. § 15A-267(c) for pre-trial DNA testing of the shell casings recovered from the crime scene. Specifically, Defendant's written motion indicated that he wanted "to test the shell casings to see if there is any DNA material on the shell casings that may be compared to the Defendant." Defendant's written motion requested DNA testing on he following grounds:

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2. It is unclear from the record how or when Defendant reacquired the same gold Jaguar after it was released by the police to a local auto dealer.

1. The Defendant is charged with attempted 1st Degree Murder in that it is alleged on or about April 20th in the early morning hours that the Defendant fired shots into a club in Greensboro injuring three people. Numerous shell casings were found from the weapon discharged outside the club on April 20, 2008.

2. The Defendant intends to plead not guilty and contends that he did not discharge a firearm.

3. The Defendant would like to test the shell casings to see if there is any DNA material on the shell casings that may be compared to the Defendant.

At the motion hearing, counsel for Defendant argued as follows:

> It's my understanding that the State has these shell casings in their custody. We've talked about a plea bargain in this case. There's not going to be a plea bargain in this case. My client says he's not guilty of this offense. In order to pursue all efforts to show that he's not guilty, I'd like to have the opportunity to test these shell casings. There may or may not be DNA on the shell casings, but we won't know until we test them; until we try. So we'd like to have the opportunity to test those shell casings to see if there's any DNA evidence on there and have it compared to [Defendant's]. So that's what—I think that's a reasonable request, Your Honor.

Defendant also moved the trial court to order other discovery including fingerprint testing on the shell casings at issue. At the motion hearing, counsel for Defendant indicated that no fingerprint testing had been performed on the shell casings to date.

By order dated 4 March 2010, the trial court denied Defendant's motion for pre-trial DNA testing. In the same order, the trial court ordered that the shell casings at issue be subjected to fingerprint testing "to determine what fingerprint evidence, if any, was present and whether or not any fingerprint evidence found on those shell casings match the Defendant's prints." No fingerprints were found.

Thereafter, Defendant was tried and convicted on all counts and sentenced to two consecutive terms of 251 to 311 months in prison for the attempted first-degree murder convictions and to concurrent sentences for the remaining convictions. Defendant gave timely notice of appeal in open court.

II. Jurisdiction

Defendant's post-judgment appeal of the trial court's order denying Defendant's motion for DNA testing lies of right to this court pursuant to N.C. Gen. Stat. §§ 7A-27(b), 15A-1444(a) (2013). *See also* N.C. Gen. Stat. § 15A-270.1 (2013).

III. Analysis

The only question presented to this Court by Defendant's appeal is whether the trial court erred in its application of N.C. Gen. Stat. § 15A-267(c). Defendant contends that pursuant to the cited statute, the trial court was required to order pre-trial DNA testing on shell casings found at the crime scene. We disagree.

"Alleged statutory errors are questions of law, and as such, are reviewed *de novo*." *State v. Mackey*, 209 N.C. App. 116, 120, 708 S.E.2d 719, 721 (2011) (internal citation omitted). " 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen*, Ltd. P'ship, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

N.C. Gen. Stat. § 15A-267(c) provides:

> Upon a defendant's motion made before trial in accordance with [N.C. Gen. Stat. §] 15A-952, the court shall order the Crime Laboratory or any approved vendor that meets Crime Laboratory contracting standards to perform DNA testing . . . upon a showing of all of the following:
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> (1) That the biological material is relevant to the investigation.
>
> (2) That the biological material was not previously DNA tested or that more accurate testing procedures are now available that were not available at the time of previous testing and there is a reasonable possibility that the result would have been different.
>
> (3) That the testing is material to the defendant's defense.

See also N.C. Gen. Stat. § 15A-269(a) (2013) (outlining similar requirements for a post-conviction motion for DNA testing). Accordingly, by the plain language of this statute, the burden is on Defendant to make the required showing under subsections (1), (2), and (3) before the trial court. Absent the required showing, the trial court is not statutorily

obligated to order pre-trial DNA testing. *Cf. State v. Foster*, ___ N.C. App. ___, ___, 729 S.E.2d 116, 120 (2012) (describing the required showing of materiality in the post-conviction context as a "condition precedent to a trial court's statutory authority to grant a motion under [N.C. Gen. Stat.] § 15A-269").

Here, Defendant failed to establish the required showing under N.C. Gen. Stat. § 15A-267(c)(1) and (3) in his written motion and before the trial court at the motion hearing.[3] Defendant's written motion stated in cursory fashion that "Defendant intends to plead not guilty and contends that he did not discharge a firearm" and that "Defendant would like to test the shell casings to see if there is any DNA material on the shell casings that may be compared to Defendant." At the motion hearing, defense counsel added: "[i]n order to pursue all efforts to show that he's not guilty . . . we'd like to have the opportunity to test those shell casings to see if there's any DNA evidence on there and to have it compared to [Defendant's]." Thus, before the trial court, Defendant failed to sufficiently demonstrate how the absence of his DNA on the shell casings would be either relevant to the investigation or material to his defense at trial.

Before this Court, Defendant contends that the presence of biological material on the shell casings at issue would have been relevant to the investigation because "such biological material would tend to identify the actual perpetrator." Defendant further contends that the absence of his DNA on the shell casings, if established, would be material to his defense because such a showing would tend to identify someone else as the shooter and corroborate his alibi defense.[4] We address each in turn.

" '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. R. Evid. 401. The State does not challenge Defendant's relevancy argument, and we find it sufficiently persuasive to satisfy the required showing under N.C. Gen. Stat. § 15A-267(c)(1). The presence of DNA evidence on a spent shell casing has some tendency to identify the person who fired the bullet.

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3. The State conceded at the hearing that the shell casings had not been previously tested for DNA, thereby satisfying the showing required by N.C. Gen. Stat. § 15A-267(c)(2).

4. At trial Defendant testified that he was in Maryland attending his cousin's grandmother's funeral at the time of the shooting. Defendant could provide no additional witnesses or evidence corroborating his alibi.

However, while we agree that the presence of DNA evidence on the shell casings at issue would be relevant to the investigation, we disagree that the absence of Defendant's DNA on the shell casings would be material to Defendant's alibi defense in this case.

As used in N.C. Gen. Stat. § 15A-269(a)(1), our Court has adopted the *Brady* definition of materiality. *See State v. Hewson*, ___ N.C. App. ___, ___, 725 S.E.2d 53, 56 (2012) (stating that evidence is "material" for purposes of N.C. Gen. Stat. § 15A-269(a)(1) if "there is a 'reasonable probability' that its disclosure to the defense would result in a different outcome in the jury's deliberation" (quotation marks and citations omitted)). While such a standard is appropriate when evaluating motions made in the post-trial context pursuant to N.C. Gen. Stat. § 15A-269, we find that such a standard is inappropriate when evaluating pre-trial motions made pursuant to N.C. Gen. Stat. § 15A-267(c). Whether a particular piece of DNA evidence would have influenced the outcome of a trial can only be determined after the trial is completed and the judge has had an opportunity to compare that DNA evidence against the cumulative evidence presented at trial.[5] Accordingly, for purposes of applying N.C. Gen. Stat. § 15A-267(c)(3), we resort to the plain meaning of "material" and hold that biological evidence is material to a defendant's defense where such biological evidence has "some logical connection" to that defense and is "significant" or "essential" to that defense. *Black's Law Dictionary* 998 (8th ed. 2004).

Here, we hold that the absence of Defendant's DNA on the shell casings at issue would not be material to his alibi defense. At the outset, we note that a showing of materiality under N.C. Gen. Stat. § 15A-267(c)(3) carries a higher burden than a showing of relevancy under N.C. Gen. Stat. § 15A-267(c)(1). Thus, while the presence of DNA evidence may have relevance to an investigation, it does not follow that such evidence is necessarily material to a defendant's defense at trial.

Defendant contends that the absence of his DNA and a positive showing of someone else's DNA on the shell casings would be material to his alibi defense because it would have "tended to show that someone

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5. Although Defendant waited until after he was convicted to appeal in the instant case, our General Assembly has provided a right to appeal pre-trial orders denying motions for DNA testing on an interlocutory basis. *See* N.C. Gen. Stat. § 15A-270.1 (2013) ("The defendant may appeal an order denying the defendant's motion for DNA testing under this Article, including by an interlocutory appeal."). In such situations, it would be difficult if not impossible for this Court to determine whether disclosure of a DNA test result would have a reasonable probability of changing a jury's verdict.

other than [Defendant] fired the SKS assault rifle[.]"[6] However, the absence of Defendant's DNA from the shell casings would only provide evidence of his absence from the scene if one would otherwise expect to find his DNA on the shell casings in such a situation.[7] Even then, such evidence would only justify the inference that Defendant was absent—it would not provide "essential" or "significant" evidence corroborating Defendant's alibi. Accordingly, we hold that the absence of Defendant's DNA on the shell casings at issue, if established, would not have a logical connection or be significant to Defendant's defense that he was in Maryland at the time of the shooting.

Furthermore, we note like its counterpart in the post-conviction setting, N.C. Gen. Stat. § 15A-267(c) outlines a procedure for the DNA testing of "biological material," not evidence in general. *Cf. State v. Brown*, 170 N.C. App. 601, 609, 613 S.E.2d 284, 288–89 (2005) ("[N.C. Gen. Stat. § 15A-269(a)] provides for testing of 'biological evidence' and not evidence in general. Since defendant desires to demonstrate a lack of biological evidence, the post-conviction DNA testing statute does not apply." (internal citation omitted)), *superseded by statute on other grounds as stated in State v. Norman*, 202 N.C. App. 329, 332–33, 688 S.E.2d 512, 515 (2010). Here, the purpose of Defendant's request for DNA testing is to demonstrate the absence of his DNA on the shell casings at issue. By its plain language, N.C. Gen. Stat. § 15A-267(c) contemplates DNA testing for ascertained biological material—it is not intended to establish the absence of DNA evidence. It is unknown in this case if there is any biological material that may be tested on the shell casings. Indeed, at the motion hearing, defense counsel stated "[t]here may or may not be DNA on the shell casings, but we won't know until we test them; until we try." Thus, to the extent that Defendant's motion sought to establish a lack of DNA evidence on the shell casings, we hold that such a motion is not proper under N.C. Gen. Stat. § 15A-267(c).

IV. Conclusion

For the foregoing reasons, we affirm the order of the trial court denying Defendant's motion under N.C. Gen. Stat. § 15A-267(c) for pretrial DNA testing.

Affirmed.

Judges ROBERT C. HUNTER and CALABRIA concur.

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6. Defendant's contention assumes the presence of biological material on the shell casings—a premise that has not been established in this case.

7. Such an expectation is undermined by the fact that shooting a gun does not require one to load or handle bullets.

STATE OF NORTH CAROLINA
v.
AUDRA LINDSEY SMATHERS

No. COA13-496

Filed 21 January 2014

1. Search and Seizure—community caretaking doctrine—recognized in North Carolina

The community caretaking doctrine is formally recognized as an exception to the warrant requirement of the Fourth Amendment in North Carolina. The State has the burden of proving that a search or seizure within the meaning of the Fourth Amendment has occurred, that under the totality of the circumstances an objectively reasonable basis for a community caretaking function is shown, and that the public need or interest outweighs the intrusion upon the privacy of the individual. Imminent danger to life or limb is not a required element of the test.

2. Search and Seizure—Fourth Amendment—community caretaking exception—requirements satisfied

The three elements of the community caretaking exception to the Fourth Amendment were satisfied in a driving while impaired case. Applying the exception narrowly, it was uncontested that the traffic stop was a seizure under the meaning of the Fourth Amendment; there was an objectively reasonable basis under the totality of the circumstances to conclude that the seizure was predicated on the community caretaking function of ensuring the safety of defendant and her vehicle; and there was a public need and interest in having the officer seize defendant that outweighed her privacy interest in being free from the intrusion. The officer was able to identify specific facts which led him to believe that help may have been needed, rather than a general sense that something was wrong.

Appeal by defendant from judgment entered 28 July 2012 by Judge Mark E. Powell in Transylvania County Superior Court. Heard in the Court of Appeals 9 October 2013.

Attorney General Roy Cooper, by Assistant Attorney General Martin T. McCracken, for the State.

Leslie C. Rawls for defendant-appellant.

HUNTER, Robert C., Judge.

Audra Lindsey Smathers ("defendant") appeals from judgment entered pursuant to her *Alford* plea to driving while impaired. Specifically, defendant challenges the order entered by the trial court denying her motion to suppress evidence gathered during a traffic stop. On appeal, defendant argues that the trial court erred by denying her motion because the officer had neither reasonable suspicion nor probable cause to seize her, and the seizure was unreasonable under the Fourth Amendment.

After careful review, we affirm the trial court's order.

Background

The facts of this case are largely undisputed. Shortly after 10:00 p.m. on 27 May 2010, Transylvania Sheriff's Deputy Brian Kreigsman ("Officer Kreigsman") was traveling down Highway 280 in the interior lane adjacent to the center turning lane roughly one car length behind defendant, who was driving a red Corvette in the right lane. Defendant was traveling at speeds close to the posted limit of 45 miles per hour, and Officer Kreigsman did not observe anything illegal or suspicious about her driving.

Officer Kreigsman then saw a large animal run in front of defendant's vehicle. Defendant struck the animal, causing her vehicle to bounce and produce sparks as it scraped the road. Officer Kreigsman pulled his police cruiser behind defendant, who had decreased her speed to about 35 miles per hour, and activated his blue lights. He testified that because he knew Corvettes have a fiberglass body, he stopped defendant to ensure that she and the vehicle were "okay." Defendant continued without stopping after Officer Kreigsman activated his blue lights, so he turned on his siren; defendant continued for about 1.1 to 1.2 miles before stopping.[1] Officer Kreigsman called in for backup after defendant did not immediately stop her vehicle and relayed over the radio that he was making a stop because the vehicle had struck an animal. Deputy Justin Bell ("Deputy Bell") arrived shortly thereafter with other officers.

1. Officer Kreigsman testified that this procedure was not uncommon due to "blue light bandits" in the area who would impersonate police officers by attaching blue lights to their vehicles. It is uncontested that defendant's continued driving did not produce reasonable suspicion of illegal activity.

Once stopped, Officer Kreigsman approached the driver's side of the vehicle and saw defendant crying. She and her passenger told Officer Kreigsman that they had hit a dog. He examined defendant's vehicle and saw that the front had been cracked and damaged, presumably by the collision with the animal. Both Officer Kreigsman and Deputy Bell detected the scent of alcohol coming from defendant. Officer Bell noticed that she also had glassy eyes and slurred speech. He conducted roadside sobriety tests, which defendant failed. After failing the field tests, defendant submitted to roadside breath tests, which produced a positive indication of alcohol consumption. Defendant was then taken into custody and charged with driving while impaired. Later testing showed that her blood alcohol concentration was .18.

Defendant pled guilty to the charge of driving while impaired in District Court and appealed to the Superior Court. She moved to suppress all evidence gathered from Officer Kreigsman's stopping of her vehicle on the ground that he had neither probable cause nor reasonable suspicion to seize her and that the seizure was unreasonable under the Fourth Amendment. The trial court denied defendant's motion. Defendant entered an *Alford* plea on 20 December 2012 and appealed in open court from the judgment and ruling on her motion to suppress.

Discussion

I. The Community Caretaking Doctrine

[1] Defendant's sole argument on appeal is that the trial court erred by denying her motion to suppress. Specifically, she claims that Officer Kreigsman had neither probable cause nor reasonable suspicion to seize her, and the seizure was unreasonable under the totality of the circumstances, thereby violating the Fourth Amendment. The State concedes that Officer Kreigsman had neither probable cause nor reasonable suspicion to seize defendant, but instead asks this Court to adopt a version of the "community caretaking" doctrine to affirm the trial court's order. After careful review, we formally recognize the community caretaking doctrine as an exception to the warrant requirement of the Fourth Amendment, and we hold that Officer Kreigsman's seizure of defendant falls under this exception. Therefore, we affirm the trial court's order denying defendant's motion to suppress.

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).

The Fourth Amendment to the United States Constitution and Article I, Section 20 of the North Carolina Constitution prohibit unreasonable searches and seizures. U.S. Const. amend. IV; N.C. Const. art. I, § 20. Traffic stops are recognized as seizures under both constitutions. *See State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) ("A traffic stop is a seizure even though the purpose of the stop is limited and the resulting detention quite brief.") (quoting *Delaware v. Prouse*, 440 U.S. 648, 653, 59 L. Ed. 2d 660, 667 (1979)). Although a warrant supported by probable cause is typically required for a search or seizure to be reasonable, *State v. Phillips*, 151 N.C. App. 185, 191, 565 S.E.2d 697, 702 (2002), traffic stops are analyzed under the "reasonable suspicion" standard created by the United States Supreme Court in *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968). *Styles*, 362 N.C. at 414, 665 S.E.2d at 439. "Reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence. The standard is satisfied by some minimal level of objective justification." *Id.* (citation and quotation marks omitted). "A court must consider 'the totality of the circumstances—the whole picture' in determining whether a reasonable suspicion to make an investigatory stop exists." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (quoting *U.S. v. Cortez*, 449 U.S. 411, 417, 66 L. Ed. 2d 621, 629 (1981)). "When a defendant in a criminal prosecution makes a motion to suppress evidence obtained by means of a warrantless search, the State has the burden of showing, at the suppression hearing, how the [warrantless search] was exempted from the general constitutional demand for a warrant." *State v. Nowell*, 144 N.C. App. 636, 642, 550 S.E.2d 807, 812 (2001).

Here, the trial court concluded, and the State concedes, that no reasonable articulable suspicion of criminal activity existed when defendant was seized. Officer Kreigsman's seizure of defendant was not predicated on criminal investigation or prevention of any kind; rather, he was checking to make sure that defendant and her vehicle were "okay" after hitting a large animal. Thus, the trial court did not apply the *Terry* doctrine, but instead utilized an unspecified "balancing test" to conclude that a seizure was made on defendant, but the seizure was "justified under the situation as observed by Officer Kreigsman." In so concluding, the trial court rejected defendant's contention that the stop was arbitrary and unreasonable, but also rejected the State's argument

that the community caretaking exception was applicable, noting that the doctrine has not yet been explicitly recognized in North Carolina. We find that the generic "balancing test" applied by the trial court is not one of the "specifically established and well-delineated exceptions" which would otherwise render Officer Kreigsman's warrantless seizure of defendant constitutional. *See State v. Grice*, __ N.C. App. __, __, 735 S.E.2d 354, 356-57 (2012) ("As a general rule, searches and seizures conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.") (citation and quotation marks omitted). These exceptions, such as exigent circumstances, *Nowell*, 144 N.C. App. at 643, 550 S.E.2d at 812, or the automobile exception, *State v. Corpening*, 109 N.C. App. 586, 589, 427 S.E.2d 892, 894 (1993), are unhelpful here, because they apply only to situations where officers are investigating or preventing criminal activity. Thus, we address the State's alternative argument – that this Court should recognize some variant of the community caretaking exception to affirm the order denying defendant's motion to suppress.

So far, North Carolina courts have only referenced the community caretaking exception in the limited context of impounding abandoned vehicles. *See State v. Phifer*, 297 N.C. 216, 219, 254 S.E.2d 586, 587 (1979) ("In the interests of public safety and as part of what the Court has called 'community caretaking functions,' automobiles are frequently taken into police custody.") (quoting *South Dakota v. Opperman*, 428 U.S. 364, 368-69, 49 L. Ed. 2d 1000, 1002 (1976)); *see also State v. Peaten*, 110 N.C. App. 749, 752-53, 431 S.E.2d 237, 239 (1993). Application of this doctrine outside the context of vehicle impoundment, specifically in regard to the seizure of citizens, is a matter of first impression. As such, an overview of how the exception has developed in similar contexts by courts in other jurisdictions is helpful to our determination here.

The community caretaking exception was established by the United States Supreme Court in *Cady v. Dombrowksi*, 413 U.S. 433, 37 L. Ed. 2d 706 (1973). In *Cady*, the Supreme Court held that the warrantless search of the defendant's vehicle after impoundment did not violate the Fourth Amendment because the vehicle was damaged and constituted a nuisance on the highway, the defendant could not arrange for the vehicle to be moved, and the standard police procedure of impounding the vehicle and searching it was reasonable under the circumstances to promote public safety. *Cady*, 413 U.S. at 443, 447-478, 37 L. Ed. 2d at 715-18. The Court reasoned that:

> Because of the extensive regulation of motor vehicles and traffic, and also because of the frequency with which a vehicle can become disabled or involved in an accident on public highways, the extent of police-citizen contact involving automobiles will be substantially greater than police-citizen contact in a home or office. Some such contacts will occur because the officer may believe the operator has violated a criminal statute, but many more will not be of that nature. Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.

Cady, 413 U.S. at 441, 37 L. Ed. 2d at 714-15.

Since the Supreme Court's decision in *Cady*, a large majority of state courts have recognized the community caretaking doctrine as a valid exception to the warrant requirement of the Fourth Amendment. *State v. Moats*, 403 S.W.3d 170, 187, n. 8 (Tenn. 2013); *see*, *e.g.*, *Commonwealth v. Evans*, 764 N.E.2d 841, 843 (Mass. 2002); *State v. Martinez*, 615 A.2d 279, 281 (N.J. Super. Ct. App. Div. 1992). The overarching public policy behind this widespread adoption is the desire to give police officers the flexibility to help citizens in need or protect the public even if the prerequisite suspicion of criminal activity which would otherwise be necessary for a constitutional intrusion is nonexistent.

> The doctrine recognizes that, in our communities, law enforcement personnel are expected to engage in activities and interact with citizens in a number of ways beyond the investigation of criminal conduct. Such activities include a general safety and welfare role for police officers in helping citizens who may be in peril or who may otherwise be in need of some form of assistance.

*Ullom v. Mille*r, 705 S.E.2d 111, 120-23 (W.Va. 2010) (holding that an officer's seizure of the defendant was reasonable under the community caretaking exception where the officer saw the defendant's vehicle on the side of a dirt road at dusk with its parking lights on, the officer had a sense that something was wrong, and the "road safety check" that constituted the seizure was based solely on safety and welfare considerations); *see also State v. Deneui*, 775 N.W.2d 221, 242 (S.D. 2009)

("Modern society has come to see the role of police officers as more than basic functionaries enforcing the law. From first responders to the sick and injured, to interveners in domestic disputes, and myriad instances too numerous to list, police officers fulfill a vital role where no other government official can."). As these courts have demonstrated, there are countless situations where government intrusion into individual privacy for the purposes of rendering aid is reasonable, regardless of whether criminal activity is afoot. We find the analysis utilized by these courts persuasive, and we can identify no reason why the community caretaking exception should not apply in North Carolina when it has been recognized by the United States Supreme Court and widely adopted by a majority of state courts throughout the country.

Thus, we now formally recognize the community caretaking exception as a means of establishing the reasonableness of a search or seizure under the Fourth Amendment. *See State v. Browning*, 28 N.C. App. 376, 379, 221 S.E.2d 375, 377 (1976) (adopting a new rule of law based on well-reasoned decisions in other jurisdictions that was consistent with, although not directly supported by, precedent from the North Carolina Supreme Court). In recognizing this exception, we must apply a test that strikes a proper balance between the public's interest in having officers help citizens when needed and the individual's interest in being free from unreasonable governmental intrusion. *See State v. Scott*, 343 N.C. 313, 327, 471 S.E.2d 605, 613-14 (1996) ("In creating exceptions to the general [warrant requirement], this Court must consider the balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.") (citation and quotation marks omitted).

Despite its wide recognition, "[n]o single set of specific requirements for applicability of the community caretaker exception has been adopted by a majority of those states recognizing the exception." *Ullom*, 705 S.E.2d at 122.

Courts are split as to how the community caretaking doctrine should be classified from a Fourth Amendment perspective. A minority of jurisdictions characterizes community caretaking activities as consensual police-citizen encounters which do not rise to the level of "searches" or "seizures" under the Fourth Amendment. *See Moats*, 403 S.W.3d at 182, 187 n. 8 ("[T]he community caretaking function exists [in Tennessee] within the third tier of consensual police-citizen encounters that do not require probable cause or reasonable suspicion[.]"). However, North Carolina courts, as well as most courts in other jurisdictions, recognize that police interactions with citizens that do not amount to "searches" or

"seizures" under the meaning of the Fourth Amendment do not trigger its safeguards. *See State v. Sugg*, 61 N.C. App. 106, 108-9, 300 S.E.2d 248, 250 (1983); *see also People v. Luedemann*, 857 N.E.2d 187, 198-99 (Ill. 2006). Thus, we need not create an exception to the Fourth Amendment under the community caretaking doctrine to justify already permissible police-citizen interactions. *See State v. Isenhour*, 194 N.C. App. 539, 544-45, 670 S.E.2d 264, 268-69 (2008) (holding that reasonable suspicion was not required to justify an interaction that did not amount to a seizure under the Fourth Amendment).

There are also competing viewpoints as to the manner in which the subjective motivation of an officer should be taken into account when applying the community caretaking exception. A primary concern amongst courts which apply these tests is that the community caretaking exception not serve as pretext for impermissible criminal investigation. *See*, *e.g.*, *Com. v. Waters*, 456 S.E.2d 527, 530 (Va. Ct. App. 1995) ("No seizure, however limited, is a valid exercise of the community caretaking function if credible evidence indicates that the stop is a pretext for investigating criminal activity."). Some courts, like those in the state of Washington, have adopted tests which contain both objective and subjective requirements and only allow a search or seizure if the officer's motivation is not primarily related to criminal investigation. *See State v. Angelos*, 936 P.2d 52, 54 (Wash. Ct. App. 1997) ("[T]he [government] must show that the officer, both subjectively and objectively, is actually motivated by a perceived need to render aid or assistance. The search must not be primarily motivated by intent to arrest and seize evidence.") (citation and quotation marks omitted). Other courts, like the Fourth Circuit and the Wisconsin Supreme Court, hold that a warrantless search or seizure will be upheld if there is an objectively reasonable basis for the community caretaking action, regardless of a coinciding subjective intent on the officer's part to investigate crime. *See State v. Kramer*, 759 N.W.2d 598, 608 (Wis. 2009) ("[W]e conclude that the 'totally divorced' language from Cady does not mean that if the police officer has any subjective law enforcement concerns, he cannot be engaging in a valid community caretaker function. Rather, we conclude that in a community caretaker context, when under the totality of the circumstances an objectively reasonable basis for the community caretaker function is shown, that determination is not negated by the officer's subjective law enforcement concerns."); *United States v. Newbourn*, 600 F.2d 452, 456 (4th Cir. 1979) ("An interest in furthering a criminal investigation supplements justifiable concern about hazards presented by an automobile's contents; it does not negate it, and *Cady* supports the warrantless intrusion. Thus the warrantless search should be upheld, whatever

the policeman's subjective state of mind[,] if the objective facts present a reasonable basis for a belief that there is a potential danger similar to or greater than that presented in *Cady*, which danger should be inactivated.").

The North Carolina Supreme Court, in two relatively recent opinions, has made clear that the subjective mentality of a police officer will not make a seizure under the *Terry* doctrine unconstitutional if the intrusion was objectively reasonable under the totality of the circumstances. *See State v. Barnard*, 362 N.C. 244, 248, 658 S.E.2d 643, 645 (2008) (noting that "[t]he constitutionality of a traffic stop depends on the objective facts, not the officer's subjective motivation" in holding that an officer's subjective mistake of law did not cause a traffic stop to be unconstitutional where there was articulable, reasonable suspicion that the individual was violating a different, actual law), *cert. denied*, 555 U.S. 914, 172 L. Ed. 2d 198 (2008); *State v. Heien*, 366 N.C. 271, 283, 737 S.E.2d 351, 359 (2012) (holding that where an officer's subjective mistake of law was itself objectively reasonable, there may still be reasonable suspicion to justify a warrantless traffic stop). Thus, in keeping with the "foundational principle" recognized by our Supreme Court that the Fourth Amendment requires only that an officer's actions be "objectively reasonable in the circumstances," *Heien*, 366 N.C. at 278, 737 S.E.2d at 356 (citation omitted), we adopt an objective method of inquiry into the purpose of a seizure in the community caretaking context. The public safety concerns which underlie the community caretaking exception are not mutually exclusive of criminal prevention and investigation, and therefore we decline to formulate a test where existence of the latter negates the former. As the Wisconsin Supreme Court aptly noted, "to interpret . . . [*Cady*] to mean that an officer could not engage in a community caretaker function if he or she had any law enforcement concerns would, for practical purposes, preclude police officers from engaging in any community caretaker functions at all. This result is neither sensible nor desirable." *Kramer*, 759 N.W.2d at 609.

After assessing the analytical methods developed by courts in other jurisdictions, we find that the current three-pronged test used by courts in Wisconsin in applying the community caretaking exception provides a flexible framework within which officers can safely perform their duties in the public's interest while still protecting individuals from unreasonable government intrusions. *See State v. Anderson*, 417 N.W.2d 411, 414 (Wis. Ct. App. 1987), *rev'd on other grounds*, 454 N.W.2d 763 (Wis. 1990); *Kramer*, 759 N.W.2d at 608. Under this test, which we now adopt, the State has the burden of proving that: (1) a search or seizure within the

meaning of the Fourth Amendment has occurred; (2) if so, that under the totality of the circumstances an objectively reasonable basis for a community caretaking function is shown; and (3) if so, that the public need or interest outweighs the intrusion upon the privacy of the individual. *See Anderson*, 417 N.W.2d at 414; *Kramer*, 759 N.W.2d at 608. Relevant considerations in assessing the weight of public need against the intrusion of privacy include, but are not limited to:

> (1) the degree of the public interest and the exigency of the situation; (2) the attendant circumstances surrounding the seizure, including time, location, the degree of overt authority and force displayed; (3) whether an automobile is involved; and (4) the availability, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished.

Anderson, 417 N.W.2d at 414. We note that many courts which apply a similar balancing test place great weight on the exigency of the situation, with some holding that only imminent danger to life or limb can outweigh the individual's privacy interest. *See*, *e.g.*, *Provo City v. Warden*, 844 P.2d 360, 364-65 (Utah Ct. App. 1992), *aff'd*, 875 P.2d 557 (Utah 1994). Because such a requirement may prevent aid in situations where danger to life and limb may not be imminent, but could be prevented by swift action,[2] we decline to make imminent danger to life or limb a required element of our test. However, we agree with the proposition espoused by many courts that this exception should be applied narrowly and carefully to mitigate the risk of abuse. *See*, *e.g.*, *State v. Rinehar*t, 617 N.W.2d 842 (S.D. 2000); *Wright v. State*, 7 S.W.3d 148 (Tex. Crim. App. 1999); *see also United States v. Dunbar*, 470 F. Supp. 704, 708 (D. Conn. 1979) ("The investigative stop authority announced in *Terry v. Ohio* has led to cases where the officer says, 'He looked suspicious.' The Fourth Amendment stands against initiating a new line of cases in which the officer says, 'I thought he was lost.' ") (citation and quotation omitted), *aff'd*, 610 F.2d 807 (2d Cir. 1979).

[2] Having set out a community caretaking exception that we feel properly frames our inquiry into the reasonableness of a search or seizure under the Fourth Amendment, we must apply our rule to the facts of this case. After careful review, we hold that all three elements are met. First, it is uncontested that the traffic stop was a seizure under the meaning of the Fourth Amendment. *See Styles*, 362 N.C. at 414, 665 S.E.2d at

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2. For example, where an officer executes a search or seizure to fix a gas leak before an explosion might have occurred.

439. Second, given that Officer Kreigsman witnessed defendant strike a large animal and saw sparks fly when her car struck the road, there was an objectively reasonable basis under the totality of the circumstances to conclude that the seizure was predicated on the community caretaking function of ensuring the safety of defendant and her vehicle. Third, as discussed below, we find that the public need and interest in having Officer Kreigsman seize defendant outweighed her privacy interest in being free from the intrusion.

The facts that weigh in favor of defendant are as follows. First, the trial court entered an uncontested finding of fact that defendant was only affected by the collision with the animal at the point of impact. According to Officer Kreigsman, at that moment "a little bit of sparks [came] from the rear end where the car struck the roadway. And then the car continued on." Officer Kreigsman followed defendant at a steady speed for almost two miles without noticing anything which indicated that defendant was injured or otherwise unfit to drive, or that the vehicle itself could not be operated safely. Although later inspection revealed that the front of defendant's car was damaged by the collision, Officer Kreigsman was unaware of this fact at the time he executed the seizure. Thus, the circumstances lacked an exigency that would weigh in favor of police intervention. Second, this was a substantial intrusion on defendant's liberty. Unlike a situation where an officer might approach an already stopped vehicle to check on its occupants, Officer Kreigsman interrupted defendant's mobility by executing a traffic stop, using his blue lights and siren as displays of overt authority to do so. The United States Supreme Court has noted that traffic stops may create "substantial anxiety" and may be brought about by an "unsettling show of authority;" further, they "interfere with freedom and movement" and are "inconvenient." *Delaware v. Prouse*, 440 U.S. 648, 657, 59 L. Ed. 2d 660, 666 (1979). Thus, the "possibly unsettling show of authority," *id.*, used to seize defendant, in addition to the interruption of her freedom to travel, weigh in favor of defendant's argument that the seizure was unreasonable.

Although these factors support defendant's argument, we hold that the public's need and interest in Officer Kreigsman's actions outweigh defendant's competing privacy interest. First, the seizure occurred at nighttime in what was described by Officer Kreigsman as a rural and dimly lit stretch of road. Since there was a lower probability that defendant could have gotten help from someone if she needed it, compared to if she had a similar collision during the day time in a highly populated area, this setting weighs in favor of the State's argument that the public

need or interest was furthered by Officer Kreigsman's conduct. Second, Officer Kreigsman witnessed defendant strike a large animal with her vehicle and saw sparks when the car bounced on the road. Thus, he was able to identify specific facts which led him to believe that help may have been needed, rather than a general sense that something was wrong. Finally, defendant was operating a vehicle when she was seized rather than enjoying the privacy of her home. As this Court has noted, "[o]ne has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects . . . . It travels public thoroughfares where both its occupants and its contents are in plain view." *State v. Francum*, 39 N.C. App. 429, 432, 250 S.E.2d 705, 707 (1979) (quoting *Cardwell v. Lewis*, 417 U.S. 583, 590, 41 L. Ed. 2d 325, 335 (1974)). Thus, the lessened expectation of privacy weighs in favor of the State's argument that the seizure was reasonable.

N.C. Gen. Stat. § 20-4.01(33b) defines a "reportable crash" as one resulting in death or injury to a human being or in property damage of over $1000.00. N.C. Gen. Stat. § 20-4.01(4b) defines a "crash" as "[a]ny event that results in an injury or property damage attributable directly to the motion of a motor vehicle or its load. The terms collision, accident and crash and their cognates are synonymous." N.C. Gen. Stat. § 20-166.1(e) states that the "appropriate law enforcement agency must investigate a reportable accident." In addition to the other factors that weigh in favor of the State, these statutes underscore the significance of the public interest involved. Based upon Officer Kreigsman's statutory duty under section 20-166.1(e), he had an objectively reasonable basis to seize defendant in order to ascertain the nature and extent of the damage to defendant's vehicle. Thus, when considering this statutory duty along with all of the other factors that support the public need and interest in Officer Kreigsman's actions, the scales are tipped in favor of the State.

After weighing these facts, keeping in mind the general principle that the community caretaking exception should be applied narrowly to prevent potential abuses, we hold that the public need and interest did outweigh defendant's privacy interest in being free from government seizure here. Thus, because the stop fits into the community caretaking exception as we apply it, it was reasonable under the Fourth Amendment.

Conclusion

After careful review, we recognize the community caretaking doctrine as a valid exception to the warrant requirement of the Fourth

Amendment and hold that Officer Kreigsman's seizure of defendant fits into this exception as we apply it. Thus, we affirm the trial court's order denying defendant's motion to suppress.

AFFIRMED.

Judges BRYANT and STEELMAN concur.

STATE OF NORTH CAROLINA
v.
JOSHUA ANDREW STEPP

No. COA13-46

Filed 21 January 2014

Homicide—first-degree murder—failure to instruct on affirmative defense—accepted medical purpose—new trial

The trial court committed reversible error by failing to instruct the jury on the affirmative defense of "accepted medical purpose" as provided in N.C.G.S. § 14-27.1(4) for the predicate felony on which the jury based its first-degree murder conviction. Defendant was entitled to a new trial.

Judge STEPHENS concurring in separate opinion.

Judge BRYANT dissenting in separate opinion.

Appeal by Defendant from judgment entered 13 September 2011 by Judge W. Osmond Smith III, in Wake County Superior Court. Heard in the Court of Appeals 14 August 2013.

Attorney General Roy Cooper, by Assistant Attorney General Anne M. Middleton and Sherri Horner Lawrence, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Barbara S. Blackman, for Defendant.

DILLON, Judge.

Joshua Andrew Stepp (Defendant) appeals from a judgment sentencing him to lifetime imprisonment, based on a jury verdict finding him guilty of first-degree murder, under the felony murder rule, for the death of his ten-month old stepdaughter Cathy.[1] We conclude Defendant is entitled to a new trial based on the trial court's failure to instruct the jury on an affirmative defense to the underlying felony, which supported the first-degree murder conviction.

I: Background

On the night of 8 November 2009 at approximately 8:50 P.M., Defendant placed a 911 call from his Wake County apartment, where he resided with three other people: Brittany Yarley ("Ms. Yarley"), his wife of six months; Cathy, Ms. Yarley's ten-month old daughter; and Defendant's four-year old daughter.

A: Physical Evidence at the Scene

Police officers and EMS responded to Defendant's 911 call and discovered that Cathy had no pulse and was not breathing. The responders attempted resuscitation and were able to get a pulse in the ambulance before Cathy went into cardiac arrest. When Cathy arrived at Wake Medical Center, she had no vital signs. Cathy's pupils were fixed and dilated, indicating brain death; Cathy was declared dead fifteen minutes after her arrival.

In a trash can at the apartment the officers found a urine-soaked diaper, three diapers containing baby wipes, feces, and blood, and empty rum, whiskey, and beer bottles. Blood and feces were visible in a number of locations throughout the apartment. Blood was also found on Defendant's underwear. Defendant smelled of alcohol.

B: Cathy's Injuries

During the course of the evening, Cathy sustained injuries to her head and back as well as to her rectal and genital areas. Her head and back injuries included several bruises, a broad abrasion on her forehead, lacerations in her mouth, and hemorrhaging in her brain and retinas. Cathy's rectal injuries included bruising and several deep and superficial tears in and around her anal opening.

The injuries to her genital area, which were less severe than those in her rectal area, included two superficial tears on the forward portion

1. Cathy is a pseudonym.

and a single wider tear at the rear portion. However, there was no evidence of injuries indicating deep penetration; and her hymen was intact.

II: The Trial

On 30 November 2009, Defendant was indicted on charges of first-degree murder and first-degree sexual offense. The matter came on for trial at the 18 July 2011 criminal session of Wake County Superior Court.

A: State's Evidence

At trial, the State offered the testimonies of a number of medical witnesses, which tended to show as follows: Cathy's head injuries were likely caused by multiple blows which were consistent with non-accidental trauma "caused by an abusive person." Her rectal injuries were consistent with the introduction of a penis or other object that penetrated the anus but most likely *not* by a single finger wrapped in a wipe. Her genital injuries may have been caused by a finger or an object, and were also consistent with an adult attempting, unsuccessfully, to insert his penis into her vagina.

B: Defense Evidence

Defendant testified in his own behalf and offered the testimonies of other witnesses, including experts, which tended to show as follows: Defendant was a member of the Army Reserves, having resigned from active duty after completing a tour in Iraq. He suffered from post-traumatic stress disorder and alcohol dependency. Ms. Yarley was also an Army reservist, who worked at Fort Bragg.

During the day of 8 November 2009, Defendant took four Vicodin capsules and drank several shots of liquor and cans of beer. He spent the afternoon at a sports bar where he continued drinking. Because Ms. Yarley was scheduled to work the night shift on that day, Defendant returned to the apartment at 7:25 P.M. to watch the children for the evening. Upon his return, Cathy was crying and screaming; and Ms. Yarley noticed that Defendant was lethargic and stumbling.

After Ms. Yarley's departure, Defendant ate dinner and then attempted to calm Cathy down by holding her and giving her a bottle. He then placed Cathy on the floor of his bedroom closet and walked away to escape the sound of her crying. Defendant returned to her, grabbed her by the back of the head, and rubbed her face into the carpet. Cathy's face became raw and began to bleed, and she cried even harder. Defendant used a damp washcloth to dab the blood and then carried Cathy into the living room, put Vaseline on her face, and laid her down on the living

room floor. This episode occurred at approximately 8:00 P.M., which was the time that, according to a defense witness, Defendant's blood alcohol level likely peaked at 0.141%.

Moments later, Defendant opened Cathy's diaper and discovered that it was full of feces. Cathy flailed and screamed as Defendant tried to clean her with a baby wipe. Defendant wiped aggressively to get the feces and urine off of Cathy's body. Cathy began bleeding from her anus, and Defendant tried to stop the bleeding with a baby wipe. A few minutes later, Cathy was still bleeding and had defecated again. Defendant cleaned Cathy again with a baby wipe and put on a second fresh diaper. However, the second diaper became soiled, and Defendant cleaned and changed Cathy a third time.

Cathy continued to scream and cry. Defendant then grabbed some toilet paper, wet it, and put it in Cathy's mouth in an attempt to stop the screaming. However, Cathy started gagging. Defendant was unable to retrieve the toilet paper from Cathy's mouth with his fingers; so he picked Cathy up, shook her, and hit her on her back to try to dislodge the toilet paper. He was then able to pull the toilet paper out of Cathy's mouth with his fingers; however, by this time, Cathy was barely breathing. Moments later, Cathy stopped breathing, whereupon Defendant made the 911 call.

The testimonies of Defendant's witnesses tended to show that Defendant suffered from substance abuse issues and post-traumatic stress disorder caused by his military service, conditions which affected his impulse control and decision making; that on the evening in question, he had trouble coping with Cathy's crying; and that his intentions all along were to stop Cathy from crying. Regarding Cathy's injuries, one defense medical witness testified that he had frequently seen vaginal and rectal tears caused by parents using force to clean feces, and that Cathy's injuries to her rectal and genital areas were consistent with harsh cleaning with a finger and baby wipes and were *not* consistent with a sexual assault.

C: Closing Arguments

During closing arguments, the State asserted that the jury should find Defendant guilty of first-degree murder. The State contended that Defendant's acts involved premeditation and deliberation. Alternatively, the State contended that Defendant was guilty of first-degree murder based on the felony murder rule, as the evidence showed that Defendant had either raped or attempted to rape Cathy, or otherwise committed a sexual offense upon Cathy.

Defendant admitted that he was responsible for Cathy's death, but contended that he had not acted with premeditation and deliberation due to his condition, nor had he sexually assaulted Cathy in any way; and, therefore, Defendant asserted the jury should consider returning a guilty verdict for second degree murder.

D: The Verdict and Judgment

The jury found Defendant guilty of first-degree murder. Specifically, the verdict sheet submitted to and answered by the jury stated as follows:

> We, the jury, return as our unanimous verdict that the defendant is:
>
> _X_ Guilty of first degree murder
>
> If you find the defendant guilty of first degree murder, is it:
>
> A. On the basis of malice, premeditation, and deliberation?
>
> ANSWER: NO
>
> B. Under the first degree felony murder rule in the perpetration of rape of a child by an adult?
>
> ANSWER: NO
>
> C. Under the first degree felony murder rule in the attempted perpetration of rape of a child by an adult?
>
> ANSWER: NO
>
> D. Under the first degree felony murder rule in the perpetration of sexual offense with a child by an adult?
>
> ANSWER: YES
>
> If you find the defendant guilty of first degree murder under the first degree felony murder rule in the perpetration of a sexual offense with a child by an adult, is it:
>
> 1. Based upon a sexual act of anal intercourse?
>
> ANSWER: NO
>
> 2. Based upon a sexual act of penetrating by an object into the genital opening of the alleged victim?
>
> ANSWER: YES

3. Based upon a sexual act of penetration by an object into the anal opening of the alleged victim?

ANSWER: NO

__ Guilty of second degree murder[2]

__ Not guilty

Based on the jury's verdict, the trial court imposed a sentence of life imprisonment without parole. From this judgment, Defendant appeals.

III: Analysis

In Defendant's sole argument on appeal, he contends the trial court committed reversible error by failing to instruct the jury on an affirmative defense to the predicate felony on which the jury based its first-degree murder conviction. We agree.

As reflected by its responses to the issues presented on the verdict sheet, the jury convicted Defendant of first-degree murder based *solely* on its determination that Defendant was also guilty of committing a "sexual offense with a child" in violation of N.C. Gen. Stat. § 14-27.4 (2011), a Class B1 felony which proscribes, *inter alia*, the engagement of a "sexual act" with a child by an adult. Further, the jury concluded that Defendant was guilty of committing this offense based *solely* on its determination that Defendant had committed a "sexual act," as defined in N.C. Gen. Stat. § 14-27.1(4) (2011), upon Cathy by penetrating her *genital* opening with an object.[3]

N.C. Gen. Stat. § 14-27.1(4) (2011), defines "sexual act," in relevant part, as:

> . . . the penetration, however slight, by any object into the genital . . . opening of another person's body: provided,

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2. Having convicted Defendant of first-degree murder, the jury did not reach the question of Defendant's guilt of second degree murder.

3. Though the jury could have found Defendant guilty of first-degree murder based on *either* premeditation and deliberation *or* based on a finding that Defendant either had vaginal intercourse or attempted to have vaginal intercourse with Cathy, the jury found Defendant *not guilty* based on these theories. Further, the jury could have found that Defendant committed a "sexual act" by penetrating Cathy's *anal* opening with either his penis or another object; however, the jury found Defendant *not guilty* of felony sexual offense based on these theories as well. Accordingly, our review *must* be limited to the evidence regarding the penetration of Cathy's *genital* opening with an object, and, for the reasons stated herein, we must view this evidence in the light most favorable to Defendant.

> that *it shall be an affirmative defense that the penetration was for accepted medical purposes.*

Id. (emphasis added). The "penetration" of the female "genital opening" is accomplished when the defendant has caused an object to enter the labia without entering the vagina, *see State v. Bellamy*, 172 N.C. App. 649, 658, 617 S.E.2d 81, 88 (2005), *disc. review denied*, 360 N.C. 290, 628 S.E.2d 384 (2006); and an "object" can be, not only an inanimate object, but also a human body part, such as a finger, *see State v. Lucas*, 302 N.C. 342, 345, 275 S.E.2d 433, 436 (1981).

At trial, Defendant admitted that he penetrated Cathy's genital opening with his finger; however, he requested an instruction on the affirmative defense provided by N.C. Gen. Stat. § 14-27.1(4), that he penetrated her genital opening for "accepted medical purposes." Defendant based his request on the evidence tending to show that he penetrated Cathy's genital opening with his finger wrapped in a wipe for the purpose of cleaning feces and urine during the course of changing her diapers and that this purpose is an "accepted medical purpose." However, the trial court denied the request, to which Defendant properly excepted.

A: Defendant was Entitled to the Instruction

We believe that Defendant was entitled to have the jury instructed on the affirmative defense for "accepted medical purpose" as provided in N.C. Gen. Stat. § 14-27.1(4).

We have held that "[f]or a jury instruction to be required on a particular defense, there must be substantial evidence of each element of the defense when 'the evidence [is] viewed in the light most favorable to the defendant." *State v. Hudgins*, 167 N.C. App. 705, 711, 606 S.E.2d 443, 446 (2005) (citation and quotation marks omitted). The burden rests with Defendant to establish the affirmative defense. *State v. Caddell*, 287 N.C. 266, 289, 215 S.E.2d 348, 363 (1975) (describing an affirmative defense as "one in which the defendant says, 'I did the act charged in the indictment, but I should not be found guilty of the crime charged because * * * ").

In his brief, Defendant points to evidence that, when viewed in the light most favorable to him, supports giving the instruction. Specifically, he points to his own testimony that he digitally penetrated Cathy's genital opening for the purpose of cleaning feces and urine during diaper changes. He points to the testimony of his medical expert who stated that Cathy's injuries to her genital opening were consistent with Defendant's stated purpose. For example, this witness testified as follows:

> The source of the [genital] injuries were – again, by the information that I was provided, Mr. Stepp in his testimony has admitted to trying to clean a poopy diaper in a very rough way using wipes, his fingers, and in a way that was consistent with this type of trauma. This was harsh, harsh physical trauma in cleaning out a diaper. I have seen more cases than I would like of parents trying to clean out poopy diapers and how difficult it is to get stool out of the vaginal and rectal areas on occasion, and the kind of force that they have to use sometimes. This was excessive, but it is consistent with a digital attack, if you will, on those areas there.

He points to the evidence presented by the State regarding the soiled diapers and wipes found by the police at the apartment. He points to the testimonies of the State medical experts that the injuries to the genital opening were more superficial in nature – in that there was no evidence of deep penetration or that the hymen was broken - and could have been caused by fingers.

Neither party cites to a case in which a North Carolina court has construed the phrase "accepted medical purposes" as contained in N.C. Gen. Stat. § 14-27.1(4). We believe that when the Legislature defined "sexual act" as the penetration of a genital opening with an object, it provided the "accepted medical purposes" defense, in part, to shield a parent[4] — or another charged with the caretaking of an infant — from prosecution for engaging in sexual conduct with a child when caring for the cleanliness and health needs of an infant, including the act of cleaning feces and urine from the genital opening with a wipe during a diaper change. To hold otherwise would create the absurd result that a parent could not penetrate the labia of his infant daughter to clean away feces and urine or to apply cream to treat a diaper rash without committing a Class B1 felony, a consequence that we do not believe the Legislature intended.

Though not controlling on our resolution of this issue, we do find decisions from other jurisdictions, involving statutory language similar to "accepted medical purposes," instructive. For instance, the Texas Court of Criminal Appeals, that State's highest appellate court for criminal cases, handed down a decision on 6 November 2013 ordering a new trial for a defendant, convicted of sexual assaulting a child – where he admitted to digitally penetrating the genital opening of a three-year old

4. There is no language in N.C. Gen. Stat. § 14-27.1(4) which limits its application of the defense to acts performed by medical professionals.

girl for the purpose of applying medication for a diaper rash - because the trial court failed to instruct the jury on an affirmative defense provided in the Texas Penal Code, excusing "conduct [which] consisted of medical care for the child[.]" *Villa v. Texas*, 2013 Tex. Crim. App. LEXIS 1655 (2013) (interpreting Tex. Penal Code § 22.011(d) (2012)). On the same day it decided *Villa*, the Texas Court of Criminal Appeals also handed down *Cornet v. Texas*, 2013 Tex. Crim. App. LEXIS 1654 (2013), in which it held, as in *Villa*, that it was error not to instruct on the "medical care" defense, where a defendant was convicted of sexual assault based on digitally penetrating the genital opening of his step-daughter. However, unlike its holding in *Villa*, the court concluded that the error was harmless because the jury in *Cornet* also convicted the defendant of a second sexual assault count based on the defendant's oral contact with the child's anus during the same event.[5] *Id.* (reasoning that it "is inconceivable that the jury would have found [the defendant] guilty of causing the anus of the complainant to contact his mouth . . . had it believed his claim that he was providing medical care to the complainant [when he digitally penetrated her genital opening] during the same event").

In a case involving the prosecution of a defendant for digitally penetrating the genital opening of his young step-child — where the defendant admitted to the conduct, but contended that he did so for the purpose of applying salve to treat the child's diaper rash — the Oregon Court of Appeals held that it was reversible error for the trial court not to instruct the jury on an affirmative defense provided by statute which excused such conduct where the "penetration is part of a medically recognized treatment[.]" *Oregon v. Ketchum*, 206 Ore. App. 635, 138 P.3d 860, *review denied*, 341 Ore. 450, 143 P.3d 773 (2006) (quoting Or. Rev. Stat. § 163.412 (2003)). The court ordered a new trial, holding that the defense was not limited to the conduct of medical personnel. *Id.*

We believe the facts of our case are similar to the facts of *Villa* and *Ketchum* — where the courts ordered a new trial — because Defendant was convicted *solely* on a finding that he digitally penetrated Cathy's genital opening with an object.

In the present case, the State makes a number of arguments in support of the trial court's refusal to give the "accepted medical purpose" affirmative defense instruction. First, the State argues that Defendant failed to meet his evidentiary burden by failing to produce any evidence

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5. Under Tex. Penal Code § 21.011(d), the "medical care" defense is not available where the conduct involves contact of a genital opening by a defendant's mouth. *Id.*

to establish that penetrating the genital opening of an infant to clean out feces and urine is, in fact, an "accepted medical purpose," *citing State v. Hageman*, 307 N.C. 1, 27, 296 S.E.2d 433, 448 (1982) (stating that "in this State, we have traditionally placed the burden of production and persuasion on defendants who seek to avail themselves of affirmative defenses"). In other words, the State argues that though there was expert testimony suggesting that Defendant penetrated the genital opening to clean it, none of the experts ever expressly testified that Defendant's actions constituted an "accepted medical purpose."

We agree that there may be circumstances where a defendant would be required to offer direct evidence through the testimony of a medical expert to establish that certain conduct constitutes an "accepted medical purpose," rather than allowing a jury to infer it from the evidence. However, we do not believe that Defendant was required, in this instance, to offer direct evidence establishing that penetrating the genital opening of an infant for the purpose of cleaning the feces and urine during a diaper change constitutes an "accepted medical purpose." Our appellate courts have held on a number of occasions that, in the context of a criminal trial, direct evidence need not be provided to prove a fact if it otherwise is within the "common knowledge and experience" of the jury. *State v. Packer*, 80 N.C. 439, 441-42 (1879). In *Packer*, the defendant appealed his conviction for selling an "intoxicating liquor" where the evidence showed that he sold "port wine," but the State did not produce evidence that "port wine" was, in fact, an "intoxicating liquor." *Id.* In upholding the conviction, our Supreme Court held that "the jury could rightfully as to matters of common knowledge and experience, find without any testimony as to [whether "port wine" is an "intoxicating liquor."] *Id.*; *see also State v. Fields*, 201 N.C. 110, 114, 159 S.E. 11, 12 (1931); *State v. Payne*, 328 N.C. 377, 400, 402 S.E.2d 582, 595 (1991) (stating, in a prosecution for murder and rape, that "[i]t is common knowledge that homeowners do not change or replace carpets as frequently as once every several months"); *State v. Becker*, 241 N.C. 321, 326, 85 S.E.2d 327, 331 (1954) (stating, in a prosecution for manslaughter where there was testimony as to the defendant's driving speed and his distance from the victim, that "[i]t would seem as a matter of common knowledge and experience that it would have been a physical impossibility for the defendant to have stopped his car in so short a distance if at the time in question it was traveling at such a rate of speed"); *State v. Purdie*, 93 N.C. App. 269, 280, 377 S.E.2d 789, 795 (1989) (stating, in a prosecution for involuntary manslaughter, that "it is common knowledge that intoxication impairs the ability to drive").

We also believe this evidentiary issue is similar to those in cases involving professional malpractice, where we have stated that an exception to the rule requiring expert testimony to establish the professional standard of care is "where the common knowledge and experience of the jury is sufficient to evaluate compliance with a standard of care." *Russell v. DENR*, __ N.C. App. __, __, 742 S.E.2d 329, 333 (2013) (quoting *Handex v. Haywood*, 168 N.C. App. 1, 11, 607 S.E.2d 25, 31 (2005)). In conclusion, while there may be circumstances where expert testimony *may* be required to establish that certain conduct constitutes an "accepted medical purpose" pursuant to N.C. Gen. Stat. § 14-27.1(4), we believe that it is within the common knowledge and experience of the jury that penetrating the genital opening of an infant to clean feces and urine during a diaper change is an "accepted medical purpose."

The State next argues that the "accepted medical purpose" defense did not apply to the facts of this particular case. Specifically, the State contends that even if Defendant's *purpose* of cleaning the genital opening was an "accepted medical purpose," doing so *in a manner that causes injury* is not "accepted," and, therefore, Defendant was not entitled to the instruction. We believe the State's argument is misplaced. First, the plain language of the statute provides that the "medical purpose," and *not the manner*, must be "accepted." We do not believe that the Legislature intended to criminalize, as a Class B1 felony, an action by a doctor or a parent who penetrates a genital opening of a child under 13 years of age for an "accepted medical purpose," but does so in a negligent manner, thereby unintentionally causing injuries.[6]

The State further argues the following:

> By defendant's logic, a robber sticking a gun in a victim's vagina or anus to intimidate the victim would not be a sexual offense; torture by inserting objects into a person's genitals or anus would not be a sexual offense; a perpetrator forcefully punching and penetrating a victim's genitalia to harm and degrade them would not be guilty of a sexual offense; a caretaker forcefully penetrating a child in a rage would not be guilty of a sexual offense. By defendant's analysis, if in any of these scenarios, the

6. We do not imply that the evidence conclusively establishes that Defendant did not intend to cause the injuries to Cathy's genital opening. This is a matter for a jury to resolve. Rather, we believe that a jury *could* reasonably conclude from the evidence - when taken in the light most favorable to Defendant – that Defendant unintentionally caused Cathy's injuries to her genital opening while cleaning her.

> perpetrator merely claimed to be doing a medical check or administering medication, the "accepted medical purpose" instruction must be given upon request.

However, assuming *arguendo* any of the foregoing scenarios were properly before us, it stretches credulity to propose that these acts could ever be performed for an "accepted medical purpose." Further, as discussed above, the evidence relied upon by Defendant in this case consists of more than his self-serving assertion that he penetrated Cathy's genital opening to clean feces. *See State v. Sessoms*, __ N.C. App. __, __, 741 S.E.2d 449, 452 (2013) (holding that the trial court did not commit error by refusing to instruct the jury on "the defense of others" in the prosecution for assault with a deadly weapon where the only evidence supporting the defense was the defendant's self-serving testimony).

Finally, the State argues that the trial court did not err by refusing to instruct the jury on the "accepted medical purpose" defense because the specific instruction tendered by Defendant for the trial court's consideration was an incorrect statement of law. Specifically, the State argues that the "proposed instruction can be construed to incorrectly place the burden on the State to disprove the affirmative defense beyond a reasonable doubt." We believe this argument is misplaced.

Our Supreme Court has stated that "it is the duty of the trial court to instruct the jury on all of the substantive features of a case. . . . All defenses arising from the evidence presented during the trial constitute substantive features of a case and therefore warrant the trial court's instruction thereon." *State v. Loftin*, 322 N.C. 375, 381, 368 S.E.2d 613, 617 (1988). This duty arises even where a defendant *fails* to request the instruction. *Id.; see also State v. Scanlon*, 176 N.C. App. 410, 424, 626 S.E.2d 770, 780 (2006). "Failure to instruct upon all substantive or material features of the crime charged is error." *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989).

In this case, the "accepted medical purpose" defense is a "substantive feature" of this case; and, therefore, the trial court was required to give the instruction even if Defendant never made a request for the instruction. We believe that *State v. Hudgins*, 167 N.C. App. 705, 606 S.E.2d 443 (2005), is instructive on this point. In *Hudgins*, the defendant requested an instruction on the defense of "necessity" in a DWI prosecution. The Court stated the general rule that the defense of "necessity" is available to excuse a person from criminal liability where he acts "to protect life or limb or health[.]" *Id.* at 710, 606 S.E.2d at 447. The defendant provided the trial court with an instruction that was not a correct

statement of the law in that "it [further] suggested that the defense was available for attempts to [protect property from] damage." *Id.* We held that "[a] trial court is not, however, 'relieved of his duty to give a correct . . . instruction [as to a defense], there being evidence to support it, merely because defendant's request was not altogether correct." *Id.* (quoting *State v. White*, 288 N.C. 44, 48, 215 S.E.2d 557, 560 (1975)). Accordingly, we do not need to reach whether Defendant's tendered instruction was a correct statement of the law: Since the instruction pertained to a substantive feature of the case, the trial court was required to give it.

B: The Error Was Reversible

Having determined that the trial court erred by failing to instruct the jury on the affirmative defense of "accepted medical purpose," we must determine whether the error is reversible pursuant to N.C. Gen. Stat. § 15A-1443 (2011). Defendant argues that the error is a constitutional error and, therefore, the burden is on the State to show that the error was harmless beyond a reasonable doubt, pursuant to N.C. Gen. Stat. § 15A-1443(b). We believe that "insofar as the error committed is not one of constitutional dimension, [D]efendant has met his burden of satisfying us that had the error in the instruction . . . not been made, there is a reasonable possibility that a different result would have been obtained at trial[,]" pursuant to N.C. Gen. Stat. § 15A-1443(a). *State v. Mash*, 323 N.C. 339, 349-50, 372 S.E.2d 532, 538-39 (1988). Further, "[i]nsofar as the error is one of constitutional dimension, the [S]tate has not satisfied us beyond a reasonable doubt that the error was harmless." *Id.* at 350, 372 S.E.2d at 539. Accordingly, we believe that the error is reversible based on either standard.

Specifically, Defendant admitted to penetrating and causing the superficial tears to Cathy's genital opening. In other words, his defense includes an admission to the elements of the crime of sexual conduct with a child, that is, he admitted that he digitally penetrated Cathy's genital opening. However, Defendant presented evidence that he committed these acts for the purpose of cleaning feces and urine away from Cathy while changing her diapers.

In the State's closing arguments, the prosecutor contended that "even under the defendant's version of the facts, penetrated her with his finger, however slight, ... That's what a sexual act is, the defendant's guilty of that charge." In other words, the prosecutor implied that the jury could convict Defendant of felony sexual offense based upon his digital penetration of Cathy's genital opening – conduct to which Defendant admitted – even if the jury believed Defendant's testimony and evidence

that he engaged in the conduct for the purpose of cleaning feces and urine. Furthermore, the trial court instructed the jury that it was their duty to return a verdict of guilty of committing a sexual offense with a child if they found that Defendant had caused the "penetration, however slight, . . . by an object into [Cathy's] genital [] opening[;] that the "object may be an animate or an inanimate object[;] that Cathy was "a child of under the age of 13 years[;]" and that Defendant was "at least 18 years of age." The jury was not given any option in the instruction to, otherwise, find Defendant not guilty even if they determined that Defendant engaged in the conduct for an "accepted medical purpose." Based on the foregoing, we believe that there is a possibility that the jury, or some number of jurors, would have been satisfied that Defendant penetrated Cathy's genital opening for an "accepted medical purpose." Therefore, Defendant's conviction of felony first-degree murder must be reversed.

Finally, the State contends that "[i]f this Court allows [Defendant] relief, judgment should be entered on second-degree murder as a lesser-included offense of first-degree murder under both the theory of premeditation and deliberation and felony murder," contending that "[s]econd-degree murder is a lesser included offense of felony murder." The State's argument based on the theory of premeditation and deliberation is inapposite, as the jury did not convict Defendant based on premeditation and deliberation. As to the State's argument that second degree murder is a lesser included offense of felony murder, neither case cited by the State stands for the proposition that the proper remedy from this Court, where we find reversible error in the conviction of felony first-degree murder, is to direct the trial court to enter judgment on second degree murder. *State v. Gwynn*, 362 N.C. 334, 338, 661 S.E.2d 706, 708 (2008); *State v. Millsaps*, 356 N.C. 556, 565, 572 S.E.2d 767, 774 (2002). Rather, *Gwynn* and *Millsaps* were concerned with the trial court's failure to instruct a jury on the lesser-included offense of second degree murder in a prosecution of felony first-degree murder. We note that, in *Gwynn*, the Supreme Court stated that voluntary manslaughter is also a lesser included offense of felony murder. *Gwynn*, *supra*. Therefore, we do not believe that it is the duty of this Court to invade the province of a jury to determine whether the actions of Defendant constituted second degree murder or some other lesser-included offense of felony murder.

IV: Conclusion

Defendant inflicted numerous and severe injuries on his ten-month old stepdaughter Cathy on the evening of 8 November 2009, which led to her tragic death. There was substantial evidence presented at trial from which the jury could have convicted Defendant of first-degree murder

based on a number of theories. However, the jury based its verdict *solely* on the finding that Defendant had penetrated Cathy's genital opening with an object prior to inflicting the injuries that caused her death. The evidence was conflicting as to whether Defendant penetrated Cathy's genital opening for the sole purpose of cleaning feces and urine while changing her diapers or whether he ever deviated from this purpose. However, a jury could infer from the evidence - when taken in the light most favorable to Defendant - that Defendant penetrated Cathy's genital opening, causing superficial tears thereto, while he was cleaning the feces and urine. Therefore, Defendant was entitled to the "accepted medical purpose" instruction pursuant to N.C. Gen. Stat. § 14-27.1(4), a defense which was a substantive feature of the case, notwithstanding that a proposed instruction tendered by Defendant may have contained an incorrect statement of the law. Defendant properly objected to the trial court's refusal to give the instruction. Given that Defendant admitted to the conduct which formed the sole basis by which the jury returned a guilty verdict of first-degree murder, the trial court's error by not giving the affirmative defense instruction by which the jury could have excused Defendant of his admitted conduct, we believe the error was prejudicial. Accordingly, we are compelled to reverse the verdict of the jury convicting Defendant of felony first-degree murder and remand this case for a new trial.

NEW TRIAL.

STEPHENS, Judge, concurring.

I am constrained by statute, case law, and the evidence presented at trial to agree with the majority opinion that we must grant Defendant a new trial. However, I write separately because I believe the result we are compelled to reach in this appeal is not what our General Assembly envisioned or intended when it provided the affirmative defense of penetration for an "accepted medical purpose[]" under section 14-27.1. *See* N.C. Gen. Stat. § 14-27.1 (2011) (defining "[s]exual act" to include "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").

I believe that, in the context of *sexual abuse* prosecutions, our legislature intended this affirmative defense to distinguish between necessary penetrations required by medical, hygiene, or other health needs from those which are criminal in nature. I *cannot* believe that our legislators intended this affirmative defense be used as a shield by a

drunken, drugged, and enraged Defendant who *by his own admission* (1) rubs a baby's face into carpet until she bleeds from second-degree rug burns, (2) bruises her face and head in multiple locations, and then (3) attempts to "clean" her genital and anal regions with such violence that her rectum and vagina are left torn and bleeding (all before asphyxiating the helpless infant by shoving wet toilet paper into her mouth in an effort to silence her hysterical screams of pain). I would draw our General Assembly's attention to the discussion in the majority opinion regarding the distinction between penetration for an accepted medical *purpose* and penetration which occurs for such a purpose in a medically accepted *manner*. Surely it should be a criminal offense, even if not sexual abuse, to penetrate a baby's vagina, even in an alleged attempt to clean feces away, if that action is undertaken in a drunken rage and results in injuries such as those Cathy suffered in the last moments of her brief life.

I further note the State could have elected to charge Defendant with felony child abuse, as the predicate felony to his first-degree murder charge, pursuant to various provisions of N.C. Gen. Stat. § 14-318.4:

> (a) A parent or any other person providing care to or supervision of a child less than 16 years of age who intentionally inflicts any serious physical injury upon or to the child or who intentionally commits an assault upon the child which results in any serious physical injury to the child is guilty of a Class E felony . . . .
>
> . . .
>
> (a3) A parent or any other person providing care to or supervision of a child less than 16 years of age who intentionally inflicts any serious bodily injury to the child or who intentionally commits an assault upon the child which results in any serious bodily injury to the child, or which results in permanent or protracted loss or impairment of any mental or emotional function of the child, is guilty of a Class C felony.
>
> (a4) A parent or any other person providing care to or supervision of a child less than 16 years of age whose willful act or grossly negligent omission in the care of the child shows a reckless disregard for human life is guilty of a Class E felony if the act or omission results in serious bodily injury to the child.

> (a5) A parent or any other person providing care to or supervision of a child less than 16 years of age whose willful act or grossly negligent omission in the care of the child shows a reckless disregard for human life is guilty of a Class H felony if the act or omission results in serious physical injury to the child.
>
> . . .
>
> (d) The following definitions apply in this section:
>
> (1) Serious bodily injury. — Bodily injury that creates a substantial risk of death or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization.
>
> (2) Serious physical injury. — Physical injury that causes great pain and suffering. The term includes serious mental injury.

N.C. Gen. Stat. § 14-318.4 (2011). As noted *supra*, Defendant admitted that his actions caused second-degree rug burns to Cathy's face and deep tears to her anus. These injuries would surely qualify, at a minimum, as "serious physical injur[ies]" under the statute. Likewise, Defendant's actions were plainly willful. I cannot understand the decision by the State to proceed against Defendant on charges for sexual offense felonies without also charging him with felony child abuse, an offense for which Defendant's shocking claim of "diaper changing" would have provided little or no defense.

BRYANT, Judge, dissenting.

The majority opinion holds that the trial court erred and grants defendant a new trial, stating that defendant is entitled to an affirmative defense instruction based upon evidence showing that defendant's actions were for an "accepted medical purpose." Because I do not believe there was sufficient evidence that defendant's actions fell within the definition of accepted medical purpose, I do not believe defendant was entitled to an instruction on this affirmative defense; therefore, I respectfully dissent.

The majority maintains that it is a matter of common knowledge and common sense that cleaning feces from a body is an act performed

for an accepted medical purpose. I would agree that cleaning feces is necessary for purposes of good hygiene (as is washing one's hands and body, and cleaning one's teeth), and that failure to clean feces could eventually result in an infection or condition which might require medical attention. But, I would not agree that, standing alone, defendant's act of cleaning feces from the infant should be considered an act that was performed for an accepted medical purpose.

"Medical" means "[o]f or relating to the study or practice of medicine." AMERICAN HERITAGE COLLEGE DICTIONARY 846 (3d ed. 1993). "Accepted" means "[w]idely encountered, used, or recognized." *Id.* at 8. General Statutes, section 14-27.1, defining "sexual act," provides an affirmative defense for penetration of the genital or anal opening of a person where the act is done for an accepted medical purpose. N.C. Gen. Stat. § 14-27.1(4).

A common sense reading of General Statutes, section 14-27.1(4), suggests that the affirmative defense of penetration for an accepted medical purpose is available only to a defendant who can show the act was clearly done for a purpose generally approved or accepted by a physician or was done for purposes accepted in the medical field or in the practice of medicine.

In the case before us, no one testified that defendant's actions were carried out for an accepted medical purpose. Neither defendant's medical expert nor any other medical professional testified that cleaning feces from an infant is an act that is recognized as having an accepted medical purpose. Had defendant's medical expert testified that the cleaning was for an accepted medical purpose, we would be in a different posture. However, what we do have is evidence, including defendant's own admission, which supports a finding that defendant's conduct caused the injuries to the infant. There was testimony that vaginal tears may be common place with harsh cleaning and that the penetration of the infant's anus and vagina in an effort to clean off feces was responsible for the injuries inflicted. Yet, none of the evidence supports a finding that such conduct was for an accepted medical purpose.

At trial before the jury, and now before this Court, defendant asks not only that we accept his theory that his actions in causing the injuries to the genital and anal area of the child were not sexual in nature, but that we make the extraordinary leap to determine defendant's actions were conducted for an accepted medical purpose and, thus, within the safe harbor of an affirmative defense. Because I am unable to make such a leap, I do not believe the trial court erred in refusing to give an

instruction on the affirmative defense of penetration for an accepted medical purpose.

The majority cites *Cornet v. Texas*, No. PD-0205-13, 2013 Tex. Crim. App. LEXIS 1654 (Tex. Crim. App. 6 Nov. 2013), and other Texas and Oregon cases[1] as persuasive authority for its reasoning that defendant should have been entitled to the affirmative defense instruction. However, while the language of the statutes[2] involved in those cases is similar in the context of allowing an affirmative defense to an act of penetration, our statute clearly requires that acts of penetration be for accepted medical purposes before allowing the defense. I am not persuaded that the cases interpreting statutes in Texas and Oregon should inform the result of the case before us.

While I would not go so far as to posit that non-medical professionals are not entitled to this defense, I do believe it is necessary to require some direct testimony that the considered conduct is for a medically accepted purpose in order to be entitled to the affirmative defense instruction. To this end, I agree with the language of the dissent in *Cornet v. Texas*, 359 S.W.3d 217 (Tex. Crim. App. 25 Jan. 2012): "[w]hen asserting a 'medical care' defense, the defendant bears the burden of offering some evidence that his conduct was, in fact, a legitimate, accepted medical methodology. Before a trial judge is required to instruct on . . . a defense . . . there must be evidence in the record that raises . . . that defense as a valid, rational alternative to the charge." *Id.* at 229-30 (Cochran, J., dissenting).

Here, the majority states its belief that our legislature provided for the affirmative defense

> in part, to shield a parent or other charged with the caretaking of an infant, from prosecution for engaging in sexual conduct with a child when caring for the cleanliness and health needs of an infant, including the act of cleaning

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1. *Villa v. Texas*, No. PD-0792-12, 2013 Tex. Crim. App. LEXIS 1655 (Tex. Crim. App. 6 Nov. 2013), and *Oregon v. Ketchum*, 206 Or. App. 635, 138 P.3d 860 (2006).

2. Tex. Penal Code § 22.011(d) (2012) ("It is a defense to prosecution [for sexual assault of a child] that the conduct consisted of medical care for the child and did not include any contact between the anus or sexual organ of the child and the mouth, anus, or sexual organ of the actor or a third party."), as quoted in *Villa*, 2013 Tex. Crim. App. LEXIS, at *12 (emphasis added); Or. Rev. Stat. § 163.412(1) (2003) ("[Neither first nor second degree sexual penetration statute] prohibits a penetration described in either of those sections when: The penetration is part of a medically recognized treatment or diagnostic procedure[.]"), as quoted in *Ketchum*, 206 Or. App. at 637-38, 138 P.3d at 862 (emphasis suppressed).

> feces and urine from the genital opening with a wipe during a diaper change.

This is a most expansive reading of the affirmative defense portion of the statute. I must agree with the concurring opinion that the legislature could not have intended this statute to be used as a shield by a defendant whose attempt to "clean" the child's genital and anal area was performed "with such violence that her rectum and vagina [was] left torn and bleeding."

While I do not agree that defendant is entitled to an affirmative defense instruction on penetration for an accepted medical purpose, I also point out that defendant was not denied the opportunity to put on a defense. Defendant testified that his cleaning feces was the reason for the digital insertion into the child's genital and rectal area. However, defendant did not put forth evidence that his actions were for an accepted medical purpose. There was no testimony from defendant's medical experts or any other witnesses to support an instruction to the jury that the act of cleaning feces from the infant could be considered an act performed for accepted medical purposes. And, a trial court is not required to instruct the jury on an affirmative defense for which there is not sufficient evidence. Perhaps it would be a closer question had defendant's request for this affirmative defense instruction been based on his application of medication to treat a diaper rash or to treat some other medical condition. However, this appeal concerns defendant's actions of wiping feces from a baby, a common, everyday occurrence in the life of a child necessary to maintaining good hygiene, not the treatment of a medical condition.

Therefore, because I do not believe that defendant met his burden of showing that his actions were for an accepted medical purpose, the trial court was not required to instruct on the requested affirmative defense. I would find no error in the trial court's refusal to so instruct.

STATE OF NORTH CAROLINA
v.
JASON RUSSELL WILLIAMS, DEFENDANT

No. COA12-1128

Filed 21 January 2014

1. Pornography—second-degree sexual exploitation of minor—instruction—duplication

The trial court did not err by instructing the jury on second-degree sexual exploitation of a minor. The evidence sufficiently supported an instruction on duplication for all counts because defendant duplicated the images when he downloaded them from the internet and placed them on his computer.

2. Pornography—third-degree sexual exploitation of minor—multiple counts—receiving and possessing—separate harms

The trial court did not err by entering judgment on twenty-five counts of third-degree sexual exploitation of a minor. The Legislature's criminalization of both receiving and possessing such images prevents or limits two separate harms to the victims of child pornography.

3. Constitutional Law—right to public trial—temporary closure of courtroom—presentation of pornographic images

Defendant's constitutional right to a public trial was not violated in a sexual exploitation of a minor case when the trial court closed the courtroom during the presentation of images involving sexual activity. The State advanced an overriding interest that was likely to be prejudiced, the closure of the courtroom was no broader than necessary, the trial court considered reasonable alternatives, and the trial court made findings adequate to support the closure.

4. Evidence—officer testimony—images found on CD—sexual activity—no prejudice

The trial court did not abuse its discretion in a sexual exploitation of a minor case by allowing a detective and a special agent to testify that some of the images found on a CD that defendant gave to his neighbor included minors engaged in sexual activity. Given the jury's opportunity to observe each image and make an individualized determination of the nature of the image coupled with the fact that the image files frequently had titles noting the subject's status

as a minor and the sexual act depicted, defendant could not establish that he was prejudiced.

5. Evidence—prior crimes or bad acts—intent—absence of mistake or accident—no plain error

The trial court did not commit plain error in a sexual exploitation of a minor case by admitting evidence that defendant set up a webcam in his minor neighbor's room, videotaped her dancing in her pajamas, and inappropriately touched her while they were riding four-wheelers. The evidence served to demonstrate defendant's intent to obtain sexual images of minors and showed absence of mistake or accident.

Appeal by defendant from judgments entered 9 May 2011 by Judge Claire V. Hill in Robeson County Superior Court. Heard in the Court of Appeals 9 April 2013.

Roy Cooper, *Attorney General*, *by Sherri Horner Lawrence*, *Assistant Attorney General*, *for the State.*

Staples Hughes, *Appellate Defender*, *by David W. Andrews*, *Assistant Appellate Defender*, *for defendant-appellant.*

DAVIS, Judge.

Jason Russell Williams ("Defendant") appeals from his convictions for 102 counts of second-degree sexual exploitation of a minor and 25 counts of third-degree sexual exploitation of a minor. On appeal, Defendant asserts that the trial court (1) erroneously instructed the jury on two alternate theories of guilt where one theory was not supported by the evidence in 79 of the 102 counts of second-degree sexual exploitation of a minor; (2) incorrectly entered judgment on 25 counts of third-degree sexual exploitation of a minor despite a lack of intent by the General Assembly to punish criminal defendants for both receiving and possessing the same images; (3) violated his right to a public trial by closing the courtroom for a portion of the trial; (4) improperly admitted lay opinion testimony from law enforcement officers that images on a compact disc depicted minors engaged in sexual activity; and (5) improperly admitted testimony under Rule 404(b) that Defendant placed a webcam in a minor's bedroom, touched her inappropriately, and videotaped her. After careful review, we find no prejudicial error.

Factual Background

The State's evidence tended to establish the following facts: Defendant lived in Robeson County next door to Corey and Tabitha,[1] siblings who were 15 and 16 years old at the time of the underlying events. In April 2002, Corey told his school counselors that Defendant had given him a compact disc ("CD") containing pornographic images. Corey's stepfather viewed the images and determined that, in his opinion, the pictures included images depicting adults engaging in sexual activity and images depicting persons under the age of 18 who were "unclothed." During this same time period, Tabitha informed her stepfather that Defendant had installed a webcam in her bedroom when he came over to work on her computer.

Tabitha and Corey's stepfather called the Robeson County Sheriff's Office, and on 31 May 2002, Detective Howard Branch ("Detective Branch") of the Sheriff's Office came to their home to collect the CD and to inspect and photograph the webcam in Tabitha's bedroom. Detective Branch contacted Special Agent Charles Lee Newcomb ("Special Agent Newcomb") of the State Bureau of Investigation ("SBI") to assist him in opening the files on the CD. Detective Branch testified that after several attempts, Special Agent Newcomb was able to open and view the files, which contained images of both minors and adults engaging in sexual activity.

On 11 July 2002, law enforcement officers executed a warrant to search Defendant's home, and Special Agent Newcomb seized four computer towers from four desktop-style computers. Special Agent Newcomb testified that while the officers were searching Defendant's residence, he spoke to Defendant, and Defendant admitted that there was both adult and child pornography on his computers. Special Agent Newcomb further related that Defendant had admitted attempting to install a webcam in Tabitha's room but had stated that he did not have a receiver for the webcam. During their conversation, Defendant also acknowledged that he gave Corey the CD containing the pornographic images.

Defendant was indicted and charged with 2 counts of disseminating obscene material to a minor under the age of 16, 114 counts of second-degree sexual exploitation of a minor, and 60 counts of third-degree sexual exploitation of a minor. Prior to trial, the State elected not to proceed on 9 counts of second-degree sexual exploitation of a minor and 35 counts

1. "Corey" and "Tabitha" are pseudonyms used to protect the identities of children who were minors at the time of the incidents giving rise to Defendant's convictions.

of third-degree sexual exploitation of a minor. A jury trial was held during the May 2011 Criminal Session of Robeson County Superior Court.

At trial, SBI Special Agent Jonathan Lee Dilday ("Special Agent Dilday") testified regarding each image that formed the basis of a count of sexual exploitation of a minor. Each image was shown to the jury, and Special Agent Dilday testified as to when the file was created, the specific computer(s) on which the file was located, the file's name, and — for some of the images — when the file had last been accessed. Many of the images had file titles that described the specific sexual act portrayed in the image in graphic and explicit terms and labeled the subjects as "underage," "preteens," or "kiddies." By order of the trial court, the courtroom was closed during Special Agent Dilday's testimony — the portion of the trial when the images were presented to the jury. The courtroom was open for every other portion of the trial.

Defendant testified at trial in his own defense. He stated that he repaired computers and removed computer viruses for a living and would often have 20 to 40 different clients at a time. He also testified that he was involved in multi-player computer gaming and would both invite people to his home to play videogames and go to other locations to play videogames and share files. Defendant further stated that he would let friends and other persons come to his home and use his high-speed Internet connection.

At the close of all the evidence, the trial court dismissed the two counts of disseminating obscene material to a minor and three of the counts of second-degree sexual exploitation. The jury returned guilty verdicts on all remaining charges. The trial court sentenced Defendant to five consecutive presumptive-range terms of 13 to 16 months imprisonment. The trial court then suspended three of the sentences and ordered Defendant to be placed on supervised probation for 36 months upon his release from incarceration. The trial court also ordered Defendant to register as a sex offender for 30 years. Defendant gave notice of appeal in open court.

On 7 August 2013, this Court entered an order remanding this matter to the trial court to conduct a hearing and make findings of fact and conclusions of law regarding the temporary closure of the courtroom in accordance with *Waller v. Georgia*, 467 U.S. 39, 48, 81 L.Ed.2d 31, 39 (1984), as interpreted by this Court in *State v. Rollins*, ___ N.C. App. ___, ___, 729 S.E.2d 73, 77-79 (2012). Defendant's appeal was held in abeyance pending this Court's receipt of the trial court's order containing these new findings.

A hearing was held by the trial court on 9 September 2013. On 27 September 2013, the trial court entered an order containing findings of fact and conclusions of law as directed by this Court.

Analysis

I. Jury Instructions

[1] Defendant first argues that the trial court erroneously instructed the jury on second-degree sexual exploitation of a minor. Pursuant to N.C. Gen. Stat. § 14-190.17, a person commits second-degree sexual exploitation of a minor when, knowing the nature or content of the material, he

> (1) Records, photographs, films, develops, or duplicates material that contains a visual representation of a minor engaged in sexual activity; or
>
> (2) Distributes, transports, exhibits, receives, sells, purchases, exchanges, or solicits material that contains a visual representation of a minor engaged in sexual activity.

N.C. Gen. Stat. § 190.17(a)(1)-(2) (2011).

Here, the trial court instructed the jury on two alternative theories of guilt: (1) exploitation of a minor by *duplicating* material that contained a visual representation of a minor engaged in sexual activity; and (2) exploitation of a minor by *receiving* material that contained a visual representation of a minor engaged in sexual activity. Defendant's specific argument on appeal is that the trial court committed reversible error in its instructions because the duplication theory of guilt was supported by the evidence in only some of the counts.

Defendant correctly notes that "[w]here the trial court instructs on alternative theories, one of which is not supported by the evidence, and it cannot be discerned from the record upon which theory the jury relied in arriving at its verdict, the error entitles the defendant to a new trial." *State v. O'Rourke*, 114 N.C. App. 435, 442, 442 S.E.2d 137, 140 (1994); *see State v. Pakulski*, 319 N.C. 562, 574, 356 S.E.2d 319, 326 (1987) ("resolv[ing] the ambiguity in favor of the defendant" and ordering new trial where one alternate theory of guilt was erroneous and one was properly submitted).

Defendant asserts that he is entitled to a new trial on 79 of the 102 counts of second-degree sexual exploitation of a minor. He contends that the evidence presented at trial was sufficient to support the duplication theory for only the 23 images that were found in two or more

locations on Defendant's computers. Because the remaining 79 images or videos were discovered in only one location, Defendant argues that the duplication theory of guilt was unsupported by the evidence offered by the State for the 79 counts predicated on those images.

At trial, Special Agent Dilday testified regarding the process that occurs when an image is downloaded from a file sharing website or other Internet source. He explained that "when you download something from the [I]nternet, you are making a copy of the file . . . from the location where it is stored on the [I]nternet down to the local machine that you are working on." When further questioned as to whether it was accurate to say that two copies of the downloaded material exist once a download is successfully completed, he replied affirmatively. The State contends that this evidence sufficiently supported an instruction on duplication for *all* counts of second-degree sexual exploitation because Defendant "duplicated the images when he downloaded them from the [I]nternet and placed them on his computer because [he] obtained a copy of the image and the original image remained in its original location."

Whether the act of downloading an image from the Internet constitutes a duplication for purposes of N.C. Gen. Stat. § 14-190.17 appears to be an issue of first impression in North Carolina. The Arizona Court of Appeals, however, addressed this precise question in *State v. Windsor*, 224 Ariz. 103, 227 P.3d 864 (2010). Arizona's sexual exploitation statute is virtually identical to N.C. Gen. Stat. § 14-190.17 and prohibits "[r]ecording, filming, photographing, developing or duplicating" and "[d]istributing, transporting, exhibiting, receiving, selling, purchasing, electronically transmitting, possessing or exchanging" visual depictions of a minor engaging in sexual activity or exploitive exhibitions. A.R.S. § 13-3553(A)(1)-(2) (2009). While we recognize that "decisions from other jurisdictions are, of course, not binding on the courts of this State," we are free to review such decisions for guidance. *State v. Tucker*, ___ N.C. App. ___, ___, n.4, 743 S.E.2d 55, 61, n.4 (2013); *see Skinner v. Preferred Credit*, 172 N.C. App. 407, 413, 616 S.E.2d 676, 680 (2005) ("Because this case presents an issue of first impression in our courts, we look to other jurisdictions to review persuasive authority that coincides with North Carolina's law."), *aff'd*, 361 N.C. 114, 638 S.E.2d 203 (2006).

In *Windsor*, the defendant argued that evidence of his actions in downloading child pornography from an Internet site was insufficient to support his convictions for sexual exploitation by duplicating visual depictions of minors engaged in sexual conduct. As in the present case, a witness for the State testified in *Windsor* that "downloading involves

using the Internet to copy a file from a remote computer." *Windsor*, 224 Ariz. at 104, 227 P.3d at 865.

In analyzing whether such evidence was sufficient to constitute duplication, the Arizona Court of Appeals looked to other courts' interpretations of the downloading process as well as the plain meanings of the words "download" and "duplicate." *Id.* at 105, 227 P.3d at 866. Noting that the dictionary definition of duplicate is "to make an exact copy of," the court concluded that "one who downloads an image from a remote computer or computer server has duplicated it for purposes of [the sexual exploitation statute]." *Id.* The *Windsor* court also rejected the defendant's argument that downloading an image was only consistent with "receipt or distribution of an existing image," reasoning that the defendant provided no explanation of "how creating an electronic copy of an image is so significantly different from making any other type of duplicate that it should be treated differently under the law." *Id.*

We believe that the Arizona Court of Appeals' analysis of this issue is well-reasoned and equally applicable here. In this case, the evidence presented at trial indicated that the images on Defendant's computers were obtained from the Internet using both a file sharing site and various Internet searches. Special Agent Dilday testified that when an image is downloaded from either a file sharing website or another remote site, the original image remains in its original location and a separate copy is created and stored on the machine being used. As the *Windsor* court noted, the dictionary definition of duplicate is "to make a copy of." Merriam—Webster's Collegiate Dictionary 387 (11th ed. 2003).

It is well established that this Court's principal aim when interpreting statutes "is to effectuate the purpose of the legislature in enacting the statute," *State v. Goodson*, 178 N.C. App. 557, 558, 631 S.E.2d 842, 843 (2006) (citation and quotation marks omitted), and that "[s]tatutory interpretation properly begins with an examination of the plain words of the statute," *State v. Carr*, 145 N.C. App. 335, 343, 549 S.E.2d 897, 902 (2001) (citation and quotation marks omitted). Based on the evidence presented at trial and the plain meaning of the word "duplicate," we conclude the trial court's instruction on the duplication theory of guilt was proper.

II. Legislative Intent

[2] Defendant also contends that the trial court erred in entering judgment on the 25 counts of third-degree sexual exploitation of a minor because the General Assembly did not intend to punish criminal defendants for both receiving and possessing the same images. We first

note — and Defendant acknowledges — that this Court has already determined that convictions for both second-degree sexual exploitation (based on *receiving* illicit images of minors) and third-degree sexual exploitation (based on *possessing* those same images) do not violate the constitutional prohibition against double jeopardy. *See State v. Anderson*, 194 N.C. App. 292, 298-99, 669 S.E.2d 793, 797-98 (2008), *disc. review denied*, 363 N.C. 130, 675 S.E.2d 659 (2009). In *Anderson*, we determined that — as with receiving and possessing stolen goods — receiving illicit images and possessing those same images are "separate and distinct acts," and, as such, convictions for both do not amount to double jeopardy. *Id.* at 299-300, 669 S.E.2d at 798.

Defendant asserts that because *Anderson* only addressed the issue of double jeopardy, the question of whether the Legislature intended to punish criminal defendants for both receiving and possessing the same sexually explicit images "remains unanswered." By likewise analogizing to the receipt and possession of stolen goods, he contends that the General Assembly's intent in enacting the sexual exploitation statutes "was not to impose multiple punishments on defendants for receiving and possessing the same images, but instead to allow the State an option for prosecuting defendants for possessing the images despite not being able to prove where the images came from or who received them." We disagree.

In *State v. Howell*, 169 N.C. App. 58, 609 S.E.2d 417 (2005), we discussed the legislative intent behind our sexual exploitation statutes.

> Child pornography laws, such as N.C.G.S. § 14-190.17A(a) . . . are designed to prevent the victimization of individual children, and to protect minors from the physiological and psychological injuries resulting from sexual exploitation and abuse. This Court has noted that child pornography poses a particular threat to the child victim because the child's actions are reduced to a recording [and] the pornography may haunt him in future years, long after the original misdeed took place.

Id. at 63, 609 S.E.2d at 420-21 (internal citations and quotation marks omitted).

As such, we believe that the Legislature's criminalization of both receiving and possessing such images was not intended merely "to provide for the State a position to which to recede when it cannot establish the elements of" the greater offense, *State v. Perry*, 305 N.C. 225, 236, 287 S.E.2d 810, 816 (1982) (citation and quotation marks omitted), *overruled*

on other grounds by State v. Mumford, 364 N.C. 394, 699 S.E.2d 911 (2010), but rather to prevent or limit two separate harms to the victims of child pornography. *See Anderson*, 194 N.C. App. at 299, 669 S.E.2d at 798 ("[T]he unlawful receipt . . . is a single, specific act occurring at a specific time; possession, however, is a continuing offense beginning at the time of receipt and continuing until divestment.") (citation and quotation marks omitted)); *Cinema I Video, Inc. v. Thornburg*, 83 N.C. App. 544, 568-69, 351 S.E.2d 305, 320 (1986) ("A child who was posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography.") (citation omitted)), *aff'd*, 320 N.C. 485, 358 S.E.2d 383 (1987). We therefore overrule Defendant's argument.

III. Closure of the Courtroom

[3] Defendant next argues that his constitutional right to a public trial was violated when the trial court closed the courtroom during the presentation of the images at issue. We disagree.

The United States Supreme Court has stated the following with respect to a criminal defendant's right to a public trial under the Sixth Amendment to the United States Constitution:

> The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions. In addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury.

Waller, 467 U.S. at 46, 81 L.Ed.2d at 38 (citations and quotation marks omitted).

The presumption of an open and public trial, while substantial, is not absolute and can be overcome "by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Id.* at 45, 81 L.Ed.2d at 38.

When deciding whether closure of the courtroom during a trial is appropriate, the trial court must: (1) determine whether the party seeking the closure has advanced "an overriding interest that is likely to be prejudiced" if the courtroom was not closed; (2) ensure that the closure

is "no broader than necessary to protect that interest;" (3) "consider reasonable alternatives to closing the proceeding;" and (4) "make findings adequate to support the closure." *Id.* at 48, 81 L.Ed.2d at 39. We review the trial court's decision *de novo*. *See State v. Comeaux*, ___ N.C. App. ___, ___, 741 S.E.2d 346, 349 (2012) (applying *de novo* review to trial court's closure of courtroom), *disc. review denied*, ___ N.C. ___, 739 S.E.2d 853 (2013).

Here, the State made a pretrial motion to close the courtroom while the images at issue were shown to the jury "because of the nature of the images . . . [and] the nature of the testimony as to what may be depicted in the images." The trial court granted the State's motion, stating

> [t]he court will not be closed at any other time[,] and it will be open to anyone except for those witnesses that are on the — these witnesses that I have previously named that are on either the State or the defense witness list. But due to the nature of these charges, due to the nature of the photographs and that it is a criminal offense to disseminate these photographs and in a sense during this trial these photographs will be disseminated; so, the Court grants the motion to close the courtroom only during the time period in which these photographs are being presented during the trial.

The trial court subsequently made the following pertinent supplemental findings in its 27 September 2013 order:

> 5. The Court finds that the State has presented an overriding interest that is likely to be prejudiced if the courtroom is not closed.
>
> 6. The Court finds that there is a problem with the proliferation of child pornography, which is the images of children, that being minors under the age of 18, engaged in sexual activity.
>
> . . .
>
> 8. The Court recognizes that both the North Carolina Legislature and Congress have enacted specific statutes with regards to the proliferation and dissemination of child pornography, to include federal acts such as the Jacob Wetterling Act and the Adam Walsh Act, specifically to stem child pornography by preventing duplication

and discovery in criminal cases, prohibiting copying and allowing the defendant to have access to these images in a secure setting.

9. This case dealt with still images and video images, with audio, of alleged child pornography, children under the age of 18 being involved in sexual activity.

. . .

11. In this trial, there were over 120 counts involving second and third degree sexual exploitation of a minor.

12. The Court finds that there is a compelling interest to stop the distribution and dissemination of child pornography. In this case, it was disseminated to the jurors because they had to make the finding as the triers of fact, and it was up to the jury to make the determination of whether or not the defendant was guilty of second and third degree sexual exploitation of a minor.

13. The Court also recognizes the North Carolina Court of Appeals opinion *Cinema I*, 83 N.C. App. 544 (1986), and *Ferber v. New York*, that pornography is a greater threat to the victim than just the images themselves because the actions are reduced to recordings and photographs that can haunt them for years and be circulated for years.

14. The Court finds that the mere fact that the child in the video is not present in court does not obviate the State's interest to prevent continued dissemination.

15. As to the second prong of the Waller test, the Court finds that the closure of the courtroom was no broader than necessary.

16. The Court closed the courtroom during the testimony of Special Agent Dilday from the State Bureau of Investigation.

17. The Court notes that there was no media present and there were no requests by media for any access to the courtroom. Specifically, the Court recalls that there were two individuals in the courtroom at the time that the courtroom was closed and that there was a sequestration order in effect for both the State and the defense at the time.

18. The Court finds that the still images were numerous and that it would not have been judicially efficient and economical to require the State to copy all still images, one set of photographs for each of the 13 jurors and to have to view those individually. It was more judicially efficient and economical to present those images through the ELMO [projector] on the television monitor; that based on the logistics of this courtroom, the electrical outlets, that the position of the television at the time, the monitor with the ELMO on the prosecutor's table, and the computer on the prosecutor's table, that this was a reasonable placement of the monitor for all the jurors to see and that the TV was in the most centrally located position for all the jurors to be able to see and/or hear.

19. The closure did not occur until the State was ready to present these images and videos to the jury, and the Court reopened the courtroom as soon as the testimony with regards to these images and videos concluded. That the courtroom was closed for a few hours, and it was not closed at any other time during the trial of this matter. Further, the courtroom was closed temporarily for the limited purpose of publishing the still photographs through the ELMO and the videos with sound, with the sexually descriptive titles to the jury through the testimony of Special Agent Dilday. The Court does find that the defense, Mr. Davis, requested his investigator to remain in the courtroom, and the court allowed that request. Further, the Court finds that defendant's attorney, Mr. Davis, was allowed to relocate so that he would be able to view the images as they were being presented to the jury.

20. As to the third prong of the *Waller* test, the Court finds that, based on the logistics of the courtroom, that there were no other reasonable alternatives to closing the courtroom.

21. The Court finds that the State did have the television monitor on a cart, utilized it along with the ELMO and a laptop computer at the prosecutor's table. All of those had to be in close proximity to each other, not just because of the cord into the electrical outlet, but also the cords linking them up together so that these images could be presented

to the jury so that they could make their necessary findings with regard to the nature of the images and videos to determine the guilt or innocence of the defendant.

22. The Court also notes that the videos had audio, which even though the statute specifically does not discuss as it relates to detailed images being disseminated, the Court finds that the audio is a part of the video in the dissemination of the child pornography, and that if the spectators had been allowed to remain, they would have also heard the audio, which is a direct part of the video.

23. The Court does find that there were over 100 images presented to the jury, and that the position of the television was the best position for all jurors to have the best ability to see and/or hear the evidence as it was being presented.

24. The Court also notes that some of the videos were smaller in size and did not take up the whole screen of the television, so if the television had been positioned further away, as proposed by the defense, it would have been harder for jurors in seats 1 and 8 to have seen that video.

25. The Court notes that the State has limited resources and sometimes doesn't always have the necessary equipment within which to comply with other alternatives.

26. The Court finds that the location of the television was the most reasonable and logical to present the images and the videos to the jury.

27. The Court finds that all of the elements, pursuant to *Waller v. Georgia* have been met to support closure of the courtroom during the presentation of the still images and videos depicting child pornography, that being children under the age of 18 engaged in sexual activity.

Based on its findings of fact, the trial court made the following conclusions of law:

1. The State advanced an overriding interest that is likely to be prejudiced if the courtroom is not closed;

2. The closure in this case was no broader than necessary to protect the State's interest;

> 3 The Court considered and found there were no other reasonable alternatives to closing the courtroom; and
>
> 4. The closure of the courtroom during the publication of the still images and videos with audio complied with the test set forth in *Waller v. Georgia*.

Defendant challenges findings 18 and 21-26 of the trial court's supplemental findings of fact. He first argues that findings 21 and 25 — which address the logistics of the audiovisual equipment and the State's limited resources — are not supported by competent evidence because they were based solely upon the prosecutor's arguments at the 9 September 2013 hearing.

As explained above, we remanded this matter to the trial court so that it could evaluate the propriety of the temporary closure by applying the four-part *Waller* test and making the requisite findings. In so doing, the trial court essentially reheard on 9 September 2013 the State's pretrial motion to close the courtroom. During the 9 September 2013 hearing, both the prosecution and defense counsel made arguments on their respective positions as to whether the temporary closure was proper.

While Defendant is correct that arguments of counsel are generally not considered substantive evidence, *see State v. Tuck*, 191 N.C. App. 768, 775, 664 S.E.2d 27, 31 (2008) (holding that prosecutor's statements were not evidence and could not support restitution order), this Court has held that in certain pretrial motions, "evidence at the hearing may consist of oral statements by the attorneys in open court in support and in opposition to the motion . . . ." *State v. Chaplin*, 122 N.C. App. 659, 663, 471 S.E.2d 653, 656 (1996); *see State v. Pippin*, 72 N.C. App. 387, 397-98, 324 S.E.2d 900, 907 (upholding trial court's findings regarding defendant's speedy trial claim that were based on counsel's statements), *disc. review denied*, 313 N.C. 609, 330 S.E.3d 615 (1985).

In *Pippin*, we noted that the Official Commentary to N.C. Gen. Stat. § 15A-952, a statute addressing pretrial motions, specifically provides that " 'pretrial motions . . . can be disposed of on affidavit or representations of counsel.' " 72 N.C. App. at 397, 324 S.E.2d at 907. We believe the same is true here given that the State's motion to temporarily close the courtroom was a pretrial motion. Thus, even though the 9 September 2013 hearing took place well after the trial ended, it was simply a rehearing of the original motion, and — for this reason — we believe that N.C. Gen. Stat. § 15A-952 is applicable. As such, the trial court did not err in basing its findings that (1) the audiovisual equipment all needed to be in close proximity; and (2) the State had finite

resources to comply with potential alternatives to a limited closure, on the prosecutor's arguments.

Defendant next contends that findings 23, 24, and 26 were not supported by the evidence because the testimony of Defendant's trial counsel at the 9 September 2013 hearing contradicted these findings. During the hearing, Defendant's appellate counsel argued that if the television monitor was oriented in a different direction, the courtroom could remain open. Defense counsel reasoned that if the monitor was angled differently, spectators could be present yet unable to actually view the images while still allowing an unobstructed view of the images by the jury. At the 9 September 2013 hearing, Defendant's trial counsel testified that he could see the monitor in the alternate location from each of the jurors' seats. Defendant thus asserts that the trial court's findings that the original position of the television was the most "reasonable and logical" for the jurors' viewing was unsupported by the evidence. We are not persuaded.

This Court has recently explained that in an order addressing the propriety of the temporary closure of the courtroom, "[t]he 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." *State v. Rollins*, ___ N.C. App. ___, ___, ___, S.E.2d. ___, ___ (filed Dec. 17, 2013). Thus, the trial judge herself was in a position to determine the relative merits of alternative locations for the television monitor. As such, we cannot conclude that these findings were erroneous simply because the testimony of Defendant's trial counsel could have supported a different conclusion. *See id.* at ___, ___ S.E.2d at ___ ("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[, that] does not mean that the trial court erred.").

Defendant also contends that finding 22 does not support the temporary closure of the courtroom because the audio portions of the videos at issue are not part of the "visual representation of a minor engaged in sexual activity." Defendant thus argues that the State was not required to play the audio and, even if it did, "the audio portions would not have exposed the spectators to child pornography." However, because N.C. Gen. Stat. § 14-190.13 — which provides definitions for terms used in the statutes addressing sexual exploitation — specifically includes "video recordings" in its description of "material," N.C. Gen. Stat. § 14-190.13(2) (2011), we do not believe that the trial court erred in considering the harm of disseminating the audio portions of the videos.

Finally, Defendant asserts that finding 18 and conclusion of law 3 were erroneous because the trial court misapplied the third prong of *Waller*, which requires the trial court to "consider reasonable alternatives to closing the proceeding[.]" *Waller*, 467 U.S. at 48, 81 L.Ed.2d at 39. Although the trial court ultimately rejected Defendant's proposed alternatives to temporary closure as unreasonable because they were not judicially efficient, economical, or the most appropriate for the jury's viewing ability, the trial court's supplemental findings do indicate that it *considered* these options. *Waller* does not require more.

We therefore conclude that the trial court's detailed supplemental findings of fact sufficiently demonstrate that "the State advanced an overriding interest that was likely to be prejudiced; that the closure of the courtroom was no broader than necessary to protect the overriding interest; that the trial court considered reasonable alternatives to closing the courtroom; and that the trial court made findings adequate to support the closure." *Comeaux*, ___ N.C. App. at ___, 741 S.E.2d at 351. Therefore, Defendant's right to a public trial was not violated.

IV. Lay Opinion Testimony of Officers

[4] Defendant's fourth argument on appeal is that the trial court erred in allowing Detective Branch and Special Agent Newcomb to testify that some of the images found on the CD that Defendant gave to Corey included minors engaged in sexual activity. Defendant contends that this testimony was improper because it expressed an opinion as to Defendant's guilt and thereby invaded the province of the jury.

"[W]hether a lay witness may testify as to an opinion is reviewed for abuse of discretion." *State v. Norman*, 213 N.C. App. 114, 119, 711 S.E.2d 849, 854 (citation and quotation marks omitted), *disc. review denied*, 365 N.C. 360, 718 S.E.2d 401 (2011). An abuse of discretion occurs when the trial judge's decision "lacked any basis in reason or was so arbitrary that it could not have been the result of a reasoned decision." *Williams v. Bell*, 167 N.C. App. 674, 678, 606 S.E.2d 436, 439 (citation and quotation marks omitted), *disc. review denied*, 359 N.C. 414, 613 S.E.2d 26 (2005).

Under Rule 701 of the North Carolina Rules of Evidence, a lay witness may testify in the form of opinions or inferences "which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. R. Evid. 701. It is well established that lay witnesses may testify as to "instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses

at one and the same time. Such statements are usually referred to as shorthand statements of fact." *State v. Alexander*, 337 N.C. 182, 191, 446 S.E.2d 83, 88 (1994) (citation and quotation marks omitted).

In *State v. Ligon*, 206 N.C. App. 458, 464, 697 S.E.2d 481, 486 (2010), this Court addressed the admissibility of statements by lay witnesses that photographs of a minor child were " 'disturbing,' 'graphic,' 'of a sexual nature involving children,' 'objectionable,' [and] 'concerning' to the witness." In *Ligon*, defendant did not object to this testimony at trial, and the Court, being "directed to no case finding prejudicial error in admitting testimony regarding the contents of a still photograph where the testimony was not objected to at trial," determined that the lay witnesses' "reactions to the photographs [did] not rise to the level of plain error." *Id.* We did note, however, that "[a]lthough their opinions as to what the pictures showed were based on their perceptions of the photographs, the helpfulness of those opinions to the jury, which was in no worse position to evaluate the pictures, is questionable." *Id.* at 462-63, 697 S.E.2d at 485 (emphasis omitted).

Here, unlike in *Ligon*, Defendant made timely objections to Special Agent Newcomb's and Detective Branch's testimony that some of the images were of minors engaged in sexual activity. However, even when objected to at trial, evidentiary errors are subject to harmless error analysis on appeal. Thus,

> [t]he burden is on the party who asserts that evidence was improperly admitted to show both error and that he was prejudiced by its admission. The admission of evidence which is technically inadmissible will be treated as harmless unless prejudice is shown such that a different result likely would have ensued had the evidence been excluded.

State v. Gappins, 320 N.C. 64, 68, 357 S.E.2d 654, 657 (1987) (internal citations omitted); *see also* N.C. Gen. Stat. § 15A-1443 (2011) (prejudice occurs "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached . . . The burden of showing such prejudice . . . is upon the defendant"). Furthermore, "[w]here there exists overwhelming evidence of defendant's guilt[,] defendant cannot make . . . a showing [of prejudicial error] . . . ." *State v. Gayton*, 185 N.C. App. 122, 125, 648 S.E.2d 275, 278 (2007) (citation and quotation marks omitted).

During Defendant's trial, Special Agent Newcomb and Detective Branch testified that some of the images found on the CD depicted individuals under the age of 18 engaging in sexual activity. However, neither

specified which *particular* images, in their opinion, included minors engaging in sexual activity. After this testimony, the jurors viewed each of the images for themselves with regard to every count of second- and third-degree sexual exploitation of a minor and were instructed to determine whether the image forming the basis of the count "contained a visual representation of a minor engaged in sexual activity." Given the jury's opportunity to observe each image and make an individualized determination of the nature of the image coupled with the fact that the image files frequently had titles noting the subject's status as a minor and the sexual act depicted, Defendant cannot establish that he was prejudiced by the admission of Special Agent Newcomb's and Detective Branch's testimony. Accordingly, even assuming, without deciding, that the admission of this testimony was an abuse of discretion, it was not reversible error.

V. Evidence of Prior Bad Acts

[5] Defendant's final argument is that the trial court erred in admitting evidence that Defendant (1) set up a webcam in Tabitha's room; (2) videotaped her dancing in her pajamas; and (3) inappropriately touched Tabitha while they were riding four-wheelers. Defendant only made objections regarding the form of the State's questions during this testimony and thus seeks review of this issue under the plain error doctrine.

Rule 404(b) of the North Carolina Rules of Evidence provides that:

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

N.C. R. Evid. 404(b).

It is well established that 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 its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense . . . ." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990) (emphasis in original). The State contends that the evidence was properly admitted to show Defendant's intent "to obtain electronic images of minors of a sexual nature" and to show "the absence of mistake or accident that the pornographic images were found on Defendant's hard drive."

"In determining whether the prior acts are offered for a proper purpose, the ultimate test of admissibility is whether the [prior acts] are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of . . . Rule 403." *State v. Martin*, 191 N.C. App. 462, 467, 665 S.E.2d 471, 474 (2008) (citation and quotation marks omitted), *disc. review denied*, ___ N.C. ___, 676 S.E.2d 49 (2009). Defendant relies on *State v. Doisey*, 138 N.C. App. 620, 532 S.E.2d 240, *disc. review denied*, 352 N.C. 678, 545 S.E.2d 434 (2000), *cert. denied*, 531 U.S. 1177, 148 L.Ed.2d 1015 (2001); *State v. Hinson*, 102 N.C. App. 29, 401 S.E.2d 371, *appeal dismissed and disc. review denied*, 329 N.C. 273, 407 S.E.2d 846 (1991); and *State v. Maxwell*, 96 N.C. App. 19, 384 S.E.2d 553 (1989), *disc. review denied*, 326 N.C. 53, 389 S.E.2d 83 (1990), to support his contention that the testimony regarding these prior acts was inadmissible. We believe that Defendant's reliance on these cases is misplaced.

In *Doisey*, this Court held that the trial court erred in admitting evidence that the defendant placed a camcorder in the bathroom in his prosecution for first-degree statutory sex offense. 138 N.C. App. at 626, 532 S.E.2d at 244-45. We determined that this evidence described "conduct dissimilar to the conduct with which Defendant was charged," and thus "did not tend to show Defendant's plan or scheme to sexually assault [the victim]." *Id.* We also held, however, that the improperly admitted evidence did not rise to the level of plain error because the defendant could not show that in light of all the other evidence admitted, the testimony at issue had a probable impact on the jury's determination of guilt. *Id.* at 627, 532 S.E.2d at 245.

In *Hinson*, we determined that evidence of the defendant's possession of sexual paraphernalia and books about sexual intercourse was improperly admitted in his prosecution for first-degree sex offense and indecent liberties with a minor. 102 N.C. App. at 36, 401 S.E.2d at 375-76. Ultimately, we concluded that although the evidence did not indicate proof of intent, preparation, or a plan or scheme, its admission did not constitute plain error in light of the overwhelming evidence of the defendant's guilt. *Id.* at 37, 401 S.E.2d at 376.

Finally, in *Maxwell*, this Court held that evidence that the defendant often appeared nude in front of his children and fondled himself in the presence of his daughter did not show his plan or scheme to sexually abuse his daughter and did "little more than impermissibly inject character evidence . . . of whether [the] defendant acted in conformity with these character traits at the times in question." 96 N.C. App. at 24-25, 384 S.E.2d at 557. We determined that the erroneous admission of such

evidence, combined with the improper exclusion of the victim's prior sexual abuse allegations directed at her uncle, prejudiced the defendant's right to a fair trial.

Unlike *Doisey*, *Hinson*, and *Maxwell*, however, Defendant in the present case was charged with second-degree and third-degree sexual exploitation of a minor — offenses which implicate "visual representation[s] of a minor engaged in sexual activity." N.C. Gen. Stat. § 14-190.17; 14-190.17A. We believe that installing a webcam in Tabitha's bedroom and videotaping her dancing in pajama shorts and a tank top are acts similar in nature to Defendant's present charges of possessing and receiving or duplicating visual representations of minors engaged in sexual activity and serve to demonstrate Defendant's intent to obtain sexual images of minors. *See State v. Brown*, 211 N.C. App. 427, 433-34, 710 S.E.2d 265, 270 (2011) (determining that evidence of defendant's possession of incestuous pornography was admissible under Rule 404(b) to show intent to commit sex offense against his daughter because "evidence of a defendant's incestuous pornography collection sheds light on that defendant's desire to engage in an incestuous relationship, and that desire serves as evidence of that defendant's motive to commit the underlying act — engaging in sexual intercourse with [his] child — constituting the offense charged"), *aff'd per curiam*, 365 N.C. 465, 722 S.E.2d 508 (2012).

We also note that both the offenses for which Defendant was charged and the prior acts of videotaping and attempting to capture images of Tabitha by means of a webcam involved the use of electronics to obtain sexual images of minors. This further demonstrates the admissibility of the testimony regarding these prior acts pursuant to Rule 404(b).

Furthermore, these prior acts are also evidence of the absence of mistake or accident. Defendant denied any improper conduct during his testimony at trial, claiming that he attended large-scale file sharing events where users could share and access other users' files and that during these file sharing events "information [could] be passed to [his] hard drive" without his knowledge. Defendant also stated that when he copied customers' hard drives for his computer repair business, he did not know what sort of information was on their drives. This testimony suggested that Defendant was not aware of the images that were found on his computers. Indeed, Defendant specifically stated that he had never viewed child pornography on his computer and did not know it was there. The evidence that Defendant had previously attempted to obtain sexual images of Tabitha, a minor, was therefore relevant to suggest that the images of minors engaged in sexual activity found on

Defendant's computers were not transferred or placed there by accident or mistake.

Thus, we conclude the trial court properly determined that the testimony regarding (1) Defendant's installation of a webcam in Tabitha's room; and (2) his act of videotaping her dancing in pajamas was admissible because it was introduced for purposes other than merely to demonstrate Defendant's propensity to commit a crime.[2]

Conversely, Tabitha's testimony that Defendant touched her breasts and under her pants while they were driving a four-wheeler does not possess the same indicia of similarity to the charged offenses. Because Defendant did not object to this evidence at trial, however, he bears the burden of showing that its admission constituted plain error – meaning that the error was such that it "had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations and quotation marks omitted).

We conclude that in light of the overwhelming evidence of Defendant's guilt — specifically, the voluminous testimony concerning the images found on his computers and the explicit file names of those images, which typically described the age of the subjects and the sexual nature of the content — Defendant cannot establish plain error. *See State v. Stancil*, 355 N.C. 266, 267, 559 S.E.2d 788, 789 (2002) (holding that inadmissible testimony did not rise to level of plain error because "[t]he overwhelming evidence against defendant leads us to conclude that the error committed did not cause the jury to reach a different verdict than it otherwise would have reached").

Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial free from prejudicial error.

NO PREJUDICIAL ERROR.

Judges McGEE and STEPHENS concur.

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2. Defendant further contends that, even if it was admissible under Rule 404(b), the evidence regarding his videotaping of Tabitha nevertheless should have been excluded under Rule 403 as its probative value was substantially outweighed by the danger of unfair prejudice. However, as we explained in *State v. Cunningham*, 188 N.C. App. 832, 837, 656 S.E.2d 697, 700 (2008) (quoting *State v. Steen*, 352 N.C. 227, 256, 536 S.E.2d 1, 18 (2000), *cert. denied*, 531 U.S. 1167, 148 L.Ed.2d 997 (2001)), "[t]he balancing test of Rule 403 is reviewed by this [C]ourt for abuse of discretion, and we do not apply plain error 'to issues which fall within the realm of the trial court's discretion.'" *Accord State v. Jones*, 176 N.C. App. 678, 687, 627 S.E.2d 265, 271 (2006) (refusing, based on *Steen*, to review "defendant's Rule 403 argument" for plain error).

YEAGER v. YEAGER

[232 N.C. App. 173 (2014)]

CAROL YEAGER, PLAINTIFF
v.
GEORGE YEAGER, DEFENDANT

NO. COA13-542

Filed 21 January 2014

1. Appeal and Error—mootness—appeal from contempt orders

Plaintiff's arguments were moot in an appeal from contempt orders in an equitable distribution action involving a receivership and the division of property. The trial court did not impose any consequence or penalty for plaintiff's contempt and the subsequent order dissolving the receivership and the equitable distribution order distributing the properties left no underlying controversy.

2. Appeal and Error—sanctions—frivolous appeal

Sanctions were imposed for a frivolous appeal in light of the extensive history of litigation between the parties and the conclusion that plaintiff's arguments were moot.

Appeal by plaintiff from orders entered 26 November 2012 by Judge Christy T. Mann in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 October 2013.

Aylward Family Law, by Ilonka Aylward, for plaintiff-appellant.

Leonard G. Kornberg for defendant-appellee.

McCULLOUGH, Judge.

Plaintiff appeals from two contempt orders. Based on the reasons set forth below, we dismiss plaintiff's appeal as moot and impose sanctions based on this frivolous appeal.

I. Background

Plaintiff Carol Yeager and defendant George Yeager were married in 1972 and separated in 2007. On 6 May 2008, plaintiff filed a complaint against defendant for post-separation support, alimony, interim distribution, equitable distribution, and attorneys' fees. On 12 June 2008, defendant filed an answer and counterclaim for equitable distribution.

Following a hearing held in August 2008, the trial court entered an "Order and Judgment" on 12 September 2008. The trial court found, in

pertinent part, that plaintiff was the sole manager of NG Holdings, LLC, a marital asset. NG Holdings, LLC, owned a warehouse located at 440 Springbrook Road (hereinafter the "warehouse"), which produced rental income. The parties' former marital residence, titled in plaintiff's name, was located at 422 Livingston Drive in Charlotte, North Carolina (hereinafter the "marital residence"). The 12 September 2008 order awarded plaintiff post-separation support, ordered defendant to pay plaintiff's attorneys fees, and ordered for plaintiff to receive rental income from the warehouse.

On 29 January 2010, defendant filed a "Motion to Appoint a Receiver Order, Interim Distribution and Judicial Assistance."

On 25 June 2010 *nunc pro tunc* 30 November 2010, the trial court entered a "Motion to Appoint a Receiver Order [sic], Interim Distribution and Judicial Assistance." (hereinafter "the Receiver Order"). The trial court made the following pertinent findings of fact in the Receiver Order:

> 3. . . . The major assets of the parties are two tracts of real property each worth approximately $300,000. Prior to the parties separation neither property was encumbered with any lien whatsoever. . . .
>
> 4. Initially the Plaintiff took out two lines of credit in [an] amount under $100,000 on the marital residence. The Plaintiff paid off one line of credit but the other line of credit remains in an unknown amount.
>
> 5. The marital residence was owned by a trust setup by the parties for "asset protection reasons." The trustee for the Trust . . . deeded this property solely to the Plaintiff without the knowledge or consent of the Defendant. . . .
>
> 6. The other piece of real property [is the warehouse]. [The warehouse] was devised to the Defendant solely after the previous owner, his father [passed] away. This property was deeded to a corporation and the Plaintiff was the sole stockholder of the corporation[.]
>
> 7. By happenstance, the Defendant learned that the Plaintiff has executed two deeds of trust in September 2009, one for each tract of personal property. Each deed of trust was in the amount of $300,000. . . . These deeds of trusts were executed by the Plaintiff and were given to a corporation in Nevada. The corporation in Nevada was

established on or about the same time the Deeds of trust were executed. During a prior hearing the Plaintiff testified that she signed a promissory note for each deed of trust and an unsigned promissory not[e] was offered by her during the last hearing in this matter.

8. The incorporator and the president is a paralegal in Nevada who owns a company who is a registered agent for many corporations in Nevada. There is no evidence that this corporation is anything other th[a]n [a] holder of the deeds of trust and was established solely for that purpose.

9. Although the Plaintiff did not appear in this matter, the Court remembers her reasons for having to execute the deeds of trust. Her testimony was that a trust in Virginia had been paying the utility bills on the residence and the Deed of trust was meant to secure these utilities payments.

10. The Plaintiff could not offer any documents for this alleged trust in Virginia but a letter was offered by the Plaintiff . . . which "explained" this transaction and the trustee of this trust to whom the deeds were executed on behalf[.]

11. When the above facts were established in Court, Plaintiff's counsel indicated he was taking immediate action to attempt to undo or reform the Deeds of Trust; These deeds of trust undoubtedly complicate this case and the parties estate and it is necessary to take any possible action to unravel the above transactions and put the properties back into the hands of the parties.

12. Since the time of the prior action, Plaintiff['s] previous counsel has withdrawn and no action has been taken to undo the Deeds of trust or to unravel the web of trusts and corporations.

The trial court further found that plaintiff's rationale for entering into these deeds was not credible and that it did not believe the deeds of trust were for "a legitimate purpose but because of the nature of these documents cannot void these deeds without the appropriate legal process." Based on the foregoing, the trial court believed "it is in the best interest of the marital estate to handle the financial matters regarding the [warehouse]."

The trial court appointed a receiver to investigate and take all necessary steps to remove both deeds of trust from the marital residence and the warehouse (hereinafter "the properties") and ordered plaintiff to "not take any other action as it relates to either proper[ty and] to in anyway further encumber either piece of real property[.]"

On 13 December 2010, the trial court entered an "Order Clarifying and Amending Appointment of Receiver/Referee." This order restated and incorporated by reference the findings of fact and conclusions of law in the Receiver Order. The trial court found that "[t]he Court needs the assistance of the Receiver/Referee in investigating the transactions related to two parcels of real property that have impacted the value of the marital estate, so that the Court can engage in its statutory responsibilities in Equitable Distribution between the parties herein." It further specified that the receiver shall have powers contemplated in Rule 53 of North Carolina Rules of Civil Procedure, without limitation, for conducting the investigation:

> Receiver/Referee . . . is conferred with all powers that the Court may vest pursuant to the North Carolina General Statutes and North Carolina Rules of Civil Procedure, to take any and all necessary legal actions to assist the Court, as it relates to these two parcels of property, to cure any defects in the titles thereto, so that the Court can properly and equitably distribute same as the law would require.

On 7 June 2011, defendant filed a "Motion for Contempt," alleging that plaintiff was violating the Receiver order. Defendant alleged that plaintiff was using the line of credit encumbering the marital residence, thereby increasing the outstanding debt, and was refusing to comply with the requests of the receiver.

On 21 June 2011, plaintiff, through her attorney Ilonka Aylward, filed a "Declaratory Judgment Action to Quiet Title" to the properties.

On 28 July 2011, defendant filed another "Motion for Contempt," alleging that plaintiff had filed the 21 June 2011 action to quiet title to the properties in direct contravention of the receiver's orders. Defendant alleged that the receiver had expressly told both "[p]laintiff and her counsel . . . that they were not to file Lawsuit to reform the Deeds of Trust which Plaintiff executed encumbering the party's marital property."

On 8 August 2011, the trial court entered a "Show Cause Order," ordering plaintiff to appear in court on 16 August 2011 and "to show cause, if any there be, why Plaintiff should not be adjudged in willful contempt of this Court."

On 16 August 2011, the trial court held a hearing upon defendant's motion for contempt. The receiver testified that he informed Ms. Aylward, plaintiff's counsel, via e-mail, "do not file the action to quiet title." However, Ms. Aylward "made it clear to everyone that she planned to proceed with the action to quiet title even though she had been directly, or I had directed her not to file for a number of reasons." At the conclusion of the hearing, the trial court orally found the following:

> [Trial Court]: Okay. Alright, I find that Ms. Yeager is in contempt of Court for filing the lawsuit in direct contradiction of what the court appointed Referee and Receiver said. I don't know how much clearer it can be, do not file the action, do not file the action.

In the written order, signed on 9 November 2012 and filed on 26 November 2012, the trial court made the following findings of fact:

1. This Court previously entered [the Receiver Order] (which remains in full force and effect) that provided, among other things, neither party would further encumber any assets (particularly the 2 pieces of real estate) that are the subject of both parties' claims for equitable distribution.

2. After the entry of that Order the Plaintiff drew money out of an equity line that was secured by the former marital residence. The Plaintiff freely admitted that she had used this money to pay for her own expenses, including attorney's fees.

3. The Plaintiff increased the amount of money owed on the equity line in direct violation of the Court's previous Order.

4. The Plaintiff's actions in borrowing money and increasing the balance due on the equity line further encumbered the former marital residence. The Plaintiff's actions were willful and without justification.

5. The Plaintiff has had and continues to have the ability to comply with the Order.

The trial court ordered that plaintiff "shall not use the equity line or further encumber any assets that are the subject of this litigation."

On 4 April 2012, the trial court held a hearing upon defendant's motion to hold plaintiff in contempt. At the conclusion of the hearing, the trial court orally made the following findings:

> despite [the Receiver] [O]rder prohibiting further encumbrances, Plaintiff admitted that she, in fact, wrote checks off of the equity line thereby increasing the amount owed and secured by the property.
>
> The Plaintiff continued to write checks on the line of credit, received monies and increased the amount owed on the equity line up to the date of the filing of the contempt motion.
>
> Plaintiff's actions of further encumbering the property was willful. I find her in contempt; order her to abide by all terms and conditions of the order; to not write anymore checks on the equity line[.]
>
> . . . .
>
> My previous order of the court Todd Owens, appointed referee, giving him authority among other things, resolve the issue of the encumbrances; to establish what encumbrances of any were on the real property pursuant to North Carolina Rules of the Civil Procedure 53.
>
> The referee has authority to file such lawsuits as he thinks necessary and appropriate. Mr. Owens instructing [plaintiff] not to file a lawsuit in Superior Court regarding an action [to] quiet title in this very property that is the subject of the case.
>
> In despite of this, [plaintiff] filed a Superior Court action regarding the property that is the subject matter of this case. Records specifically instructed [plaintiff] to not file this lawsuit but she filed it in direct contradiction of the direct instructions.
>
> [Plaintiff's] action to file the Superior Court lawsuit was willful and a direct violation of the previous order of the court. I find her in contempt[.]

The trial court's written order, signed on 9 November 2012 and filed on 26 November 2012, made the following findings of fact:

> 1. On June 25, 2010 this Court previously entered [the Receiver Order] (which remains in full force and effect) that provided, among other things, N Todd Owen was appointed as Receiver/Referee of certain real estate which was the subject of both parties'

claims for equitable distribution. The [Receiver] Order was later clarified in an order dated December 13, 2010. The [Receiver Order] was appealed; however, this appealed [sic] was dismissed by the North Carolina Court of Appeals.

2. Both of the aforementioned orders gave the Receiver/Referee broad powers to investigate the various claims of certain 3rd parties which purported to place liens against the real estate that is the subject of the equitable distribution claims. The orders also gave the Receiver/Referee the power to take the steps necessary to "quiet" the titles to both parcels.

3. The Receiver/Referee instructed both parties to NOT file any additional claims regarding these 2 parcels of real estate. The Plaintiff filed a Superior Court lawsuit to "quiet" title after being instructed numerous times to not do so.

4. The Plaintiff's actions in filing the Superior Court lawsuit was a direct violation of the Court's [Order] and was willful and without justification.

5. The Plaintiff has had and continues to have the ability to comply with the Order.

Furthermore, plaintiff was ordered to not file any other legal actions regarding the two real estate parcels.

On 13 December 2011 *nunc pro tunc* 1 December 2011, the trial court entered an "Order Dissolving Receivership and Relieving Court Appointed Receiver/Referee." This order found that on 16 August 2011, the receiver caused Satisfactions of Security Instruments to be recorded with the Mecklenburg Register of Deeds to terminate the post-complaint encumbrances on the properties. The trial court also found that the receiver had concluded the investigation and rendered a detailed report and ordered the receivership to be dissolved.

On 5 June 2012, the trial court entered an Equitable Distribution Order distributing the marital residence to plaintiff and holding, *inter alia*, that the warehouse is the separate property of defendant.

On 20 December 2012, plaintiff appealed from both of the trial court's orders holding her in contempt.

II. Standard of Review

"The standard of review for contempt proceedings is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Sharpe v. Nobles*, 127 N.C. App. 705, 709, 493 S.E.2d 288, 291 (1997) (citation omitted).

III. Discussion

[1] On appeal, plaintiff argues that there is insufficient evidence in the record to support both contempt orders entered by the trial court. Plaintiff also maintains that both contempt orders are fatally defective for the following reasons: that the trial court erred by finding that the Receiver Order "remains in full force and effect"; that the contempt orders contained permanent injunctions but failed to meet the statutory requirements of Rule 56; and that the contempt orders failed to contain adequate findings of fact.

> At the outset we note that contempt in this jurisdiction may be of two kinds, civil or criminal, although we have stated that the demarcation between the two may be hazy at best. Criminal contempt is generally applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice.

O'Briant v. O'Briant, 313 N.C. 432, 434, 329 S.E.2d 370, 372 (1985) (citations omitted). "[C]ivil contempt, . . ., is employed to coerce disobedient [parties] into complying with orders of court." *Ruth v. Ruth*, 158 N.C. App. 123, 126, 579 S.E.2d 909, 912 (2003) (citation omitted).

Guided by these principles, we conclude that plaintiff's failure to abide by the Receiver Order constituted civil contempt.

> To hold a [party] in civil contempt, the trial court must find the following: (1) the order remains in force, (2) the purpose of the order may still be served by compliance, (3) the non-compliance was willful, and (4) the non-complying party is able to comply with the order or is able to take reasonable measures to comply.

Shippen v. Shippen, 204 N.C. App. 188, 190, 693 S.E.2d 240, 243 (2010) (citation omitted).

In the case *sub judice*, although plaintiff challenges the sufficiency of the evidence in the record and the findings made by the trial court to

uphold the contempt orders, we initially consider defendant's contention that this appeal is moot in light of the fact that the receivership established by the Receiver Order was dissolved on 13 December 2011 and the properties were distributed through the 5 June 2012 Equitable Distribution Order.

"When events occur during the pendency of an appeal which cause the underlying controversy to cease to exist, this Court properly refuses to entertain the cause merely to adjudicate abstract propositions of law." *In re Hatley*, 291 N.C. 693, 694, 231 S.E.2d 633, 634 (1977) (citation omitted). "A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. [A]n appeal presenting a question which has become moot will be dismissed." *Swanson v. Herschel*, 174 N.C. App. 803, 805, 622 S.E.2d 159, 160 (2005) (citations omitted).

In *Smithwick v. Frame*, 62 N.C. App. 387, 303 S.E.2d 217 (1983), the plaintiff filed a motion for civil contempt against the defendants for failure to comply with an order awarding temporary custody of the minor child to plaintiff and failure to comply with a consent order providing primary custody of the minor child with the defendants, subject to temporary custody and visitation rights in the plaintiff. The trial court entered an order finding the defendants in contempt but reserving punishment of the defendants until final disposition of the child custody matter. *Id.* at 391, 303 S.E.2d at 220. Subsequently, the trial court entered an order disposing of the child custody matter and electing not to punish the defendants for contempt. The defendants appealed, arguing that the trial court lacked jurisdiction to consider the issue of contempt. *Id.* Our Court held that because the defendants "suffered no injury or prejudice as a result of the contempt order, their [arguments] are moot and will not be considered by us." *Id.*

Here, plaintiff was found in contempt for willfully failing to comply with the Receiver Order by drawing money out of an equity line secured by the marital residence and by filing an action to quiet title to the properties. However, the trial court did not impose any consequence or penalty for plaintiff's contempt. Similar to *Smithwick*, plaintiff did not suffer an injury or prejudice as a result of the contempt orders. In addition, the order dissolving the receivership and the equitable distribution order distributing the properties has left "the underlying controversy to cease to exist." *Hatley*, 291 N.C. at 694, 231 S.E.2d at 634 (citation omitted). Based on the foregoing, we hold that any determination we might make in this appeal concerning the contempt orders would not have any practical effect, and therefore, plaintiff's arguments are moot. Accordingly, we dismiss plaintiff's appeal.

[2] Moreover, we note two recent interrelated cases from our Court that involved the same parties and counsel. Our Court filed an unpublished opinion on 2 July 2013, affirming an order of the trial court awarding defendant $4,605.00 in attorney's fees as a sanction against plaintiff for seeking the issuance of a mandamus petition by our Court. *Yeager v. Yeager*, __ N.C. App. __, 748 S.E.2d 774 (2013) (unpublished). Our Court observed that during the pendency of that appeal, the parties had filed eleven motions and other requests for relief and stated the following:

> [a]s should be apparent from the unusual length of the list of motions and other requests for relief that the parties have asserted before this Court during the pendency of the present appeal, the parties have expended considerable time and effort complaining about each other's conduct and seeking redress from the Court for allegedly unprofessional or legally unsupported actions on the part of their opponents. Although the various remedies available under the North Carolina Rules of Appellate Procedure exist for a reason and although members of the bar do have an obligation to provide their clients with zealous representation, we take the liberty of pointing out that "scorched earth" litigation tactics, while sometimes emotionally satisfying to attorneys or their clients, are often counterproductive, particularly in family law matters; have the potential to substantially increase the complexity and cost of the litigation process; and increase the burdens placed upon both the trial and appellate judiciary.

Id. at __, 748 S.E.2d at __. More importantly, we point out that our Court warned counsel, which included Ilonka Aylward of Aylward Family law, the following: "we urge counsel to seriously consider the merits and potential demerits of the manner in which this case has been litigated to this point as they attempt to resolve any matters which remain at issue between the parties." *Id.*

Subsequently, in an unpublished opinion filed 6 August 2013 also involving the same parties and counsel, our Court affirmed the trial court's dismissal of plaintiff's complaint for declaratory judgment and to quiet title to the properties. *Yeager v. Yeager*, __ N.C. App. __, 746 S.E.2d 427 (2013) (unpublished). Our Court noted that

> [c]ontinuously since 6 May 2008, when plaintiff filed a complaint for alimony, equitable distribution, and

> attorney's fees against defendant, the parties have been engaged in a course of incessant litigation in several interrelated lawsuits in Mecklenburg County which have thus far resulted in numerous court orders addressing various issues including interim distribution, appointment of a receiver, contempt, sanctions, equitable distribution, and no less than eleven appeals to this Court, excluding the many petitions filed with this Court.
>
> . . . .
>
> This litigation has been particularly rancorous. . . .

Id. at __, 746 S.E.2d at 428.

Based on our conclusion above that plaintiff's arguments challenging the contempt orders are moot, we conclude that plaintiff's present appeal was taken frivolously, as it was "not well grounded in fact and was not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law" pursuant to Rule 34(a) of the North Carolina Rules of Appellate Procedure. N.C. R. App. P. 34(a)(1) (2013). In light of the extensive history of litigation between the parties, we must also conclude that this appeal was taken for an "improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation[.]" N.C. R. App. P. 34(a)(2). Therefore, we determine that sanctions are warranted and order that plaintiff and her attorney pay the costs and reasonable expenses, including reasonable attorney fees, incurred by defendant because of this frivolous appeal. N.C. R. App. P. 34(b)(2). Pursuant to Rule 34(c), we remand this case to the trial court for a hearing to determine defendant's costs and expenses. N.C. R. App. P. 34(c).

Dismissed and remanded.

Judges McGEE and DILLON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 21 JANUARY 2014)

BARNES v. HENDRICK AUTO. No. 13-537	N.C. Industrial Commission (W80523)	Affirmed
BLAND v. MILLS No. 13-628	Cabarrus (08CVS3379)	Reversed and Remanded
BOMBRIA v. LOWES HOME CTRS., INC. No. 13-680	Iredell (11CVS2751)	Affirmed
BURNS v. UNION CNTY. BD. OF EDUC. No. 13-616	N.C. Industrial Commission (TA-22902)	Reversed and Remanded
ETHERIDGE v. LEVITSKY No. 13-350	Currituck (11CVS33)	Affirmed
HENSLEE v. N.C. DEP'T OF PUB. SAFETY No. 13-739	N.C. Industrial Commission (TA-22724)	Dismissed
IN RE D.D.D. No. 13-854	Cherokee (02JT59-60) (08JT38-39)	Affirmed
IN RE J.C. No. 13-848	Wake (12JA320-322)	Affirmed
LLOYD v. COFFEY No. 13-840	Henderson (11CVS1251)	Affirmed
NAYLOR CONCRETE CONSTR., CO., INC. v. MIDCONTINENT CAS. CO. No. 13-83	Mecklenburg (10CVS7027)	Affirmed
SIMMONS v. FAYETTEVILLE STATE UNIV. No. 13-749	N.C. Industrial Commission (TA-22342)	Dismissed
SPENCER v. SPENCER No. 13-727	Stokes (12CVD57)	Dismissed
STATE v. BRIDGES No. 13-493	Wake (11CRS214643)	Affirmed
STATE v. BROCK No. 13-648	Buncombe (12CRS325)	No Error

STATE v. DAVIS No. 13-677	Craven (11CRS50791) (12CRS1014)	Affirmed in part, reversed and remanded in part.
STATE v. HARRELL No. 13-591	Stokes (10CRS446) (10CRS50048-50) (10CRS51449)	Vacate possession of a firearm by a felon conviction; reverse and remand for resentencing on remaining charges.
STATE v. HINES No. 13-793	Wilson (12CRS52283)	Remanded for resentencing.
STATE v. JACKSON No. 13-825	Pitt (09CRS59887) (09CRS59891)	Reversed and Remanded
STATE v. JOHNSON No. 13-382	Wake (12CRS204029) (12CRS206399) (12CRS5924)	No Error
STATE v. JOHNSON No. 13-428	Johnston (10CRS50020)	Reversed and Remanded
STATE v. JOHNSON No. 13-872	Rowan (11CRS4870) (11CRS54373)	No Error
STATE v. JOHNSON No. 13-792	Guilford (11CRS85063)	No Error
STATE v. KAY No. 13-570	Wayne (11CRS5499)	No Error
STATE v. KISER No. 13-826	Rowan (12CRS52407)	No Error
STATE v. KNOTTS No. 13-903	Union (11CRS55510) (12CRS869)	No Error
STATE v. MCGARVA No. 13-336	Carteret (11CRS51385) (11CRS51395)	No Error
STATE v. MINTON No. 13-218	Orange (08CRS930-931) (09CRS512)	No Error

STATE v. PUGH No. 13-536	Randolph (97CRS17484)	Conviction of First Degree Murder on Basis of Felony Murder: No Error. Conviction for First Degree Murder on the Basis of Premeditation and Deliberation: No Plain Error.
STATE v. RICKS No. 12-1476	Edgecombe (10CRS2944-45)	No Error
STATE v. SANFORD No. 13-890	Mecklenburg (11CRS55571) (11CRS55572) (11CRS55573)	No Error
STATE v. TUCKER No. 13-722	Wake (12CRS204030) (12CRS5922)	No Error
STATE v. WATLINGTON No. 13-891	Alamance (11CRS50193) (11CRS51683)	Reversed and Remanded
STATE v. WILLIS No. 13-626	Rutherford (11CRS2459)	Vacated and Remanded
STATE v. WOODRUFF No. 13-812	Rowan (12CRS54233)	No Error

BEARD v. WAKEMED

[232 N.C. App. 187 (2014)]

TRACY BEARD, EMPLOYEE, PLAINTIFF
v.
WAKEMED, EMPLOYER, SELF-INSURED (KEY RISK MANAGEMENT SERVICES, ADMINISTRATOR), DEFENDANTS

No. COA13-723

Filed 4 February 2014

1. Workers' Compensation—opinion and award—compensable injury—findings of fact—conclusions of law—evidence not reweighed

Defendants' argument in a worker's compensation case that the Industrial Commission's opinion and award awarding workers' compensation benefits to plaintiff contained fifteen findings of fact not supported by the evidence and three conclusions of law not supported by the findings of fact was overruled. Defendants were asking the Court of Appeals to reweigh the evidence before the Industrial Commission in favor of defendants. As the Court will not reweigh the evidence before the Commission, there was no valid legal argument for the Court to consider.

2. Workers' Compensation—disability—burden of proof met

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff met her burden of proof to show disability pursuant to the second prong of *Russell v. Lowes Product Distrib.*, 108 N.C. App. 762. The evidence and the findings of fact supported this conclusion.

3. Workers' Compensation—denial of motion—newly discovered evidence—reconsideration—no abuse of discretion

The Industrial Commission did not abuse its discretion in a workers' compensation case by denying defendants' motion to reconsider and admit newly discovered evidence. Evidence that plaintiff obtained a job after the hearing was not "newly discovered evidence" because it was not in existence at the time of the hearing. Furthermore, defendants' brief did not present any argument regarding the denial of the motion to the extent that it might have been considered as a motion for reconsideration.

Appeal by defendants from Opinion and Award entered 1 February 2013 and order entered 8 April 2013 by the North Carolina Industrial Commission. Heard in the Court of Appeals 19 November 2013.

O'Malley Tunstall, PLLC, by Joseph P. Tunstall, III, for plaintiff-appellee.

Cranfill Sumner & Hartzog LLP, by Jaye E. Bingham-Hinch, for defendants-appellants.

STROUD, Judge.

Defendants appeal opinion and award awarding workers' compensation benefits to plaintiff and order denying their motion for reconsideration. For the following reasons, we affirm.

I. Background

On or about 25 April 2011, defendant entered a Form 19, "EMPLOYER'S REPORT OF EMPLOYEE'S INJURY OR OCCUPATIONAL DISEASE TO THE INDUSTRIAL COMMISSION" ("report"). The report stated that plaintiff, a staff nurse, "was pulling a patient in their bed and felt lower back pain." On or about 2 May 2011, plaintiff's workers' compensation claim was denied for the following reasons:

- Your injury was not the result of an accident
- Your injury was not the result of a specific traumatic incident
- Your injury did not arise out of and in the course and scope of your employment
- Credibility based on inconsistent inaccurate and/or contradictory information
- and any other defenses that become known to the employer/carrier

On 12 May 2011, plaintiff requested that her claim be assigned for a hearing. On or about 27 May 2011, defendants responded to plaintiff's request for a hearing stating "that the plaintiff did not sustain an injury by accident arising out of and in the course of her employment and is therefore entitled to no workers' compensation benefits." On or about 13 December 2011, the parties entered into a "PRE-TRIAL AGREEMENT" wherein they all stipulated that plaintiff was an employee of defendant WakeMed and that she sustained an injury on 12 April 2011. On 23 May 2012, Deputy Commissioner Victoria M. Homick of the Industrial Commission entered an opinion and award ordering defendants to "pay temporary total disability compensation[,]" "all past and future medical

expenses incurred or to be incurred as a result of plaintiff's compensable injury[,]" "reasonable attorney's fee[,]" and "costs." On 29 May 2012, defendants appealed the Deputy Commissioner's opinion and award. On 1 February 2013, the Full Commission of the Industrial Commission entered an opinion and award again ordering defendant's to "pay temporary total disability compensation[,]" "all past and future medical expenses incurred or to be incurred as a result of Plaintiff's compensable injury[,]" "reasonable attorney's fee[,]" and "costs."

On 28 February 2013, defendants filed a "MOTION FOR RECONSIDERATION" On 7 March 2013, plaintiff objected to defendants' motion for reconsideration because, *inter alia*, it was not timely filed. On 7 March 2013, defendants contended that their motion should be heard because it was timely filed. On 8 April 2013, the Full Commission entered an order denying defendants' motion to reconsider. Defendants appealed both the opinion and award of the Full Commission and the order denying their motion to reconsider.

II. Findings of Fact and Conclusions of Law

Defendants challenge various findings of fact as unsupported by the competent evidence and several conclusions of law as unsupported by the findings of fact.

> 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 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, quotation marks, and brackets omitted).

A. Compensable Injury

[1] Defendants contend that fifteen findings of fact "are not supported by the evidence of record" and three conclusions of law "are not supported by findings of fact or the applicable law" regarding "whether

plaintiff sustained a compensable injury by accident to her back in the form of a specific traumatic incident, arising out of and in the course of her employment with WakeMed that aggravated her pre-existing low back condition[.]" (Original in all caps.) (Quotation marks omitted.) While a cursory glance of defendant's brief makes it appear that defendants are appropriately challenging the evidence, findings of fact, and conclusions of law, a thorough reading reveals that defendants are actually asking this Court to reweigh the evidence before the Commission in favor of defendants. This we cannot do, as "this [C]ourt's duty goes no further than to determine whether the record contains *any evidence* tending to support the finding." *Id.* (emphasis added). The fact that the evidence may support a different finding of fact is irrelevant if there is "any evidence tending to support" the findings of fact actually made by the Commission. *Id.*

Defendants also argue that "the only evidence that plaintiff did sustain such an injury is plaintiff's own testimony" and "plaintiff was not honest[;]" however, the evidence contains statements by medical professionals regarding the fact that plaintiff sustained a compensable injury. Furthermore, plaintiff's own testimony *is* evidence which the Commission may weigh for credibility and if it determines the evidence is credible it may base findings of fact regarding plaintiff's compensable injury upon such evidence; defendant has failed to cite any legal authority stating otherwise.

Defendants further contend that "the Commission erroneously ignored all the evidence regarding plaintiff's failure to disclose her back history to WakeMed and her medical providers and made no findings of fact regarding this evidence or the evidence that plaintiff was reprimanded for failing to assist a co-worker on a problematic procedure[.]" Yet the fact that the Commission may not have made a finding of fact regarding every piece of evidence presented does not mean that the Commission "ignored" that evidence, but only that it did not determine that a finding of fact regarding such evidence was necessary to support its determination. Quoting and citing appropriate law regarding the Commission's duty to make all the material findings of fact necessary to support the conclusions of law is not actually an argument to this Court as to why specific findings of fact are necessary in this case. Defendants have failed to demonstrate that the Commission ignored any material evidence upon which a finding must be made.

Defendants also challenge the "medical evidence" before the Commission because "there is no medical evidence that plaintiff sustained an injury at the time she alleges" as the deposed doctors were

basing their opinions "on plaintiff's subjective history[.]" Defendants have pointed to no legal authority that doctors may not rely on "plaintiff's subjective history" both in diagnosing and treating her; indeed, defendants seem to imply that all "subjective history" should be disregarded. But a doctor's medical determination is not rendered incompetent because it is based upon a patient's subjective reports of her history and symptoms as a part of a medical evaluation. *See Yingling v. Bank of America*, ___ N.C. App. ___, ___, 741 S.E.2d 395, 406 (2013) ("Especially when treating pain patients, a physician's diagnosis often depends on the patient's subjective complaints, and this does not render the physician's opinion incompetent as a matter of law." (citation, quotation marks, and brackets omitted)). Defendants have made no legal arguments showing that the doctors' depositions should not be included as competent evidence before the Commission simply because the doctors relied in part upon plaintiff's subjective history in both diagnosing and treating plaintiff, and we can think of none. As such, the Commission was allowed to weigh the evidence, including the depositions, as it saw fit and make the appropriate and essential findings of fact based upon them. *See id.* Based on the foregoing reasons, the arguments regarding the findings of fact and conclusions of law are overruled. We will not reweigh the evidence before the Commission, so there is no valid legal argument for this Court to consider from defendants regarding any of the challenged findings of fact or conclusions of law as to plaintiff's compensable injury.

B. Disability

[2] Defendants also contend that five findings of fact "are not supported by the competent evidence of record" and three conclusions of law "are not supported by the findings of fact or applicable law. Defendants' challenge to the five findings of fact and three conclusions of law center around one issue: defendants argue that the Commission erred in concluding that "plaintiff met her burden of proof pursuant to the second prong of *Russell v. Lowes Product Distrib.*, 108 N.C. App. 762, 425 S.E.2d 454 (1993)[.]"

Russell provides,

> The burden is on the employee to show that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment. The employee may meet this burden in one of four ways [including] . . . (2) the production of evidence that he is capable of some work, but that he has, after

> a reasonable effort on his part, been unsuccessful in his effort to obtain employment[.]

Russell v. Lowes Product Distribution, 108 N.C. App. 762, 765-66, 425 S.E.2d 454, 457 (1993) (citation omitted).

Defendants direct our attention to statements Dr. Daniel Albright made during his deposition which could be construed as evidence that plaintiff should not be under work restrictions. But Dr. Alright did place a 20 pound lifting restriction on plaintiff, at the very least to relieve her of the anxiety she had about returning to work because of the "exacerbation of her previous low back condition" caused by her "on-the-job injury[.]" Thus, the Commission had to weigh and consider Dr. Albright's statements along with the other evidence and based upon this could properly find that

> Dr. Albright diagnosed Plaintiff with a low back strain and recommended physical therapy and work conditioning. Dr. Albright released Plaintiff to return to work with restrictions of no lifting over twenty pounds. . . . Dr. Albright opined, to a reasonable degree of medical certainty, that the April 12, 2011 work incident exacerbated a pre-existing low back condition.

Furthermore, plaintiff's husband testified that it had been "very difficult for her" to find work due to her back pain, and plaintiff spent "four or five hours a day looking" for jobs and sending resumes to prospective employers. Plaintiff also testified that she had attempted to return to work taking a part-time position and eventually moving to a full-time position which she had held until a week or two before her hearing before the Industrial Commission but ultimately voluntarily left because she "had a lot of back pain" and "would come at the end of the day and it was hard for [her] to move." We believe that the evidence and the Commission's findings of fact regarding the evidence support the conclusion that "Plaintiff has proven disability under the second prong of *Russell*, through evidence that she made reasonable efforts to find work but has been unsuccessful in obtaining employment." Accordingly, this argument is overruled.

III. Motion for Reconsideration

[3] Defendants also contend the Commission erred in denying their motion to reconsider which they argue "contain[ed] a Motion to Consider and Admit . . . Newly Discovered Evidence[.]" Defendants' motion is entitled "DEFENDANTS' MOTION FOR RECONSIDERATION

OF FULL COMMISSION'S OPINION AND AWARD" and includes 30 numbered paragraphs. Defendants contend that two of these paragraphs contain their motion to consider and admit newly discovered evidence. The alleged "newly discovered evidence" is information that plaintiff obtained another job *after* the hearing before the Commission; this is not "newly discovered evidence" since this evidence did not exist at the time of the hearing. *See Parks v. Green*, 153 N.C. App. 405, 412, 571 S.E.2d 14, 19 (2002). "The newly discovered evidence must have been in existence at the time of the trial. This limitation on newly discovered evidence has been justified on the firm policy ground that, if the situation were otherwise, litigation would never come to an end." *Id.* (citation and quotation marks omitted).

Defendants' brief addresses only the denial of the motion to consider and admit newly discovered evidence and does not present any argument regarding the denial of the motion to the extent that it might be considered as a motion for reconsideration. In any event, both motions are reviewed for abuse of discretion. *See generally Cummins v. BCCI Const. Enters.*, 149 N.C. App. 180, 185, 560 S.E.2d 369, 373 ("the Commission did not manifestly abuse its discretion by denying defendants' Motion for Reconsideration"), *disc. review denied*, 356 N.C. 611, 574 S.E.2d 678 (2002); *Owens v. Mineral Co.*, 10 N.C. App. 84, 87, 177 S.E.2d 775, 777 (1970) ("Ordinarily, a motion for further hearing on the grounds of introducing additional or newly discovered evidence rests in the sound discretion of the Industrial Commission."); *cert. denied*, 277 N.C. 726, 178 S.E.2d 831 (1971).

> 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. Because the reviewing court does not in the first instance make the judgment, the purpose of the reviewing court is not to substitute its judgment in place of the decision maker. Rather, the reviewing court sits only to insure that the decision could, in light of the factual context in which it is made, be the product of reason.

Burnham v. McGee Bros. Co., Inc., ___ N.C. App. ___, ___, 727 S.E.2d 724, 728 (2012) (citation, quotation marks, and ellipses omitted), *disc. review dismissed and cert. denied*, 366 N.C. 437, 737 S.E.2d 106 (2013).

As the "newly discovered evidence" which the defendants asked the Commission to consider is not actually "newly discovered evidence," *see Parks*, 153 N.C. App. at 412, 571 S.E.2d at 19, the Commission did not

abuse its discretion in denying the motion. Defendants further contend that the Commission erred in failing to address their motion to consider and admit newly discovered evidence; however, even according to defendants, this "motion" was two paragraphs as part of a larger motion to reconsider. It is obvious that the Commission denied defendants' entire motion. The Commission is not required to file a separate order or even add a separate sentence specifically denying this additional "motion" embedded within the motion to reconsider, since the order denying the motion to reconsider is clearly a denial of all arguments made within that motion. This argument is overruled.

IV. Conclusion

For the foregoing reasons, we affirm.

AFFIRMED.

Judges McGEE and BRYANT concur.

COPYPRO, INC., Plaintiff
v.
JOSEPH EDWARD MUSGROVE, Defendant

No. COA13-297

Filed 4 February 2014

1. Appeal and Error—interlocutory orders and appeals—preliminary injunction—livelihood—substantial right

Where the entry of an order granting a request for the issuance of a preliminary injunction effectively destroyed defendant's livelihood by prohibiting him from working for his current employer for a period of three years, it affected a substantial right and was subject to immediate appellate review.

2. Employer and Employee—noncompetition agreement—unreasonably wide prohibition

The trial court erred by granting a preliminary injunction to plaintiff that prohibited defendant from working in any capacity for a competitor. The noncompetition agreement contained in the employment contract prohibited an unreasonably wide range of activities.

COPYPRO, INC. v. MUSGROVE

[232 N.C. App. 194 (2014)]

Appeal by defendant from order entered 19 December 2012 by Judge Thomas D. Haigwood in Pitt County Superior Court. Heard in the Court of Appeals 12 September 2013.

White & Allen, P.A., by David J. Fillippeli, Jr., for Plaintiff.

Cranfill Sumner & Hartzog LLP, by Benton L. Toups and Susie E. Sewell, for Defendant.

ERVIN, Judge.

Defendant Joseph Edward Musgrove appeals from an order granting a preliminary injunction sought by Plaintiff CopyPro, Inc., prohibiting Defendant from working in any capacity for a competitor. On appeal, Defendant contends that Plaintiff failed to demonstrate that it would likely succeed on the merits of its claim or that it would suffer harm in the absence of the issuance of the injunction. After careful consideration of Defendant's challenges to the trial court's order in light of the record and the applicable law, we conclude that the trial court's order should be reversed, in part.[1]

I. Factual Background

A. Substantive Facts

Plaintiff has been engaged in the selling, maintaining and leasing of office equipment systems for the past forty-two years, with ninety percent of Plaintiff's business being derived from the leasing of office equipment. Almost all of Plaintiff's leases are for a term of either 36, 48, or 60 months. All of Plaintiff's customers are located in various counties in eastern North Carolina.

Sales personnel working for Plaintiff are provided with access to pricing and customer information in four principal ways. First, each sales representative has access to a company database that contains important information relating to the customers within the territory

1. As will be discussed in more detail below, the trial court's order enforced a contractual provision that prohibited Defendant from disclosing or making use of certain specified information and a separate contractual provision that prohibited Defendant from working for or having any connection with a competitor. On appeal, Defendant has challenged the validity of the noncompetition agreement, but has made no challenge to the trial court's decision to enforce the nondisclosure agreement. As a result, we have no basis for overturning the trial court's decision to enforce the nondisclosure agreement and leave that part of the trial court's order undisturbed.

assigned to that employee, with the information contained in that database consisting of material such as customer names, phone numbers, "decision-makers'" names, and lease expiration reports. Secondly, Plaintiff's sales representatives receive a weekly spreadsheet that shows order logs for the entire company organized on a territory by territory basis. The weekly spreadsheets list customer names, the date and amount of each sale, and the nature of the equipment sold. However, the weekly spreadsheet does not provide information concerning the length of specific leases. Thirdly, Plaintiff's sales persons have access to an electronic database known as Recollect, which contains copies of each contract that Plaintiff has entered into with any customer. Finally, pricing changes are communicated to sales representatives using a revised electronic price book that is sent out each time such a change takes place.

On 10 November 2009, Defendant entered into an employment contract with Plaintiff under which he agreed to work for Plaintiff as a salesperson. As a condition of his employment, Defendant was required to sign a nondisclosure agreement and a covenant not to compete. In the nondisclosure agreement, Defendant agreed to refrain from disclosing or making any use of any of Plaintiff's customer lists during or after his employment except to the extent that Defendant's activities benefitted Plaintiff. In the noncompetition agreement, Defendant agreed that he would not engage in certain activities for a period of three years after the end of his employment with Plaintiff.

During the time that he worked for Plaintiff, Defendant was assigned responsibility for accounts within Pender and Onslow Counties. In carrying out his job responsibilities, Defendant was responsible for servicing the accounts that were assigned to him and obtaining new accounts. Although Plaintiff did business in 33 eastern North Carolina counties, Defendant focused his efforts on his assigned area and only contacted potential customers outside that area on a few occasions, with such extra-territorial contacts including customers in Craven, Duplin, New Hanover, and Sampson Counties and an old hunting friend in Carteret County. As a result, 95% to 97% of Defendant's time was spent working with customers or potential customers in Onslow and Pender Counties.

Defendant remained employed by Plaintiff until his resignation on 28 August 2012. Defendant decided to leave Plaintiff's employment after learning that he was no longer Plaintiff's sole service representative in Onslow County, which made up the majority of his assigned territory. A few days after he resigned from his employment with Plaintiff, Defendant went to work for Coastal Document Systems, an entity which

competes with Plaintiff and operates solely in Brunswick, Columbus, and New Hanover Counties. After beginning to work for Coastal, Defendant refrained from calling on customers in Onslow or Pender Counties. In fact, Coastal officials informed Defendant that his employment would be terminated if he contacted any of Plaintiff's customers or conducted business within the territory that had been assigned to him during his employment with Plaintiff. However, Plaintiff learned in late August that Defendant was working for Coastal when one of its sales representatives visited a potential customer, learned that Coastal had provided the potential customer with a quote, and saw that one of Defendant's business cards was attached to Coastal's proposal.

B. Procedural Facts

On 29 October 2012, Plaintiff filed a complaint in which it alleged that Defendant had breached the nondisclosure and noncompetition agreements and sought the issuance of a temporary restraining order, a preliminary injunction, a permanent injunction and an award of attorneys' fees. After conducting a hearing with respect to Plaintiff's request for the issuance of a preliminary injunction on 15 November 2012, the trial court entered an order on 19 December 2012 granting Plaintiff's motion and enjoining Defendant for violating the nondisclosure and noncompetition provisions of his contract with Plaintiff. Defendant noted an appeal to this Court from the trial court's order.

II. Legal Analysis

A. Appealability

[1] "A preliminary injunction is interlocutory in nature," which means that an order issuing a preliminary injunction "cannot be appealed prior to [a] final judgment absent a showing that the appellant has been deprived of a substantial right which will be lost should the order escape appellate review before final judgment." *Clark v. Craven Regional Medical Authority*, 326 N.C. 15, 23, 387 S.E.2d 168, 173 (1990) (internal quotation marks omitted) (quoting *State ex rel. Edmisten v. Fayetteville Street Christian School*, 299 N.C. 351, 358, 261 S.E.2d 908, 913, *cert. denied*, 449 U.S. 807, 101 S. Ct. 55, 66 L. Ed. 2d 11 (1980)). However, when the entry of an order granting a request for the issuance of a preliminary injunction has the effect of destroying a party's livelihood, the order in question affects a substantial right and is, for that reason, subject to immediate appellate review. *See Precision Walls, Inc. v. Servie*, 152 N.C. App. 630, 635, 568 S.E.2d 267, 271 (2002). As a result of the fact that the challenged order prohibits Defendant from working for Coastal

for a period of three years, we conclude that his appeal from the trial court's order is properly before us.

B. Standard of Review

"[O]n appeal from an order of superior court granting or denying a preliminary injunction, an appellate court is not bound by the findings, but may review and weigh the evidence and find facts for itself." *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 402, 302 S.E.2d 754, 760 (1983). As a general proposition, however, "a decision by the trial court to issue or deny an injunction will be upheld if there is ample competent evidence to support the decision, even though the evidence may be conflicting and the appellate court could substitute its own findings." *Wrightsville Winds Townhouse Homeowners' Ass'n v. Miller*, 100 N.C. App. 531, 535, 397 S.E.2d 345, 346 (1990) (citing *Robins & Weill v. Mason*, 70 N.C. App. 537, 540, 320 S.E.2d 693, 696, *disc. review denied*, 312 N.C. 495, 322 S.E.2d 559 (1984)), *disc. review denied*, 328 N.C. 275, 400 S.E.2d 463 (1991). In light of that fact, " 'there is a presumption that the judgment entered below is correct, and the burden is upon appellant to . . . show error.' " *Western Conference of Original Free Will Baptists of N.C. v. Creech*, 256 N.C. 128, 140, 123 S.E.2d 619, 627 (1962) (quoting *Lance v. Cogdill*, 238 N.C. 500, 504, 78 S.E.2d 319, 322 (1953)). As a result, we will uphold a trial court's decision to issue a preliminary injunction "(1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued." *Ridge Cmty. Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977). In view of the fact that the evidence received at the hearing held before the trial court was essentially undisputed and reflected in the trial court's findings of fact, the ultimate question for our consideration is whether the trial court correctly applied the applicable law to the undisputed record evidence, a determination that requires us to utilize a *de novo* standard of review. *Robins & Weill*, 70 N.C. App. at 540, 320 S.E.2d at 696.

C. Validity of Noncompetition Agreement

[2] In his brief, Defendant contends that the trial court erroneously granted the requested preliminary injunction on the grounds that Plaintiff failed to establish that it was likely to succeed on the merits of its underlying breach of contract claim. According to Defendant, the evidentiary materials contained in the record demonstrate that the noncompetition agreement contained in his employment contract prohibited an unreasonably wide range of activities and should, for that reason, have been deemed unenforceable. Defendant's argument has merit.

A noncompetition agreement contained in or associated with an employment agreement is subject to careful scrutiny. *Keith v. Day*, 81 N.C. App. 185, 193, 343 S.E.2d 562, 567 (1986), *disc. review improvidently granted*, 320 N.C. 629, 359 S.E.2d 466 (1987). A valid noncompetition agreement entered into in the employer-employee context must be "(1) in writing; (2) reasonable as to time and territory; (3) made a part of the employment contract; (4) based on valuable consideration; and (5) designed to protect a legitimate business interest of the employer." *Young v. Mastrom, Inc.*, 99 N.C. App. 120, 122-23, 392 S.E.2d 446, 448 (citing *A.E.P. Indus.*, 308 N.C. at 403-04, 302 S.E.2d at 760-61), *disc. review denied*, 327 N.C. 488, 397 S.E.2d 239 (1990). On the one hand, an employer has a right " 'to protect, by reasonable contract with [its] employee, the unique assets of [its] business, a knowledge of which is acquired during the employment and by reason of it,' " with these unique assets having "been defined as 'customer contacts' and 'confidential information.' " *Elec. S., Inc. v. Lewis*, 96 N.C. App. 160, 165-66, 385 S.E.2d 352, 355 (1989) (alterations in original) (quoting *Kadis v. Britt*, 224 N.C. 154, 159, 29 S.E.2d 543, 546 (1944), and citing *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 653, 657, 370 S.E.2d 375, 381, 384 (1988)), *disc. review denied*, 326 N.C. 595, 393 S.E.2d 876 (1990). On the other hand, an enforceable noncompetition agreement must "not impose unreasonable hardship on the [employee]," *Kadis*, 224 N.C. at 161, 29 S.E.2d at 547, and should not, for that reason, be "broader than necessary to protect its legitimate business interest." *Hartman v. W.H. Odell & Assocs.*, 117 N.C. App. 307, 316, 450 S.E.2d 912, 919 (1994), *disc. review denied*, 339 N.C. 612, 454 S.E.2d 251 (1995). Although the record before us in this case clearly establishes that the noncompetition agreement at issue here was in writing, was made part of the employment contract between Plaintiff and Defendant, and was supported by valuable consideration, we conclude that the noncompetition agreement at issue prohibits Defendant from engaging in a much broader array of activities than is necessary to protect Plaintiff's legitimate business interests.[2]

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2. In addition to contending that the noncompetition agreement was broader than necessary to protect Plaintiff's legitimate business interests, Defendant challenges its temporal and territorial restraints as well. Although Plaintiff has raised serious questions about the validity of these temporal and territorial restraints, which prohibit Defendant from working in counties outside his assigned territory for a period of three years, we need not address Defendant's challenges to these provisions given our decision to reverse the trial court's order on the grounds that the noncompetition agreement between the parties prohibits a broader array of activities than is necessary to protect Plaintiff's legitimate business interests. For that same reason, we decline to address Defendant's specific objections concerning the extent to which Plaintiff demonstrated that it would suffer irreparable harm absent the issuance of a preliminary injunction.

The noncompetition agreement between the parties provides that:

> [f]or a period of three (3) years from the date of the termination of his/her employment, the Employee will not, within the geographical limits of the Counties of Beaufort, Bertie, Bladen, Brunswick, Camden, Carteret, Chowan, Columbus, Craven, Currituck, Dare, Duplin, Edgecombe, Gates, Greene, Halifax, Hertford, Hyde, Jones, Lenoir, Martin, Nash, New Hanover, Northampton, Onslow, Pamlico, Pasquotank, Pender, Pitt, Tyrrell, Washington, Wayne, Wilson or within a sixty (60) mile radius of Greenville and Wilmington, directly or indirectly, own, manage, operate, join, control, be employed or participate in the ownership, management, operation or control of, or be connected in any manner with any business of the type and character of the business engaged in by the Employer at the time of such termination.

As our decisions reflect, we have held on numerous occasions that covenants restricting an employee from working in a capacity unrelated to that in which he or she worked for the employer are generally overbroad and unenforceable. *E.g.*, *Henley Paper Co. v. McAllister*, 253 N.C. 529, 534-35 117 S.E.2d 431, 434 (1960) (holding that a noncompetition agreement was unenforceable on the grounds, in part, that it precluded the defendant from engaging in activities unrelated to those inherent in the sales position that he had occupied while employed by the plaintiff); *Med. Staffing Network, Inc. v. Ridgway*, 194 N.C. App. 649, 656-57, 670 S.E.2d 321, 327-28 (2009) (holding that a noncompetition agreement that prohibited an employee from working for a competing business even if the employment duties assigned to that employee by the competing business were not similar to the duties that the employee had performed while working for the plaintiff was unenforceable); *VisionAIR, Inc. v. James*, 167 N.C. App. 504, 508-09, 606 S.E.2d 359, 362-63 (2004) (alterations in original) (holding that a covenant that prohibited an employee from "own[ing], manag[ing], be[ing] employed by or otherwise participat[ing] in, directly or indirectly, any business similar to" the employer's business was overly broad and unenforceable); *Hartman*, 117 N.C. App. at 317, 450 S.E.2d at 920 (holding that a noncompetition agreement was unenforceable on the grounds that the agreement in question prohibited the plaintiff from having any "association whatsoever with any business that provides actuarial services"). We have even held similar restrictions to be unenforceable outside the employment contract context. *E.g.*, *Outdoor Lighting Perspectives Franchising*

v. Harders, __ N.C. App. __, __, 747 S.E.2d 256, 267-68 (2013) (holding that a noncompetition agreement contained in a franchise agreement was unenforceable because it prevented the franchisee from associating with or owning a business in competition with any of the franchisor's affiliates regardless of the extent to which the franchisor's affiliates engaged in a business similar to that in which the franchisee was currently employed). As a result, in the absence of unusual factors tending to justify such a restriction, the appellate courts in this jurisdiction have typically refused to allow the enforcement of noncompetition agreements precluding an employee from engaging in activities that have no bearing on the employer's business interests.

A careful reading of the relevant contractual language at issue here establishes, as confirmed by the testimony of David Jones, Plaintiff's chief of operations, that the noncompetition agreement at issue here was intended to and actually did prohibit Defendant from working for Coastal in any capacity, including as a custodian. As the cases summarized above clearly establish, such overly broad restrictions are generally not enforceable in the employer-employee context on the grounds that the scope of the restrictions contained in such agreements far exceeds those necessary to protect an employer's legitimate business interests. *E.g.*, *Hartman*, 117 N.C. App. at 317, 450 S.E.2d at 920 (holding that a noncompetition agreement that would prevent a non-custodial "plaintiff from working as a custodian for any 'entity' which provides 'actuarial services' " was unenforceable). As a result, we conclude that the noncompetition agreement at issue here is unenforceable.[3]

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3. The ordering paragraphs in the trial court's order do not contain the "in any manner" language found in the noncompetition agreement. Although Defendant contends that this omission represents an implicit attempt to "blue pencil" the noncompetition agreement in order to render it enforceable, we are inclined to agree with Plaintiff that the omission of this language from the trial court's order simply reflects the nature of Defendant's activities on behalf of Coastal rather than a "blue penciling" exercise. However, to the extent that this limitation on the scope of the trial court's order did represent an attempt to "blue pencil" the noncompetition agreement in order to make it enforceable, that effort must be deemed unavailing given that the exclusion of the omitted language for the reason suggested by Defendant would amount to an effort to rewrite the noncompetition agreement rather than a refusal to enforce a severable provision. *E.g.*, *Welcome Wagon Int'l, Inc. v. Pender*, 255 N.C. 244, 248, 120 S.E.2d 739, 742 (1961) (stating that, "where, as here, the parties have made divisions of the territory, a court of equity will take notice of the divisions the parties themselves have made, and enforce the restrictions in the territorial divisions deemed reasonable and refuse to enforce them in the divisions deemed unreasonable"); *Whittaker Gen. Med. Corp. v. Daniel*, 324 N.C. 523, 528, 379 S.E.2d 824, 828 (1989) (stating that, "[t]he courts will not rewrite a contract if it is too broad but will simply not enforce it," and that, "[i]f the contract is separable, however, and one part is reasonable, the courts will enforce the reasonable provision").

In seeking to persuade us to reach a different result, Plaintiff places principal reliance upon our decision in *Precision Walls*. In *Precision Walls*, the defendant worked as one of the plaintiff's project managers, having responsibility for customer contacts, calculating job costs, projecting bids, ordering materials, and engaging in other similar activities. *Precision Walls*, 152 N.C. App. at 632, 568 S.E.2d at 269. After signing a covenant that prevented him from being employed in any capacity with a competing business for a period of one year, the defendant went to work for a competitor. *Id.* at 632-33, 568 S.E.2d at 269-70. In holding that the noncompetition agreement at issue in that case was enforceable against a challenge predicated on the theory that it prohibited an unduly broad array of activities, we stated:

> that defendant would not be less likely to disclose the information and knowledge garnered from his employment with plaintiff if he worked for one of plaintiff's competitors in a position different from the one in which he worked for plaintiff. If defendant's new employer asked him about information he gained while working for plaintiff, defendant would likely feel the same pressure to disclose the information. Thus, plaintiff's legitimate business interest allows the covenant not to compete to prohibit employment of any kind by defendant with a direct competitor.

Id. at 639, 568 S.E.2d at 273. However, we do not believe that *Precision Walls* is controlling in this case.

Aside from the fact that the restriction at issue in *Precision Walls* was to remain in effect for only one year while the noncompetition agreement at issue here will remain in effect for three years, the present record contains no indication that Defendant ever had either the same level of responsibility or the same level of access to competitively sensitive information as the defendant whose conduct was at issue in *Precision Walls*. Simply put, the record developed in this case, unlike the record developed in *Precision Walls*, contains no evidence that Defendant had the responsibility for developing client-specific pricing proposals or adjusting prices for competitive reasons or that Defendant was involved in the development and operation of his employer's bidding or pricing strategies. Although Plaintiff contended in the court below that Defendant might share vital information even if he were hired by a competing business as a custodian, nothing in the present record indicates that Defendant actually possessed sufficiently important information to render him a competitive threat regardless of the

position he held with a subsequent employer. Although our opinion in *Precision Walls* indicates that the defendant possessed all of the information about which the employer was concerned, Defendant denied having taken any of Plaintiff's materials with him when he left its employment, claimed that he had never accessed the Recollect system during the entire time that he worked for Plaintiff, stated that his failure to access the Recollect system prevented him from knowing the identity of Plaintiff's customers, and testified that, in the event that he determined that a potential customer upon whom he called while working for Coastal was currently receiving service from Plaintiff, his standard reply was to describe Plaintiff as a "fine company" and depart without leaving a business card.

In order to affirm the trial court's order in this case, we would have to hold that an employer's decision to merely make information available to employees, without more, would support the enforcement of a noncompetition agreement like that at issue here. Such a result would be a substantial expansion of our decision in *Precision Walls*, and would be inconsistent with decisions such as *Henley Paper*, *Medical Staffing Network*, *VisionAIR*, and *Hartman*.[4] Although Plaintiff would have clearly had the right to seek "to prohibit defendant from working in an identical position with a competing business," *id.* at 638, 568 S.E.2d at 273, its decision to draft a much broader noncompetition agreement that prohibited Defendant from engaging in a wide array of activities which posed no competitive threat to Plaintiff and which involved an employee who had very different responsibilities than those at issue in *Precision Walls* causes us to conclude that *Precision Walls* does not control the outcome in this case.

Aside from *Precision Walls*, Plaintiff has cited no authority in support of its contention that a noncompetition agreement that precludes an employee from working for a competitor in a capacity unrelated to the employer's competitive position protects a legitimate business interest. In light of the absence of any controlling authority tending to suggest that restrictions such as those at issue here are appropriate in this case and in light of the fact that, contrary to many prior decisions of the

4. Although Plaintiff asserts that Defendant possessed information that would allow him to approach Plaintiff's customers when their existing leases were about to expire, this argument is not valid unless one assumes that Defendant actually accessed the Recollect system or concludes that the fact that Defendant did, at one point, have access to the information contained in the Recollect system is sufficient to support a decision to uphold the enforceability of the noncompetition agreement at issue here, a step that we are unwilling to take.

Supreme Court and this Court, the noncompetition agreement at issue here precludes Defendant from working for a competitor in a manner which does not affect the employer's legitimate business interests, we hold that the noncompetition agreement at issue here is much broader than is necessary to protect Plaintiff's legitimate business interests and is, for that reason, unenforceable. As a result, the trial court erred by issuing a preliminary injunction enforcing the noncompetition provisions of the employment agreement between Plaintiff and Defendant.

III. Conclusion

Thus, for the reasons set forth above, we conclude that, while the trial court's decision to enforce the nondisclosure agreement should be affirmed, the trial court erred by concluding that the noncompetition agreement at issue here was enforceable and by issuing a preliminary injunction enforcing that agreement. As a result, the trial court's order should be, and hereby is, affirmed in part and reversed in part.

AFFIRMED IN PART; REVERSED IN PART.

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

JAMES HINSON, Plaintiff
v.
CITY OF GREENSBORO, DAVID WRAY, former Police Chief of the City of Greensboro, in his official and Individual capacity, and RANDALL BRADY, former Deputy Police Chief of the City of Greensboro, in his official and individual capacity, Defendants

No. COA13-404

Filed 4 February 2014

1. Appeal and Error—interlocutory orders and appeals—denial of motion to dismiss—immunity—substantial right—non-immunity related arguments

Although appeals from interlocutory orders raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review, defendants were not entitled to immediate appellate review of the trial court's denial of their motions to dismiss on the basis of any non-immunity related arguments. Further, defendant's petitions for writ of *certiorari* were denied.

2. Immunity—sovereign—liability insurance policy—official capacity—waiver—state claims of discrimination

The trial court erred by denying defendants' motion to dismiss with respect to plaintiff's state claims against defendant city and defendants Wray and Brady in their official capacities. Based on the terms of the city's liability insurance policy, it had not waived its immunity as to plaintiff's state claims of discrimination on the basis of race, conspiracy to discriminate on the basis of race, or conspiracy to injure plaintiff in his reputation and profession. Further, plaintiff's claim against defendants Wray and Brady in their official capacities was a suit against the State, and therefore, sovereign immunity applied.

Appeal by defendants from order entered 18 December 2012 by Judge Edwin G. Wilson, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 8 October 2013.

Ferguson Chambers & Sumpter, P.A., by James E. Ferguson, II, for plaintiff-appellee James Hinson.

Van Laningham Duncan PLLC, by Allison O. Van Laningham, Alan W. Duncan, and L. Cooper Harrell, for defendant-appellant City of Greensboro.

Smith, James, Rowlett & Cohen, LLP, by Seth R. Cohen, and Carruthers & Roth, P.A., by Kenneth R. Keller, for defendant-appellants Randall Brady and David Wray.

McCULLOUGH, Judge.

Defendants City of Greensboro, David Wray, and Randall Brady appeal from a trial court's interlocutory order, denying their motions to dismiss plaintiff James Hinson's complaint, except as to plaintiff's claim for punitive damages against defendant City of Greensboro. Based on the following reasons, we reverse the trial court's denial of defendants' motion to dismiss with respect to plaintiff's State claims against defendant City of Greensboro and defendants David Wray and Randall Brady in their official capacities.

I. Background

On 30 May 2008, plaintiff James Hinson filed a complaint against defendant City of Greensboro ("defendant Greensboro"), David Wray,

former Police Chief of the City of Greensboro, in his official and individual capacity ("defendant Wray"), and Randall Brady, former Deputy Police Chief of the City of Greensboro, in his official and individual capacity ("defendant Brady") (collectively "defendants"). Plaintiff sought compensation and alleged that defendants had subjected plaintiff to discrimination on the basis of race, conspired to discriminate on the basis of race, and conspired to injure plaintiff in his reputation and profession. Plaintiff amended this complaint on 6 February 2009. On 4 September 2009, plaintiff filed a voluntary dismissal of his claims, without prejudice.

Plaintiff filed a second complaint on 3 September 2010. The complaint alleged the following, in pertinent part: Plaintiff, an African-American, started working for the Police Department of the City of Greensboro in 1991 as a police officer in training. Plaintiff received numerous awards and received evaluations at the level of "exceeds expectations" and "superior performance" from the years 2000 through 2010. On 1 December 2001, plaintiff was promoted to Lieutenant. In 2003 and 2004, Chief of Police defendant Wray and Deputy Police Chief defendant Brady began "targeting plaintiff and creating problems for him in his workplace because of plaintiff's race."

The complaint further alleged that in 2003, defendants Wray and Brady directed two officers to gather pictures of various black officers employed by the Greensboro Police Department, including a photograph of plaintiff, to be used in line-up books or to be used in line-up photos while similarly situated white officers were not treated in this manner. From 2003 to 2004, defendants Wray and Brady caused some black officers of the City of Greensboro Police Department, including plaintiff, to be investigated by the Special Investigation Division ("SID") for alleged misconduct when SID was not created for this purpose. The Criminal Investigation Division ("CID") and Internal Affairs units were designed to investigate matters involving Greensboro Police Officers. Defendants required white officers suspected of wrongdoing to be investigated by the CID, Internal Affairs Division, or caused some white officers not to be investigated at all.

Plaintiff was transferred from the Operation Support Division to the Central Division under the direction of a Commanding Officer who required plaintiff to complete a detailed monthly schedule. Plaintiff alleges that similarly situated white officers were not treated in this manner. Plaintiff's department-issued computer was installed with a device that would monitor his activity while no other lieutenants in the Greensboro Police Department were monitored. Plaintiff filed a grievance

alleging retaliation and a hostile work environment but dropped the grievance after a meeting on 2 February 2005 where defendant Wray, defendant Brady, an Assistant Chief, a Commanding Officer, and Police Attorney were present. In March 2005, at the instruction of defendant Wray, a tracking device was placed on plaintiff's patrol car. Defendant Brady advised plaintiff that he was under surveillance because he was "possibly working off duty while on duty in violation of the Greensboro Police Department Departmental Directives and Procedures." Plaintiff alleged that his race was the motivation in initiating these investigations.

Defendant Wray falsely reported to the City Manager, Deputy City Manager, City Attorney, and media that plaintiff was suspected of being associated with illegal drug activity and other criminal activity. On 17 June 2005, plaintiff was suspended by defendant Wray for alleged ongoing relationships with prostitutes and others who have a reputation in the community for involvement in criminal activity. Defendant Wray also delivered a public media statement falsely alleging that plaintiff was part of an "ongoing multi-jurisdictional criminal investigation" and that plaintiff's actions were under "internal review." Even though plaintiff was cleared by SID for any alleged wrongdoing, defendant Wray initiated an additional investigation of plaintiff by hiring retired and former officers of the Internal Affairs Division. Defendants Brady and Wray approved an additional investigation which did not adhere to the Greensboro Police Department's policies and Standard Operating Procedures. It was completed on 31 August 2005. On 5 June 2005, plaintiff was placed on leave. He was reinstated in January 2006. Since 2001, plaintiff has not been promoted and has not received any awards or commendations within the department.

Plaintiff's complaint alleged discrimination on the basis of his race, conspiracy to discriminate on the basis of race, and conspiracy to injure plaintiff and his reputation and profession in violation of federal law, 42 USC § 1981, § 1983, and § 1985 and in violation of North Carolina common law. Plaintiff argued that defendants had waived their governmental immunity by the purchase of liability insurance, as provided in N.C. Gen. Stat. § 160A-485[1], and that defendant Greensboro was liable as

1. N.C.G.S. § 160A-485(a) (2013) states that "[a]ny city is authorized to waive its immunity from civil liability in tort by the act of purchasing liability insurance. Participation in a local government risk pool pursuant to Article 23 of General Statute Chapter 58 shall be deemed to be the purchase of insurance for the purposes of this section. Immunity shall be waived only to the extent that the city is indemnified by the insurance contract from tort liability. No formal action other than the purchase of liability insurance shall be required to waive tort immunity, and no city shall be deemed to have waived its tort immunity by any action other than the purchase of liability insurance. . . ."

respondeat superior as to each of the state common law claims against defendants Wray and Brady.

On 22 November 2010, defendant Wray and defendant Brady filed motions to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. On 24 November 2010, defendant Greensboro filed a motion to dismiss pursuant to Rule 12(b)(1), 12(b)(2), and 12(b)(6).

Following a hearing held on 16 October 2012, the trial court entered an order on 18 December 2012. The order denied defendant Wray's motion to dismiss and defendant Brady's motion to dismiss. The order denied defendant Greensboro's motion to dismiss, except as to the claim for punitive damages against defendant Greensboro. As to that claim only, the motion to dismiss was allowed.

From this order, defendants appeal.

II. Standard of Review

"On appeal of a 12(b)(6) motion to dismiss for failure to state a claim, our Court conducts a de novo review[.]" *Ventriglia v. Deese*, 194 N.C. App. 344, 347, 669 S.E.2d 817, 819-820 (2008) (citation omitted). "We consider 'whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory.'" *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013) (citation omitted). "The court must construe the complaint liberally and should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief." *Enoch v. Inman*, 164 N.C. App. 415, 417, 596 S.E.2d 361, 363 (2004) (citation and quotation marks omitted).

"Dismissal is proper, however, when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Newberne v. Dep't of Crime Control & Pub. Safety*, 359 N.C. 782, 784, 618 S.E.2d 201, 204 (2005) (citation and quotation marks omitted).

III. Discussion

A. Scope of Review

[1] As a preliminary matter, we must first identify the issues that are properly before this Court.

"This Court has held that appeals from interlocutory orders raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review." *Williams v. Devere Const. Co., Inc.*, __ N.C. App. __, __, 716 S.E.2d 21, 25 (2011) (citation omitted). However, this only applies "for denial of a motion to dismiss under Rules 12(b)(2), 12(b)(6), and 12(c), or a motion for summary judgment under Rule 56. We cannot review a trial court's order denying a motion to dismiss under Rule 12(b)(1)." *Horne v. Town of Blowing Rock*, __ N.C. App. __, __, 732 S.E.2d 614, 621 (2012). Therefore, defendants' challenges to the trial court's denial of their motion to dismiss under Rule 12(b)(2) and 12(b)(6) based on governmental immunity grounds are properly before us.

Defendants have also sought immediate review of the trial court's denial of their motion to dismiss based on non-immunity related challenges by petitioning this Court.[2] However, defendants have not stated how a substantial right would be lost absent immediate appellate review of these non-immunity related challenges. Because it is well established that "[i]t is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order" and that "the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits[,]" we decline to review the non-immunity related challenges to the trial court's denial of defendants' motions to dismiss. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994) (citations omitted). *See Bynum v. Wilson County*, __ N.C. App. __, __, 746 S.E.2d 296, 299-300 (2013) (granting review of an interlocutory order raising issues of governmental or sovereign immunity but limiting the scope of review to only immunity-related challenges).

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2. The non-immunity related arguments advanced by defendants consist of claims that plaintiff's cause of action on the basis of race in violation of 42 U.S.C. § 1981 was time-barred; that defendant Greensboro could not be held liable on the basis of *respondeat superior*; that plaintiff's claim pursuant to 42 U.S.C. § 1983 is a new claim that cannot be included based on the "savings provision" of Rule 41(a) of the North Carolina Rules of Civil Procedure; that plaintiff's discrimination claim in violation of 42 U.S.C. § 1983 for violation of 42 U.S.C. § 1981 is time-barred; that defendants cannot be parties to a conspiracy; that plaintiff cannot show an agreement that would support a civil conspiracy due to the intracorporate immunity doctrine; that the parties' signed "Memorandum of Understanding" operated as an accord and satisfaction to bar plaintiff's claims; and that plaintiff's 2010 complaint did not properly allege claims against defendants Wray and Brady in their individual capacities, thereby violating Rule 41(a) and being barred by the statute of limitations.

Based on the foregoing, defendants are not entitled to immediate appellate review of the trial court's denial of their motions to dismiss on the basis of any non-immunity related arguments and we dismiss those portions of their appeal that rely on non-immunity related issues. Furthermore, we deny defendant's petitions for writ of certiorari, requesting that our Court review the entirety of the 18 December 2012 Order, including non-immunity related arguments.

B. Sovereign Immunity

[2] Defendants argue that plaintiff's state law claims of discrimination on the basis of race, conspiracy to discriminate on the basis of race, and conspiracy to injure plaintiff in his reputation and profession all fail under the doctrine of governmental immunity.

It is well established that "[s]overeign immunity shields the State, its agencies, and officials sued in their official capacities from suit on state law claims unless the State consents to suit or waives its right to sovereign immunity." *Toomer v. Garrett*, 155 N.C. App. 462, 480, 574 S.E.2d 76, 91 (2002) (citation omitted). "The rule of sovereign immunity applies when the governmental entity is being sued for the performance of a governmental, rather than proprietary, function." *Dalenko v. Wake Cty. Dep't of Human Servs.*, 157 N.C. App. 49, 55, 578 S.E.2d 599, 603 (2003) (citation omitted). "Law enforcement is well-established as a governmental function, and includes the training and supervision of officers by a police department." *Pettiford v. City of Greensboro*, 556 F. Supp. 2d 512, 524 (2008) (citations and quotation marks omitted).

"A [city] may, however, waive such immunity through the purchase of liability insurance. [I]mmunity is waived only to the extent that the [city] is indemnified by the insurance contract from liability for the acts alleged." *Satorre v. New Hanover County Bd. Of Comm'rs*, 165 N.C. App. 173, 176, 598 S.E.2d 142, 144 (2004) (citations and quotation marks omitted). A municipality may also waive its immunity by participating in a local government risk pool. N.C. Gen. Stat. § 160A-485(a) (2011). "In order to overcome a defense of [sovereign] immunity, the complaint must specifically allege a waiver of [sovereign] immunity. Absent such an allegation, the complaint fails to state a cause of action." *Green v. Kearney*, 203 N.C. App. 260, 268, 690 S.E.2d 755, 762 (2010) (citation omitted).

We find *Pettiford v. City of Greensboro*, 556 F. Supp. 2d 512 (M.D.N.C. 2008), to be instructive on the issue before us. In *Pettiford*, plaintiffs Nicole and Anthony Pettiford sought civil damages based on alleged misconduct arising from an investigation by the Greensboro

Police Department which is operated and owned by the defendant City of Greensboro. *Id.* at 515. The plaintiffs filed the action in the Superior Court of Guilford County, North Carolina, seeking recovery under the United States Constitution, pursuant to 42 U.S.C. § 1983, the North Carolina Constitution, and the common law of negligence. *Id.* at 516. The City of Greensboro removed the action on the grounds of federal question jurisdiction. *Id.* In lieu of answering, the City of Greensboro filed a motion to dismiss and a supplemental motion to dismiss pursuant to Rule 12(b)(1), (b)(2), (b)(6) and (b)(7)[3] of the Federal Rules of Civil Procedure. *Id.*

The *Pettiford* court noted that the City of Greensboro acknowledged its participation in a Local Government Excess Liability Fund ("Fund") and purchased an excess liability insurance policy, but that "neither constitute[d] a waiver of its immunity." *Id.* at 525. Uncontested evidence established that the City of Greensboro is self-insured up to $100,000.00 and that the Fund pays claims between $100,000.00 and $3,000,000.00, though the City of Greensboro is obligated to repay the Fund in the entirety. *Id.* The court in *Pettiford* concluded that the Fund did not waive the City of Greensboro's immunity as explained in *Dobrowolska ex rel. Dobrowolska v. Wall*, 138 N.C. App. 1, 8-9, 530 S.E.2d 590, 596 (2000), because the Fund failed to meet the statutory requirements of a local government risk pool.

Furthermore, the *Pettiford* court concluded that the City of Greensboro's purchase of excess liability insurance did not waive its governmental immunity based on the explicit language of the policy. The City of Greensboro acknowledged that it purchased a $5 million excess liability policy to cover claims above $3 million. The *Pettiford* court examined the policy provisions of the excess liability insurance and found them to be substantially similar to those found in *Magana v. Charlotte-Mecklenburg Board of Education*, 183 N.C. App. 146, 645 S.E.2d 91 (2007), where our Court held that a local governmental entity had not waived its immunity through the purchase of excess liability insurance. *Id.* at 527. Both the policy found in *Magana* and the City of

3. Rule 12(b) of North Carolina Rules of Civil Procedure provides the following, in pertinent part: "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) Lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, . . . (6) Failure to state a claim upon which relief can be granted, (7) Failure to join a necessary party." N.C. Gen. Stat. § 1A-1, Rule 12(b)(1), (2), (6), and (7) (2013).

Greensboro's policy in *Pettiford* "disclaim[ed] any right of indemnification until (1) the damages exceed a self-insured retention amount ($1 million in *Magana* and $3 million in [*Pettiford*]); (2) the insured has a legal obligation to pay those damages; and (3) the insured actually pays those damages to the claimant." *Id.* at 529. The *Pettiford* court concluded the following:

> This excess liability insurance does not apply unless and until the City has a legal obligation to pay the $ 3 million self-insured amount. Because the City is immune from negligence claims up to $ 3 million, it will never have a legal obligation to pay this self-insured amount and, thus, has not waived its immunity through the purchase of this excess liability insurance policy.

The City of Greensboro's motion to dismiss and supplemental motion to dismiss the negligence claims were granted. *Id.* at 529.

In the case before us, plaintiff argued in the 3 September 2010 complaint that defendant Greensboro had waived its governmental immunity by the purchase of liability insurance. In its motion to dismiss, defendant Greensboro acknowledges the purchase of liability insurance, but maintains that the liability insurance does not constitute a waiver of its sovereign immunity. In support of its defense, defendant Greensboro filed the affidavit of Everette Arnold, Executive Director of the Guilford City/County Insurance Advisory Committee and the insurance contracts themselves[4]. The evidence indicates that in 2004, defendant Greensboro purchased a $5 million excess liability policy with a $3 million self-insured retention from the Genesis Insurance Company. Arnold's affidavit stated that "the retained limit ($3,000,000.00) 'must be paid by the Insured. . . .' Thus, under the terms of the policy, the City [of Greensboro] is responsible for paying $3,000,000.00 before there is any potential coverage under the Genesis Insurance policy." The language of the insurance policy states that "[t]his policy is not intended by the Insured to waive its governmental immunity[.]" We find these policy provisions to be substantially similar to those found in *Magana* and *Pettiford*.

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4. The defense of sovereign immunity is both a North Carolina Rules of Civil Procedure Rule 12(b)(1) and Rule 12(b)(2) defense. *Battle Ridge Cos. v. N.C. DOT*, 161 N.C. App. 156, 157, 587 S.E.2d 426, 427 (2003). "Consideration of the affidavits and insurance contracts is proper, without converting the motion to dismiss to one for summary judgment, under motions filed pursuant to Rules 12(b)(1) and (b)(2) and with respect to state law claims." *Pettiford*, 556 F. Supp. 2d at 525 n.11.

Based on the terms of defendant Greensboro's liability insurance policy, we hold that defendant Greensboro has not waived its immunity as to plaintiff's State claims of discrimination on the basis of race, conspiracy to discriminate on the basis of race, and conspiracy to injure plaintiff in his reputation and profession. Furthermore, plaintiff's claims against defendants Wray and Brady in their official capacities "is a suit against the State" and therefore, sovereign immunity applies. *White v. Trew*, 366 N.C. 360, 363, 736 S.E.2d 166, 168 (2013) (citation omitted); *See Clayton v. Branson*, 153 N.C. App. 488, 493, 570 S.E.2d 253, 257 (2002) (stating that "[a]n officer acting in his official capacity shares the municipalities immunity or waiver" (citation omitted)). Accordingly, we reverse the trial court's denial of defendants' motion to dismiss with respect to plaintiff's state claims against defendant Greensboro and defendants Wray and Brady in their official capacities.

Reversed.

Judges McGEE and DILLON concur.

IN THE MATTER OF C.W.F.

No. COA13-444

Filed 4 February 2014

Evidence—reports—non-testifying witness—right to confrontation—voluntary admission of a minor

The trial court erred in a hearing for review of a voluntary admission of a minor authorizing a continued admission for inpatient psychiatric treatment by admitting into evidence and relying upon three reports prepared by non-testifying witnesses. Admission of the reports violated the minor's right to confrontation.

Appeal by juvenile respondent from order entered 22 August 2012 by Judge Don W. Creed, Jr. in Moore County District Court. Heard in the Court of Appeals 25 September 2013.

Attorney General Roy Cooper, by Assistant Attorney General Charlene Richardson and Special Deputy Attorney General Lisa Corbett, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender David W. Andrews, for juvenile respondent-appellant.

Miranda R. McCoy, for petitioner-appellee Jackson Springs Treatment Center.

CALABRIA, Judge.

C.W.F. appeals an order concurring with the voluntary admission of a minor and authorizing a continued admission for inpatient psychiatric treatment for a period of 90 days. We vacate the order and remand to the trial court for findings.

On 7 August 2012, C.W.F's mother consented to C.W.F.'s evaluation for treatment, services and support provided by Jackson Springs Treatment Center ("Jackson Springs"). Freida Green ("Green"), a member of Jackson Springs' staff, completed C.W.F.'s Evaluation for Admission/Continued Stay ("Green's evaluation"). Green described her findings, included C.W.F.'s medications and recommended his admission for treatment or rehabilitation.

On 8 August 2012, Green filed a Request for Hearing to determine whether the court concurred with the voluntary admission/continued stay. Green attached her evaluation as well as a psychological evaluation prepared by licensed psychological associate Daniel Huang, M.A., dated 15 January 2012 ("Huang's evaluation").

Dr. Leah McCallum, Ph.D. ("Dr. McCallum"), performed a Comprehensive Clinical Assessment ("McCallum's assessment") dated 10 August 2012, which included, *inter alia*, C.W.F.'s general health and behavioral health history, described his removal from home for sexually abusing his younger sister, physical abuse by his father, and the precipitating events that caused his problems. McCallum's assessment also included recommendations for C.W.F.'s treatment within a structural 24-hour therapeutic environment. Dr. McCallum justified treatment at Jackson Springs because less intense levels of care where C.W.F. remained in the home and received community based treatment had been attempted but were unsuccessful. In the less structured treatment environments, C.W.F. continued to exhibit emotional and behavioral problems both in the home and community settings.

At the hearing in Moore County District Court on 22 August 2012 to determine whether C.W.F. should be treated at Jackson Springs or whether a less restrictive environment would be sufficient, the trial

court reviewed Green's and Huang's evaluations that had been attached to the Request for Hearing. C.W.F. was represented by appointed counsel. Jackson Springs presented the testimony of clinical director Teresa McGuire ("McGuire") as well as McCallum's assessment. McGuire, a social worker and clinical director at Jackson Springs, testified that she was providing C.W.F. with individual and group therapy. McGuire stated the reason C.W.F. was transferred to Jackson Springs from his prior treatment facility in South Carolina. Specifically, during C.W.F's prior placement, he displayed physical and verbal aggression and violated sexual boundaries with peers. McGuire believed that in C.W.F.'s prior treatment facility, he had possibly learned the skills he needed to reduce his physical and verbal aggression but had been unable to carry out those skills. C.W.F. objected to McGuire's testimony.

When McGuire was questioned regarding the purpose of reviewing a patient's medical records, she answered that it is part of the process of familiarizing the staff with a new patient's history, and that to prepare for the hearing she had reviewed Green's and Huang's evaluations as well as McCallum's assessment (collectively, "the reports"). C.W.F. objected to the introduction of the reports. The trial court overruled C.W.F.'s objections to McGuire's testimony and also admitted the reports.

The trial court found as fact all matters that had been set out in Green's evaluation, which included Green's opinion that C.W.F. was mentally ill, and incorporated it by reference as findings. Based on the findings, the trial court concluded that C.W.F. was mentally ill and in need of continued treatment at Jackson Springs because less restrictive measures would not be sufficient. In addition, the court concurred with C.W.F.'s voluntary admission and authorized C.W.F.'s continued admission at Jackson Springs for 90 days. C.W.F. appeals.

C.W.F. argues that the court erred by admitting and relying on three reports prepared by non-testifying witnesses because the reports violated his right to confrontation. We agree.

N.C. Gen. Stat. § 122C-224.3(f) (2011) provides the criteria for the trial court to determine whether a minor should remain in a voluntary admission:

> For an admission to be authorized beyond the hearing, the minor must be (1) mentally ill or a substance abuser and (2) in need of further treatment at the 24-hour facility to which he has been admitted. Further treatment at the admitting facility should be undertaken only when lesser measures will be insufficient. It is not necessary that the

> judge make a finding of dangerousness in order to support a concurrence in the admission.

On appeal from an order of involuntary commitment, the questions for determination are (1) whether the court's findings of fact "are indeed supported by the 'facts' which the court recorded in its order as supporting its findings, and (2) whether in any event there was competent evidence to support the court's findings." *In re Hogan*, 32 N.C. App. 429, 433, 232 S.E.2d 492, 494 (1977). These same issues must be addressed in an appeal from the voluntary commitment of a minor.

C.W.F. disputes the trial court's findings of mental illness and that further treatment at Jackson Springs was based upon competent evidence. Specifically, C.W.F. argues that the admission of all three reports deprived him of his right to confrontation.

N.C. Gen. Stat. § 122C-224.3, which addresses hearings for review of voluntary admissions of minors, provides that "[c]ertified copies of reports and findings of physicians, psychologists and other responsible professionals as well as previous and current medical records are admissible in evidence, but the minor's right, through his attorney, to confront and cross-examine witnesses may not be denied." N.C. Gen. Stat. § 122C-224.3(c) (2011). Thus, the plain language of this statute not only permits admission of relevant medical records into evidence, but also ensures the minor's right to confront and cross-examine witnesses. *Id.* The juxtaposition of these two points in a single sentence indicates the legislature sought to protect the minor's right to confront and cross-examine witnesses regarding those admissible records.

In the instant case, McGuire was Jackson Springs' sole witness at the hearing. C.W.F.'s counsel specifically objected to McGuire's reliance on the reports "on the grounds of hearsay, lack of confrontation, and foundation" and later objected to the admission of the reports themselves on the same grounds. The court overruled the objections and admitted Green's report as well as Huang's evaluation and McCallum's assessment. McGuire indicated that the purpose of all three reports was for the professionals at Jackson Springs to acquaint themselves with C.W.F.'s specific needs and individual conditions as a new patient.

The trial court found as fact all matters in Green's evaluation, and incorporated it by reference as findings. The court made no additional findings of fact. While Green's evaluation was certified as a true and exact copy of the Evaluation for Admission/Continued Stay, and therefore admissible under N.C. Gen. Stat. § 122C-224.3(c) as a certified copy of a report by a "psychologist [or] other responsible professional,"

Green was not available to testify at the hearing. In addition, Green was not subject to cross-examination regarding her evaluation and opinions regarding C.W.F.'s mental health. Therefore, the trial court erred in relying solely on Green's evaluation, since C.W.F. had no opportunity to cross-examine her.

The court's conclusions of law that C.W.F. was mentally ill, in need of continued treatment, and that less restrictive measures than a voluntary commitment would not be sufficient, are based solely upon Green's report. However, Green did not testify at the hearing, and C.W.F. was unable to confront or cross-examine Green regarding the findings and opinions she recorded in her evaluation. Since N.C. Gen. Stat. § 122C-224.3(c) protects a minor's right to cross-examine witnesses regarding relevant medical records, we vacate the trial court's order, remand for further findings, and need not address C.W.F.'s remaining arguments.

Vacated and remanded.

Judges ELMORE and STEPHENS concur.

IN THE MATTER OF D.H., D.H., K.H.

No. COA13-1055

Filed 4 February 2014

1. Termination of Parental Rights—best interests of child—age of children

The trial court did not abuse its discretion by determining that termination of respondent mother's parental rights was in the best interests of the minor children even though the trial court failed to make written findings concerning the age of the children. Respondent failed to cite any evidence in the record indicating that age was raised as a relevant factor in this case.

2. Termination of Parental Rights—findings—likelihood children would be adopted

Although respondent mother in a termination of parental rights case contended that the trial court abused its discretion by making no findings with respect to the likelihood that the children would be adopted pursuant to N.C.G.S. § 7B-1110(a)(2), the trial court made the requisite findings concerning this factor.

3. Termination of Parental Rights—findings—whether termination would aid in accomplishment of permanent plan

Although respondent mother in a termination of parental rights case contended that the trial court abused its discretion by making no findings with respect to N.C.G.S. § 7B-1110(3), concerning whether termination would aid in the accomplishment of the permanent plan for the juveniles, which in this case was adoption, the trial court made sufficient findings concerning this factor.

4. Termination of Parental Rights—findings—absence of adoptive placement

Although respondent mother in a termination of parental rights case contended that the trial court abused its discretion by making no findings with respect to the quality of the relationship between the juveniles and the proposed adoptive parent, guardian, custodian, or other permanent placement, pursuant to N.C.G.S. § 7B-1110(5), the absence of an adoptive placement for a juvenile at the time of the termination hearing was not a bar to terminating parental rights.

5. Termination of Parental Rights—findings—adoptability of children

The trial court did not abuse its discretion by terminating respondent mother's parental rights even though she contended that it was unlikely that two of the children would be adopted. The trial court found as fact that with continued therapeutic support, these children were likely to be adoptable.

Appeal by respondent from order entered 27 June 2013 by Judge Elizabeth T. Trosch in Mecklenburg County District Court. Heard in the Court of Appeals 7 January 2014.

Twyla Hollingsworth-Richardson for Mecklenburg County Department of Social Services, Youth & Family Services.

Poyner Spruill LLP, by Shannon E. Hoff, for guardian ad litem.

Peter Wood for respondent-mother.

DILLON, Judge.

Respondent mother appeals from an order terminating her parental rights as to the juveniles D.H. ("Dora"), D.H. ("David"), and K.H ("Kim").[1] For the reasons stated herein, we affirm.

In February of 2009, the Mecklenburg County Department of Social Services ("DSS") obtained non-secure custody of eleven-year-old Kim, five-year-old David, and four-year-old Dora and filed a petition alleging that they were neglected and dependent juveniles. The petition's allegations described respondent's inadequate supervision of the juveniles and substance abuse, as well as her lack of appropriate alternative placement for the children.

The district court entered adjudications of neglect and dependency on 16 April 2009. On 8 February 2012, the court ceased reunification efforts and changed the juveniles' permanent plan to adoption.

DSS filed a petition for termination of respondent's parental rights on 16 October 2012. The district court heard the petition on 15 May 2013. In its order entered 27 June 2013, the district court found grounds to terminate respondent's parental rights based on (1) neglect, (2) failure to make reasonable progress, (3) failure to pay a reasonable portion of the cost of care, and (4) abandonment. N.C. Gen. Stat. § 7B-1111(a)(1), (2), (3), (7) (2011). At disposition, the court found and concluded that terminating respondent's parental rights was in the best interests of each child. N.C. Gen. Stat. § 7B-1110(a) (2011). Respondent filed timely notice of appeal from the termination order.[2]

The termination of parental rights statutes provide for a two-stage termination proceeding: an adjudication stage and a disposition stage. *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984). In the adjudication stage, the trial court must determine whether there exists one or more grounds for termination of parental rights under N.C. Gen. Stat. § 7B-1111(a). *Id.* If the trial court determines that at least one ground for termination exists, it then proceeds to the disposition stage where it must determine whether terminating the rights of the parent is in the best interest of the child, in accordance with N.C. Gen. Stat. § 7B-1110(a). " 'We review the trial court's decision to terminate parental rights [(made at the disposition stage)] for abuse of discretion.' " *In re*

1. Pseudonyms are used throughout this opinion to protect the identity of the juveniles. *See* N.C.R. App. P. 3.1(b).

2. The order also terminated the parental rights of the juveniles' fathers, none of whom has pursued an appeal.

J.L.H., __ N.C. App. __, __, 741 S.E.2d 333, 337 (2012) (citation omitted). "The trial court 'is subject to reversal for abuse of discretion only upon a showing . . . that the challenged actions are manifestly unsupported by reason.' " *Id.* (citation omitted).

In this case, respondent does not challenge the adjudicatory portion of the trial court's order in which the court determined that grounds existed to support termination of respondent's parental rights. Rather, respondent argues that the trial court abused its discretion in the disposition portion of its order in which the court determined that termination of her parental rights was in the children's best interests. Specifically, respondent argues that the trial court failed to made adequate findings of fact on the dispositional factors set forth in N.C. Gen. Stat. § 7B-1110(a) (2011); and, further, that the court erred in determining that termination of her parental rights was in the juveniles' best interests, given that two of the children are unlikely to be adopted.

N.C. Gen. Stat. § 7B-1110(a) provides that in determining whether terminating parental rights is in a child's best interest, "[t]he court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, that the court finds relevant, reliable and necessary to determine the best interests of the juvenile." *Id.* This statute further provides the following:

> In each case, the court shall consider the following criteria and make written findings regarding the following that are relevant:
>
> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

Id. We believe that the language of this stature requires the trial court to "consider" all six of the listed factors, and that any failure to do so would

constitute an abuse of discretion. The statute, as amended in 2011, also requires that the trial court make certain written findings. *In re J.L.H.*, __ N.C. App. at __, 741 S.E.2d at 338-39. We do not believe, however, that N.C. Gen. Stat. § 7B-1110(a) requires the trial court to make written findings with respect to *all* six factors; rather, as the plain language of the statute indicates, the court must enter written findings in its order concerning only those factors "that are relevant." *Id.* at __, 741 S.E.2d at 339 (holding that "[t]he amended statute now explicitly requires that the trial court to make written findings of fact on all relevant factors from N.C. Gen. Stat. § 7B-1110(a)").

[1] Respondent argues that the trial court erred by not making any written findings in connection with the factors set forth in subparts (1), (2), (3) and (5) of N.C. Gen. Stat. § 7B-1110(a). Regarding subpart (1), which concerns the age of the children, we agree with respondent that the trial court did not make any findings as to this factor. Respondent argues that the age of each child is a relevant factor because it bears on their adoptability. However, respondent fails to cite any evidence in the record indicating that age was raised as a relevant factor *in this case*. Respondent instead focuses on the following testimony of the DSS worker:

> . . . I'm aware that there are families – or there is at least one family that has expressed an interest in [Dora].
>
> [David], with the right supports in place, I believe that we could find an adoptive home for [David]. It will be a little bit more difficult just given the . . . behavioral issues that he's exhibiting in placement and in school.
>
> And I don't think that it would be a problem to find — [Kim] is a very engageable, very sweet young woman. I don't think there would be any problem in finding an adoptive home for her. *That does get a little bit more difficult with age*, but I think that she could certainly engage with a family if the right family was found for her.

(Emphasis added). We construe this testimony as indicative of the DSS worker's belief that a child's age *can be* a relevant factor in considering a child's adoptability, but not as indicative of any belief on her part that the children's age was a relevant or influential factor in the present case. Since respondent fails to point to any evidence in the record demonstrating that age was placed in issue as a relevant factor, such that it had an impact on the trial court's decision, we do not believe that the trial

court erred in not making specific findings concerning the children's ages in its order.[3]

[2] Next, respondent argues that the trial court erred by making no findings with respect to the likelihood that the children would be adopted, pursuant to N.C. Gen. Stat. § 7B-1110(a)(2). However, we believe that the trial court made the requisite findings concerning this factor. Specifically, the trial court made findings with respect to each child's current emotional state, that each child's emotional state would likely improve once the uncertainty about their status was lifted, and that "[w]ith continued therapeutic support[,] these children are likely to be adoptable." We believe that these findings are supported by the evidence, including the testimonies of the DSS worker and Dr. Kamillah McKissick. Accordingly, this argument is overruled.

[3] Respondent next argues that the trial court erred by failing to make findings pursuant to N.C. Gen. Stat. § 7B-1110(3), concerning whether termination would aid in the accomplishment of the permanent plan for the juveniles, which in this case is adoption. We believe, however, that the trial court made sufficient findings concerning this factor in its order. Specifically, the trial court found as fact that the children have "experienced significant emotional turmoil over the last four years as a result of their impermanent status in foster care"; that they would significantly improve once they are "free and able" to engage in a relationship with a permanent care provider; that "with therapeutic support[,] these children are likely to be adoptable"; and that any attempts to encourage contact with their mother would be "inconsistent with the children's health, safety, and need for a safe permanent home within a reasonable time." Accordingly, this argument is overruled.

[4] Respondent next argues that the trial court erred by making no findings concerning "[t]he quality of the relationship between the juvenile[s] and the proposed adoptive parent, guardian, custodian, or

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3. *In J.L.H.*, *supra*, the trial court did not to make findings regarding the factors listed in subparts (3) and (4) of N.C. Gen. Stat. § 7B-1110(a). *In re J.L.H.*, __ N.C. App. at __, 741 S.E.2d at 337. We determined that those factors were relevant and, accordingly, remanded to the trial court to make findings as to those factors. *Id.* at __, 741 S.E.2d at 338. In determining that those factors were relevant, we noted that they had been placed in issue by virtue of the evidence presented before the trial court; and we specifically recounted the conflicting evidence concerning one of the factors. *Id.* at __, 741 S.E.2d at 337-38. However, unlike in *J.L.H.*, in the case *sub judice*, though the ages of the children were properly "considered," respondent does not point to any evidence indicating that the age of any child was placed in issue such that this factor was "relevant."

other permanent placement[,]" pursuant to N.C. Gen. Stat. § 7B-1110(5). Respondent contends that there was no evidence concerning a potential adoptive parent for any of the children. Indeed, the trial court found that Youth and Family Services "is yet to find a single relative who has cooperated with efforts to assess their home for placement and maintained a willingness to provide a home for these children." However, we have held that the absence of an adoptive placement for a juvenile at the time of the termination hearing is not a bar to terminating parental rights. *See In re Norris*, 65 N.C. App. 269, 275, 310 S.E.2d 25, 29 (1983) ("It suffices to say that such a finding [of adoptability] is not required in order to terminate parental rights."). Therefore, where there is currently no proposed candidate to provide permanent placement, a trial court would not be able to make any findings with regard to subpart (5), since there would be no relationship bond to assess in its decision-making process. In any event, the trial court did identify the children's maternal grandmother as a possible permanent placement provider if she were able to qualify; and the trial court made a number of findings regarding the relationship between her and the children. Accordingly, this argument is overruled.

[5] Finally, respondent argues that the trial court abused its discretion in terminating her parental rights because, she contends, it was unlikely that two of the children would be adopted. However, trial court found as fact that "[w]ith continued therapeutic support[,] these children are likely to be adoptable." We believe that this finding is supported by the evidence, including Dr. McKissick's expert opinion and the testimony of the DSS worker, *supra*. We have carefully reviewed the trial court's order and do not believe that its decision to terminate respondent's parental rights was "manifestly unsupported by reason[,]" *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980). Accordingly, this argument is overruled; and we affirm the order of the trial court.

AFFIRMED.

Judges McGEE and McCULLOUGH concur.

IN RE THOMPSON

[232 N.C. App. 224 (2014)]

IN THE MATTER OF MARY ELLEN BRANNON THOMPSON

No. COA13-564

Filed 4 February 2014

1. Civil Procedure—law of case—judgment never entered

The trial court erred by concluding that an incompetency order was the law of the case. The incompetency order was invalid because judgment was never entered.

2. Guardian and Ward—appointment of guardian of estate—incompetency order never entered

The clerk's appointment of Mr. Thompson as guardian of respondent's estate was without legal authority. The incompetency order was never entered.

3. Collateral Estoppel and Res Judicata—res judicata—reliance on invalid orders

The trial court erred by concluding that the issues raised in appellant's appeal to the trial court were barred by the doctrine of *res judicata*. The other orders relied upon by the trial court in determining *res judicata* were invalid.

4. Pleadings—sanctions—improperly assessed

The trial court erred by imposing sanctions pursuant N.C.G.S. § 1A-1, Rule 11. The clerk's failed entry of the incompetency order prevented appellant from filing timely written notice of appeal of that order. Appellant also had a proper purpose, factual basis, and legal basis to the file motions.

Appeal by Calvin Brannon from order entered 20 November 2012 by Judge Anderson D. Cromer in Forsyth County Superior Court. Heard in the Court of Appeals 20 November 2013.

Attorney Reginald D. Alston for Calvin Brannon, appellant.

CRUMPLER, FREEDMAN, PARKER & WITT, by Dudley A. Witt, for Bryan C. Thompson, appellee.

ELMORE, Judge.

On 20 November 2012, Judge Anderson D. Cromer (Judge Cromer) entered an order that denied all four of Calvin Brannon's (appellant)

motions, dismissed them with prejudice, and issued sanctions against appellant. Each of appellant's motions hinged on the argument that an incompetency order dated 3 May 2007 declaring Mary Ellen Brannon Thompson (respondent) incompetent was never entered. After careful consideration, we reverse and remand the trial court's order.

I. Facts

On 4 April 2007, a Petition for Adjudication of Incompetence and Application for Appointment of Guardian or Limited Guardian was filed by Leslie Poe Parker in Forsyth County Superior Court. The petition alleged that respondent lacked the capacity to manage her own affairs or to make important decisions concerning her "person, family [sic] or property[.]" The same day, a notice of "Hearing on Incompetence and Order Appointing Guardian Ad Litem" was filed. A hearing was conducted on 26 April 2007 by Theresa Hinshaw, assistant clerk of Forsyth County Superior Court (clerk Hinshaw). Numerous individuals were present at the hearing, including appellant, who is the brother of respondent. After the hearing, clerk Hinshaw announced in open court that she found respondent to be incompetent, and she orally appointed Bryan Thompson (Mr. Thompson) as guardian of the estate. On 3 May 2007, clerk Hinshaw signed and dated an order (incompetency order) finding "by clear, cogent, and convincing evidence that the respondent [was] incompetent." Additionally, clerk Hinshaw signed and dated an order authorizing issuance of letters appointing Mr. Thompson guardian of the estate.

Thereafter, appellant filed a "Petition for Removal of Guardianship of the Person" and a "Motion to Set Aside the Adjudication of Incompetence Order and Ask For a Rehearing[.]" Lawrence G. Gordon, Jr., Forsyth County Superior Court Clerk (clerk Gordon), signed and dated an order on 8 December 2009 denying the motions and concluded that the matters were time barred because appellant failed to timely appeal clerk Hinshaw's incompetency order. Appellant then appealed clerk Gordon's order to superior court. In an order entered 6 April 2010, Forsyth County Superior Court Judge James M. Webb (Judge Webb) dismissed both motions with prejudice.

On 27 March 2012, appellant filed four motions giving rise to this appeal. These motions were:

> (a) for relief in the cause from a guardianship granted to Mr. Thompson dated May 1, 2007;
>
> (b) to declare that Leslie Parker did not have the capacity to represent respondent in the filings of motions and petitions on April 4, 2007;

(c) to declare that Mr. Thompson was not appointed the guardian of respondent after an adjudication of incompetence under G.S. 35A 1112(e) and G.S. 35A-1120.

(d) to declare Mr. Thompson's act of filing a voluntary bankruptcy petition under 11 U.S.C. 301 as a state court guardian of the estate of respondent invalid.

These motions were heard before Susan Frye (clerk Frye), Forsyth Superior Court Clerk, and she entered an order on 4 May 2012 denying appellant's motions. She also granted Mr. Thompson's motion for sanctions. In her order, clerk Frye denied motions (a), (b), and (c) because clerk Gordon and Judge Webb had previously "clearly ruled" on appellant's motions, "no appeals were ever entered[,]" "no new evidence was presented[,]" and "[t]he pleadings filed . . . [were] repetitious[.]" Clerk Frye declined to rule on motion (d) because she "[did] not have jurisdiction to hear this matter as the jurisdiction is presently under the Federal Bankruptcy Court." Appellant appealed clerk Frye's order to Forsyth County Superior Court. For the same reasons decreed by clerk Frye, Judge Cromer entered an order on 20 November 2012 denying and dismissing with prejudice appellant's motions (a), (b), and (c). Judge Cromer denied appellant's motion (d) with prejudice because it was "baseless." He also granted Mr. Thompson's motion for sanctions.

II. Analysis

a.) Law of the Case

[1] Appellant first argues that the incompetency order was invalid because judgment was never entered, and therefore the trial court erred in concluding that the incompetency order was the law of the case. We agree.

"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."). "In reviewing a trial judge's findings of fact, we are 'strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.'" *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)); *see also Sisk v. Transylvania Cmty. Hosp., Inc.*,

364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010) (" '[F]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary.' " (quoting *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 100-01, 655 S.E.2d 362, 369 (2008))). "Appeal from an order adjudicating incompetence shall be to the superior court for hearing de novo and thence to the Court of Appeals." N.C. Gen. Stat. § 35A-1115 (2013).

N.C. Gen. Stat. § 35A-1112 provides a superior court clerk with the authority to find that an individual is incompetent. N.C. Gen. Stat. § 35A-1112 (2013). After such a finding is made, "the clerk *shall enter* an order adjudicating the respondent incompetent." *Id.* (emphasis added). When such an order is entered, "a guardian or guardians shall be appointed[.]" N.C. Gen. Stat. § 35A-1120 (2013). A party seeking to appeal an incompetency order entered by a clerk must

> within 10 days of *entry* of the order or judgment, appeal to the appropriate court for a trial or hearing *de novo*. The order or judgment of the clerk remains in effect until it is modified or replaced by an order or judgment of a judge. Notice of appeal shall be filed with the clerk in writing. Notwithstanding the service requirement of G.S. 1A-1, Rule 58, orders of the clerk shall be served on other parties only if otherwise required by law.

N.C. Gen. Stat. § 1-301.1 (2013) (emphasis added).

The North Carolina Rules of Civil Procedure "are applicable to special proceedings, except as otherwise provided." N.C. Gen. Stat. § 1-393 (2013). Rule 58 of the North Carolina Rules of Civil Procedure governs the entry of judgments and orders. N.C.R. Civ. P. § 1A-1, Rule 58 (2013). Under Rule 58, "a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court." *Id.* We have also held that "Rule 58 applies to orders, as well as judgments, such that an *order* is likewise entered when it is reduced to writing, signed by the judge, and filed with the clerk of court." *Watson v. Price*, 211 N.C. App. 369, 370, 712 S.E.2d 154, 155 *review denied*, 365 N.C. 356, 718 S.E.2d 398 (2011) (citation omitted). Thus, an oral ruling announced in open court is "not enforceable until it is entered[.]" *West v. Marko*, 130 N.C. App. 751, 756, 504 S.E.2d 571, 574 (1998) (internal quotation mark omitted). Accordingly, a party cannot appeal an order until entry occurs. *Mastin v. Griffith*, 133 N.C. App. 345, 346, 515 S.E.2d 494, 495 (1999). After entry, a clerk's order that is not timely appealed "will stand as a judgment of the court[.]" *In re Atkinson-Clark Canal Co.*, 234 N.C. 374, 377, 67

S.E.2d 276, 278 (1951). This legal proposition stems from the law of the case doctrine, which provides that "when a party fails to appeal from a tribunal's decision that is not interlocutory, the decision below becomes the law of the case and cannot be challenged in subsequent proceedings in the same case." *Boje v. D.W.I.T.*, 195 N.C. App. 118, 122, 670 S.E.2d 910, 912 (2009) (internal quotation mark omitted).

Here, both parties agree that the hearing on the Petition for Adjudication of Incompetence was a special proceeding, and thus the Rules of Civil Procedure applied. Clerk Hinshaw orally rendered her decision finding respondent incompetent on 26 April 2007 in open court. Thereafter, she reduced the order to writing and dated it. However, nothing in the record indicates that the order was filed with the clerk of court. The order is devoid of any stamp-file or other marking necessary to indicate a filing date, and therefore it was not entered. *See Huebner v. Triangle Research Collaborative*, 193 N.C. App. 420, 422, 667 S.E.2d 309, 310 (2008) (asserting that a filing date is to be determined by the date indicated on the file-stamp); *see also Watson*, 211 N.C. App. at 373, 712 S.E.2d at 157 (standing for the proposition that a signed and dated order is insufficient to be considered filed).

Because the order was not filed, it was not entered. Accordingly, the time period to file notice of appeal of clerk Hinshaw's order has not yet commenced. *See Darcy v. Osborne*, 101 N.C. App. 546, 549, 400 S.E.2d 95, 96 (1991) (holding that where judgment was not entered, the appeals period neither triggered nor expired). Furthermore, because clerk Hinshaw's incompetency order is effective only after its entry, the order cannot be the law of the case. *See Worsham v. Richbourg's Sales & Rentals, Inc.*, 124 N.C. App. 782, 784, 478 S.E.2d 649, 650 (1996) ("[A] judgment is . . . not enforceable between the parties until it is entered.").

b.) Guardian of the Estate

[2] Next, appellant argues that since the incompetency order was never entered, clerk Hinshaw had no jurisdiction to appoint Mr. Thompson as guardian of the estate. We agree.

"The question of subject matter jurisdiction may be raised at any time, even in the Supreme Court." *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 85 (1986). "Whether a trial court has subject-matter jurisdiction is a question of law, reviewed *de novo* on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

As mentioned above, N.C. Gen. Stat. § 35A-1112 requires the clerk to enter an order adjudicating incompetency. *See* N.C. Gen. Stat.

§ 35A-1112. Only once the order is entered shall "a guardian or guardians . . . be appointed[.]" N.C. Gen. Stat. § 35A-1120. Since the order was never entered, the clerk's appointment of Mr. Thompson as guardian of respondent's estate immediately thereafter was without legal authority.[1]

c.) Res Judicata

[3] Appellant also argues that the trial court erred in concluding that the issues raised in his appeal to the trial court were barred by the doctrine of *res judicata*. Specifically, appellant avers that the other orders relied upon by the trial court in determining *res judicata* were invalid. We agree.

N.C. Gen. Stat. § 7A-251 (2013) states that "[i]n all matters properly cognizable in the superior court division which are heard originally before the clerk of superior court, appeals lie to the judge of superior court having jurisdiction from all orders and judgments of the clerk[.]" A court acting in an appellate capacity is "without authority to entertain an appeal where there has been no entry of judgment" because entry of judgment is jurisdictional. *Searles v. Searles*, 100 N.C. App. 723, 725, 398 S.E.2d 55, 56 (1990) (citation omitted). Under the doctrine of *res judicata*, "a final judgment on the merits in a prior action will prevent a second suit based on the same cause of action between the same parties or those in privity with them." *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986).

Here, appellant appealed clerk Frye's decision *de novo* to superior court. Judge Cromer declined to rule on the merits of appellant's motions and concluded that "[a]ll the previous [m]otions were denied by the [c]lerk and/or another [s]uperior [c]ourt [j]udge or the Bankruptcy Court and, other than the Bankruptcy Order, said Orders were never appealed to the North Carolina Court of Appeals. Based upon the previous [o]rders entered in this matter, the issues raised in the appeal are barred by the doctrine of res judicata[.]" The "previous orders" referred to superior court Judge Webb's order entered 6 April 2010, which was appealed from clerk Lawrence Gordon's order dated 8 December 2009. According to Judge Cromer, he "[could not] reverse Judge Webb" on "a case that [Judge Webb] already ruled on." However, Judge Cromer's conclusion assumed that Judge Webb had jurisdiction to rule on appellant's appeal of clerk Gordon's order to superior court. It is clear from the

1. We also note that the Order Authorizing Issuance of Letters purporting to appoint Mr. Thompson as guardian of the estate was never filed with the clerk's office as it was merely signed and dated by clerk Hinshaw.

record that clerk Gordon's order was never entered as it was merely signed and dated, but devoid of a filing date. *See Watson*, *supra*. The entry of clerk Gordon's order was necessary to vest Judge Webb with jurisdiction to hear appellant's appeal in superior court. *See Searles*, *supra*. Accordingly, no entry of final judgment on the merits of appellant's prior motions occurred such that the issues before Judge Cromer were barred by *res judicata*.

d.) Sanctions

[4] Appellant further argues that the trial court erred in imposing sanctions pursuant to Rule 11 of the North Carolina Rules of Civil Procedure. We agree.

> The trial court's decision to impose or not to impose mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a) is reviewable *de novo* as a legal issue. In the *de novo* review, the appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a).

Turner v. Duke Univ., 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). An analysis of sanctions under Rule 11 consists of a three-pronged analysis: "(1) factual sufficiency, (2) legal sufficiency, and (3) improper purpose." *Peters v. Pennington*, 210 N.C. App. 1, 27, 707 S.E.2d 724, 742 (2011) (citation and quotation omitted). A violation of any of these prongs requires the imposition of sanctions. *Id.* (citation omitted). In determining factual sufficiency, we must decide "(1) whether the plaintiff undertook a reasonable inquiry into the facts and (2) whether the plaintiff, after reviewing the results of his inquiry, reasonably believed that his position was well grounded in fact." *Id.* (citation and quotation omitted). Whether a motion is legally sufficient requires this Court to look at "the facial plausibility of the pleading and only then, if the pleading is implausible under existing law, to the issue of whether to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, the complaint was warranted by the existing law." *Polygenex Int'l, Inc. v. Polyzen, Inc.*, 133 N.C. App. 245, 249, 515 S.E.2d 457, 460 (1999) (citation and quotation omitted). "An objective standard is used to determine whether a paper has been interposed for an improper

purpose, with the burden on the movant to prove such improper purpose." *Coventry Woods Neighborhood Ass'n Inc. v. City of Charlotte*, 213 N.C. App. 236, 241, 713 S.E.2d 162, 166 (2011) (citation and quotation omitted). A signer's purpose is heavily influenced by "whether or not a pleading has a foundation in fact or is well grounded in law[.]" *Id.* at 242, 713 S.E.2d at 166 (citation and quotation omitted).

Here, appellant appealed the order from clerk Frye to Judge Cromer in superior court based on motions:

> (a) for relief in the cause from a guardianship granted to Mr. Thompson dated May 1, 2007;
>
> (b) to declare that Leslie Parker did not have the capacity to represent respondent in the filings of motions and petitions on April 4, 2007;
>
> (c) to declare that Mr. Thompson was not appointed the guardian of respondent after an adjudication of incompetence under G.S. 35A 1112(e) and G.S. 35A-1120.
>
> (d) to declare Mr. Thompson's act of filing a voluntary bankruptcy petition under 11 U.S.C. 301 as a state court guardian of the estate of respondent invalid.

Judge Cromer made findings of fact in support of his conclusion to allow Mr. Thompson's motion to sanction appellant pursuant to Rule 11. The pertinent findings stated:

> 1.) The matters presently before this Court have already been heard by the Clerk of the Forsyth County Superior Court and denied, thereafter they have been appealed to the Forsyth County Superior Court and the court has previously ruled on these matters. None of these rulings were appealed to the North Carolina Court of Appeals.
>
> 2.) [T]hese matters [had] been raised, heard and conclusively established by previous court orders. . . . [Clerk Gordon] [has] found that the underlying decisions related to these issues have not been appealed. Issues raised in the first three motions have been conclusively established in this matter contrary to [appellant] and he is bound by the previous adverse rulings.
>
> 3.) [Motion (d)] is false and any reasonable attorney would have known this to be the case if he reviewed the file prior to filing a pleading asserting this claim.

In sum, Judge Cromer sanctioned appellant after finding that his motions were: 1.) time barred from appellate review; 2.) repetitious; 3.) without any factual or legal basis; and 4.) previously ruled on. However, the genesis of appellant's motions was that "the [o]rder dated May 3, 2007 declaring [respondent] incompetent was not file stamped thereby negating its validity." Rooted in our analysis above, it is clear that motions (a), (b), and (c) were never properly ruled on by previous court orders because clerks Hinshaw and Gordon never entered their orders. Moreover, the failed entry of clerk Hinshaw's incompetency order prevented appellant from filing timely written notice of appeal of that order. Appellant also had a proper purpose, factual basis, and legal basis to file motion (d) requesting that Mr. Thompson's voluntary bankruptcy petition be declared invalid based on the incompetency order's invalidity. Thus, the trial court erred in sanctioning appellant under Rule 11.

III. Conclusion

The trial court erred in concluding that: 1.) the incompetency order was the law of the case; 2.) the issues raised in appellant's appeal to superior court were barred by the doctrine of *res judicata*; and 3.) sanctions were appropriate pursuant to Rule 11. Accordingly, we reverse the trial court on each of these issues and remand to the superior court for further proceedings.

Reversed and Remanded.

Judges McCULLOUGH and DAVIS concur.

KNOX v. FIRST S. CASH ADVANCE

[232 N.C. App. 233 (2014)]

TOMMY KNOX, VELMA KNOX, AND KERRY GORDON, ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS SIMILARLY SITUATED, PLAINTIFFS
v.
FIRST SOUTHERN CASH ADVANCE; COMPUCREDIT CORPORATION; VALUED SERVICES ACQUISITIONS COMPANY, LLC; VALUED SERVICES, LLC; VALUED SERVICES OF NORTH CAROLINA, LLC; VALUED SERVICES FINANCIAL HOLDINGS, LLC; VALUED SERVICES HOLDINGS, LLC; FORESIGHT MANAGEMENT COMPANY, LLC; FIRST AMERICAN HOLDING, LLC; FIRST AMERICAN MANAGEMENT, INC.; JAMES E. SCOGGINS AND ROBERT P. MANNING, DEFENDANTS

No. COA12-604

Filed 4 February 2014

Arbitration and Mediation—motion to compel—refusal to grant—error

The trial court erred by refusing to grant defendants' motion to compel arbitration. As held in companion case *Torrence v. Nationwide Budget Finance* also filed by the Court of Appeals on 4 February 2014, the trial court erred by determining that the arbitration agreement was substantively unconscionable.

Appeal by defendants from orders entered 23 January 2012 by Judge D. Jack Hooks, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 28 November 2012.

Hartzell & Whiteman, L.L.P., by J. Jerome Hartzell, and North Carolina Justice & Community Development Center, by Carlene McNulty, for plaintiff-appellees.

Moore & Van Allen PLLC, by Thomas D. Myrick, Mark A. Nebrig and Jonathan M. Watkins, and Paul Hastings LLP, by J. Allen Maines and S. Tameka Phillips, for defendant-appellants.

STEELMAN, Judge.

Based upon the decisions of the United States Supreme Court in *AT&T Mobility v. Concepcion*, ___ U.S. ___, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011), and *American Express Co. v. Italian Colors Rest.*, ___ U.S. ___, 133 S.Ct. 2304, 186 L.Ed.2d 417 (2013), the trial court erred in holding that the arbitration agreement was unconscionable and refusing to compel arbitration.

I. Factual and Procedural History

Between 1 May 2003 and 28 January 2005, Tommy Knox, Velma Knox, Kerry Gordon and Willie Patrick (collectively, "plaintiffs") obtained loans from Community State Bank ("bank"). These loans were short-term, single-disbursement, single-repayment loans in amounts up to $750. At maturity, plaintiffs were required to pay the principal plus a finance charge ranging from eighteen to twenty-seven percent of the principal.

Upon approval for a loan, plaintiffs were presented with an agreement, which conspicuously contained provisions that plaintiffs agreed to binding arbitration of all claims, and that plaintiffs agreed not to participate in a class action lawsuit.

Of particular relevance to the instant case is the following language from the Arbitration Agreement:

> **Arbitration:** You acknowledge that you have read, understand, and agree to the terms contained in the Arbitration Agreement you are signing in connection with this Note. By entering into the Arbitration Agreement, you waive certain rights, including the right to go to court (except as specifically provided in the Arbitration Agreement), to have the dispute heard by a jury, and to participate as a part of a class of claimants relating to any dispute with Lender, First American or their affiliates.
>
> …
>
> **ARBITRATION AGREEMENT AND WAIVER OF JURY TRIAL.** Arbitration is a process in which persons with a dispute: (a) waive their rights to file a lawsuit and proceed in court and to have a jury trial to resolve their disputes; and (b) agree, instead, to submit their disputes to a neutral third person (an "arbitrator") for a decision. Each party to the dispute has an opportunity to present some evidence to the arbitrator. Pre-arbitration discovery may be limited. Arbitration proceedings are private and less formal than court trials. The arbitrator will issue a final and binding decision resolving the dispute, which may be enforced as a court judgment. A court rarely overturns an arbitrator's decision. **THEREFORE, YOU ACKNOWLEDGE AND AGREE AS FOLLOWS:**

. . .

2. By entering into this Arbitration Agreement:

(a) YOU ARE WAIVING YOUR RIGHT TO HAVE A TRIAL BY JURY TO RESOLVE ANY DISPUTE ALLEGED AGAINST US OR RELATED THIRD PARTIES;

(b) YOU ARE WAIVING YOUR RIGHT TO HAVE A COURT, OTHER THAN A SMALL CLAIMS TRIBUNAL, RESOLVE ANY DISPUTE ALLEGED AGAINST US OR RELATED THIRD PARTIES; and

(c) YOU ARE WAIVING YOUR RIGHT TO SERVE AS A REPRESENTATIVE, AS A PRIVATE ATTORNEY GENERAL, OR IN ANY OTHER REPRESENTATIVE CAPACITY, AND/OR TO PARTICIPATE AS A MEMBER OF A CLASS OF CLAIMANTS, IN ANY LAWSUIT FILED AGAINST US AND/OR RELATED THIRD PARTIES.

3. Except as provided in Paragraph 6 below, all disputes including any Representative Claims against us and/or related third parties shall be resolved by binding arbitration only on an individual basis with you. **THEREFORE, THE ARBITRATOR SHALL NOT CONDUCT CLASS ARBITRATION; THAT IS, THE ARBITRATOR SHALL NOT ALLOW YOU TO SERVE AS A REPRESENTATIVE, AS A PRIVATE ATTORNEY GENERAL, OR IN ANY OTHER REPRESENTATIVE CAPACITY FOR OTHERS IN THE ARBITRATION.**

4. Any party to a dispute, including related third parties, may send the other party written notice by certified mail return receipt requested of their intent to arbitrate and setting forth the subject of the dispute along with the relief requested, even if a lawsuit has been filed. Regardless of who demands arbitration, you shall have the right to select any of the following organizations to administer the arbitration: the American Arbitration Association[], J.A.M.S./Endispute[], or the National Arbitration Forum[]. However, the parties may agree to select a local arbitrator who is an attorney, retired judge, or arbitrator registered in good standing with an arbitration association and arbitrate pursuant to such arbitrator's rules. . .

5. If you demand arbitration, then at your request we will advance your portion of the expenses associated with the arbitration, including the filing, administrative, hearing and arbitrator's fees ("Arbitration Fees"). If related third parties or we demand arbitration, then at your written request we will advance your portion of the Arbitration Fees. Throughout the arbitration, each party shall bear his or her own attorneys' fees and expenses, such as witness and expert witness fees. The arbitrator shall apply applicable substantive law consistent with the FAA and applicable statutes of limitation, and shall honor claims of privilege recognized at law. The arbitration hearing will be conducted in the county of your residence, or within 30 miles from such county, or in the county in which the transaction under this Loan Agreement occurred, or in such other place as shall be ordered by the arbitrator. The arbitrator may decide with or without any hearing, any motion that is substantially similar to a motion to dismiss for failure to state a claim or a motion for summary judgment. In conducting the arbitration, the arbitrator shall not apply any federal or state rules of civil procedure or evidence. At the timely request of any party, the arbitrator shall provide a written explanation for the award. The arbitrator's award may be filed with any court having jurisdiction. If allowed by statute or applicable law, the arbitrator may award you statutory damages and/or your reasonable attorneys' fees and expenses. Regardless of whether the arbitrator renders a decision or an award in your favor resolving the dispute, you will not be responsible for reimbursing us for your portion of the Arbitration Fees.

6. All parties, including related third parties, shall retain the right to seek adjudication in a small claims tribunal for disputes within the scope of such tribunal's jurisdiction. Any dispute that cannot be adjudicated within the jurisdiction of a small claims tribunal shall be resolved by binding arbitration. Any appeal of a judgment from a small claims tribunal shall be resolved by binding arbitration.

7. This Arbitration Agreement is made pursuant to a transaction involving interstate commerce and shall be governed by the FAA. If a final non-appealable judgment

> of a court having jurisdiction over this transaction finds, for any reason, that the FAA does not apply to this transaction, then our agreement to arbitrate shall be governed by the arbitration law of the State of South Dakota.
>
> 8. This Arbitration Agreement is binding upon and benefits you, your respective heirs, successors and assigns. The Arbitration Agreement is binding upon and benefits us, our successors and assigns, and related third parties.

On 8 February 2005, plaintiffs filed a class-action complaint, alleging that defendants Compucredit Corporation ("Compucredit"), Valued Services Acquisitions Company, LLC ("VS-AC"), Valued Services of North Carolina, LLC ("VS-NC"), Valued Services Financial Holdings, LLC ("VS-FH"), Valued Services Holdings, LLC ("VS-H"), Foresight Management Company, LLC ("Foresight"), First American Holding, LLC ("FA-H"), First American Management, Inc. ("FA-M"), James E. Scoggins ("Scoggins"), and Robert P. Manning ("Manning"), under the name First Southern Cash Advance (collectively, "defendants") violated the North Carolina Consumer Finance Act, the North Carolina unfair trade practices statute, and North Carolina usury laws.

On 28 February 2006, plaintiffs moved that the case be certified as a class action. On 10 November 2009, Patrick voluntarily dismissed his claims against defendants without prejudice. On 25 January 2011, Scoggins and Manning moved to dismiss for insufficiency of service of process. On 19 May 2011, VS-AC, VS-FH, VS-H, FA-H, FA-M, Scoggins, and Manning moved to dismiss for lack of personal jurisdiction, asserting that they had insufficient contacts with the State of North Carolina for the trial court to exercise personal jurisdiction under the long-arm statute (N.C. Gen. Stat. § 1-75.4). On 25 May 2011, defendants moved to compel arbitration.

On 23 January 2012, the trial court denied defendants' 25 January 2011 motion to dismiss for insufficiency of service of process, denied defendants' 19 May 2011 motion to dismiss for lack of personal jurisdiction, denied defendants' 25 May 2011 motion to compel arbitration, and granted plaintiffs' 28 February 2006 motion for class certification.

Defendants appeal.

II. Failure to Compel Arbitration

Defendants first contend that the trial court erred by refusing to compel arbitration. We agree.

A. Standard of Review

> The standard governing our review of this case is that "findings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if ... there is evidence to the contrary." *Lumbee River Elec. Membership Corp. v. City of Fayetteville*, 309 N.C. 726, 741, 309 S.E.2d 209, 219 (1983) (citation omitted). "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).

Tillman v. Commercial Credit Loans, Inc., 362 N.C. 93, 100-01, 655 S.E.2d 362, 369 (2008).

B. Unconscionability

In the instant case, the trial court's order denying defendants' motion to compel arbitration was filed on 23 January 2012. On 25 January 2012, the trial court's order denying defendants' motion to compel arbitration in the companion case of *Torrence et al. v. Nationwide Budget Finance et al.* (New Hanover County case 05 CVS 447) was filed. The findings of fact, conclusions of law, and rulings of the trial court were virtually identical.[1]

We are simultaneously filing an opinion in the *Torrence* case (COA 12-453). For the reasons set forth in *Torrence*, we hold that the trial court erred in determining that the arbitration agreement was substantively unconscionable. The orders of the trial court denying defendants' motion to dismiss for insufficiency of service of process, denying defendants' motion to dismiss for lack of personal jurisdiction, denying defendants' motion to compel arbitration, and granting plaintiffs' motion for class certification are vacated, and the matter is remanded to the trial court for entry of an order compelling arbitration in this case. Because the trial court erred in holding that the arbitration agreement was substantively unconscionable, we need not reach the question of procedural unconscionability. *See Torrence*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (2014) (COA 12-453, § VI).

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1. In *Torrence*, there was additional analysis dealing with the designation of the National Arbitration Forum (NAF) as the arbitrator. In the instant case, the arbitration agreement provided for three arbitration groups, one of which was the NAF. The agreement also provided that, by agreement, the parties could select a local arbitrator. Neither party in the instant case has raised a question concerning the arbitrator or arbitrator selection clause in the arbitration agreement.

III. Other Arguments

Because the trial court erred in denying defendants' motion to compel arbitration, defendants' arguments with regard to class action are moot, and further excluded due to the express language of the arbitration agreement waiving class actions. Because this case was not properly before the trial court, we need not address defendants' further contentions regarding class certification, personal jurisdiction and service of process. *See*, *e.g.*, *Miller v. Two State Const. Co.*, *Inc.*, 118 N.C. App. 412, 418, 455 S.E.2d 678, 682 (1995) (holding that where the arbitration agreement was valid, we "need not address the other issues raised by defendants"). These issues are properly to be determined by an arbitrator.

IV. Conclusion

The trial court erred in refusing to grant defendants' motion to compel arbitration. The orders of the trial court enumerated in Section II of this opinion are all vacated, and this matter is remanded to the trial court for entry of an order compelling the parties to arbitrate their claims.

VACATED AND REMANDED.

Judges STEPHENS and McCULLOUGH concur.

JANET MAY AND CURTIS HILL, CO-ADMINISTRATORS OF THE ESTATE OF MARK CURTIS HILL, PLAINTIFFS
v.
MELROSE SOUTH PYROTECHNICS, INC., AND OCRACOKE CIVIC & BUSINESS ASSOCIATION D/B/A OCRACOKE ISLAND CIVIC AND BUSINESS ASSOCIATION, DEFENDANTS

JUDY B. GRAY, ADMINISTRATOR OF THE ESTATE OF MELISSA ANNETTE SIMMONS, PLAINTIFF
v.
EAST COAST PYROTECHNICS, INC., FORMERLY KNOWN AS MELROSE SOUTH PYROTECHNICS, INC., DEFENDANT

KEVIN F. MACQUEEN, ADMINISTRATOR OF THE ESTATE OF CHARLES NATHANIEL KIRKLAND, JR., PLAINTIFF
v.
EAST COAST PYROTECHNICS, INC., FORMERLY KNOWN AS MELROSE SOUTH PYROTECHNICS, INC., DEFENDANT

MARTEZ HOLLAND, PLAINTIFF
v.
EAST COAST PYROTECHNICS, INC., FORMERLY KNOWN AS MELROSE SOUTH PYROTECHNICS, INC., DEFENDANT

No. COA13-620

Filed 4 February 2014

1. Negligence—plaintiffs—employees or independent contractors—issues of material fact

The trial court did not err in a negligence case arising out of a fireworks accident by denying defendants' motion for summary judgment. There remained several genuine issues of material fact as to whether plaintiffs were employees of defendants or independent contractors.

2. Negligence—gross negligence—plaintiffs—employees or independent contractors—issues of material fact

The trial court did not err by denying defendants' motion for summary judgment as to plaintiffs' claims for negligence, gross negligence, strict liability, and negligent hiring because there remained several genuine issues of material fact as to whether plaintiffs were employees of defendants or independent contractors.

3. Negligence—Woodson claim—plaintiffs—employees or independent contractors—issues of material fact

The trial court did not err in a negligence case by denying defendants' motion for summary judgment as to plaintiffs' *Woodson*

claims because there remained several genuine issues of material fact as to whether plaintiffs were employees of defendants or independent contractors.

Appeal by Defendants from order entered 1 October 2012 by Judge Arnold O. Jones, II in Superior Court, Wayne County. Heard in the Court of Appeals 7 January 2014.

Farris & Farris, PA, by Robert A. Farris, Jr. and Rhyan A. Breen, and Thomas & Farris, PA, by Albert S. Thomas, Jr., for Plaintiffs-Appellees Janet May and Curtis Hill, Co-Administrators of the Estate of Mark Curtis Hill; Donald E. Clark, Jr., PLLC, by Donald E. Clark, Jr., and The Wright Law Firm, by Paul M. Wright for Plaintiff-Appellee Judy B. Gray, Administrator of the Estate of Melissa Annette Simmons; Riddle & Brantley, LLP, by Gene A. Riddle and Jonathan M. Smith, for Plaintiff-Appellee Kevin F. MacQueen, Administrator of the Estate of Charles Nathaniel Kirkland, Jr.; and Jerry Braswell for Plaintiff-Appellee Martez Holland.

Cranfill Sumner Hartzog LLP, by Daniel G. Katzenbach and M. Denisse Gonzalez, for Defendants-Appellants.

McGEE, Judge.

This case is before us on remand from the North Carolina Supreme Court. Our Court originally dismissed the appeal in this matter as interlocutory on 8 August 2013. Melrose South Pyrotechnics, Inc. ("Melrose") and East Coast Pyrotechnics, Inc. petitioned our Supreme Court for writ of certiorari, and the Supreme Court, in an order entered 3 October 2013, allowed the petition "for the limited purpose of remanding to the Court of Appeals for consideration of the merits." This Court therefore reviews the merits of Defendants' appeal.

This action arises out of a fireworks explosion in which several people were killed or seriously injured. Janet May ("May") and Curtis Hill ("Hill"), co-administrators of the estate of Mark Curtis Hill, filed a complaint on 2 December 2010 against Melrose and Ocracoke Civic & Business Association d/b/a Ocracoke Island Civic and Business Association ("Ocracoke") (together, "Defendants"), alleging negligent hiring, gross negligence, and strict liability.

May and Hill alleged that Melrose was "in the business of providing fireworks displays[;]" that Terry Holland "had been a part-time employee of . . . Melrose since 2000;" that Ocracoke "contracted with . . . Melrose to

provide a fireworks display[;]" that Terry Holland "received some training from . . . Melrose as 'Chief Pyrotechnician' to work on its behalf conducting fireworks displays in North Carolina;" and that Terry Holland "was advanced sums of money to retain the independent services of a crew to assist him in performing fireworks displays" by Melrose.

Judy B. Gray ("Gray"), as administrator of the estate of Melissa Annette Simmons, and Kevin F. MacQueen ("MacQueen"), as administrator of the estate of Charles Nathaniel Kirkland, Jr., filed separate complaints on 1 July 2011 against East Coast Pyrotechnics, Inc., formerly known as Melrose, alleging negligence, gross negligence, strict liability, and, in the alternative, a *Woodson* claim. Martez Holland filed a complaint on 1 July 2011 against Melrose, alleging negligent hiring, gross negligence, and strict liability.

The trial court, in an order entered 15 November 2011, consolidated the actions of May and Hill, Gray, MacQueen, and Martez Holland (together, "Plaintiffs"). Defendants filed a motion for summary judgment on 24 August 2012. The trial court denied Defendants' motion for summary judgment in an order entered 1 October 2012 because "there do exist genuine issues of fact[.]"

I. Standard of Review

"We review a trial court's order granting or denying summary judgment *de novo*. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment" for that of the trial court. *D.G. II, LLC v. Nix*, 213 N.C. App. 220, 229, 713 S.E.2d 140, 147 (2011) (internal quotation marks omitted).

II. Rule

A trial court should grant a motion for summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2013); *see also D.G. II*, 213 N.C. App. at 228, 713 S.E.2d at 147.

The purpose of N.C.G.S. § 1A-1, Rule 56 "is to eliminate formal trials where only questions of law are involved." *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982). "An issue is 'genuine' if it can be proven by substantial evidence and a fact is 'material' if it would constitute or irrevocably establish any material element of a claim or a defense." *Id.*

III. Relationship Between Plaintiffs and Defendants

[1] Defendants first argue the trial court erred in denying their motion for summary judgment because "[t]he issue of whether Plaintiffs are employees or independent contractors can be decided as a matter of law." We disagree.

As stated above, summary judgment requires that (1) "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 (2) "any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c). In the present case, there remain several genuine issues of fact that are material to determining the nature of the relationship between Plaintiffs and Defendants.

Defendants contend there are some undisputed facts that "show conclusively that Plaintiffs were employees" of Melrose. Defendants cite *Hayes v. Elon College*, 224 N.C. 11, 29 S.E.2d 137 (1944), for support of their argument. However, in *Hayes*, there was "no substantial controversy as to the facts." *Id.* at 15, 29 S.E.2d at 139. By contrast, in the present case, there is substantial controversy as to the facts, as will be shown in this section. We therefore cannot determine the nature of the relationship between Plaintiffs and Defendants at this stage in the proceedings.

In their complaint, May and Hill alleged that Terry Holland "had been a part-time employee of . . . Melrose since 2000[.]" They further alleged that the "crew members selected by [Terry] Holland were not employees of . . . Melrose but were contracted by [Terry] Holland for . . . Melrose on a job by job basis[.]" Melrose denied this allegation in its answer.

Similarly, in her complaint, Gray alleged that "Simmons and the other crew members were not employees of Defendant but were contracted by [Melrose] by and through its employee, [Terry] Holland, to work on the July 4, 2009, fireworks display for" Ocracoke. Melrose denied this allegation in its answer.

Likewise, in his complaint, MacQueen alleged that Charles Nathaniel Kirkland, Jr. "and the other crew members were not employees of Defendant but were independent contractors retained by Defendant by and through its employee, [Terry] Holland, to work on the July 4, 2009, fireworks display for" Ocracoke. Melrose denied this allegation in its answer.

In his complaint, Martez Holland alleged that the "crew members selected by [Terry] Holland were not employees of [Melrose] but were

contracted by [Terry] Holland for [Melrose] on a job by job basis[.]" Melrose denied this allegation in its answer.

To determine "whether the relationship of employer-employee, or that of independent contractor, exists, our Supreme Court has stated, 'The vital test is to be found in the fact that the employer has or has not retained the right of control or superintendence over the contractor or employee as to details.' " *Morales-Rodriguez v. Carolina Quality Exteriors, Inc.*, 205 N.C. App. 712, 714, 698 S.E.2d 91, 93-94 (2010). Factors to consider in determining whether the relationship of employer-employee exists include that the person employed:

> (a) is engaged in an independent business, calling, or occupation; (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work; (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he may think proper; (g) has full control over such assistants; and (h) selects his own time.

Id. at 714, 698 S.E.2d at 94.

Thomas Thompson, president of Melrose, testified in a deposition that the lead technician is paid ten percent of the value of the show and has the "choice to decide how he wants to split that up" among his crew. However, May stated in an affidavit that at no time "did Mark [Curtis] Hill ever represent to [her] that he was working for Melrose[.]" May further stated that Melrose "never issued any compensation for the work performed by Mark [Curtis] Hill." Furthermore, Ronnie Tessenner ("Tessenner"), who worked for Melrose in 2009, testified that Mark Curtis Hill, in his past work experience, had repaired items in homes. Tessenner also testified that Charles Nathaniel Kirkland, Jr. was an electrician and that "it would be helpful to have an assistant that had some electrical experience" in a fireworks display.

The pleadings and depositions show that there is substantial controversy as to the facts that define the nature of the relationship between Plaintiffs and Defendants. Because there is a substantial controversy as to the facts, at this stage in the proceedings, we cannot determine the nature of the relationship. Defendants have not shown that the trial court erred in denying Defendants' motion for summary judgment on this basis.

IV. Negligence, Gross Negligence, Strict Liability, and Negligent Hiring

[2] Defendants also argue the trial court erred in denying Defendants' motion for summary judgment "as to Plaintiffs' claims for negligence, gross negligence, strict liability, and negligent hiring because no issues of fact exist to support any of those claims." We disagree.

Defendants contend that "[e]ven if Plaintiffs are found to be independent contractors, they fail to set forth evidence to support any recognized exception to the 'no liability' rule for general contractors." However, Defendants' argument overlooks the fact, discussed in the previous section, that genuine issues of material fact remain as to the nature of the relationship between Plaintiffs and Defendants.

"Negligence claims are rarely susceptible of summary adjudication, and should ordinarily be resolved by trial of the issues." *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 425, 302 S.E.2d 868, 871 (1983); *see also Goodman v. Wenco Foods, Inc.*, 333 N.C. 1, 27, 423 S.E.2d 444, 457 (1992) ("Summary judgment 'is a drastic measure, and it should be used with caution.' "). Because genuine issues of material fact remain to be determined in the trial court as to the nature of the relationship between Plaintiffs and Defendants, the trial court did not err in denying Defendants' motion for summary judgment.

V. *Woodson* Claims

[3] Defendants also argue the trial court erred in denying Defendants' motion for summary judgment as to the alternative *Woodson* claims "because no issue of fact exists to support the higher standard required for such a claim."

When an "employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer." *Woodson v. Rowland*, 329 N.C. 330, 340-41, 407 S.E.2d 222, 228 (1991).

Defendants argue on appeal that Plaintiffs failed to allege certain elements of a *Woodson* claim. However, as stated above, the issue on a motion for summary judgment is whether the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c).

As in the previous section, because genuine issues of material fact remain to be determined in the trial court regarding the nature of the relationship between Plaintiffs and Defendants, Defendants have not shown that the trial court erred in denying Defendants' motion for summary judgment.

Affirmed.

Judges HUNTER, Robert C. and ELMORE concur.

STATE OF NORTH CAROLINA
v.
CHRISTINE RENA CHAMBERLAIN

No. COA13-886

Filed 4 February 2014

1. Constitutional Law—double jeopardy—two summonses—same facts

The superior court did not violate double jeopardy when it denied defendant's motion to dismiss a charge of willful and wanton injury to real property arising from a dispute between two neighbors and damage to shrubbery. Although the two cases involved the same facts, the two summonses to district court that began the cases listed different dates for the offense. The district court granted defendant's motion to dismiss the first case due to a fatal variance between the allegations in the charge and the proof at trial, and the State was permitted to retry defendant because the second allegation corrected the dates of the offense.

2. Criminal Law—damage to shrubbery—determination of boundary—jury question

The superior court did not err by denying defendant's motion to dismiss a charge of willful and wanton injury to real property (N.C.G.S. § 14-127) where defendant's testimony and her signed letter indicated that she did not know whether the damaged shrubs were on her property or her neighbor's. It was for the jury to determine where the shrubs were planted and whether defendant was legally justified in cutting them down.

3. Criminal Law—question from jury—instructions

The trial court did not err (much less plainly err) in a prosecution for willfully damaging real property by declining to answer a question from the jury directly. Defendant's proposed jury instructions were substantially similar to those actually given by the court.

Appeal by Defendant from judgment entered 26 March 2013 by Judge Allen Baddour in Durham County Superior Court. Heard in the Court of Appeals 11 December 2013.

Attorney General Roy Cooper, by Assistant Attorney General Carolyn McLain, for the State.

Peter Wood for Defendant.

STEPHENS, Judge.

Evidence and Procedural History

On 31 December 2011, the district court in Durham County issued a misdemeanor criminal summons ("First Summons") asserting that probable cause was present to believe that Christine Rena Chamberlain ("Defendant") committed one count of injury to real property. According to the summons, Anthony Waraksa ("Waraksa"), the complainant, alleged that Defendant destroyed "THREE LIGUSTRUM TREES" located on his property on 5 April 2011. The case was later dismissed by the district court due to a "fatal variance."[1]

Following dismissal, on 22 July 2012, the district court issued a second misdemeanor criminal summons ("Second Summons") alleging probable cause to believe that Defendant had committed two counts of injury to real property. According to the Second Summons, Waraksa alleged that Defendant had destroyed, respective to the two counts charged, (1) "TREES, LAWN[,] AND FLOWERBEDS" and (2) "THREE LIGUSTRUM SHRUBS," both located on his property. This allegedly occurred between 30 September 2010 and 22 February 2011. The Second Summons is the origin of the judgment that is now under review.

1. The court did not provide any more detail on the reason for its dismissal. However, Defendant asserts in her brief, pursuant to statements made by her trial counsel in the superior court trial, that "Waraksa was apparently confused when he took out the first warrant[and] gave the wrong date to the magistrate."

After a trial on the Second Summons, the district court found Defendant not guilty on the first count of injury to real property, related to destruction of trees, lawn, and flowerbeds, and guilty on the second count of injury to real property, related to the destruction of the Ligustrum shrubs. Defendant gave written notice of appeal to the Durham County Superior Court on 14 November 2012.

Beginning 25 March 2013, Defendant was tried before a jury in superior court on the second count of injury to real property, regarding the destruction of the shrubs. Defendant made a pre–trial motion to dismiss that charge on double jeopardy grounds, arguing that the original dismissal in the district court constituted an acquittal for the allegedly offending conduct and that she could not be re-tried for that conduct in superior court. That motion was denied. The evidence presented at trial tended to show the following:

Defendant and her husband, James Chamberlain, live next to Waraksa and his wife, Harriett Sander ("Sander") in Durham, North Carolina. They had a friendly relationship until April of 2009, when Defendant published information communicated to her by Waraksa in confidence. At that point, Waraksa broke off the friendship. The following year, in September of 2010, Defendant installed a berm near the property line between their houses. Believing that Defendant's landscaping had encroached upon his property line, Waraksa "repaired the encroachment" and planted a line of Ligustrum shrubs on his side of the line. On 11 November 2010, Defendant left Waraksa a note asking him to refrain from planting "hedge[s]. . . until [the] dispute [was] resolved regarding the property line."

Waraksa testified that property lines in his subdivision "are set out with embedded iron pipes." Prior to planting the Ligustrum shrubs, Waraksa had his property surveyed, and the surveyor identified the corners of his lot based on those pipes. There was no testimony that Defendant ever had the property surveyed. Defendant and her husband nonetheless testified that Waraksa's shrubs were planted over the property line, on their property.

On 22 February 2011, Sander observed that the Ligustrum shrubs had been destroyed and saw Defendant walking away from the shrubs with "huge scissors." Later in the trial, Defendant admitted to cutting the shrubs, knowing they belonged to Waraksa:

> [THE STATE:] Okay. It's your testimony that you intended to remove the Ligustrum bushes that had been planted by

> Mr. Waraksa, is that right? You intended to remove them; that's why you cut them down?
>
> [DEFENDANT:] Right, yeah, they were on my property.
>
> [THE STATE:] Right.
>
> [DEFENDANT:] They were planted where I needed to fix the berm.
>
> [THE STATE:] And you chose to cut them off, right? Is that what you did; you cut them?
>
> [DEFENDANT:] Yes, with a shovel.
>
> [THE STATE:] You knew . . . Waraksa had planted those bushes?
>
> [DEFENDANT:] Well, yes, uh-huh.

Defendant moved to dismiss the charges against her at the close of the State's evidence and at the close of all of the evidence. Those motions were denied. After the presentation of evidence, the jury found Defendant guilty of injury to real property. Defendant appeals the judgment entered upon the jury's verdict.

Discussion

On appeal, Defendant argues the trial court erred by (1) denying Defendant's motion to dismiss based on double jeopardy, (2) denying Defendant's motion to dismiss at the close of the State's evidence and again at the close of all the evidence because the State did not present sufficient evidence to support the charge of injury to real property, and (3) failing to "instruct the jury properly" in response to a question posed during jury deliberations. We find no error.

I. Double Jeopardy

[1] In her first argument on appeal, Defendant contends that the trial court erred in denying her pre–trial motion to dismiss on double jeopardy grounds. In making that argument, Defendant notes that Waraksa took out two different warrants for injury to real property based on the exact same damage to the trees. Defendant also points out that the district court committed a clerical error by keeping the incorrect date on the warrant, instead of amending the warrant to reflect the correct date. As a result, Defendant alleges that it was a violation of the prohibition against double jeopardy for the district court to allow the State to proceed with a second charge. Accordingly, Defendant contends that the

superior court erred in denying her motion to dismiss based upon the first and second district court trials.[2] We disagree.

The doctrine of double jeopardy "provides that no person shall be subject for the same offen[s]e to be twice put in jeopardy of life or limb." *State v. Sparks*, 182 N.C. App. 45, 47, 641 S.E.2d 339, 341 (2007) (citation and internal quotation marks omitted). "[T]he Double Jeopardy Clause protects against (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense." *State v. Rahaman*, 202 N.C. App. 36, 40, 688 S.E.2d 58, 62 (2010) (citations and internal quotation marks omitted). "[W]hen the trial court grants a defendant's motion to dismiss at the close of evidence, that ruling has the same effect as a verdict of not guilty." *Id.* at 43, 688 S.E.2d at 64; *see also* N.C. Gen. Stat. § 15-173 (2013). "However, the 5th Amendment right to be free from double jeopardy only attaches in a situation where the motion to dismiss is granted due to insufficiency of the evidence to support each element of the crime charged." *Rahaman*, 202 N.C. App. at 44, 688 S.E.2d at 64. Double jeopardy does not preclude a retrial when a charge is dismissed because there was a fatal variance between the proof and the allegations in the charge. *Id.*; *State v. Johnson*, 9 N.C. App. 253, 175 S.E.2d 711 (1970). We review a trial court's denial of a motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

> In *Johnson*, the indictment alleged that the defendant committed the crime of breaking and entering "a certain storehouse, shop, warehouse, dwelling house and building occupied by one Lloyd R. Montgomery, 648 Swannanoa River Road, Asheville, N.C." The evidence at trial tended to show that the defendant broke into "438 Swannanoa River Road in Asheville which was occupied by one Elvira L. Montgomery, who was engaged in

2. We note that there is no substantial evidence in the record regarding the nature of the fatal variance beyond (a) the fact of its existence and (b) the district court's dismissal of the original charge against Defendant on that basis. The only other discussion about the variance is counsel's statement to the superior court in Defendant's pre-trial motion to dismiss regarding Waraksa's alleged confusion over the date of the offense. However, "it is axiomatic that the arguments of counsel are not evidence." *State v. Collins*, 345 N.C. 170, 173, 478 S.E.2d 191, 193 (1996). Therefore, the only evidence properly before us in the record is the handwritten note on the summons stating that the case was dismissed due to a fatal variance, and we are limited to that fact. *See State v. Gillis*, 158 N.C. App. 48, 55, 580 S.E.2d 32, 37-38 (2003) (citation omitted) ("[T]his Court is bound on appeal by the record on appeal as certified and can judicially know only what appears in it.").

> business under the name of 'Cat and Fiddle Restaurant.' " The trial court granted the defendant's motion to dismiss due to a fatal variance between the indictment and the evidence presented at trial. The State retried [the] defendant for the offense of breaking and entering, but upon an indictment that corresponded to the evidence. The defendant then appealed and asserted that his right to be free from double jeopardy had been violated. Our Supreme Court held that "a judgment of dismissal for whatever reason entered after a trial on the first indictment would not sustain a plea of former jeopardy when [the] defendant was brought to trial on the charge contained in the second indictment."

Rahaman, 202 N.C. App. at 44–45, 688 S.E.2d at 64–65 (citation omitted).

In this case, the two summonses pertain generally to the same facts, but the First Summons lists the date of offense as "04/05/2011" while the Second Summons lists the date of offense as "9/30/2010 through 02/22/2011." Pursuant to the record properly before us, the district court granted Defendant's motion to dismiss due to a fatal variance between the First Summons and the proof at trial, not due to insufficiency of the evidence.[3] Therefore, the State was permitted to retry Defendant because the Second Summons corrected the dates of the offense. Accordingly, we hold that the superior court did not violate the double jeopardy provisions of the state and federal constitutions and did not err by denying Defendant's motion to dismiss. *See also State v. Fraley*, __ N.C. App. __, 749 S.E.2d 111 (unpublished opinion), *available at* 2013 N.C. App. LEXIS 806 ("Double jeopardy does not preclude a retrial when a charge is dismissed because there was a fatal variance between the proof and the allegations in the charge.").[4]

II. Defendant's Motion to Dismiss

[2] Second, Defendant argues that the trial court erred in denying her motion to dismiss due to insufficiency of the evidence, alleging that the State failed to present substantial evidence of every element of the crime charged.

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3. Defendant admits that the district court dismissed the charge for a fatal variance. Defendant also admits that the only evidence of record shows the variance was between the date of offense in the First Summons and the Second Summons.

4. While unpublished decisions are not binding upon this court, the facts in *Fraley* are similar to those here, and we find the Court's reasoning to be especially persuasive.

The test to be applied in ruling on a defendant's motion to dismiss is whether the State has produced substantial evidence of each and every element of the offense charged, or a lesser-included offense, and substantial evidence that the defendant committed the offense. *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "If substantial evidence exists supporting [the] defendant's guilt, the jury should be allowed to decide if the defendant is guilty beyond a reasonable doubt." *State v. Fowler*, 353 N.C. 599, 621, 548 S.E.2d 684, 700 (2001), *cert. denied*, 535 U.S. 939, 152 L. Ed. 2d 230 (2002).

Substantial evidence is defined as "evidence from which a rational finder of fact could find the fact to be proved beyond a reasonable doubt." *State v. Davis*, 130 N.C. App. 675, 678, 505 S.E.2d 138, 141 (1998). When ruling on a motion to dismiss, the trial court must consider all the evidence in the light most favorable to the State. *Id.* at 679, 505 S.E.2d at 141. "Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal." *State v. King*, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996). The trial court's decision as to whether there is substantial evidence is a "question of law," and, on appeal, we review it *de novo*. *State v. Bumgarner*, 147 N.C. App. 409, 412, 556 S.E.2d 324, 327 (2001).

Defendant was charged with violating N.C. Gen. Stat. § 14-127, which provides as follows:

> *Willful and wanton injury to real property.*
>
> If any person shall willfully and wantonly damage, injure or destroy any real property whatsoever, either of a public or private nature, [she] shall be guilty of a Class 1 misdemeanor.

N.C. Gen. Stat. § 14-127 (2013). Defendant does not challenge the sufficiency of the evidence to prove that she was the perpetrator of the crimes. Rather, she argues that the State presented insufficient evidence as to her mental state. We disagree.

Section 14-127 requires, as an essential element of the offense, a showing that the person charged with violating the statute "willfully" and "wantonly" caused the damage to real property. The words "willful" and "wanton" have substantially the same meaning when used in reference to the requisite state of mind for a violation of a criminal statute. *State v. Williams*, 284 N.C. 67, 72–73, 199 S.E.2d 409, 412 (1973). "[Willful] as used in criminal statutes means the wrongful doing of an act without justification or excuse, or the commission of an act purposely

and deliberately in violation of law." *State v. Arnold*, 264 N.C. 348, 349, 141 S.E.2d 473, 475 (1965). "Willfulness" is a state of mind which is seldom capable of direct proof, but which must be inferred from the circumstances of the particular case. *Id.*

Despite Defendant's assertion to the contrary, there need not be an *intent* to break the law in order for an act to be "willful." *State v. Coal Co.*, 210 N.C. 742, 754–55, 188 S.E. 412, 420 (1936). Thus, it does not matter whether Defendant knew for certain if the Ligustrum shrubs were on her property or Waraksa's property when she cut them down.

> The word ["willful"], used in a statute creating a criminal [offense], means something more than an intention to do a thing. It implies the doing the act purposely and deliberately, indicating a purpose to do it, without authority — careless whether [she] has the right or not — in violation of law, and it is this which makes the criminal intent, without which one cannot be brought within the meaning of a criminal statute.

In re Adoption of Hoose, 243 N.C. 589, 594, 91 S.E.2d 555, 558 (1956) (citation and internal quotation marks omitted).

In this case, the State presented testimony by Waraksa that the Ligustrum shrubs were on his property. The State also presented evidence that Defendant acknowledged that the property line was in dispute through a signed letter in which she asked Waraksa to stop planting hedges until the property-line dispute was resolved. Defendant's testimony and her signed letter indicate that she did not know whether the Ligustrum shrubs were on her property or Waraksa's. Accordingly, it was for the jury to determine whether the shrubs were planted on Waraksa's property or Defendant's and whether Defendant was legally justified in cutting them down. While Defendant presented some evidence to contradict Waraksa's testimony regarding the location of the shrubs in relation to the property line, "[i]t is elementary that the jury may believe all, none, or only part of a witness'[s] testimony[.]" *State v. Miller*, 26 N.C. App. 440, 443, 216 S.E.2d 160, 162, *affirmed*, 289 N.C. 1, 220 S.E.2d 572 (1975). Here, the jury opted to believe Waraksa's testimony that the shrubs were planted on his property. Therefore, the evidence produced by the State, even though it was contested, provided sufficient evidence for the finding that Defendant had cut down the shrubs on Waraksa's property without justification. Accordingly, we hold that the superior court did not err in denying Defendant's motion to dismiss.

III. Jury Instructions

[3] Lastly, Defendant contends that the trial court committed reversible error by failing to directly answer the jury's question: "Is [D]efendant [j]ustified in cutting down property she knew was not hers if she truly believed [that the bushes] were on her property[?]" Defendant contends a proper instruction would have been:

> For you to find[D]efendant guilty of injury to real property, you must find that she willfully damaged trees, lawn[,] and flowerbeds, the real property of[] Waraksa. ["]Willful" is defined as "the wrongful doing of an act without justification or excuse, or the commission of an act purposely and deliberately in violation of [the] law. ["]Willfully" means "something more than an intention to commit the offense."

Defendant contends that the superior court's failure to give this instruction "affected [the jury's] verdict." Defendant argues that the trial court's decision not to answer this question amounted to a failure to instruct on willfulness and, thus, that the jury might not have properly considered Defendant's state of mind. Therefore, Defendant reasons, the State was improperly required to prove only that Defendant *damaged* the shrubs.

The State argues, and Defendant concedes, that — because Defendant did not object to the trial court's original charge, request a different charge at the charge conference, or request any additional charge when the jury expressed confusion — Defendant did not properly preserve this argument for appeal. We agree.

In matters concerning jury instructions, a party's failure to object at trial limits our review to an examination for plain error. *State v. King*, 342 N.C. 357, 364, 464 S.E.2d 288, 293 (1995) (citing *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983)); *see also* N.C.R. App. P. 10(a)(2). Plain error is "error so fundamental that it tilted the scales and caused the jury to reach its verdict convicting the defendant." *State v. Bagley*, 321 N.C. 201, 211, 362 S.E.2d 244, 250 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988) (internal quotation marks omitted). "In deciding whether a defect in the jury instruction constitutes 'plain error', [sic] the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *Odom*, 307 N.C. at 661, 300 S.E.2d at 378-79. "[A] charge must be construed as a whole in the same connected way in which it was given. When thus considered, if it fairly and correctly presents the law, it will afford no ground for reversing the judgment, even if an isolated expression should

be found technically inaccurate." *State v. Tomblin*, 276 N.C. 273, 276, 171 S.E.2d 901, 903 (1970) (internal quotation marks omitted).

In this case, Defendant's proposed jury instructions are substantially similar to those actually given by the superior court. Indeed, the court initially explained the term "willful" as follows:

> THE COURT: . . .
>
> [D]efendant has been charged with willful and wanton damage to, injury to, or destruction of real property. For you to find[D]efendant guilty of this offense, the State must prove two things beyond a reasonable doubt.
>
> First, that [D]efendant damaged, injured, or destroyed Ligustrum shrubs of Anthony Waraksa. Lugustrum [sic] shrubs are real property.
>
> And second, that[] [D]efendant did this willfully and wantonly; that is, intentionally and without justification or excuse, and without regard for the consequences or the rights of others.
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date, [D]efendant willfully and wantonly damaged, injury, [sic] or destroyed Ligustrum shrubs, 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.

In addition, the jurors had written copies of the instructions quoted above, and the judge offered to re–read the instructions to the jurors if necessary:

> THE COURT: . . .
>
> I'm happy to re-read them, if they want. But since they all have copies of the instructions, I don't want to insult their intelligence — I won't say that, but something like that. And I'll ask them to return to the jury room to continue deliberating. But if for any reason they, any one of them wants the Court to orally re[-]give the instructions, I'll be happy to do so, and they can just send out another note. I mean I have found in the past from time to time there is a juror who does not read well and prefers to hear something orally. So I want to make sure they understand

> they have that option and that right, whether or not they'll exercise it.

"[T]his Court has consistently held that a trial court is not required to repeat verbatim a . . . specific instruction that is correct and supported by the evidence, but that it is sufficient if the court gives the instruction in substantial conformity with the request." *State v. Brown*, 335 N.C. 477, 490, 439 S.E.2d 589, 597 (1994).

Here, the instruction given clearly sets forth that "willfulness" is a necessary element of injury to real property. To find Defendant guilty of injury to real property, the State had to prove the Defendant had a "willful" state of mind when she damaged the shrubs. If the jury had a reasonable doubt as to the willfulness of Defendant's actions, the jury's duty was to find Defendant not guilty of injury to real property. This is, in substance, the concept Defendant claims the trial court should have reiterated to the jury. Because the trial court gave instructions in substantial conformity with those that Defendant argues for on appeal, Defendant's argument is overruled. The trial court did not err — much less plainly err — in declining to directly answer the jury's question. Accordingly, we find

NO ERROR.

Judges STEELMAN and DAVIS concur.

STATE OF NORTH CAROLINA
v.
TRAVIS ANTONIO LEE, DEFENDANT

No. COA13-775

Filed 4 February 2014

1. Jurisdiction—probation revocation—defendant's address

The trial court had jurisdiction over defendant's probation under N.C.G.S. § 15A-1344(a) where he was indicted and plead guilty in Harnett County and the violation report was filed in Sampson County. Defendant abandoned his argument concerning jurisdiction in Sampson County when he did not contest the State's contention that the address listed both on defendant's affidavit of indigency and the violation report was in Sampson County.

2. Probation and Parole—probation revocation—notice—allegations of charges

The trial court had jurisdiction to revoke defendant's probation for violation of the "commit no criminal offense" condition even though defendant argued that the trial court lacked jurisdiction due to inadequate notice. The violation report alleged only criminal charges, not convictions, but defendant was aware both that the State was alleging a revocation-eligible violation and of the exact violation upon which the State relied. Defendant could have denied the violation and presented evidence in his own defense had he chosen to do so.

3. Probation and Parole—probation revocation—findings—clerical errors

A revocation of probation was remanded for correction of clerical errors where the trial court's written judgment was missing several key findings, but the record clearly supported the grounds, reasoning, and authority for the order.. Any error in failing to check a box on the revocation form was clerical only.

Appeal by defendant from Judgment entered on or about 2 April 2013 by Judge W. Douglas Parsons in Superior Court, Sampson County. Heard in the Court of Appeals 19 November 2013.

Attorney General Roy A. Cooper, III by Assistant Attorney General Andrew O. Furuseth, for the State.

Yoder Law PLLC by Jason Christopher Yoder, for defendant-appellant.

STROUD, Judge.

Travis Lee ("defendant") appeals from the judgment entered on or about 2 April 2013 revoking his probation and activating his sentence. We remand for correction of the clerical errors in the judgment.

I. Background

In June 2012, defendant was indicted in Harnett County for obtaining property by false pretenses, felony larceny of a motor vehicle, and felony possession of a stolen motor vehicle. On 24 September 2012, defendant pled guilty to larceny of a motor vehicle and was sentenced to 10-12 months imprisonment, suspended for 24 months of supervised

probation. On 17 January 2013, defendant's probation officer filed a violation report in Sampson County alleging that defendant had violated four conditions of his probation: (1) that he report as directed to the supervising officer, (2) that he pay all fees owed, (3) that he participate in substance abuse treatment through TASC, and (4) that he commit no criminal offense. On 2 April 2013, the superior court in Sampson County found that defendant had violated his probation as alleged in paragraphs one through four of the violation report, revoked his probation, and sentenced him to 8-10 months imprisonment. Defendant filed written notice of appeal to this Court on 12 April 2013.

II. Subject Matter Jurisdiction

On appeal, defendant contends that the trial court lacked jurisdiction because Sampson County was not in a judicial district which had jurisdiction over his probation and because he received inadequate notice of the State's allegations against him. We disagree.

A. Correct County

[1] Defendant argues for the first time on appeal that the trial court lacked jurisdiction to revoke his probation because Sampson County was not in the judicial district where probation was imposed, Judicial District 11A, there was no evidence he lived in Sampson County, Judicial District 4A, and there was no evidence that any of his alleged violations took place in Sampson County.

Under N.C. Gen. Stat. § 15A-1344(a) (2011),

> probation may be reduced, terminated, continued, extended, modified, or revoked by any judge entitled to sit in the court which imposed probation and who is resident or presiding in the district court district as defined in G.S. 7A-133 or superior court district or set of districts as defined in G.S. 7A-41.1, as the case may be, where the sentence of probation was imposed, where the probationer violates probation, or where the probationer resides.

Defendant fails to note that both his affidavit of indigency and the violation report filed by his probation officer list his residence as one on County Manor Lane in Dunn, North Carolina. The State contends that this address is situated in Sampson County. Defendant does not argue on appeal—and did not argue to the trial court—that this address is not actually in Sampson County, nor that he did not live at that address at the relevant time. Therefore, we deem such arguments abandoned. N.C.R. App. P. 28(a). Accordingly, we conclude that the

trial court had jurisdiction over defendant's probation under N.C. Gen. Stat. § 15A-1344(a) because he was residing in Sampson County, part of Judicial District 4A.

B. Notice

[2] Defendant next argues that the trial court lacked jurisdiction because he had inadequate notice that the State intended to revoke his probation on the basis of a new criminal offense. He contends that "[b]ecause the violation report alleged only criminal charges, and not convictions, it cannot be the sole basis for revoking probation."

Under the Justice Reinvestment Act, a defendant's probation is subject to revocation if he violates the normal condition of probation that he "[c]ommit no criminal offense in any jurisdiction." N.C. Gen. Stat. § 15A-1343(b)(1) (2011); N.C. Gen. Stat. § 15A-1344(a) (2011). A conviction by jury trial or guilty plea is one way for the State to prove that a defendant committed a new criminal offense. *See State v. Guffey*, 253 N.C. 43, 45, 116 S.E.2d 148, 150 (1960) ("[W]hen a criminal charge is pending in a court of competent jurisdiction, which charge is the sole basis for activating a previously suspended sentence, such sentence should not be activated *unless there is a conviction on the pending charge or there is a plea of guilty entered thereto.*" (emphasis added)). The State may also introduce evidence from which the trial court can independently find that the defendant committed a new offense. *See, e.g.*, *State v. Monroe*, 83 N.C. App. 143, 145-46, 349 S.E.2d 315, 317 (1986), *State v. Debnam*, 23 N.C. App. 478, 480-81, 209 S.E.2d 409, 410-11 (1974).

The State is required to give defendant notice "of the [probation] hearing and its purpose, including a statement of the violations alleged." N.C. Gen. Stat. § 15A-1345(e)(2011). Thus, the relevant piece of information is the violation alleged, not the manner of proving the violation. "The purpose of the notice mandated by this section is to allow the defendant to prepare a defense and to protect the defendant from a second probation violation hearing for the same act." *State v. Hubbard*, 198 N.C. App. 154, 158, 678 S.E.2d 290, 293 (2009).

Here, the violation report specifically alleged that defendant violated the condition of probation that he commit no criminal offense in that he had several new pending charges which were specifically identified, including that "on 12/18/12 the defendant was charged with possession of firearm by felon in 12CR057780 and possess marijuana up to 1/2 oz in 12 CR 057779 in Johnston County." The violation report went on to state that "If the defendant is convicted of any of the charges it will be a violation of his current probation."

Defendant is correct that charges alone are insufficient to show that he committed a new criminal offense. *See Guffey*, 253 N.C. at 45, 116 S.E.2d at 150. Nevertheless, the issue here is notice—i.e., whether the information provided was sufficient "to allow the defendant to prepare a defense and to protect the defendant from a second probation hearing for the same act." *Hubbard*, 198 N.C. App. at 158, 678 S.E.2d at 293. Additionally, because of the changes effected by the Justice Reinvestment Act, we have required that defendants be given notice of the particular revocation-eligible violation alleged by the State. *See, e.g.*, *State v. Tindall*, ___ N.C. App. ___, ___, 742 S.E.2d 272, 275 (2013) (holding that defendant received insufficient notice because "defendant did not have notice that her probation could potentially be revoked when she appeared at the hearing."), *State v. Kornegay*, ___ N.C. App. ___, ___, 745 S.E.2d 880, 883 (2013) ("Under *Tindall*, which violation is alleged dictates whether the trial court has the jurisdiction to revoke a defendant's probation or not." (emphasis added)).

Unlike *Tindall* and *Kornegay*, the violation report here put defendant on notice that the State was alleging a revocation-eligible violation, namely that he committed a new criminal offense. The probation officer specifically alleged in the violation report that defendant had violated the condition that he not commit any criminal offense. The violation report identified the criminal offense on which the trial court relied to revoke defendant's probation—possession of a firearm by a felon—and the specific county and case file number of that alleged offense. Given such notice, defendant was aware that the State was alleging a revocation-eligible violation and he was aware of the exact violation upon which the State relied. Defendant could have denied the violation and presented evidence in his own defense had he chosen to do so. Therefore, we conclude that the trial court had jurisdiction to revoke defendant's probation for violation of the "commit no criminal offense" condition.[1]

III. Findings of Fact

[3] Defendant next argues that the trial court made inadequate findings to support its judgment revoking his probation. We agree that the trial court's written judgment is missing several key findings, including findings that, "[u]pon due notice or waiver of notice," defendant admitted the violations and that that defendant had violated the condition that he not commit a new criminal offense. We conclude that these omissions are clerical errors and remand for entry of a corrected judgment.

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1. Because we conclude that the notice provided was adequate we do not address the issue of waiver.

The form which was used here, "Judgment and Commitment Upon Revocation of Probation—Felony," AOC Form CR-607 Rev. 12-12, includes five potential findings of fact with various optional subsections. Finding 1 addresses the particular probation violations alleged against the defendant. Finding 2 addresses "due notice," waiver of notice, and hearing. Finding 3 addresses the specific conditions which the court finds that defendant has violated. Finding 4 addresses the willfulness and timing of violations, and does not require that a box be "checked," unless the subsection is applicable (and here it was not marked, nor should it have been). Finding 5 includes the direction: "NOTE TO COURT: *This finding is required when revoking probation for violations occurring on or after December 1, 2011*" (emphasis in original), gives the Court two optional findings, and at least one of these is necessary to revoke probation.

Here, the trial court made only two findings: No. 3(a), which was "checked" and Finding 4, which does not require any additional notation. The *only* optional finding on Form AOC-CR-607 that the trial court checked was 3(a), where it found that "The condition(s) violated and the facts of each violation are as set forth" in paragraphs 1-4 of the violation report. By failing to check the right boxes, the trial court failed to incorporate the violation reports by reference (Finding 1(a)), made no finding that defendant admitted the violations (Finding 2), and failed to find a willful violation of one of the revocation-eligible conditions under the Justice Reinvestment Act (Finding 5). Finding 5 is particularly important here because only one of the four alleged violations was revocation-eligible. *See State v. Jones*, ___ N.C. App. ___, ___, 736 S.E.2d 634, 637-38 (2013) (concluding that "the trial court should have checked the box finding that it had the authority to revoke defendant's probation under the Justice Reinvestment Act 'for the willful violation of the condition(s) that he/she not commit any criminal offense, G.S. 15A–1343 (b)(1), or abscond from supervision, G.S. 15A–1343(b)(3a), as set out above.' ").

But in this case, the record clearly supports the grounds, reasoning, and authority for the trial court's order of revocation of probation, so any error in failing to check a box on the revocation form is clerical only. *See id. at* ___, 736 S.E.2d at 637-38 (concluding that the trial court made a clerical error when it failed to check the right boxes on the AOC form to revoke probation). Defendant admitted the alleged violations through counsel, including that he had been convicted of a new criminal offense on 18 December 2012. The trial court found from the bench that defendant had admitted the violations. Nevertheless, the order must document the findings necessary to the trial court's decision to revoke

defendant's probation. *See* N.C. Gen. Stat. § 15A-1345(e) (2011) ("Before revoking or extending probation, the court must, unless the probationer waives the hearing, hold a hearing to determine whether to revoke or extend probation and must make findings to support the decision and a summary record of the proceedings."); *State v. Williamson*, 61 N.C. App. 531, 534, 301 S.E.2d 423, 425 (1983) (noting that due process requires "a written judgment by the judge which shall contain (a) findings of fact as to the evidence relied on, [and] (b) reasons for revoking probation."). The failure to check the appropriate boxes constitutes a clerical error. *Jones*, ___ N.C. App. at ___, 736 S.E. 2d at 637-38. Therefore, we remand for correction of the clerical errors.

IV. Conclusion

Although we conclude from the current record that the trial court had subject matter jurisdiction to adjudicate defendant's alleged probation violations, due to the failure to "check the boxes" on the order, the trial court's written findings are inadequate to support its decision to revoke defendant's probation. Therefore, we remand for the trial court to correct the clerical errors in the judgment.

REMANDED.

Judges McGEE and BRYANT concur.

STATE OF NORTH CAROLINA
v.
RONDELL LUVELL SANDERS

No. COA13-750

Filed 4 February 2014

1. Sentencing—prior record level determination—out-of-state statute—correct version

Defendant did not show error on a remand for examination of prior record level points for a Tennessee conviction where defendant argued that the State did not prove the Tennessee statutes were unchanged from the versions under which defendant was convicted. While the date of offense often determines which version of a criminal statute applies in North Carolina, defendant cites no Tennessee authority to show that statutory amendments in Tennessee operate in the same manner as in North Carolina.

2. Sentencing—prior record points—Tennessee offense—substantially similar to North Carolina offense

The trial court did not err by concluding that the Tennessee offense of theft and the North Carolina offense of larceny are substantially similar. The only difference between the elements of the offenses in the two states that defendant pointed out was that the Tennessee offense allegedly required no showing of permanent deprivation. However, courts in Tennessee have held that Tennessee's theft statute requires an intention to permanently deprive the owner of property.

3. Sentencing—prior record level—prior Tennessee offense—elements

The trial court erred when determining defendant's sentence in its consideration of a prior Tennessee conviction. The Tennessee statute referred to another statute, not presented by the State in this case, and both statutes were necessary for an understanding of the elements of the Tennessee offense.

4. Sentencing—prior record level—Tennessee offense—domestic assault—compared to assault on a female

The trial court erred by finding that the Tennessee offense of domestic assault was substantially similar to the North Carolina offense of assault on a female. The required comparison is of the elements of the two offenses.

Judge BRYANT concurring part and dissenting in part.

Appeal by Defendant from judgment entered 15 February 2013 by Judge Wayland J. Sermons, Jr. in Superior Court, Beaufort County. Heard in the Court of Appeals 19 November 2013.

Attorney General Roy Cooper, by Assistant Attorney General David L. Gore, for the State.

W. Michael Spivey for Defendant.

McGEE, Judge.

Rondell Luvell Sanders ("Defendant") appeals from his re-sentencing for robbery with a dangerous weapon. In an earlier appeal to this Court, Defendant asserted error in the prior record level determination, which included points based on the substantial similarity of Tennessee

offenses to North Carolina offenses. This Court remanded for resentencing because it appeared the trial court compared the *punishments*, rather than comparing the *elements* of the offenses. *State v. Sanders*, ___ N.C. App. ___, 736 S.E.2d 238 (2013).

I. Standard of Review

The "question of whether a conviction under an out-of-state statute is substantially similar to an offense under North Carolina statutes is a question of law requiring *de novo* review on appeal." *State v. Fortney*, 201 N.C. App. 662, 669, 687 S.E.2d 518, 524 (2010) (internal quotation marks omitted).

II. Date of Prior Tennessee Offenses

[1] Defendant argues the trial court erred by assigning points for Tennessee convictions because the State did not prove the Tennessee statutes were unchanged from the versions under which Defendant was convicted. We disagree.

In *State v. Burgess*, ___ N.C. App. ___, 715 S.E.2d 867 (2011), this Court remanded for resentencing when the State presented the 2008 versions of the out-of-state statutes and "presented no evidence that the statutes were unchanged from the 1993 and 1994 versions under which [the] defendant had been convicted." *Burgess*, ___ N.C. App. at ___, 715 S.E.2d at 870.

In the present case, the State presented copies of judgments to the trial court showing Defendant was convicted in Tennessee of theft on 10 March 2009 and domestic assault on 6 January 2009. Defendant contends the judgments do not show the date of the offenses. However, Defendant provides no support for his implied assertion that the date of each offense is necessary to determine which version of the Tennessee criminal statute applied.

It is true that, in North Carolina, the date of offense often determines which version of a criminal statute applies. *See, e.g.*, "An Act to Provide That If a Defendant Has Four or More Prior Larceny Convictions, A Subsequent Larceny Offense is a Felony," 2012 N.C. Sess. Laws ch. 154 § 2 ("This act becomes effective December 1, 2012, and applies to offenses committed on or after that date."); "An Act to Amend the Law Concerning Assaults on Governmental Officers and Employees and to Make It a Felony to Assault a Governmental Officer or Employee with a Deadly Weapon," 1991 N.C. Sess. Laws ch. 525 § 3 ("This act becomes effective October 1, 1991, and applies to offenses committed on or after

that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act[.]").

However, because Defendant cites no Tennessee authority to show that statutory amendments in Tennessee operate in the same manner as the North Carolina amendments above, we must assume the State presented the correct versions of the Tennessee criminal statutes at issue. Defendant has thus not demonstrated error on this basis.

III. Substantial Similarity of Tennessee Offense of Theft to North Carolina Offense of Misdemeanor Larceny

[2] Defendant also argues the trial court erred in finding the Tennessee offense of theft substantially similar to the North Carolina offense of misdemeanor larceny.

> If the State proves by the preponderance of the evidence that an offense classified as a misdemeanor in the other jurisdiction is substantially similar to an offense classified as a Class A1 or Class 1 misdemeanor in North Carolina, the conviction is treated as a Class A1 or Class 1 misdemeanor for assigning prior record level points.

N.C. Gen. Stat. § 15A-1340.14(e) (2011). "For each prior misdemeanor conviction as defined in this subsection, 1 point." N.C. Gen. Stat. § 15A-1340.14(b)(5).

"Determination of whether the out-of-state conviction is substantially similar to a North Carolina offense is a question of law involving comparison of the *elements* of the out-of-state offense to those of the North Carolina offense." *Fortney*, 201 N.C. App. at 671, 687 S.E.2d at 525 (emphasis added); *see also State v. Sanders*, ___ N.C. App. ___, ___, 736 S.E.2d 238, 240 (2013) ("the trial court must compare 'the *elements* of the out-of-state offense to those of the North Carolina offense"); *State v. Wright*, 210 N.C. App. 52, 71, 708 S.E.2d 112, 126 (2011).

Although the case law is clear that the determination as to substantial similarity involves comparison of the elements of the offenses, the determination as to what exactly constitutes substantial similarity remains unclear. While N.C.G.S. § 15A-1340.14(e) "provides that either the State or the defendant may prove that an offense for which the defendant was convicted in a foreign jurisdiction is substantially similar to a North Carolina offense, the statute does not give guidance as to how a trial court is to make such a determination." *State v. Phillips*, ___ N.C. App. ___, ___, 742 S.E.2d 338, 343 (2013) (citing *State v. Hanton*, 175 N.C. App. 250, 623 S.E.2d 600 (2006)).

Defendant cites *State v. Amanns*, 2 S.W.3d 241 (Tenn. Crim. App. 1999) for the elements of "theft of property." "In order to obtain a conviction for theft, the State must prove (1) the defendant knowingly obtained or exercised control over property; (2) the defendant did not have the owner's effective consent; and (3) the defendant intended to deprive the owner of the property." *Amanns*, 2 S.W.3d at 244-45.

The only difference between the elements of the offenses that Defendant points out is that the Tennessee offense requires no showing of permanent deprivation. Defendant asserts that, if a defendant simply "took a joyride on somebody's horse, he would violate Tennessee's theft statute."

However, it appears that the court in *Amanns* was merely giving a shortened recitation of the elements. In a challenge to the sufficiency of evidence in an attempted theft case, the Court of Criminal Appeals of Tennessee considered whether the State showed the defendant "possessed the requisite intent to *permanently* deprive each of the owners of their automobiles." *State v. Roberts*, 943 S.W.2d 403, 410 (Tenn. Crim. App. 1996) (emphasis added), *overruled on other grounds by State v. Ralph*, 6 S.W.3d 251 (Tenn. 1999). Thus, courts in Tennessee have held that Tennessee's theft statute requires an intention to *permanently* deprive the owner of property.

Defendant's contention that the offenses are not substantially similar on this basis is without merit. The trial court did not err in concluding the Tennessee offense of theft and the North Carolina offense of larceny are substantially similar.

IV. Substantial Similarity of Tennessee Offense of Domestic Assault to North Carolina Offense of Assault on a Female

Defendant next argues the trial court erred in finding the Tennessee offense of domestic assault substantially similar to the North Carolina offense of assault on a female. Defendant makes two contentions in support of his argument.

A. Necessity of Reviewing Applicable Statutes

[3] First, Defendant contends "the State did not offer the Tennessee statute necessary to determine the elements of the offense." The State presented a copy of Tenn. Code Ann. § 39-13-111. However, that statute refers to another statute which the State did not provide to the trial court, namely, Tenn. Code Ann. § 39-13-101.

The Tennessee domestic assault statute reads: "A person commits domestic assault who commits an assault as defined in § 39-13-101

against a domestic abuse victim." Tenn. Code Ann. § 39-13-111(b). Both statutes are thus necessary to understanding the elements of the Tennessee offense of domestic assault. The record contains no indication that the trial court considered both Tenn. Code Ann. §§ 39-13-111 and 39-13-101. Defendant has shown error in the trial court's determination under *Fortney*.

B. Substantial Similarity

[4] Second, Defendant contends the offenses are not substantially similar because "the Tennessee statute is gender and age neutral in its definition of 'domestic abuse victims.' " The North Carolina offense of assault on a female is set forth in N.C. Gen. Stat. § 14-33(c).

> [A]ny person who commits any assault, assault and battery, or affray is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray, he or she . . . [a]ssaults a female, he being a male person at least 18 years of age[.]

N.C. Gen. Stat. § 14-33(c)(2) (2011).

By contrast, the Tennessee offense of domestic assault is as follows: "A person commits domestic assault who commits an assault as defined in § 39-13-101 against a domestic abuse victim." Tenn. Code Ann. § 39-13-111(b). "Domestic abuse victim" is defined as any person who falls within the following categories:

> (1) Adults or minors who are current or former spouses;
>
> (2) Adults or minors who live together or who have lived together;
>
> (3) Adults or minors who are dating or who have dated or who have or had a sexual relationship, but does not include fraternization between two (2) individuals in a business or social context;
>
> (4) Adults or minors related by blood or adoption;
>
> (5) Adults or minors who are related or were formerly related by marriage; or
>
> (6) Adult or minor children of a person in a relationship that is described in subdivisions (a)(1)-(5).

Tenn. Code Ann. § 39-13-111(a).

An examination of the elements reveals that the North Carolina offense of assault on a female and the Tennessee offense of domestic assault are not substantially similar, especially given that "the rule of lenity requires us to interpret [N.C.G.S. § 15A-1340.14(e)] in favor of defendant." *Phillips*, ___ N.C. App. at ___, 742 S.E.2d at 343 (quoting *Hanton*, 175 N.C. App. at 259, 623 S.E.2d at 606).

The Tennessee offense requires showing that the victim falls into one of six categories. The categories describe particular relationships between the defendant and the victim. By contrast, the North Carolina offense of assault on a female requires no showing as to a particular relationship between the defendant and the victim.

A second significant difference between the offenses is that the North Carolina offense requires the victim be female. The Tennessee offense does *not* require the victim be female. Based on these two significant differences, we must conclude the trial court erred in finding that the Tennessee offense of domestic assault was substantially similar to the North Carolina offense of assault on a female.

The dissent analyzes the facts of the Tennessee offense to determine whether Defendant could be convicted of assault on a female in North Carolina. As previously discussed, we are required to compare the elements of the Tennessee offense to the elements of the North Carolina offense. "Determination of whether the out-of-state conviction is substantially similar to a North Carolina offense is a question of law involving comparison of the *elements* of the out-of-state offense to those of the North Carolina offense." *Fortney*, 201 N.C. App. at 671, 687 S.E.2d at 525 (emphasis added); *see also Sanders*, ___ N.C. App. at ___, 736 S.E.2d at 240 ("the trial court must compare 'the *elements* of the out-of-state offense to those of the North Carolina offense"); *Wright*, 210 N.C. App. at 71, 708 S.E.2d at 126. The trial court erred in finding that the Tennessee offense of domestic assault was substantially similar to the North Carolina offense of assault on a female.

V. Conclusion

Defendant has demonstrated no error in the trial court's determination as to the Tennessee offense of theft. However, Defendant has shown error in the trial court's determination as to the Tennessee offense of domestic assault, and we remand for resentencing.

Affirmed in part; remanded in part for resentencing.

Judge STROUD concurs.

BRYANT, Judge, concurring in part and dissenting in part.

The majority opinion remands for resentencing based on its determination that the trial court erred in finding that the Tennessee offense of domestic assault was substantially similar to the North Carolina offense of assault on a female. Because I believe the trial court did not err in finding that the Tennessee offense of domestic assault is substantially similar to the North Carolina offense of assault on a female, I respectfully dissent from that portion of the majority opinion. I concur in the remainder of the majority opinion.

Pursuant to N.C. Gen. Stat. § 15A-1340.14(e) (2011),

> [i]f the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points.

Here, the State presented the trial court with copies of Tenn. Code Ann. § 39-13-111 and N.C. Gen. Stat. § 14-33(c). The majority opinion agrees with defendant's argument that the trial court erred in finding that T.C.A. § 39-13-111 and N.C.G.S. § 14-33(c) are substantially similar. This Court has held that in considering whether a statute from another state is substantially similar to a North Carolina statute "the requirement set forth in N.C. Gen. Stat. § 15A-1340.14(e) is not that the statutory wording precisely match, but rather that the offense be 'substantially similar.' " *State v. Sapp*, 190 N.C. App. 698, 713, 661 S.E.2d 304, 312 (2008). I find it inconceivable that this requirement of substantial similarity is meant to pose an insurmountable burden for the State, as each state is entitled to tailor its statutes as it sees fit. Accordingly, the State is required to prove merely by a preponderance of the evidence — not by the higher standards of by clear and convincing evidence or beyond a reasonable doubt — that two statutes are substantially similar.

North Carolina does not have a domestic assault statute. Rather, domestic assault in North Carolina is recognized as a form of assault, upon a female, by a male, under N.C.G.S. § 14-33(c)[1]; no other North

1. That N.C.G.S. § 14-33(c) is intended to address domestic assault is further demonstrated by N.C. Gen. Stat. § 15A-534.1 (2011), "Crimes of domestic violence," which establishes specific procedures for determining a defendant's pretrial release "[i]n all cases in which the defendant is charged with assault on, stalking, communicating a threat to, or committing a felony provided in Articles 7A, 8, 10, or 15 of Chapter 14 of the General Statutes upon a spouse or former spouse or a person with whom the defendant lives or has lived as if married . . .

Carolina statute is thus as suitably equivalent to T.C.A. § 39-13-111 in addressing the specific elements of an assault upon a female. Furthermore, North Carolina has no statutory definition of assault, and assault is thus defined by the common law. *State v. Roberts*, 270 N.C. 655, 658, 155 S.E.2d 303, 305 (1967). The majority agrees with defendant that because the State did not present the trial court with both T.C.A. § 39-13-111 and the statute to which it refers, T.C.A. § 39-13-101, the State did not meet its burden of proving that T.C.A. § 39-13-111 and N.C.G.S. § 14-33(c) are substantially similar. An examination of T.C.A. § 39-13-111, "domestic assault," reveals that it does indeed reference T.C.A. § 39-13-101, "assault." However, as the trial court examined the elements of assault in T.C.A. § 39-13-111 in relation to the common law definition of assault, it was unnecessary that T.C.A. § 39-13-101 accompany T.C.A. § 39-13-111 in order for the elements of assault in T.C.A. § 39-13-111 to be defined and considered by the trial court.

As defined by the common law, an assault is an unauthorized touching which causes an offensive or harmful contact. Such contact can occur between two people of any age or gender. *See Roberts*; *see also State v. Hill*, 6 N.C. App. 365, 369, 170 S.E.2d 99, 102 (1969) ("Where in a prosecution for assault . . . the evidence tends to show assault on a female at least, it is not error to fail to submit the question of guilt of simple assault."). In creating statutes which distinguish between types of assaults, like domestic assault, these distinctions assist with governmental goals such as identifying particular categories of offenders for sentencing purposes. *See State v. Gurganus*, 39 N.C. App. 395, 400, 250 S.E.2d 668, 672 (1979) ("[N.C.G.S. § 14-33] in its entirety provides a logical pattern protecting the citizens of North Carolina from acts of violence. Subsection (a) of the statute establishes the crimes of assault, assault and battery and affray. Subsection (b) and its subsections do not create additional or separate offenses. Instead, those subsections provide for differing punishments when the presence or absence of certain factors is established.").

The majority appears to accept defendant's argument that T.C.A. § 39-13-111 is not substantially similar to N.C.G.S. § 14-33(c) because T.C.A. § 39-13-111 is gender and age-neutral while N.C.G.S. § 14-33(c) specifically applies to a male over the age of 18 assaulting a female. I find defendant's argument to lack merit, as the State of Tennessee could have chosen to charge defendant under its general assault statute, § 39-13-101. Instead, by charging defendant under the more specific statute for domestic abuse, the State of Tennessee pursued the more specific and relevant charge against defendant of committing assault

upon a female with whom he was in a relationship. Moreover, the State of Tennessee dismissed a charge of regular assault against defendant at the same time it pursued the domestic abuse charge against him. As such, the State of Tennessee demonstrated its intent to charge defendant according to the elements of the most applicable statute. Furthermore, an analysis of Tennessee case law indicates that the domestic abuse statute can and is applied specifically in situations where a male has assaulted a female with whom he had a relationship. *Compare State v. Anderson*, No. W2011-00139-CCA-R3-CD, 2012 Tenn. Crim. App. LEXIS 707 (Sept. 5, 2012) (finding the male defendant guilty of domestic assault under T.C.A. § 39-13-111 where he admitted to choking and hitting his estranged wife); *State v. Boston*, No. M2010-00919-CCA-R3-CD, 2011 Tenn. Crim. App. LEXIS 779 (Oct. 18, 2011) (finding the male defendant guilty of domestic assault for hitting his ex-wife during a fight and guilty of aggravated assault for hitting his ex-wife's male friend with a board); *State v. Parham*, No. W2009-02576-CCA-R3-CD, 2010 Tenn. Crim. App. LEXIS 1049 (Dec. 10, 2010) (finding the male defendant guilty of domestic assault for severely beating his ex-girlfriend with a fireplace log), *remanded on other grounds*, No. W2011-01276-CCA-R3-CD, 2012 Tenn. Crim. App. LEXIS 788 (Sept. 26, 2012); *State v. Terrell*, No. M2006-01688-CCA-R3-CD, 2008 Tenn. Crim. App. LEXIS 135 (Jan. 30, 2008) (discussing how domestic abuse under T.C.A. § 39-13-111 is a specific form of assault as defined in T.C.A. § 39-13-101), with *Fain v. State*, No. M2009-01148-CCA-R3-PC, 2010 Tenn. Crim. App. LEXIS 212 (Mar. 9, 2010) (finding defendant-mother guilty of assault for beating her juvenile son); *State v. Hall*, No. W2008-01875-CCA-R3-CD, 2010 Tenn. Crim. App. LEXIS 147 (Feb. 18, 2010) (finding the male defendant guilty of assault for attacking the male victim with a frying pan); *State v. Adkins*, No. M2007-01728-CCA-R3-CD, 2008 Tenn. Crim. App. LEXIS 994 (Dec. 4, 2008) (finding the male defendant guilty of assault upon two police officers, one male and one female); *State v. Elkins*, 83 S.W.3d 706 (2002) (finding the male defendant guilty of assault and aggravated sexual battery upon a juvenile girl).

The record in the instant case offers additional evidence in support of the statutory elements necessary to convict defendant of assault upon a female: the judgment for domestic assault indicates that defendant was to have no contact with the victim, Ashley Blango, and to attend 24 domestic abuse counseling classes. Moreover, defendant's criminal history record indicates that he has a neck tattoo which reads "Ashley." Although I acknowledge defendant's contention that "Ashley" is a unisex name, I find it inconceivable that this evidence — (1) a neck tattoo with the name "Ashley," (2) a conviction for domestic assault,

(3) a victim's name of Ashley, (4) an order to attend domestic abuse counseling classes, and (5) an analysis of Tennessee case law showing how T.C.A. § 39-13-111 is specifically used for instances where a male has assaulted a female with whom he has a relationship — fails to meet the State's burden of proving substantial similarity between the elements of the two relevant statutes by a preponderance of the evidence.

Of further note here is that T.C.A. § 39-13-111 states that "[a] person commits domestic assault who commits an assault as defined in § 39-13-101 against a domestic abuse victim." As such, T.C.A. § 39-13-111 is clearly intended to be treated like an assault as defined under T.C.A. § 39-13-101; the distinction between these two statues is thus relevant only as to whether the assault occurred in a domestic situation or not. *See State v. Woosley*, No. M2013-00578-CCA-R3-CD, 2013 Tenn. Crim. App. LEXIS 1045, at *15 (Nov. 26, 2013) ("Domestic assault is an "assault" committed against a "domestic abuse victim." T.C.A. § 39-13-111(b) (2010). As charged in the indictment, an assault occurs when a person "[i]ntentionally, knowingly, or recklessly causes bodily injury to another[.]" Id. § 39-13-101(a)(1) (2010). A "domestic abuse victim" is [also] defined to include "[a]dults . . . who are current or former spouses." *Id.* § 39-13-111(a)(1) (2010)."); *see also* T.C.A. § 39-13-111(a)(2) ("[D]omestic abuse victim means . . . [a]dults . . . who live together or who have lived together[.]"); *Id.* § 39-13-101(a) ("A person commits assault who: (1) [i]ntentionally, knowingly or recklessly causes bodily injury to another; (2) [i]ntentionally or knowingly causes another to reasonably fear imminent bodily injury; or (3) [i]ntentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative.").

I also note that the trial court took notice of the common law definition of assault as presented by the State. This Court has recognized that in determining whether two statutes are substantially similar, the underlying purposes of the statutes must be examined to "avoid absurd or bizarre consequences." *State v. Key*, 180 N.C. App. 286, 294, 636 S.E.2d 816, 823 (2006) (holding that a Maryland theft statute was substantially similar to a North Carolina larceny statute because both statutes followed common-law definitions of theft, taking, and asportation).

Here, the underlying purpose of the statutes is clear: to protect females from assaults committed by males. "In adopting G.S. 14-33, the General Assembly of North Carolina clearly sought to prevent bodily injury to the citizens of the State arising from assaults, batteries and affrays." *Gurganus*, 39 N.C. App. at 400, 250 S.E.2d at 672.

> In matters of statutory construction, the role of this court is to ascertain and give effect to the intent of the legislature. Unless ambiguity requires resort elsewhere to ascertain legislative intent, judicial interpretation of a statute is restricted to the natural and ordinary meaning of the language used. "Legislative enactments must be interpreted in their natural and ordinary sense without a forced construction to either limit or expand their meaning." "Courts must construe statutes as a whole and in conjunction with their surrounding parts and their interpretation should be consistent with their legislative purposes." The meaning of a statute is to be determined not from specific words in a single sentence or section but from the act in its entirety in light of the general purpose of the legislation; any interpretation should express the intent and purpose of the legislation. "The cardinal rule of statutory construction is to effectuate legislative intent, with all rules of construction being [aids] to that end."

State v. Cross, 93 S.W.3d 891, 894 (Tenn. Crim. App. 2002) (citations omitted). A review of the elements of the Tennessee domestic assault statute supports a similar purpose as the North Carolina assault on a female statute — to protect females from assault by males. Accordingly, upon *de novo* review of the trial court's ruling after comparison of the elements of the relevant North Carolina and Tennessee assault statutes, I submit that the State met its burden of proof to show by a preponderance of the evidence that these statutes are substantially similar. Therefore, I respectfully dissent.

STATE OF NORTH CAROLINA
v.
LARRY STUBBS

No. COA13-174

Filed 4 February 2014

1. Appeal and Error—appellate jurisdiction—subsequent panel—cannot overrule prior panel granting certiorari

A subsequent panel of the Court of Appeals could not overrule a prior panel which had decided the issue of jurisdiction to hear the appeal by granting the State's petition for a writ of *certiorari*.

2. Criminal Law—jurisdiction—MAR—sentence invalid as a matter of law

The State's challenge to the trial court's jurisdiction was overruled where the gravamen of the argument presented in defendant's MAR was that his life sentence for second-degree burglary in 1973 was unconstitutionally excessive under evolving standards of decency,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 1973 judgment to consider whether defendant's sentence was invalid as a matter of law.

3. Constitutional Law—1973 sentence of life with the possibility of parole—not cruel and unusual

The trial court erred by concluding that defendant's 1973 sentence of life imprisonment with the possibility of parole for second-degree burglary violated the prohibitions of the Eighth Amendment to the United States Constitution. 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 case was remanded for reinstatement of the original sentence.

Judge DILLON concurs in separate opinion.

Judge Stephens dissents in 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

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).

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.

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 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

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2. **[1]** 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, a separate concurring and a separate dissenting opinion further address the issue of jurisdiction to hear this appeal.

support the order entered by the trial court.' " *State v. Peterson*, ___ N.C. App. ___, ___, 744 S.E.2d 153, 157 (2013) (quoting *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982)).

A

[2] 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

[3] 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 Eight 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. 48, 58, 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, 419, 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 59, 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 59, 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 59-60, 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. 11, 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 59, 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 69-70, 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 74, 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 75, 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

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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.

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 82, 176 L. Ed. 2d at 850. Defendant's sentence 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."),

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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.

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.

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 2 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 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

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).

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.

STEPHENS, Judge, dissenting.

Because I believe that this Court lacks subject matter jurisdiction to review the State's arguments, I respectfully dissent.

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 *North Carolina Nat. Bank 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 in favor of reviewing the trial court's order when a preceding panel had earlier decided to the contrary."). In my view, *Virginia Carolina Builders* is clearly distinguishable from the issue presented in the case at bar because it concerned a Court of Appeals panel's reconsideration of a prior panel's exercise of discretion, rather than a question regarding this Court's subject matter jurisdiction over a matter.

In *Virginia Carolina Builders*, the appellant sought review of an interlocutory order. *Id.* at 565, 299 S.E.2d at 630. The appellant gave notice of appeal from the order, but prior to filing the record with this Court, he petitioned for writ of *certiorari*. *Id.* A panel of this Court denied that petition. *Id.* Thereafter, the appellant filed the record on appeal with this Court and presented arguments on the merits of his claims. *Id.* Two judges of a second panel of this Court, to whom the appeal was assigned, recognized that the order appealed from was interlocutory and would ordinarily be nonappealable, but nonetheless elected to reach the merits in their "discretion[.]" *Id.* at 565, 299 S.E.2d at 630-31. Based on the dissent of one judge who would have dismissed the appeal, the appellees sought review as a matter of right in the Supreme Court. *Id.* at 565-66, 299 S.E.2d at 631.

The Supreme Court stated:

> Although we have never considered the question, well-established analogies in our law lead us to conclude that the second panel of the Court of Appeals was without authority to overrule the first on the same question in the same case. Once an appellate court has ruled on a question, that decision becomes the law of the case and governs the question not only on remand at trial, but on a subsequent appeal of the same case. At the trial level the well[-]established rule in North Carolina is that no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action. The power of one judge of the superior court is equal to and coordinate with that of another, and a judge holding a succeeding term

> of court has no power to review a judgment rendered at a former term on the ground that the judgment is erroneous.
>
> Applying these principles to the question before us, we conclude that once 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 in favor of reviewing the trial court's order when a preceding panel had earlier decided to the contrary.
>
> Our decision on this point in no way impinges on the power of this Court or the Court of Appeals to change its ruling upon a motion to rehear, or on the court's own motion, if the court determines that its former ruling was clearly erroneous. In the case of the Court of Appeals, however, such a change must be made, if at all, by the same panel which initially decided the matter. Otherwise, a party against whom a decision was made by one panel of the Court of Appeals could simply continue to press a point in that court hoping that some other panel would eventually decide it favorably, as indeed the plaintiff did in this case; and we would not have that orderly administration of the law by the courts, which litigants have a right to expect.

Id. at 566-67, 299 S.E.2d at 631-32 (citations, internal quotation marks, and some brackets omitted).

I fully agree that in matters such as the exercise of discretion, factual determinations, and legal rulings, one panel of this Court cannot overrule another. However, I believe that determination of subject matter jurisdiction presents a different situation, one to which the analysis of *Virginia Carolina Builders* plainly does not apply. "Characterizing a rule as jurisdictional renders it unique in our adversarial system." *Sebelius v. Auburn Reg'l Med. Ctr.*, __ U.S. __, __, 184 L. Ed. 2d 627, 637 (2013) (noting that "[o]bjections to a tribunal's jurisdiction can be raised at any time, even by a party that once conceded the tribunal's subject-matter jurisdiction over the controversy"). "Subject[]matter jurisdiction defines the court's authority to hear a given type of case[.]"

United States v. Morton, 467 U.S. 822, 828, 81 L. Ed. 2d 680, 688 (1984). A "lack of jurisdiction of the subject matter may always be raised by a party, or the court may raise such defect on its own initiative." *Dale v. Lattimore*, 12 N.C. App. 348, 352, 183 S.E.2d 417, 419, *cert. denied*, 279 N.C. 619, 184 S.E.2d 113 (1971). "If a court finds *at any stage of the proceedings* that it lacks jurisdiction over the subject matter of a case, it must dismiss the case for want of jurisdiction." *McAllister v. Cone Mills Corp.*, 88 N.C. App. 577, 579, 364 S.E.2d 186, 188 (1988) (emphasis added) (citing *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E. 2d 806, 808 (1964) ("[T]he proceedings of a court without jurisdiction of the subject matter are a nullity. If a court finds at any stage of the proceedings it is without jurisdiction, it is its duty to take notice of the defect and stay, quash or dismiss the suit. This is necessary, to prevent the court from being forced into an act of usurpation, and compelled to give a void judgment. So, *ex necessitate*, the court may, on plea, suggestion, motion, or *ex mero motu*, where the defect of jurisdiction is apparent, stop the proceeding.") (citation and internal quotation marks omitted)). Further, "parties cannot stipulate to give a court subject matter jurisdiction where no such jurisdiction exists." *Northfield Dev. Co. v. City of Burlington*, 165 N.C. App. 885, 887, 599 S.E.2d 921, 924 (citation omitted), *disc. review denied*, 359 N.C. 191, 607 S.E.2d 278 (2004).

My careful review of our State's statutory and case law reveals that this Court lacks subject matter jurisdiction to consider the State's arguments via review of a trial court's allowance of a motion for appropriate relief ("MAR") or by issuance of a writ of *certiorari*.

In *State v. Starkey*, immediately after entering judgment on a jury's verdict, the trial court entered an order *sua sponte* granting its own 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 the same two issues as presented in this matter: "(I) whether the State ha[d] 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*.") (italics added). *Id.*

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.

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;
>
> 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

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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).

> 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 (2013) (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.

The mention of an appeal "regularly taken" refers to subsection 15A-1422(b) of our General Statutes, which covers MARs: "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) (2013). 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 (2013), while section 15A-1415 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 (2013). 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]

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2. Nothing in *Starkey* or the relevant statutes suggests that the timing of the MAR's filing (*i.e.*, within or outside of 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 15A-1415 would permit the appeal by the State in the case before us.

> 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 (a) and (b) 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 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

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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) (2013), 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").

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), and *State v. Whitehead*, 365 N.C. 444, 722 S.E.2d 492 (2012). 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 language of the statute states that this jurisdiction is circumscribed by "*statute*[,] *rule of the Supreme Court*, . . . [*or*] *the common law*." *Id.* 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 case 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 *certiorari* directly to the Supreme Court, is the proper route for this appeal.

In sum, this Court lacks jurisdiction to review the State's arguments by direct appeal, writ of *certiorari*, or any other procedure.[4] Accordingly, I dissent.

STATE OF NORTH CAROLINA
v.
GARRY WHITE

No. COA13-494

Filed 4 February 2014

1. Search and Seizure—driver's license checkpoint—findings and conclusions

There was no error in the findings and conclusions supporting the trial court's ultimate conclusion that there was a substantial violation of N.C.G.S. § 20-16.3A in a case arising from a driver's license checkpoint

2. Search and Seizure—driver's license checkpoint—no written policy

The trial court did not err by concluding that the lack of a written policy in full force and effect at the time of defendant's stop at the driver's license checkpoint constituted a substantial violation of N.C.G.S. § 20-16.3A.

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4. Further, the decision of the petition panel overruled this Court's published opinion in *Starkey*, which constituted binding precedent mandating 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. 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.").

3. Evidence—driver's license checkpoint—motion to suppress evidence—statutory authorization

The trial court did not err by granting defendant's motion to suppress evidence obtained during a driver's license checkpoint. Although the General Assembly specifically included language in subsection N.C.G.S. § 20-16.3A(d) that violation of that section should not be grounds for a motion to suppress, it excluded the same language in N.C.G.S. § 20-16.3A (a)(2a), making that subsection a proper basis for a motion to suppress.

Appeal by the State from order entered 16 January 2013 by Judge Tanya T. Wallace in Anson County Superior Court. Heard in the Court of Appeals 23 October 2013.

Attorney General Roy Cooper, by Assistant Attorney General Carrie D. Randa, for the State-appellant.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Andrew DeSimone, for defendant-appellee.

McCULLOUGH, Judge.

The State appeals from an order granting defendant's motion to suppress evidence obtained during a checkpoint stop. For the reasons set forth below, we affirm.

I. Background

On 11 September 2009, defendant Garry Anthony White was arrested and charged with one count of driving while impaired in violation of N.C. Gen. Stat. § 20-138.1 and one count of driving while license revoked in violation of N.C. Gen. Stat. § 20-28.

On 17 October 2011, defendant was convicted in Anson County District Court of driving while impaired and given a six (6) month active sentence. Defendant was also convicted of driving while license revoked and given an active sentence of forty-five (45) days. Defendant appealed the judgments to Anson County Superior Court.

On 12 April 2010, defendant filed a motion to suppress evidence alleging the following:

> 1. That on or about September 11, 2009, a blue GMC Sonoma was stopped at a checkpoint on High Street in Polkton, North Carolina, by officers with the Anson County Sheriff's Department.

2. There was no reasonable articulable suspicion to stop the afore-mentioned vehicle. The stop of the afore-mentioned vehicle was made without probable cause and was an unreasonable seizure in violation of the Constitution of the United States of America and the North Carolina Constitution.

3. The stop was in contravention of the statutory policy on checking stations and roadblocks set out in G.S. 20-16.3(A).

A hearing on defendant's motion to suppress was held on 10 September 2012. J.R. Horne ("Horne") testified that on 11 September 2009, he was serving as a traffic supervisor for the Anson County Sheriff's Office and was asked to operate a checking station in Polkton, North Carolina. Horne testified that at that time, the Anson County Sheriff's Department did not have a written policy regarding checking stations, but instead, had an oral policy.[1]

The checking station was designated to be a license checking station located at High Street and College Street in Polkton. Sometime before the checkpoint commenced, Horne wrote a "Traffic Operational Plan" that provided the following: the checkpoint was to begin at 7:55 p.m. on 11 September 2009; Deputy Jenkins and Detective Erdmanczyk would assist Horne in the license checkpoint; all cars coming through the target area would be checked; officers would wear their traffic vests when out of their cars; and that the "Chase Policy" would be in full effect. Horne testified that although he was under the assumption that the checkpoint would conclude around midnight since the stores in Polkton closed around 11:00 p.m., there was no end time indicated in the "Traffic Operational Plan."

Following a briefing held at 7:30 p.m. on 11 September 2009, the checkpoint began at 7:55 p.m. All three officers – Horne, Jenkins, and Erdmanczyk – were present with safety vests on. The officers were checking both northbound and southbound traffic coming to the checkpoint on High Street, as well as westbound traffic coming from College Street. During the license checkpoint, all three of the officers' vehicles had their blue lights activated. All vehicles coming through the checking station were stopped.

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1. The Anson County Sheriff's Department did not have a written policy concerning checking stations until 17 February 2012.

Horne testified that at 8:01 p.m., an individual was arrested and charged with driving while impaired. At 8:24 p.m., Horne left the checking station, accompanied by Officer Jenkins, and transported the arrested individual to the Sheriff's Office. Officer Erdmanczyk stayed at the checking station but did not check any vehicles until Horne and Jenkins returned at 9:57 p.m. From approximately 8:24 p.m. until 9:57 p.m., no vehicles were checked at the checkpoint. At 9:57 p.m., the checkpoint resumed. At 10:56 p.m., defendant was stopped and arrested and the checkpoint concluded around 11:20 p.m.

On 16 January 2013, the trial court entered an order finding the following in pertinent part:

> 1. The day before the actual driver's license check point, Corporal Horne was contacted by Captain Dunn of the Sheriff's Department who requested him to operate as a supervisory officer over a checkpoint.
>
> . . .
>
> 3. On September 11, 2009, the Anson County Sheriff's Department had no written policy providing guidelines for motor vehicle law checking stations as mandated by G.S. 20-16.3A.
>
> . . .
>
> 5. Corporal Horne did complete a written checking station plan prior to conducting the checkpoint on September 11, 2009. The plan provided for a license check after a briefing at the Polkton Fire Department to commence at 7:55 p.m. at the intersection of High Street and College Street which called for the officers to wear traffic vests, to stop all vehicles coming through the checkpoint, to have at least one vehicle with its blue lights activated, and to operate said checkpoint pursuant to an oral policy that was in force at that time.
>
> 6. Corporal Horne testified that the reason for the checkpoint was because there had been complaints by the store owners of speeding and reckless operation of motor vehicles in this area and that this check point was to start at 7:55 p.m. with an anticipated conclusion time of 12:00 a.m., since the stores in the area close at approximately 11:00 p.m.

7. Three (3) officers were assigned to this checkpoint including the traffic unit supervisor Corporal Horne . . . and Corporal Horne testified that all officers were to wear traffic vests, the blue lights on each vehicle were to be activated, that all vehicles were to be stopped coming through this intersection and that the chase policy was to be in force at this checkpoint.

. . .

9. The Defendant was stopped at approximately 10:56 p.m.

10. Prior to the Defendant being stopped, after the checkpoint was established, at 8:24 p.m., a vehicle was stopped which resulted in the arrest of a driver by the name of Ab Griffin for DWI and Corporal Horne testified that between 8:24 p.m. and 9:57 p.m. he and Deputy Jenkins left the checkpoint to process the arrest but left Detective Erdmanczyk at the scene until they returned, however, Detective Erdmanczyk did not continue with the checkpoint or stop any vehicles.

11. At approximately 9:57 p.m. officers Horne and Jenkins returned to the scene of the checkpoint and the checkpoint continued and the officers followed the same procedures in operating the checkpoint as were used prior to the suspension at 8:24 p.m.

. . .

13. The Court is unsure of whether or not there was a suspension of the original checkpoint for a period of almost an hour and a half or whether this is a new stop at 10:56 a.m. with no guidelines or plan in place.

The trial court concluded that

> the nature of the stop of the Defendant which occurred after the checkpoint had been abandoned for a period of approximately an hour and a half was in the nature of a spontaneous stop. Coupled with the lack of a written policy in full force and effect and taking into consideration whether a plan was reinstituted, or a new plan instituted, upon the return of the officers to the checkpoint at 9:27 p.m. mandates a conclusion that there was a substantial

> violation of G.S. 20-16.3A and the Court hereby orders that all evidence obtained as a result of the stop of the Defendant's vehicle is suppressed.

From this order, the State appeals.

II. Standard of Review

"Generally, an appellate court's review of a trial court's order on a motion to suppress is strictly limited to a determination of whether its findings are supported by competent evidence, and in turn, whether the findings support the trial court's ultimate conclusion." *State v. Roberson*, 163 N.C. App. 129, 132, 592 S.E.2d 733, 735 (2004) (citation and quotation marks omitted). "Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *State v. Taylor*, 178 N.C. App. 395, 401, 632 S.E.2d 218, 223 (2006) (citation omitted).

"While the trial court's factual findings are binding if sustained by the evidence, the court's conclusions based thereon are reviewable *de novo* on appeal." *State v. Parker*, 137 N.C. App. 590, 594, 530 S.E.2d 297, 300 (2000) (citation omitted).

III. Discussion

The State argues that the trial court erred in granting defendant's motion to suppress where: (A) finding of fact 13 is not supported by the evidence; (B) there was no substantial violation of N.C. Gen. Stat. § 20-16.3A; and (C) no constitutional violation or violation of Chapter 15A of the North Carolina General Statutes was found. Because arguments (A) and (B) are closely related, we will address them together.

A. Finding of Fact Number 13

and

B. N.C. Gen. Stat. § 20-16.3A

[1] First, the State argues that finding of fact number 13 is not supported by the evidence and thus, does not support the trial court's conclusion of law number 5.

The trial court noted in finding of fact number 13 that:

> 13. The Court is unsure of whether or not there was a suspension of the original checkpoint for a period of almost an hour and a half or whether this is a new stop at 10:56 a.m. with no guidelines or plan in place.

It also concluded in conclusion of law number 5 that:

> 5. That the nature of the stop of the Defendant which occurred after the checkpoint had been abandoned for a period of approximately an hour and a half was in the nature of a spontaneous stop. Coupled with the lack of a written policy in full force and effect and taking into consideration whether a plan was reinstituted, or a new plan instituted, upon the return of the officers to the checkpoint at 9:27 p.m. mandates a conclusion that there was a substantial violation of G.S. 20-16.3A and the Court hereby orders that all evidence obtained as a result of the stop of the Defendant's vehicle is suppressed.

We note that during defendant's motion to suppress hearing, there was ample testimony concerning the suspension of the checkpoint for an hour and half, from 8:24 p.m. until 9:57 p.m. Horne testified that at 8:01 p.m., an individual was arrested and charged with driving while impaired. Horne and Jenkins left the checkpoint from 8:24 p.m. until 9:57 p.m. in order to transport this individual to the Sheriff's Office. Horne made a decision that during the time period that he and Jenkins were absent from the checkpoint, "the checkpoint would stop[.]" Erdmanczyk remained at the checkpoint, but did not check any vehicles or licenses during this time at the direction of Horne. The following exchange occurred at defendant's hearing:

> [Defense Counsel:] We have a checking station that was basically – not due to your fault but the fault of, I guess, the driver who allegedly offended the law – that was abandoned by you for almost an hour and a half, where vehicles were free to come and go without being checked; is that correct?
>
> [Horne:] Yes, sir.

In addition, evidence established that defendant was stopped at the checkpoint at 10:56 p.m. Based on the foregoing, we hold that there was sufficient competent evidence to support the trial court's finding of fact 13 and overrule the State's argument.

Even assuming *arguendo* that finding of fact 13 was not supported by the evidence, the State's argument that the trial court erred by making conclusion of law number 5 is without merit. The remaining unchallenged findings of fact, which are binding on appeal, support the

trial court's ultimate conclusion that there was a substantial violation of section 20-16.3A of the North Carolina General Statutes.

We call attention to unchallenged finding of fact 3, which provides the following:

> On September 11, 2009, the Anson County Sheriff's Department had no written policy providing guidelines for motor vehicle law checking stations as mandated by G.S. 20-16.3A.

"When findings that are unchallenged, or are supported by competent evidence, are sufficient to support the judgment, the judgment will not be disturbed because another finding, which does not affect the conclusion, is not supported by evidence." *Dawson Industries, Inc. v. Godley Constr. Co.*, 29 N.C. App. 270, 275, 224 S.E.2d 266, 269 (1976) (citation omitted).

[2] Section 20-16.3A of the North Carolina General Statutes, which sets forth the requirements for checking stations and roadblocks, provides that:

> (a) A law-enforcement agency may conduct checking stations to determine compliance with the provisions of this Chapter. If the agency is conducting a checking station for the purposes of determining compliance with this Chapter, it *must*:
>
> . . .
>
> (2a) *Operate under a written policy* that provides guidelines for the pattern, which need not be in writing. The policy may be either the agency's own policy, or if the agency does not have a written policy, it may be the policy of another law enforcement agency, and may include contingency provisions for altering either pattern if actual traffic conditions are different from those anticipated, but no individual officer may be given discretion as to which vehicle is stopped or, of the vehicles stopped, which driver is requested to produce drivers license, registration, or insurance information. If officers of a law enforcement agency are operating under another agency's policy, it must be stated in writing.

N.C.G.S. § 20-16.3A(a)(2a) (2013) (emphasis added).

It is well established that

> [t]he paramount objective of statutory interpretation is to give effect to the intent of the legislature. The primary indicator of legislative intent is statutory language; the judiciary must give clear and unambiguous language its plain and definite meaning. Where the language of a statute is clear and unambiguous there is no room for judicial construction and the courts must give it its plain and definite meaning[.]

State v. Largent, 197 N.C. App. 614, 617, 677 S.E.2d 514, 517 (2009) (citations and quotation marks omitted).

We observe that the language used in N.C.G.S. § 20-16.3A(a)(2a) is mandatory – "If the agency is conducting a checking station . . ., it *must* [o]perate under a written policy[.]" (emphasis added). *See State v. Inman*, 174 N.C. App. 567, 570, 621 S.E.2d 306, 309 (2005) (noting that the word "must" in a statute is ordinarily "deemed to indicate a legislative intent to make the provision of the statute mandatory, and a failure to observe it fatal to the validity of the purported action").

In light of the mandatory language contained within N.C.G.S. § 20-16.3A, we conclude that the trial court did not err by concluding that a lack of a written policy in full force and effect at the time of defendant's stop at the checkpoint constituted a substantial violation of section 20-16.3A.

C. Constitutional Violation or Violation of Chapter 15A

[3] Next, the State argues that "evidence must only be suppressed if there is a Constitutional violation or a substantial violation of the provisions of Chapter 15A. . . . Provisions outside of chapter 15A do not require suppression." The State asserts that even assuming *arguendo* that a violation of N.C. Gen. Stat. § 20-16.3A occurred[2], the trial court should not have suppressed the evidence obtained at defendant's stop, and doing so amounted to error. We disagree.

The State relies on section 15A-974 of the North Carolina General Statutes, titled "Exclusion or suppression of unlawfully obtained

2. Here, the trial court did not reach the question of the constitutionality of the checkpoint and instead, rested its analysis on the State's violation of section 20-16.3A of the North Carolina General Statues as previously discussed.

evidence," for its contention. N.C. Gen. Stat. § 15A-974 states that evidence must be suppressed if "(1) Its exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina; or (2) It is obtained as a result of a substantial violation of the provisions of [Chapter 15A (Criminal Procedure Act).]" N.C.G.S. § 15A-974(a)(1) – (2) (2013).

In response to the State's arguments, defendant directs our attention to subsection (d) of N.C.G.S. § 20-16.3A. In subsection (d), the General Assembly provided that "[t]he placement of checkpoints should be random or statistically indicated, and agencies shall avoid placing checkpoints repeatedly in the same location or proximity." N.C.G.S. § 20-16.3A(d) (2013). Notably, the General Assembly further provided that "[t]his subsection shall *not be grounds for a motion to suppress* or a defense to any offense arising out of the operation of a checking station." *Id.* (emphasis added).

A "well-known canon of statutory construction [is] *expressio unius est exclusio alterius*: the expression of one thing is the exclusion of another." *State v. Dewalt*, 209 N.C. App. 187, 191-92, 703 S.E.2d 872, 875 (2011) (citation omitted). Applying this principle to the case at hand, we hold that because the General Assembly specifically included language in subsection (d) that it shall not be a basis for a motion to suppress, meanwhile excluding the same language in subsection (a)(2a), subsection (a)(2a) is a proper basis for a motion to suppress.

Furthermore, our Court has held that a violation of another section of Chapter 20 is an appropriate basis for a motion to suppress, despite the lack of express statutory language authorizing suppression. For example, in *State v. Buckheit*, __ N.C. App. __, __, 735 S.E.2d 345, 347 (2012), our Court reversed a trial court's denial of the defendant's motion to suppress evidence obtained in the violation of section 20-16.2(a) of the North Carolina General Statutes. *See also State v. Hatley*, 190 N.C. App. 639, 661 S.E.2d 43 (2008) (holding that because the State violated N.C. Gen. Stat. § 20-16.2(a), the trial court should have granted the defendant's motion to suppress evidence obtained from that violation).

Based on the foregoing analysis, we hold that the trial court did not err by granting defendant's motion to suppress and affirm the order of the trial court.

Affirmed.

Judges DAVIS and ELMORE concur.

JAMES P. TORRENCE, SR., AND TONYA BURKE,
ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS SIMILARLY SITUATED, PLAINTIFFS
v.
NATIONWIDE BUDGET FINANCE, QC HOLDINGS, INC., QC FINANCIAL SERVICES, INC. FINANCIAL SERVICES OF NC, INC. AND DON EARLY, DEFENDANTS

No. COA12-453

Filed 4 February 2014

1. Appeal and Error—interlocutory orders and appeals—compel arbitration—personal jurisdiction—substantial right

The trial court's interlocutory orders denying defendants' motion to compel arbitration and to dismiss for lack of personal jurisdiction affected substantial rights and were immediately appealable.

2. Arbitration and Mediation—appointment of substitute arbitrator—Federal Arbitration Act

The trial court erred by not compelling arbitration and appointing a substitute arbitrator where the agreement of the parties evinced a clear intent to resolve disputes through arbitration. Where the arbitrator named in the arbitration agreement was no longer conducting arbitrations, the trial court erred in not appointing a substitute arbitrator pursuant to § 5 of the Federal Arbitration Act.

3. Arbitration and Mediation—agreement—unconscionable

The trial court erred by ruling that the arbitration agreement between the parties was unconscionable based upon the decisions of the United States Supreme Court in *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, and *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304.

4. Jurisdiction—personal jurisdiction—arbitration—issue not addressed

The Court of Appeals did not address defendants' contention that personal jurisdiction was improper where the Court concluded that the matter should have been submitted to arbitration.

Appeal by defendants from orders entered 25 January 2012 by Judge D. Jack Hooks, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 28 November 2012.

Hartzell & Whiteman, L.L.P., by J. Jerome Hartzell, and North Carolina Justice & Community Development Center, by Carlene McNulty, for plaintiff-appellees.

Ellis & Winters LLP, by Paul K. Sun, Jr. and Kelly Margolis Dagger, and Katten Muchin Rosenman LLP, by Claudia Callaway, for defendant-appellants.

STEELMAN, Judge.

Where the arbitrator named in the arbitration agreement was no longer conducting arbitrations, the trial court erred in not appointing a substitute arbitrator pursuant to § 5 of the Federal Arbitration Act. Based upon the decisions of the United States Supreme Court in *Concepcion* and *Italian Colors*, the trial court erred in holding that the arbitration agreement was unconscionable and refusing to compel arbitration.

I. Factual and Procedural History

County Bank of Rehoboth Beach, Delaware ("County Bank"), an FDIC-insured Delaware bank, began offering short-term consumer loans to North Carolina residents in 2002. In March 2003, County Bank retained Financial Services of North Carolina, Inc., ("FSNC") to offer County Bank loans at FSNC locations. Applications for loans were submitted at FSNC locations, and were transmitted to County Bank for approval. Approved applications were sent back by County Bank with a proposed loan agreement.

Between May 2003 and February 2004, James Torrence ("Torrence") applied for eleven County Bank loans or renewals. On each occasion, he signed an identical loan note and disclosure agreement that contained a clause entitled "Agreement to Arbitrate All Disputes."

Between October 2003 and January 2004, Tonya Burke ("Burke") applied for seven County Bank loans and/or renewals. On each occasion, she signed an identical loan note and disclosure agreement that contained a clause entitled "Agreement to Arbitrate All Disputes."

Each of the loans signed by the plaintiffs with County Bank contained the following arbitration provisions:

> **AGREEMENT TO ARBITRATE ALL DISPUTES: You and we agree that any and all claims, disputes or controversies between you and us and/or the Company, any claim by either of us against the other or the Company (or the employees, officers, directors, agents or assigns of the other or the Company) and any claim arising from or relating to your application for this loan or any other loan you previously,**

now or may later obtain from us, this Loan Note, this agreement to arbitrate all disputes, your agreement not to bring, join or participate in class actions, regarding collection of the loan, alleging fraud or misrepresentation, whether under the common law or pursuant to federal, state or local statute, regulation, or ordinance, including disputes as to the matters subject to arbitration, or otherwise, shall be resolved by binding individual (and not joint) arbitration by and under the Code of Procedure of the National Arbitration Forum ("NAF") in effect at the time the claim is filed.

This agreement to arbitrate all disputes shall apply no matter by whom or against whom the claim is filed. Rules and forms of the NAF may be obtained and all claims shall be filed at any NAF office, on the World Wide Web at www.arb-forum.com, by telephone at 800-474-2371, or at "National Arbitration Forum, P.O. Box 50191, Minneapolis, Minnesota 55405." Your arbitration fees may be waived by the NAF in the event you cannot afford to pay them. The cost of any participatory, documentary or telephone hearing, if one is held at your or our request, will be paid for solely by us as provided in the NAF Rules and, if a participatory hearing is requested, it will take place at a location near your residence. This arbitration agreement is made pursuant to a transaction involving interstate commerce. It shall be governed by the Federal Arbitration Act, 9 U.S.C. Sections 1-16. Judgment upon the award may be entered by any party in any court having jurisdiction.

NOTICE: YOU AND WE WOULD HAVE HAD A RIGHT OR OPPORTUNITY TO LITIGATE DISPUTES THROUGH A COURT AND HAVE A JUDGE OR JURY DECIDE THE DISPUTES BUT HAVE AGREED INSTEAD TO RESOLVE DISPUTES THROUGH BINDING ARBITRATION.

AGREEMENT NOT TO BRING, JOIN OR PARTICIPATE IN CLASS ACTIONS: To the extent permitted by law, you agree that you will not bring, join or participate in any class action as to any

> **claim, dispute or controversy you may have against us, our employees, officers, directors, servicers and assigns. You agree to the entry of injunctive relief to stop such a lawsuit or to remove you as a participant in the suit. You agree to pay the attorney's fees and court costs we incur in seeking such relief. This Agreement does not constitute a waiver of any of your rights and remedies to pursue a claim individually and not as a class action in binding arbitration as provided above.**
>
> **SURVIVAL:** The provisions of this Note dealing with the Agreement to Arbitrate All Disputes and the Agreement Not To Bring, Join Or Participate In Class Actions shall survive repayment in full and/or default of this Note.

Subsequent to plaintiffs executing the notes containing the arbitration agreements, the National Arbitration Forum ("NAF") ceased conducting arbitrations, in accordance with the terms of a consent judgment entered into with the Attorney General of Minnesota on 17 July 2009. This judgment arose from allegations of bias on the part of NAF in favor of business claimants against consumer claimants.

On 8 February 2005, plaintiffs filed a complaint in this action as a class action. Plaintiffs alleged that defendants QC Holdings, Inc., QC Financial Services, Inc., and Don Early, under the name Nationwide Budget Finance (collectively, "defendants") violated the North Carolina Consumer Finance Act, the North Carolina unfair trade practices laws, and North Carolina usury laws. Plaintiffs further sought to pierce the corporate veil in order to hold QC Holdings, Inc. and Don Early personally liable. On 11 April 2005, defendants filed an answer, as well as a motion to dismiss for lack of personal jurisdiction and a motion to compel arbitration.

On 25 January 2012, the trial court filed three orders that: (1) denied defendants' motion to compel arbitration; (2) granted plaintiffs' motion for class certification; and (3) denied the motions of QC Holdings, Inc. and Don Early to dismiss for lack of personal jurisdiction.

Defendants appeal.

On 20 June 2013, the United States Supreme Court handed down its decision in *American Express Co. v. Italian Colors Rest.*, ___ U.S. ___, 133 S.Ct. 2304, 186 L.Ed.2d 417 (2013). On 15 July 2013, this Court granted the motion of plaintiffs-appellees to allow the parties to submit

supplemental briefs to this Court concerning their respective positions on the impact of the *Italian Colors* decision upon this case. Both plaintiffs and defendants submitted supplemental briefs.

II. Interlocutory Appeal

[1] The trial court's orders do not constitute a final judgment and are therefore interlocutory. *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, where an interlocutory order affects a substantial right, an immediate appeal may be taken. N.C. Gen. Stat. § 1-277 (2013).

"The right to arbitrate a claim is a substantial right which may be lost if review is delayed, and an order denying arbitration is therefore immediately appealable." *Howard v. Oakwood Homes Corp.*, 134 N.C. App. 116, 118, 516 S.E.2d 879, 881, *review denied*, 350 N.C. 832, 539 S.E.2d 288 (1999), *cert. denied*, 528 U.S. 1155, 145 L.Ed.2d 1072 (2000). "Jurisdiction in this Court over an interlocutory order is proper where the appeal is from the denial of a motion to dismiss for lack of personal jurisdiction." *Hammond v. Hammond*, 209 N.C. App. 616, 621, 708 S.E.2d 74, 78 (2011) (citing N.C. Gen. Stat. § 1-277(b)).

The trial court's rulings denying defendants' motion to compel arbitration and to dismiss for lack of personal jurisdiction are properly before this Court.

III. Standard of Review

> The standard governing our review of this case is that "findings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if … there is evidence to the contrary." *Lumbee River Elec. Membership Corp. v. City of Fayetteville*, 309 N.C. 726, 741, 309 S.E.2d 209, 219 (1983) (citation omitted). "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).

Tillman v. Commercial Credit Loans, Inc., 362 N.C. 93, 100-01, 655 S.E.2d 362, 369 (2008).

IV. Defendants' Motion to Compel Arbitration

The trial court entered a detailed order denying defendants' motion to compel arbitration. This order contained a number of separate rulings. First, the trial court held that "[t]he designation of the National Arbitration Forum ("NAF") as the sole arbitration provider and the designation of NAF rules were integral features of the arbitration clause." Second, the trial court held that there was not a valid arbitration agreement because of the taint of NAF, "because there was no legally effective and knowing consent." Third, the trial court held as a matter of law that the North Carolina Supreme Court case of *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 655 S.E.2d 362 (2008) was not overruled by the United States Supreme Court case of *AT&T Mobility v. Concepcion*, ___ U.S. ___, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011). Fourth, the trial court held that the arbitration agreement was substantively unconscionable. Fifth, the trial court held that the arbitration agreement was procedurally unconscionable. Sixth, the trial court held that the arbitration clause prohibiting class actions "is an unlawful exculpatory clause and is unenforceable."[1]

V. Appointment of a Substitute Arbitrator

[2] In their first argument, defendants contend that the trial court erred in not compelling arbitration and appointing a substitute arbitrator. This argument encompasses the first two rulings of the trial court outlined above. We agree.

There is no dispute that the parties entered into an agreement for binding arbitration governed by the Federal Arbitration Act ("FAA"), codified at 9 U.S.C. § 1 *et seq.* There is no dispute that NAF can no longer serve as arbitrator of any dispute between the parties, by virtue of the consent judgment entered into with the Attorney General of Minnesota. There is also no dispute that the FAA contains a specific provision that controls a situation where the arbitrator named in the agreement is unable to serve, or the method agreed upon for the selection of the arbitrator fails. § 5 of the FAA provides:

> If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method

1. In their Supplemental Memorandum filed 25 July 2013, plaintiffs acknowledged that pursuant to the United States Supreme Court's ruling in *Italian Colors*, the exculpatory clause ground for the trial court's decision "is no longer valid." We therefore do not address this ground in our opinion.

> be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

9 U.S.C. § 5.

In the recent case of *King v. Bryant*, ___ N.C. App. ___, 737 S.E.2d 802 (2013), we analyzed the effect of § 5 of the FAA upon an agreement to arbitrate. The trial court held that an arbitration agreement, under the terms of which the parties agreed to select three arbitrators, was nothing more than an "agreement to agree" and was an unconscionable agreement. We held that:

> Congress enacted the FAA, 9 U.S.C. § 1 *et seq.*, "[t]o overcome judicial resistance to arbitration," *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006), and to declare "a national policy favoring arbitration of claims that parties contract to settle in that manner." *Preston v. Ferrer*, 552 U.S. 346, 353, 128 S.Ct. 978, 169 L.Ed.2d 917 (2008) (quotation marks and citation omitted).

King, ___ N.C. App. at ___, 737 S.E.2d at 806. We further held that the trial court had failed to consider the applicability of § 5 of the FAA, which "provides the trial court authority to appoint a panel of arbitrators if the parties cannot come to an agreement." *Id.* at ___, 737 S.E.2d at 807. Indeed, § 5 is explicit on that point, providing a vehicle for the court to appoint an arbitrator where there is evidence that the parties agreed to arbitrate. Similarly, under North Carolina law, "[w]here the mandate of an arbitrator terminates for any reason, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced." N.C. Gen. Stat. § 1-567.45(a) (2013).

The specific issue of the enforceability of arbitration agreements with reference to NAF has been addressed in other courts as well. For

example, the United States Court of Appeals for the Seventh Circuit has noted that:

> Two courts of appeals have held that the identity of the Forum as arbitrator is not "integral" to arbitration agreements and that § 5 may be used to appoint a substitute. *Khan v. Dell, Inc.*, 669 F.3d 350 (3d Cir. 2012); *Pendergast v. Sprint Nextel Corp.*, 691 F.3d 1224, 1236 n. 13 (11th Cir. 2012); *Brown v. ITT Consumer Financial Corp.*, 211 F.3d 1217, 1222 (11th Cir. 2000). The Supreme Court must have assumed this in *CompuCredit Corp. v. Greenwood*, ——— U.S. ———, 132 S.Ct. 665, 181 L.Ed.2d 586 (2012), which held that claims under the Credit Repair Organizations Act are arbitrable. The agreement in that case specified use of the Forum, *see id.* at 677 n. 2 (Ginsburg, J., dissenting), yet the Court saw no obstacle to enforcing the arbitration clause. We grant that *Ranzy v. Tijerina*, 393 Fed. Appx. 174 (5th Cir. 2010), deems designation of the Forum "important" to arbitration and makes an agreement unenforceable once the Forum becomes unavailable, but *Ranzy* is not precedential. The decisions of the third and eleventh circuits, and the assumption of the Supreme Court, deserve greater weight.

Green v. U.S. Cash Advance Illinois, LLC, 724 F.3d. 787, 790 (7th Cir. 2013). The Seventh Circuit correctly notes that *CompuCredit*, which the United States Supreme Court decided after the 2009 consent judgment against NAF, held that the arbitration clause involving NAF could nonetheless be enforced.

The opinions cited above reaffirm the proposition that the key aspect of the analysis of an agreement to arbitrate is the intent of the parties to arbitrate, not the identity of the arbitrator. We further note the United States Supreme Court's assertion that "[a]lthough § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Concepcion*, ___ U.S. at ___, 131 S.Ct. at 1748, 179 L.Ed.2d at 753. The United States Supreme Court has made it clear that it will no longer tolerate State courts or laws which seek to frustrate the intent of Congress in enacting the FAA.

We hold that the agreement of the parties evinced a clear intent to resolve disputes through arbitration. The trial court erred in not appointing a substitute arbitrator pursuant to § 5 of the FAA.

The trial court's second ruling was that the lack of impartiality of NAF was a basis for voiding the arbitration agreement. At the time that the defendants' motion to compel arbitration was heard by the trial court, NAF was no longer conducting arbitration, and since it was not going to arbitrate the claims between the parties, its prior conduct was not a relevant consideration for the trial court. Accordingly, we hold that the trial court erred in considering the lack of impartiality of a body which, the trial court acknowledged, could not serve as an arbitrator in this case.

VI. Unconscionability

[3] In their second argument, defendants contend that the trial court erred in ruling that the arbitration agreement was unconscionable. This argument encompasses the fourth and fifth rulings of the trial court set forth in Section IV of this opinion. We agree.

A. *Tillman*

The leading case in North Carolina dealing with unconscionability in the context of an agreement to arbitrate is *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 655 S.E.2d 362 (2008). In *Tillman*, plaintiffs obtained loans from defendants. Each of the loan agreements contained arbitration provisions that required any disputes to be resolved by binding arbitration in accordance with the FAA.[2] Plaintiffs filed suit against the defendant lender seeking damages arising out of the lender's requirement that they purchase single premium credit life insurance in connection with the loans. Defendants sought to compel arbitration. The trial court found the agreement to arbitrate to be unconscionable and unenforceable. On appeal, a divided panel of the Court of Appeals reversed and remanded the case to the trial court for entry of an order to compel arbitration. *Tillman v. Commercial Credit Loans, Inc.*, 177 N.C. App. 568, 629 S.E.2d 865 (2006). On appeal, the North Carolina Supreme Court reversed the Court of Appeals, holding the arbitration agreement to be unconscionable.

In that case, a plurality of three justices concurred in the decision of the Court, two justices concurred in the result only, and two justices dissented. The plurality opinion stated that unconscionability was an affirmative defense, and that the party asserting that defense had the burden of establishing that the agreement was unconscionable. *Tillman*,

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2. While the agreements called for arbitration under the FAA, the plurality opinion and the concurring opinion of the Supreme Court make no reference to the FAA, and contain no analysis under the FAA. The dissent makes only a passing reference to the FAA.

362 N.C. at 102, 655 S.E.2d at 369. To establish unconscionability, a party must demonstrate both procedural unconscionability and substantive unconscionability. *Id.* at 102, 655 S.E.2d at 370 (citing *Martin v. Sheffer*, 102 N.C. App. 802, 805, 403 S.E.2d 555, 557 (1991); 1 James J. White & Robert S. Summers, *Uniform Commercial Code* § 4–7, at 315 (5th ed. 2006)). While both elements of unconscionability must be present, a court may rule that a contract is unconscionable "when [the] contract presents pronounced substantive unfairness and a minimal degree of procedural unfairness, or vice versa." *Id.* at 103, 655 S.E.2d at 370.

The Supreme Court began its analysis by restating North Carolina's policy in favor of arbitration. *Id.* at 101, 655 S.E.2d at 369. The Court first examined the issue of unconscionability based upon procedural unconscionability:

> In the instant case, the trial court did not explicitly conclude that the facts supported a finding of procedural unconscionability. We note, however, that the trial court made the following finding of fact, which is supported by evidence in the record: "[Mrs.] Tillman and [Mrs.] Richardson were rushed through the loan closings, and the Commercial Credit loan officer indicated where [Mrs.] Tillman and [Mrs.] Richardson were to sign or initial the loan documents. There was no mention of credit insurance or the arbitration clause at the loan closings." In addition, defendants admit that they would have refused to make a loan to plaintiffs rather than negotiate with them over the terms of the arbitration agreement. Finally, the bargaining power between defendants and plaintiffs was unquestionably unequal in that plaintiffs are relatively unsophisticated consumers contracting with corporate defendants who drafted the arbitration clause and included it as boilerplate language in all of their loan agreements. We therefore conclude that plaintiffs made a sufficient showing to establish procedural unconscionability.

Id. at 103, 655 S.E.2d at 370.

With regard to substantive unconscionability, the Court restated the trial court's conclusion, noting that:

> The trial court found the arbitration clause to be substantively unconscionable because (1) the arbitration costs borrowers may face are "prohibitively high"; (2) "the arbitration clause is excessively one-sided and lacks

> mutuality"; and (3) the clause prohibits joinder of claims and class actions. We agree that here, the collective effect of the arbitration provisions is that plaintiffs are precluded from "effectively vindicating [their] ... rights in the arbitral forum." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000).

Id. at 104, 655 S.E.2d at 370-71. Relying on *Green Tree*, and on the Fourth Circuit's decision in *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 556 (4th Cir. 2001), the Court held that, because plaintiffs were financially ill-equipped to cover the costs of arbitration, the "loser pays" provision of the arbitration agreement presented a powerful deterrent. The Court then contrasted arbitration with litigation, and stated that "paying for arbitrators is a significant cost that is simply not faced in filing a lawsuit in court[,]" but that "the trial court found that it is 'unlikely that any attorneys would be willing to accept the risks attendant to pursuing [these] claims.' " *Id.* at 105, 655 S.E.2d at 371. The Court concluded that "the combination of the loser pays provision, the *de novo* appeal process, and the prohibition on joinder of claims and class actions creates a barrier to pursuing arbitration that is substantially greater than that present in the context of litigation. We agree with the trial court that '[d]efendant's arbitration clause contains features which would deter many consumers from seeking to vindicate their rights.' " *Id.* at 106, 655 S.E.2d at 372.

Finally, the Court examined unconscionability based on the provision prohibiting class actions and joinder. The Court observed that:

> Taken alone, such a prohibition may be insufficient to render an arbitration agreement unenforceable, but *Brenner* instructs that an unconscionability analysis must consider all of the facts and circumstances of a particular case. Therefore, the trial court correctly concluded that a prohibition on joinder of claims and class actions is a factor to be considered in determining whether an arbitration provision is unconscionable.

Id. at 107, 655 S.E.2d at 373 (citations and quotations omitted).

The Court observed, however, that:

> In the instant case, the prohibition on joinder of claims and class actions affects the unconscionability analysis in two specific ways. First, the prohibition contributes to the financial inaccessibility of the arbitral forum as established

> by this arbitration clause because it deters potential plaintiffs from bringing and attorneys from taking cases with low damage amounts in the face of large costs that cannot be shared with other plaintiffs. Second, the prohibition contributes to the one-sidedness of the clause because the right to join claims and pursue class actions would benefit only borrowers.

Id. at 108, 655 S.E.2d 373.

The Court concluded that:

> [T]he arbitration clause in plaintiffs' loan agreements is unconscionable and therefore unenforceable. The inequality of bargaining power between the parties and the oppressive and one-sided nature of the clause itself lead us to this conclusion. Through the arbitration clause at issue in this case, defendants have not only unilaterally chosen the forum in which they want to resolve disputes, but they have also severely limited plaintiffs' access to the forum of their choice. Defendants argue that finding this clause to be unconscionable would be "hostile to arbitration." We disagree but at the same time reaffirm this Court's previous statements acknowledging the State's strong public policy favoring arbitration. However, this particular arbitration clause simply does not allow for meaningful redress of grievances and therefore, under *Green Tree*, must be held unenforceable.

Id. at 108-09, 655 S.E.2d 373-74.

Our Supreme Court analyzed *Tillman* solely under unconscionability. It did not address any issues under the FAA, which clearly governed the agreement. Further, the Supreme Court did not have the benefit of two cases subsequently decided by the United States Supreme Court, construing arbitration agreements under the FAA; *AT&T Mobility v. Concepcion*, ___ U.S. ___, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011), and *American Express Co. v. Italian Colors Rest.*, ___ U.S. ___, 133 S.Ct. 2304, 186 L.Ed.2d 417 (2013).

B. *Concepcion*

In *Concepcion*, plaintiffs entered into a cellular telephone contract with defendant. This contract included an arbitration provision that contained a class action waiver. Plaintiffs filed a putative class action suit in the federal district court seeking damages for false advertising and fraud.

Defendant's motion to compel arbitration was denied by the district court, and this ruling was affirmed by the United States Court of Appeals for the Ninth Circuit. The district court and Court of Appeals relied upon a decision of the California Supreme Court in *Discover Bank v. Superior Court*, 36 Cal.4th 148, 113 P.3d 1100 (2005). The holding in *Discover Bank* was that class waivers in consumer arbitration agreements were unconscionable if the agreement was contained within a contract of adhesion. *Discover Bank*, 36 Cal.4th at 162-63, 113 P.3d at 1110.

The United States Supreme Court recited § 2 of the FAA as follows:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Concepcion, ___ U.S. at ___, 131 S.Ct. at 1745, 179 L.Ed.2d at 750-51 (quotations omitted).

The Supreme Court held that this provision

> permits arbitration agreements to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." This saving clause permits agreements to arbitrate to be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability," but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.

Id. at ___, 131 S.Ct. at 1746, 179 L.Ed.2d at 751 (citations omitted). The Court further stated that "[a]lthough § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Id.* at ___, 131 S.Ct. at 1748, 179 L.Ed.2d at 753. The Court cited to a number of its own prior opinions to emphasize that these prior cases clearly stated that the FAA supersedes any state law that sets aside arbitration agreements or holds them to be unconscionable upon grounds that are exclusive to arbitration agreements.

The Supreme Court expressly overruled *Discover Bank*, which invalidated class action waivers, holding that it had the effect of "manufacturing" class arbitration, contrary to the express intent of the parties,

which was "inconsistent with the FAA." *Concepcion*, ___ U.S. at ___, 131 S.Ct. at 1753, 179 L.Ed.2d at 759. The Court further dismissed the notion that class action waivers somehow prevented consumers from seeking relief.

Subsequent to *Concepcion*, the question of whether the provisions of the FAA superseded state court rulings similar to *Discover Bank* has been discussed in a number of cases. The Fourth Circuit recently followed *Concepcion* in holding that the trial court erred in finding a class action waiver in an arbitration agreement to be unconscionable. *Muriithi v. Shuttle Exp., Inc.*, 712 F.3d 173, 180-81 (4th Cir. 2013). In *Muriithi*, the Fourth Circuit held that the holding of *Concepcion* was broader than simply overruling *Discover Bank*:

> In *Concepcion*, the Supreme Court cautioned that the generally applicable contract defense of unconscionability may not be applied in a manner that targets the existence of an agreement to arbitrate as the basis for invalidating that agreement. 131 S.Ct. at 1746–47. Applying that principle to the *Discover Bank* "rule" at issue, the Court explained that state law cannot "stand as an obstacle to the accomplishment of the FAA's objectives," by interfering with "the fundamental attributes of arbitration." 131 S.Ct. at 1748.
>
> We recently discussed the holding in *Concepcion* in our decision in *Noohi v. Toll Bros., Inc.*, 708 F.3d 599, 606–07 (4th Cir. 2013). We explained that the holding "prohibited courts from altering otherwise valid arbitration agreements by applying the doctrine of unconscionability to eliminate a term barring classwide procedures." *Id.* (citing *Concepcion*, 131 S.Ct. at 1750–53). Thus, contrary to Muriithi's contention, the Supreme Court's holding was not merely an assertion of federal preemption, but also plainly prohibited application of the general contract defense of unconscionability to invalidate an otherwise valid arbitration agreement under these circumstances. The district court in the present case, deciding the same issue of unconscionability prior to *Concepcion*, reached the opposite conclusion. Accordingly, we conclude that the district court erred in holding that the class action waiver was unconscionable.

Id.

C. *Italian Colors*

In the recent case of *Italian Colors*, the United States Supreme Court considered the question of whether "the Federal Arbitration Act permits courts ... to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim[.]" *Italian Colors*, ___ U.S. at ___, 133 S.Ct. at 2308, 186 L.Ed.2d at 423 (citing petition for certiorari). The United States Court of Appeals for the Second Circuit held that the class action waiver was unenforceable and therefore that arbitration could not proceed. It then held *Concepcion* to be inapplicable because it was a case involving pre-emption.

The Supreme Court reiterated its prior holding that "Congress enacted the FAA in response to widespread judicial hostility to arbitration." *Id.* at ___, 133 S.Ct. at 2308-09, 186 L.Ed.2d at 423-24 (citing *Concepcion*, ___ U.S. at ___, 131 S.Ct. at 1745). Plaintiffs argued that if they were required to arbitrate their claims individually, it would contravene the policies of the antitrust laws. The Supreme Court held that:

> The antitrust laws do not "evinc[e] an intention to preclude a waiver" of class-action procedure. *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). The Sherman and Clayton Acts make no mention of class actions. In fact, they were enacted decades before the advent of Federal Rule of Civil Procedure 23, which was "designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki*, 442 U.S. 682, 700–701, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979). The parties here agreed to arbitrate pursuant to that "usual rule," and it would be remarkable for a court to erase that expectation.

Id. at ___, 133 S.Ct. at 2309, 186 L.Ed.2d at 424-25.

Plaintiffs then advanced the argument that there was a judge-made exception to the FAA that allowed courts to invalidate agreements that prevent the "effective vindication" of a federal statutory right. While acknowledging the existence of the cases dealing with "effective vindication," the Supreme Court held that:

> The class-action waiver merely limits arbitration to the two contracting parties. It no more eliminates those parties' right to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief in 1938[.]

Id. at ___, 133 S.Ct. at 2311, 186 L.Ed.2d at 426 (citations omitted).

The Supreme Court then concluded:

> Truth to tell, our decision in *AT&T Mobility* all but resolves this case. There we invalidated a law conditioning enforcement of arbitration on the availability of class procedure because that law "interfere[d] with fundamental attributes of arbitration." 563 U.S., at ——, 131 S. Ct. 1740, 179 L. Ed. 2d 742. "[T]he switch from bilateral to class arbitration," we said, "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.*, at ——, 131 S. Ct. 1740, 179 L. Ed. 2d 742. We specifically rejected the argument that class arbitration was necessary to prosecute claims "that might otherwise slip through the legal system." *Id.*, at ——, 131 S. Ct. 1740, 179 L. Ed. 2d 742.

Id. at ___, 133 S.Ct. at 2312, 186 L.Ed.2d at 427.

D. Conclusions from *Tillman*, *Concepcion* and *Italian Colors*

The FAA embodies a strong Congressional policy in favor of arbitration. *Concepcion* and *Italian Colors* clearly state that the United States Supreme Court is weary of state and federal trial courts assisting plaintiffs in getting around the mandatory provisions of the FAA. While both *Concepcion* and *Italian Colors* dealt with class action waivers, underlying those decisions was a broader theme that unconscionability attacks that are directed at the arbitration process itself will no longer be tolerated. *See Muriithi*, *supra*.

This places the North Carolina Court of Appeals in the difficult position that the holdings of the North Carolina Supreme Court in *Tillman* conflict with those of the United States Supreme Court in *Concepcion* and *Italian Colors*. Ultimately, we are bound by the decisions of the United States Supreme Court construing federal laws, such as the FAA. *In re Fifth Third Bank, Nat. Ass'n*, ___ N.C. App. ___, ___, 716 S.E.2d 850, 855 (2011) (quoting *Dooley v. Seaboard Air Line Ry. Co.*, 163 N.C. 454, 457–58, 79 S.E. 970, 971 (1913)). Certain of the holdings of *Tillman* may be distinguished, because even though arbitration provisions of the *Tillman* contract referred to the FAA, none of the analysis contained in either the plurality or concurring opinions discussed the FAA and federal law principles.

As noted in Section VI-A of this opinion, a key element of the plurality opinion in *Tillman* on unconscionability is the section dealing with substantive unconscionability. Our Supreme Court cited three factors, the collective effect of which was to preclude plaintiffs from effectively vindicating their rights in an arbitration proceeding. First was the "prohibitively high" potential arbitration costs. *Tillman*, 362 N.C. at 104, 655 S.E.2d at 370-71. In *Italian Colors*, the United States Supreme Court expressly rejected the model proposed by the Court of Appeals for the Second Circuit, which would have required "that a federal court determine (and the parties litigate) the legal requirements for success on the merits claim-by-claim and theory-by-theory, the evidence necessary to meet those requirements, the cost of developing that evidence, and the damages that would be recovered in the event of success." *Italian Colors*, ___ U.S. at ___, 133 S.Ct. at 2312, 186 L.Ed.2d at 427. The Supreme Court went on to hold that the imposition of such a "preliminary litigating hurdle" at the point in the proceedings where the issue was whether or not the parties were to proceed to arbitration "would undoubtedly destroy the prospect of speedy resolution that arbitration in general and bilateral arbitration in particular was meant to secure." *Id.* We can only construe this language as eliminating the type of cost analysis applied by the North Carolina Supreme Court in *Tillman*.

Second, the North Carolina Supreme Court in *Tillman* held that there was substantive unconscionability based upon the arbitration clause being "excessively one-sided and lack[ing] mutuality[.]" *Tillman*, 362 N.C. at 104, 655 S.E.2d at 371. The United States Supreme Court in *Concepcion* noted, however, that "the times in which consumer contracts were anything other than adhesive are long past." *Concepcion*, ___ U.S. at ___, 131 S.Ct. at 1750, 179 L.Ed.2d at 755. The Court in *Concepcion* was dismissive of the idea that an arbitration agreement, apart from any other form of contract, could be found substantively unconscionable based solely upon its adhesive nature. This was an explicit part of the Supreme Court's reasoning in overruling *Discover Bank*. We must therefore hold that the one-sided quality of an arbitration agreement is not sufficient to find it substantively unconscionable.

Third, the North Carolina Supreme Court in *Tillman* held that there was substantive unconscionability based upon the arbitration provision "prohibit[ing] joinder of claims and class actions." *Tillman*, 362 N.C. at 104, 655 S.E.2d at 371. Both *Concepcion* and *Italian Colors* hold that a class action waiver does not render an arbitration agreement unconscionable. *Italian Colors* specifically holds that a party can "effectively vindicate" their rights in the context of a bilateral arbitration. *Italian Colors*, ___ U.S. at ___, 133 S.Ct. at 2311, 186 L.Ed.2d at 426.

Thus, the legal theories upon which *Tillman*'s substantive unconscionability analysis is based have been undermined by subsequent decisions of the United States Supreme Court in the context of cases under the FAA.

E. Ruling of the Trial Court

The trial court in the instant case, relying upon *Tillman* as precedent, made the following findings of fact as to substantive unconscionability:

> H SUBSTANTIVE UNCONSCIONABILITY.
>
> 42. No individual arbitration cases have ever been brought challenging payday lending in North Carolina, either against the defendants in this case or against any other payday lenders. In light of the large number of North Carolina payday loan transactions that were undertaken by these defendants and the defendants in the other class cases after the statutory authority for payday lending in North Carolina expired on August 31, 2001, and in light of the evidence that all payday lenders required customers to sign loan agreements with arbitration clauses prohibiting participation in class actions, the complete absence of any individual arbitration cases tends to confirm that legal challenges to North Carolina payday lending conducted in cooperation with out-of-state banks could not be challenged in individual arbitration cases.
>
> 43. The language calling for arbitration before the NAF required plaintiffs to submit claims to an arbitration organization that sought to build business by encouraging relationships and providing accommodations to debt-collector arbitration claimants, and that on June 27, 2007, sold a 40% ownership interest to participants in the consumer debt collection industry. The NAF's lack of neutrality affected arbitrator selection. The arbitration clause requiring arbitration before the NAF was substantively unconscionable.
>
> 44. Plaintiffs offered the affidavit and deposition testimony of attorneys George Hausen, Glenn Barfield and Kenneth Schorr, with live testimony of Mr. Barfield and Mr. Hausen, each offering their opinion it was unlikely an individual payday borrower, proceeding on an individual (non-class) basis, would be able to obtain legal counsel to prosecute claims against defendants such as those raised in this proceeding.

45. The Court notes that each of these witnesses has been involved in recruiting North Carolina lawyers to take civil cases on behalf of low and moderate income persons in North Carolina, specifically including efforts to recruit lawyers both on a pro bono basis and on a fee basis. Mr. Hausen is and since 2002 has been the Executive Director of Legal Aid of North Carolina. Mr. Schorr is the Executive Director of Legal Services of the Southern Piedmont, a nonprofit indigent civil legal services program, serving Charlotte and the western part of North Carolina. Mr. Barfield is a lawyer in private practice who is past president of Legal Services of North Carolina, Inc., and past chairman of the board of directors of Legal Aid of North Carolina. Both Mr. Hausen and Mr. Schorr are and have since 2005 been members of the North Carolina Equal Access to Justice Commission. Accordingly, the Court finds that these witnesses are particularly knowledgeable as to what cases North Carolina lawyers will accept, both on a fee basis and on a pro bono basis.

46. The Court accepts the testimony of Messrs. Barfield, Hausen and Schorr as experts. In addition, because the Court has had the opportunity to observe the demeanor of Mr. Hausen and Mr. Barfield, witnesses, the Court attaches particular weight to their testimony.

47. Mr. Barfield opined that, given the complexity involved in cases challenging payday lending in North Carolina presenting questions such as are in issue in this case, coupled with the motivation of the defendants to vigorously defend, the necessity for out-of-pocket expenditures, the uncertainty of prevailing and the lack of ability to use precedent in an arbitration forum, it is very unlikely that any North Carolina lawyer would be willing to bring such an individual case in arbitration. Mr. Barfield regularly represented defendants/counterclaimants in cases brought by "debt buyers" in counties close to his office. He wrote a manuscript to encourage attorneys across the state to engage in this work, but had virtually no success. In Mr. Barfield's opinion, the complexity of payday lending cases such as this case far exceeds the complexity of the cases he handled on behalf of consumers in the debt buyer cases. Mr. Barfield testified that it is simply not economically feasible

to prosecute payday lending cases such as this case, in court or in arbitration on an individual basis.

48. Mr. Hausen opined that it is very unlikely that a payday borrower would be able to get representation from a Legal Aid or pro bono attorney in North Carolina. The demand for services far exceeds the capacity to provide legal representation. Legal Aid offices across the state prioritize cases involving basic needs such as preservation of shelter, access to health care, access to public benefits such as food stamps and Medicaid, and protection from domestic violence. Neither Legal Aid nor, in Mr. Hausen's opinion, the private attorneys whom [L]egal Aid recruits to act as pro bono volunteer attorneys, would have the resources to act as attorneys for individual payday borrowers. While his office has devoted significant resources to foreclosure defense, including developing and implementing a series of training events for the private bar as a way to encouraging [sic] referrals, it is not likely that such an effort would be replicated in an effort to represent payday lending borrowers. Neither Legal Aid nor the volunteer attorneys recruited to assist Legal Aid have enough resources to accept cases seeking the return of money from payday lenders.

49. Mr. Schorr testified that in his opinion, people who were payday lending borrowers would not be able to find attorneys at private firms or with nonprofit organizations to handle their claims on an individual basis. He testified that the amount of damages and attorneys' fees involved was not nearly at the threshold that would make it likely that a private attorney would take such a [c]ase, and that nonprofit agencies would not handle them.

50. Messrs. Barfield, Hausen and Schorr each opined that because the stakes of an individual arbitration on behalf of a payday borrower are so small, no attorney would be willing to pursue a claim on behalf of a payday borrower on an individual basis. They go further to state that this is true despite the availability of statutory attorney fees under G.S. § 75-1.1 *et seq*. The individual claims for individual borrowers that are at issue in this case are in fact modest in amount. Plaintiffs represent that Mr. Torrence's largest damages claim is for treble the amount of his net

interest, which, after trebling, is a total of $2,788.50. Ms. Burke's largest claim is for recovery of all amounts paid, but without trebling, which is a total of $561.

51. These witnesses also opined that because of the nature of the claim and the federal preemption issue, the claims in the instant case are complex. The instant case is complex because defendants contend they were engaged in marketing and servicing loans for County Bank. The Consumer Finance Act provides an exemption for banks. Under federal preemption laws, banks are not subject to state interest rate limits. To prove that defendants are subject to the CFA, a consumer must respond to defendants' claims concerning exemption and preemption. The complexity and proof will be substantially the same regardless of whether a claim is asserted on behalf of a single individual or on behalf of a class.

52. The CFA assigns regulatory responsibility over the small loan business to the North Carolina Commissioner of Banks. The Commissioner of Banks conducted an administrative case against Advance America, to determine whether that company was in violation of the CFA by conducting payday lending in North Carolina in cooperation with an out-of-state bank. An order in that case was rendered on December 22, 2005 (the "COB Opinion"), ruling that Advance America was in violation of the CFA.

53. The COB Opinion reflects that the issue of whether payday lenders can avoid application of the CFA by entering into contracts with banks is complicated. The COB Opinion is 54 single spaced pages and has 292 footnotes. Following an appeal, the COB Opinion was affirmed by order rendered by Judge Donald W. Stephens of Wake County Superior Court on March 29, 2010, who found that the required analysis is "heavily fact dependent," and that Advance America's claim to preemption was "not supported by the facts in this matter."

54. A legal challenge to the issue of whether defendants are lawfully permitted to participate in payday lending in North Carolina by purporting to act on behalf of an out-of-state bank would present a fundamental issue concerning whether defendants and other payday lenders with

similar bank arrangements could continue to operate in North Carolina. A legal challenge over such a fundamental issue should be expected to give rise to a vigorous defense supported by resources that are more substantial that the amount in controversy in a single individual arbitration.

55. The successful prosecution of an individual claim that defendants in this case violated the CFA will likely require factual development through depositions, document review and expert analysis, just as the COB Opinion reflected factual development through depositions, document review and expert analysis.

56. The COB Opinion devoted substantial attention to financial relationships between Advance America and the various banks, to the actual results of such financial relationships, to the historical development of the relationships, to the companies' apparent business objectives, and similar matters.

57. Plaintiffs have submitted the affidavits and depositions of two financial experts. One of these experts, Ronald E. Copley, holds a Ph.D. in Finance, has been a tenured professor of Finance at the University of North Carolina at Wilmington, is a Chartered Financial Analyst, and is a licensed investment advisor. Dr. Copley reviewed the COB Opinion and has opined that it would require a minimum of 100 hours to perform financial analysis similar to the analysis performed by the Commissioner of Banks. The other of these experts, Michael J. Minikus, is a North Carolina certified public accountant. Mr. Minikus has opined that it would require a minimum of 65 hours to perform an analysis similar to the analysis performed by the Commissioner. Dr. Copley charges $225 per hour for his services. Mr. Minikus charges $125 per hour for his services. Regardless of how many hours must be devoted to analysis by a finance professional or a certified public accountant, the costs of such experts are likely to exceed the amount in controversy in an individual case.

58. Regardless of whether the instant case will require as much analysis as set out in the COB Opinion, the legal issues in this case are too factually and legally complex to be addressed in an arbitration case involving

only the amount of damages that would be at issue for a single plaintiff, because the time and expense required to be invested in such a case would be substantially in excess of the amount that could be recovered if the case was successful.

59. Defendants tendered the testimony of two North Carolina lawyers, Samuel Forehand and Woodward Webb, who stated that, in their opinion, some North Carolina lawyer would probably be willing to bring individual payday loan arbitration cases.

60. Attorneys Forehand and Webb acknowledged that they did not consider the complexities of a CFA case challenging payday lending in North Carolina done in cooperation with a bank, such as the preemption issue and the other issues identified in the COB Opinion. Mr. Webb provided representative examples of cases brought by consumer attorneys in North Carolina and other states in an effort to support his opinion that attorneys would accept representation on behalf of a payday borrower. None of these cases, however, involved usury claims, federal preemption, claims against a bank or a need for expert witness testimony. Until the preemption issues were brought to his attention at his deposition, Mr. Forehand was not aware that such a defense was likely to be involved in this case. Mr. Forehand acknowledged that he had no basis for disputing this Court's earlier finding in prior cases that litigating the preemption issue will require extensive deposition, document review and expert analysis as is reflected by the order of the Commissioner of Banks, or that the cost of expert witnesses alone would likely exceed the amounts at issue in individual cases.

61. The significance of the opinion testimony by attorneys Forehand and Webb is also diminished by their failure to identify any North Carolina lawyers who would in fact take such cases. Mr. Webb acknowledged that he would not accept one of these cases himself. In his deposition Mr. Webb mentioned three attorneys whom he thought might. However one of the attorneys mentioned was no longer in practice, and the other two attorneys signed affidavits stating that they would not take such cases on an

individual basis. In his hearing testimony Webb mentioned a fourth attorney, but merely said he had spoken with the attorney in passing who said he would "look at it."

62. Defendants have objected to the tender of affidavits of expert witnesses who were not identified in interrogatory responses. The Court understands this to be an objection to Plaintiffs' Exhibits 47-49 (affidavits of Carlene McNulty, John Van Alst and M. Jason Williams). These affidavits are directed simply to the issue of three specific lawyers' willingness to take on individual cases challenging bank-contract payday lending. The objections are overruled.

63. Mr. Forehand testified that he would need to undertake a detailed case acceptance analysis before deciding whether he would take one of these cases, which he has not yet been able to complete; that even if he went through the process outlined in his affidavit, he would not be competent to state whether he would file an individual arbitration claim, having no prior experience with arbitration; and that he could not identify any attorney willing to represent a payday borrower or even meet with a payday borrower.

64. Defendants introduced two letters written by attorneys in North Carolina as evidence to show that payday lending borrowers were able to find legal representation. One letter made allegations that the payday loan was illegal and demanded that the payday loan company cease collection efforts. The other letter alleged that a payday borrower's check had been cashed prematurely. The defendants presented no evidence indicating that any relief was provided to the clients as a result of either letter, and no evidence that either of these attorneys undertook further representation on behalf of these borrowers or any other borrowers such as filing suit in court.

65. Even if North Carolina attorneys were willing to pursue an individual arbitration on behalf of an individual payday borrower, it is unlikely that payday borrowers generally would be able to obtain legal representation for individual claims, given all witnesses' inability to identify any lawyer who would accept such individual cases.

66. It is extremely unlikely that payday borrowers could effectively represent themselves in pro se litigation or

arbitration against defendants in light of the complexity of the issues, including the factual and legal basis for federal preemption and statutory exemption.

67. Unless consumers received legal assistance that involved analyzing the legal legitimacy of payday lenders' claims to federal preemption and exemption, consumers would be unaware that they possessed any sound basis for a legal claim.

68. Defendants' witness Stephen Ware opined that NAF arbitration afforded consumers a reasonably accessible forum. Mr. Ware has never practiced law in North Carolina and has no familiarity with North Carolina law or North Carolina lawyers, and did not identify any North Carolina lawyer who is willing to take individual payday loan cases such as the instant case. Mr. Ware also did not review any pleadings in this case other than the complaint, did not review any of the briefs, affidavits or depositions in the case; and did not know what plaintiffs would have to prove in order to prevail. He had no opinion as to how many witnesses would be required to make out a claim, or whether expert testimony would be required; and had no knowledge of whether proof of intent would be required.

69. Mr. Ware based his opinion that NAF arbitration afforded consumers a reasonably accessible forum, by comparing the NAF to our court system as he contends it actually exists. Mr. Ware testified that, even taking the allegations of bias and corruption asserted by former managerial employee Deanna Richert as true, the NAF compares favorably to our court system, "given the pressure on a judge to rule in a particular way from a governor or legislator or a contributor to a judge's campaign."

70. Mr. Ware further based his opinion that NAF arbitration afforded consumers a reasonably accessible forum on information that thirteen individual arbitration claims had been advanced by Texas attorney Brian Blakeley in arbitration cases before the American Arbitration Association in which Mr. Blakeley contended that "QC Financial Services of Texas, Inc. was the 'true' lender for these payday loan transactions and that the fees collected by respondent constitute a deceptive practice and that

the respondent has violated the Texas Credit Services Organization Act and/or engaged in usury."

71. Mr. Blakeley provided an affidavit which was introduced in evidence in the present case, and Mr. Blakeley was deposed by defendants. According to his affidavit, Mr. Blakeley began pursuing cases against Texas "credit service organizations" ("CSO's") in late 2009, and sought to assert usury claims on the ground that fees paid by his clients that were purportedly credit service organizations fees "should be considered to be interest because the CSO should be regarded as the true lender in the transaction; or because the relationship between the CSO and the purported lender is such that the purported lender and the CSO are not truly independent." Mr. Blakeley attached to his affidavit a Texas Attorney General letter opining that "[determining the true relationship between a CSO and a lender would be a fact intensive endeavor."

72. However Mr. Blakeley stated in his affidavit and testified at his deposition that he had abandoned usury claims against Texas CSO's and was no longer asserting usury claims in connection with payday lending in Texas. Mr. Blakeley opined that "it is not possible to pursue usury claims on an individual basis in individual arbitrations conducted by the [AAA] for the following reasons," and gave five reasons that he believed such claims could not be pursued in AAA consumer proceedings.

73. Mr. Blakeley was deposed by defendants and provided testimony consistent with his affidavit. He continues to accept payday lending clients, and has been successful in seven out of twenty-two arbitration claims so far in cases involving Texas law disclosure claims unlike the claims in the present case. However, Mr. Blakeley has unequivocally abandoned all claims for usury and has no intention of bringing those claims in the future. Whether or not his decision to abandon these claims is because Mr. Blakeley is "lazy" as characterized by defendants or because the claims are not economically viable, the fact remains that Mr. Blakeley is not providing legal representation to Texas payday borrowers with fact-intensive claims concerning payday lenders' business relationships with third parties,

and is not providing (nor has ever provided) any representation to North Carolina payday borrowers.

74. Mr. Blakeley practices law exclusively in Texas, and is not licensed to practice law in North Carolina. The claims brought by Mr. Blakeley in the payday arbitration cases were brought under Texas law, not North Carolina law.

75. The Court finds that payday borrowers would not be able to effectively vindicate the type of claims raised by plaintiffs here, even if the claims are legally justified and correct, if payday borrowers are required to proceed on an individual rather than class basis. The facts demonstrate that this conclusion is true, regardless of whether consumers were to attempt to pursue their claims in court or in arbitration.

76. The North Carolina Attorney General filed an amicus brief in *Kucan v. Advance America*, a North Carolina payday lending case alleging similar legal issues as are alleged in the instant case, stating that "no Attorney General will ever have the funds or personnel to pursue every remedy against every person or company preying on North Carolina customers" and that "it is critically important that consumers be able to rely on the private bar— as the legislature intended— for assistance in obtaining restitution for injuries caused by unfair or deceptive business practices."

77. Defendants' practice of holding customer checks as security for loans gave defendants considerable leverage in the event of a nonpayment or dispute, making resort to court or arbitration unnecessary: if the customer failed to pay defendants could simply deposit the check, either resulting in payment to defendants or causing the customer to be faced with the legal and practical consequences of having their check bounce.

78. The arbitration agreements restrict customers from bringing a class action. The agreement contains no corresponding prohibition against County Bank or any of the defendants bringing or participating in a class action.

This type of detailed analysis of the types of evidence required for plaintiffs to pursue their claims and of the potential costs of obtaining such evidence, at the stage of the proceeding where the court determines

whether the case should be sent to arbitration, is precisely the approach rejected by the United States Supreme Court in *Italian Colors*. *See Italian Colors*, ___ U.S. at ___, 133 S.Ct. at 2312, 186 L.Ed.2d at 427. This type of analysis, based upon extensive evidentiary presentation, is not only costly, but defeats the very purpose of arbitration, which is for the parties to have a quick, expedited resolution of their dispute.

We hold that, based upon *Italian Colors*, the trial court erred in ruling that the arbitration agreement was substantively unconscionable. In the absence of substantive unconscionability, the entire unconscionability analysis must fail. *See Tillman*, 362 N.C. at 102-03, 655 S.E.2d at 370. Because there was no substantive unconscionability, it is not necessary to review procedural unconscionability. The trial court erred in not granting defendants' motion to compel arbitration.

VII. Impact of *Concepcion* upon *Tillman*

Finally, the third basis of the trial court's decision in the instant case (as set forth in Section IV of this opinion) was that *Concepcion* did not affect the *Tillman* analysis.

The trial court in the instant case acknowledged that *Concepcion* overruled *Discover Bank*. It concluded, however, that *Discover Bank* was distinct from *Tillman*, because where *Discover Bank* featured a "rule of automatic invalidation, in a case in which the plaintiff would be able to effectively vindicate his rights in arbitration[,]" *Tillman* involved "consideration of all facts and circumstances[.]" The trial court concluded that *Tillman* applied because "the instant case involves plaintiffs who would not be able to effectively vindicate their rights in NAF arbitration."

The trial court's attempt to distinguish *Concepcion* from *Tillman* was in error. *Concepcion*, in overruling *Discover Bank*, made clear that the FAA preempts any state law that prevents bilateral arbitration of claims. *Concepcion*, ___ U.S. at ___, 131 S.Ct. at 1747, 179 L.Ed.2d at 752 (holding that "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA"). This applies regardless of whether the state standard is "a rule of automatic invalidation," as in *Discover Bank*, or "consideration of all facts and circumstances[,]" as in *Tillman*.

The trial court further concluded that the fact that the agreement was non-negotiable, along with the fact that "all payday lenders doing business in North Carolina required borrowers to execute loan agreements containing arbitration clauses prohibiting participation in class

actions[,]" was further evidence of unconscionability. Yet the United States Supreme Court observed in *Concepcion* that "the times in which consumer contracts were anything other than adhesive are long past." *Id.* at ___, 131 S.Ct. at 1750, 179 L.Ed.2d at 755. That Court observed in a footnote that:

> Of course States remain free to take steps addressing the concerns that attend contracts of adhesion—for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted. Such steps cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms.

Id., fn. 6. The United States Supreme Court's position is explicit—where the FAA governs, state laws (including *Tillman*) cannot carve out exceptions.

VIII. Personal Jurisdiction

[4] In their third argument, defendants contend that the trial court erred in exercising personal jurisdiction over defendant Don Early. However, because we have previously determined that the case should have been submitted to arbitration, the matter was not properly before the trial court. We therefore need not address defendants' contention that personal jurisdiction was improper. *See, e.g., Miller v. Two State Const. Co., Inc.*, 118 N.C. App. 412, 418, 455 S.E.2d 678, 682 (1995) (holding that where the arbitration agreement was valid, we "need not address the other issues raised by defendants"). These issues are properly to be determined by an arbitrator.

IX. Conclusion

The United States Supreme Court has made it clear that the use of unconscionability attacks directed at the arbitration process can no longer serve as a basis to invalidate arbitration agreements. The intent of Congress in enacting the FAA was to overcome judicial hostility to arbitration.

The trial court erred in not designating a substitute arbitrator in this case pursuant to § 5 of the FAA; in determining that the arbitration was unconscionable; and in not entering an order compelling arbitration.

The orders of the trial court denying defendants' motion to compel arbitration, granting plaintiffs' motion for class certification, and denying the motions of QC Holdings and Don Early to dismiss for lack of

personal jurisdiction are vacated, and this matter is remanded to the trial court for entry of an order directing that the parties arbitrate plaintiffs' claims, and appointing a substitute arbitrator.

VACATED AND REMANDED.

Judges STEPHENS and McCULLOUGH concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 4 FEBRUARY 2014)

BROWNSTEAD v. BROWNSTEAD No. 13-815	Mecklenburg (07CVD6452)	Vacated and remanded in part, affirmed in part.
CLEMENTS v. CLEMENTS No. 13-596	New Hanover (10CVS2451)	Dismissed in part; Reversed and Remanded in part
DECESARE v. ISLAND GAMES, LLC No. 13-670	Rowan (12CVS609)	Affirmed
HAIRSTON v. COLLINS No. 13-850	Forsyth (11CVS851)	Affirmed
HALL v. NC SERVS. CORP. No. 13-781	Iredell (11CVS2506)	Affirmed
HARRISON-FLOYD v. FLOYD No. 13-700	Pitt (09CVD3555)	Dismissed
IN RE 109 KINSALE LAND TR. No. 13-623	Property Tax Commission (11PTC944)	Vacated and remanded.
IN RE A.B No. 13-862	Cumberland (12JA491-493)	Affirmed.
IN RE A.G. No. 13-807	Durham (07J23)	Affirmed
IN RE A.P. No. 13-674	Durham (11J98)	Affirmed
IN RE B.W. No. 13-847	Durham (12JA174-176)	Affirmed
IN RE C.B.J. No. 13-985	Wilkes (11JT56)	Affirmed
IN RE C.L.D. No. 13-941	New Hanover (13JA48) (13JA49)	Affirmed
IN RE H.R.A. No. 13-778	Wilkes (11JT23)	Affirmed

IN RE K.R. No. 13-929	Madison (08JA29-30)	Reversed and Remanded
IN RE M.I.J. No. 13-1004	Wake (11JT07-09)	Affirmed
IN RE N.K. No. 13-752	Mecklenburg (13JA7)	Affirmed
INGLE v. INGLE No. 13-453	Catawba (12CVD2053)	Dismissed
LIVINGSTON v. BAKEWELL No. 13-748	Wake (11CVS15)	Affirmed
NAT'L ENTERS. INC. v. HUGHES No. 13-820	Orange (12CVS1841)	Affirmed
ORAEFO v. POUNDS No. 13-101	Wake (11CVS12463)	Affirmed
PETRI v. BANK OF AM., N.A. No. 13-907	Macon (12CVS805)	Affirmed
SCOTT v. MURRAY No. 13-436	Union (07CVD1844) (12CVD2045)	Reversed and Remanded
STATE v. ARMSTRONG No. 12-1109	Edgecombe (10CRS52611) (10CRS52613)	No Error
STATE v. BULLARD No. 13-794	Robeson (06CRS13731) (06CRS13733)	No Error
STATE v. DAVIS No. 13-857	Iredell (09CRS59431)	No Error
STATE v. HERRERA No. 13-888	Mecklenburg (12CRS228345)	No Error
STATE v. HUDSON No. 13-230	Transylvania (10CRS51997) (10CRS51999-52001) (10CRS52003-08) (10CRS52010) (10CRS925)	No Error
STATE v. JOHNSON No. 13-360	Wake (11CRS214093)	No Error

STATE v. KAPFHAMER No. 13-734	Mecklenburg (10CRS258879) (10CRS258881)	No Error
STATE v. LAYSECA No. 13-519	Onslow (11CRS54158-60) (12CRS1727-28) (12CRS602)	No Error
STATE v. LIMANI No. 13-745	Mecklenburg (09CRS218285)	No Error
STATE v. MAHONEY No. 13-716	Hoke (10CRS51622-23) (10CRS52200)	No Error
STATE v. MARTIN No. 13-660	Randolph (98CRS6012)	Affirmed
STATE v. OAKS No. 13-701	Cumberland (09CRS56531) (09CRS56532)	No Error
STATE v. RAYFIELD No. 13-549	Gaston (10CRS57185-86) (11CRS12488-12517)	No Error
STATE v. SMITH No. 13-742	Cabarrus (09CRS7224)	Vacated and remanded for resentencing.
STATE v. WYNN No. 13-337	Hertford (10CRS51612)	Affirmed in part; remanded in part

CHARTER DAY SCHOOL, INC., PLAINTIFF-APPELLEE
v.
THE NEW HANOVER COUNTY BOARD OF EDUCATION AND TIM MARKLEY, SUPERINTENDENT IN HIS OFFICIAL CAPACITY, D/B/A "NEW HANOVER COUNTY SCHOOLS," DEFENDANT-APPELLANTS

No. COA13-488

Filed 18 February 2014

1. Schools and Education—calculations of per pupil local current expense appropriation—pro rata allocation

The trial court erred by including the entire fund balance in the calculations of the per pupil local current expense appropriation. Only that portion of the fund balance that is actually appropriated in a particular year is to be included in the local current expense fund and subject to *pro rata* allocation pursuant to the Charter School Funding Statute.

2. Schools and Education—calculations of per pupil local current expense appropriation—exclusion of pre-K students

The trial court did not err by excluding pre-K students from the calculations of the per pupil local current expense appropriation. Pre-K students are not entitled to enrollment in North Carolina's public school system or charter schools.

Appeal by defendant from order and judgment entered 4 December 2012 by Judge W. Douglas Parsons in New Hanover County Superior Court. Heard in the Court of Appeals 23 October 2013.

Shipman & Wright, LLP, by Gary K. Shipman and Gregory M. Katzman, for plaintiff-appellee.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Jill R. Wilson, Robert J. King, III, and Jennifer K. Van Zant, for defendant-appellant.

Allison B. Schafer and Christine T. Scheef for the North Carolina School Boards Association, amicus curiae.

McCULLOUGH, Judge.

Defendant, New Hanover County Board of Education d/b/a New Hanover County Schools ("NHCS"), appeals from the order and

judgment entered by the trial court on 4 December 2012. For the following reasons, we reverse in part and affirm in part.

I. Background

Plaintiff, Charter Day School, Inc. ("Charter Day"), is a charter school in Brunswick County that provides free public education to students from various southeastern North Carolina counties, including New Hanover County. As a public school, *see* N.C. Gen. Stat. § 115C-238.29E(a) (2013) ("A charter school that is approved by the State shall be a public school within the local school administrative unit in which it is located."), Charter Day is entitled to state and local funding. Specifically, for the time period pertinent to this case, N.C. Gen. Stat. § 115C-238.29H (the "Charter School Funding Statute") provided, "[i]f a student attends a charter school, the local school administrative unit in which the child resides shall transfer to the charter school an amount equal to the per pupil local current expense appropriation to the local school administrative unit for the fiscal year." N.C. Gen. Stat. § 115C-238.29H(b) (2007).[1]

On 30 June 2011, Charter Day commenced this action against NHCS and Al Lerch, in his official capacity as Superintendent of NHCS, by filing a complaint in New Hanover County Superior Court.[2] In the complaint, Charter Day asserted two claims for relief: (1) a declaratory judgment that NHCS failed to transfer all amounts owed to Charter Day under the Charter School Funding Statute from the time Charter Day opened, the 2001-2002 fiscal year ending 30 June 2002, through the 2010-2011 fiscal year ending 30 June 2011; and (2) a judgment against NHCS to recover the amount Charter Day alleged to be underfunded. By amended complaint filed shortly thereafter, Charter Day replaced defendant Al Lerch, who retired prior to the commencement of the action, with Tim Markley, the superintendent of NHCS at the time. NHCS and Tim Markley (together "defendants") answered the complaint on 1 September 2011.

On 12 April 2012, Charter Day filed a motion for partial summary judgment on defendants' seventh and eighth defenses, in which defendants alleged "Charter Day School is not a legitimate non-profit entity, as required by North Carolina law for the operation of a charter school."

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1. The years at issue in this appeal are the 2007-2008 through 2009-2010 fiscal years. Thus, we cite to the 2007 version of the North Carolina General Statutes, which were unaltered during the relevant time period.

2. Columbus Charter School initially joined Charter Day as a plaintiff in the lawsuit; however, on 11 April 2012, Columbus Charter voluntarily dismissed its claims without prejudice.

Thereafter, on 25 April 2012, defendants filed their own motion for partial summary judgment on Charter Day's claims for the 2001-2002 through 2006-2007 fiscal years on the ground that the claims were barred by the applicable three-year statute of limitations. Both partial summary judgment motions came on for hearing in New Hanover County Superior Court on 7 May 2012, the Honorable W. Allen Cobb, Jr., Judge presiding. Following the hearing, the trial court granted the motions in separate 14 May 2012 orders.

On 22 June 2012, Charter Day filed a motion for summary judgment on the remaining issues. Charter Day's motion came on for hearing in New Hanover County Superior Court before the Honorable W. Douglas Parsons on 5 July 2012.

On 17 July 2012, the trial court filed an order for partial summary judgment in favor of Charter Day. The trial court concluded defendants' "methods for calculating the per pupil local current expense appropriation for the fiscal years in question (2008, 2009 and 2010) [was] improper, as a matter of law[.]" Specifically, defendants "were required to include the entire Fund Balance for the fiscal years in question, and not just the 'modified' or 'appropriated' Fund Balance[,]" and defendants "improperly included 'pre-Kindergarten' ('pre-K') students in their total student enrollment[.]" The trial court did not, however, grant Charter Day's motion for summary judgment "as to the amounts due from the [d]efendants[.]" Instead, the trial court ordered defendants to "re-calculate its' Funding Formula for the fiscal years in question[] . . . [and] provide its re-calculated per pupil allocation for the years in question for the pupils attending [Charter Day] to [Charter Day]" within ninety (90) days.

Defendants filed a submission regarding per pupil allocations for the fiscal years in question on 12 October 2012 and a revised submission on 20 November 2012.

Following the submissions of defendants' recalculations, the trial court filed a final order and judgment on 4 December 2012. In the order and judgment, the trial court reiterated its prior determination that "[d]efendants' method for calculating the per pupil local current expense appropriation for the fiscal years in question was improper, as a matter of law, and failed to comply with the requirements of [N.C. Gen. Stat.] § 115C-238.29H(b), in that the [d]efendants did not include the entire Fund Balance in the numerator and included pre-K students in the denominator." Then, based on defendants' submissions regarding per pupil allocations, the trial court entered judgment against NHCS in favor

of Charter Day in the amount of $138,878.91. Additionally, the trial court dismissed all claims against Tim Markley and ordered NHCS, "[s]ubject to any subsequent changes in the law," to "transfer to [Charter Day] an amount equal to the per pupil local current expense appropriation for each student enrolled in a charter school operated by [Charter Day]" in accordance with the order "for all subsequent fiscal years beyond those in question in [the] action[.]"

NHCS filed notice of appeal on 21 December 2012 and execution of the judgment was stayed pursuant to the terms of the order and judgment.

II. Discussion

On appeal of the trial court's grant of summary judgment in favor of Charter Day, NHCS raises two issues: whether the trial court erred by (1) including the entire fund balance in the calculations of the per pupil local current expense appropriation, and (2) excluding pre-K students from the calculations of the per pupil local current expense appropriation.

Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)). In the present case, the facts are not in dispute and we need only determine whether the trial court erred as a matter of law in entering summary judgment in Charter Day's favor.

Fund Balance

[1] Fund balance results where money appropriated to the local school administrative unit is not spent in the fiscal year in which it was intended, but is saved for future use. Thus, the fund balance is essentially a savings account. In this case, NHCS acknowledges that the portion of the fund balance appropriated for use in any given year is included in the local current expense appropriation and shared pursuant to the Charter School Funding Statute. Yet, NHCS argues the trial erred in ordering the entire fund balance to be included in the local current expense appropriation. Upon review, we hold the trial court erred.

As noted above, charter school funding is governed by statute. During the years at issue in this case, subsection (b) of the Charter

School Funding Statute provided, in pertinent part, "[i]f a student attends a charter school, the local school administrative unit in which the child resides shall transfer to the charter school an amount equal to the per pupil local current expense appropriation to the local school administrative unit for the fiscal year." N.C. Gen. Stat. § 115C-238.29H(b) (2007). Similar to previous charter school funding cases decided by this Court, the predominant issue for our determination is what comprises the local current expense appropriation that must be shared *pro rata*.

In *Francine Delany New School for Children, Inc. v. Asheville City Bd. of Educ.*, 150 N.C. App. 338, 563 S.E.2d 92 (2002), this Court addressed whether revenues from fines, forfeitures, and supplemental school taxes accruing to the "local current expense fund" pursuant to N.C. Gen. Stat. § 115C-426(e) of the Fiscal Control Act were required to be shared on a per pupil basis with charter schools pursuant to N.C. Gen. Stat. § 115C-238.29H(b) of the Charter School Funding Statute as part of the "local current expense appropriation." In deciding the charter school was entitled to a share of the supplemental revenues, this Court affirmed the trial court's conclusion "that the phrase 'local current expense appropriation' in the Charter School Funding Statute, [N.C. Gen. Stat.] § 115C-238.29H(b), is synonymous with the phrase 'local current expense fund' in the [Fiscal Control Act], [N.C. Gen. Stat.] § 115C-426(e)." *Id.* at 347, 563 S.E.2d at 98. Accordingly, charter schools are entitled to a *pro rata* share of the local current expense fund under the Charter School Funding Statute.[3]

Subsequent to *Francine Delany*, this Court has decided several additional charter school funding cases determining whether certain funds held in the local current expense fund must be shared *pro rata* with charter schools. *See Sugar Creek Charter School, Inc. v. Charlotte-Mecklenburg Bd. of Educ.*, 188 N.C. App. 454, 655 S.E.2d 850 (*Sugar Creek I*), *disc. review denied*, 362 N.C. 481, 667 S.E.2d 460 (2008), (holding the charter school was entitled to a share of funds earmarked for Bright Beginnings, a special program for at-risk pre-K children, and a High School Challenge grant because the funds were included in the local current expense fund); *Sugar Creek Charter School, Inc. v. Charlotte-Mecklenburg Bd. of Educ.*, 195 N.C. App. 348, 673 S.E.2d 667 (*Sugar Creek II*), *appeal dismissed and disc. review denied*, 363 N.C. 663, 687 S.E.2d 296 (2009) (holding the charter school was entitled

3. Subsequent to the time period at issue in this case, the General Assembly amended N.C. Gen. Stat. § 115C-238.29H(b) to replace "per pupil local current expense appropriation to the local school administrative unit" with "per pupil share of the local current expense fund of the local school administrative unit[.]" 2013 N.C. Sess. Laws c.355 s. 1(h).

to a share of funds carried over from previous years into the current year's local current expense fund and other earmarked funds included in the local current expense fund). As this Court noted in *Thomas Jefferson Classical Academy v. Rutherford County Bd. of Educ.*, __ N.C. App __, __, 715 S.E.2d 625, 630 (2011), *appeal dismissed and disc. review denied*, N.C. __, 724 S.E.2d 531 (2012), "[t]he common thread running through each of these holdings is that if funds are placed in the 'local current expense fund[,]' . . . they must be considered as being part of the 'local current expense fund' used to determine the *pro rata* share due to the charter schools."

The present case, however, is unlike the previous cases. Here, the issue is not whether certain funds in the local current expense fund must be shared, but rather what portion of the fund balance is included in the local current expense fund and subject to allocation pursuant to the Charter School Funding Statute.

The Fiscal Control Act provides guidance.

> The local current expense fund shall include appropriations sufficient, when added to appropriations from the State Public School Fund, for the current operating expense of the public school system in conformity with the educational goals and policies of the State and the local board of education, within the financial resources and consistent with the fiscal policies of the board of county commissioners. These appropriations shall be funded by revenues accruing to the local school administrative unit by virtue of Article IX, Sec. 7 of the Constitution, moneys made available to the local school administrative unit by the board of county commissioners, supplemental taxes levied by or on behalf of the local school administrative unit pursuant to a local act or G.S. 115C-501 to 115C-511, State money disbursed directly to the local school administrative unit, and *other moneys made available or accruing to the local school administrative unit for the current operating expenses of the public school system*.

N.C. Gen. Stat. § 115C-426(e) (2007) (emphasis added). Thus, fund balance is included in the local current expense fund when it is "made available or accruing to the local school administrative unit for the current operating expenses[.]"

Charter Day contends the entire fund balance is available to the local school administrative unit for current operating expenses because

it can be appropriated for use. NHCS, on the other hand, contends only that portion of the fund balance that is appropriated for use is available to the local school administrative unit for current operating expenses. We agree with NHCS.

The Fiscal Control Act mandates "[e]ach local school administrative unit shall operate under an annual balanced budget resolution[.]" N.C. Gen. Stat. § 115C-425(a) (2007). "A budget resolution is balanced when the sum of estimated net revenues and appropriated fund balances is equal to appropriations." *Id.* Moreover, "no local school administrative unit may expend any moneys, regardless of their source . . . , except in accordance with a[n adopted] budget resolution." N.C. Gen. Stat. § 115C-425(b). A budget resolution must be adopted by the local board of education. *See* N.C. Gen. Stat. § 115C-432 (2007).

Considering these provisions together, we hold the fund balance is not available to the local school administrative unit for current operating expenses until it is appropriated for use in a budget resolution adopted by the local board of education. Therefore, only that portion of the fund balance that is actually appropriated in a particular year is to be included in the local current expense fund and subject to *pro rata* allocation pursuant to the Charter School Funding Statute. That portion of the fund balance that is not appropriated remains a balance sheet entry, subject to appropriation in future years.

In addition to deciding the issue on appeal, we take this opportunity to reconcile the holding in *Sugar Creek II*, which Charter Day argues already resolved the issue at hand. Because we determine the issue presented to this Court in *Sugar Creek II* is different from the issue in the present case, we are not bound by *Sugar Creek II*. *See In re 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 *Sugar Creek II*, this Court addressed, among other issues, whether the trial court properly included the fund balance in the local current expense fund for purposes of calculating its award to the charter school. 195 N.C. App. at 360, 673 S.E.2d at 675. Following a brief discussion, this Court held "the trial court did not err in including the fund balance in its calculation of its award." *Id.* The Court reasoned, "[a]s the fund balance is carried over from the previous fiscal year to the current fiscal year, it constitutes moneys in [d]efendants' local current expense fund." *Id.*

Charter Day argues that, because *Sugar Creek II* does not specify appropriated fund balance, the opinion requires the entire fund balance to be included in the local current expense fund. We disagree. Although we acknowledge the court did not specify appropriated fund balance, it is clear that this court upheld the trial court's decision. Upon careful review of the record in *Sugar Creek II*, it is evident the trial court determined only that the "fund balance appropriated" was "other local revenue" to be included in the local current expense fund and shared pursuant to the Charter School Funding Statute. Thus, in holding "the trial court did not err in including the fund balance in its calculation of its award[,]" this Court considered only that portion of the fund balance that was appropriated for use in the current fiscal year.

We find this Court's analysis in *Sugar Creek II* further supports both our interpretation of the *Sugar Creek II* decision and our holding in this case. In deciding the fund balance issue in *Sugar Creek II*, this Court was guided by its observation "that the General Assembly intended that charter school children have access to the same level of funding as children attending the regular public schools of this State." 195 N.C. App at 357, 673 S.E.2d at 673. This Court then focused on each year individually and determined whether the fund balance at issue must be included in the local current expense fund, discounting defendants' "double dip" argument and stating, "[d]efendants' argument is double-edged. If [d]efendants do not share the fund balance with [p]laintiff's, then [d]efendants' students will receive more per pupil funds in the current fiscal year than [p]laintiff's students." *Id.* at 360, 673 S.E.2d at 675.

Looking at each year individually, it is evident that when the appropriated portion of the fund balance is included in the local current expense fund, "charter school children have access to the same level of funding as children attending the regular public schools of this State." On the other hand, when the entire fund balance is included in the local current expense fund, charter school students receive greater funding than students attending regular public schools because charter school students receive a share of the unappropriated fund balance that is not available to students attending regular public schools. Thus, the only interpretation of *Sugar Creek II* that gives effect to the recognized intent of the General Assembly is that this Court considered only the appropriated fund balance when it stated, "[a]s the fund balance is carried over from the previous fiscal year to the current fiscal year, it constitutes moneys in [d]efendants' local current expense fund."[4]

4. We further note that following the *Sugar Creek II* decision, effective beginning with the 2010-2011 school year, 2010 N.C. Sess. Laws c.31 s. 7.17(c), the General Assembly

We hold the trial court erred in ordering NHCS to include the entire fund balance in the calculations of the per pupil local current expense appropriation.

Pre-Kindergarten Students

[2] NHCS acknowledges that, during the time period at issue in this case, money it received to fund pre-K programs was included in the local current expense fund and, pursuant to this Court's holding in *Sugar Creek I*, 188 N.C. App. at 461, 655 S.E.2d at 855, is subject to allocation under the Charter School Funding Statute. Yet, in the second issue on appeal, NHCS argues the trial court erred in ordering pre-K students to be excluded from the number of pupils in the calculations of the per pupil local current expense appropriation. Upon review, we hold the trial court did not err.

Simple math demonstrates the inclusion of pre-K students in the calculations of the per pupil local current expense appropriation increases the denominator in the funding formula and results in a smaller per pupil appropriation. In turn, where Charter Day does not operate a pre-K program, the smaller per pupil appropriation results in a lesser share of the local current expense appropriation to Charter Day and a greater share of the local current expense appropriation to NHCS. It is for this reason that NHCS argues pre-K students should be included in the calculations of the per pupil local current expense appropriation. NHCS, however, cites no authority in support of its argument. Instead, NHCS relies merely on the facts that the pre-K funds are included in the calculations pursuant to *Sugar Creek I* and the appropriation is "per pupil." In NHCS's own words,

> [F]or the relevant year, the funds for the pre-Kindergarten programs are included in the local current expense fund. That fund must be shared pro rata with Charter Day School[,] which means it is divided by the sum of the total number of students enrolled in NHCS and the total

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amended N.C. Gen. Stat. § 115C-426(c) to include the following language: "In addition, the appropriation or use of fund balance or interest income by a local school administrative unit shall not be construed as a local current expense appropriation." 2010 N.C. Sess. Laws c.31 s. 7.17(a). Although we recognize the amendment does not apply retroactively, the amendment supports our interpretation of *Sugar Creek II*, as the legislature acted to prevent appropriations from the fund balance from being apportioned pursuant to the Charter School Funding Statute. Had *Sugar Creek II* considered the entire fund balance, following the amendment to N.C. Gen. Stat. § 115C-426(c), the unappropriated portion of the fund balance would continue to be included in the local current expense appropriation while the appropriated fund balance would not. This would be an absurd and illogical result.

> number of students enrolled at Charter Day School. If the funds are in, the students should be in.

We are not persuaded by NHCS's argument.

Admission into North Carolina's public school system is governed by statute. The admission requirements provide that only those children who have "reached the age of 5 on or before August 31 of that school year" or those children who had "been attending school during that school year in another state in accordance with the laws or rules of that state before the child moved to and became a resident of North Carolina[]" may enroll in public schools. N.C. Gen. Stat. § 115C-364(a) (2007). Furthermore, when a child is enrolled, "[t]he initial point of entry into the public school system shall be at the kindergarten level." N.C. Gen. Stat. § 115C-364(c). Admission into North Carolina's charter schools is subject to these same restrictions. *See* N.C. Gen. Stat. § 115C-238.29F(g)(1) (2007) ("Any child who is qualified under the laws of this State for admission to a public school is qualified for admission to a charter school."). Based on these statutes, it is evident pre-K students are not entitled to enrollment in North Carolina's public school system or charter schools.

Although charter school funding is calculated on a "per pupil" basis, because pre-K students are not entitled to enrollment in North Carolina's public school system or charter schools, we hold pre-K students should not be included in the pupil count for purposes of calculating the per pupil local current expense appropriation.

To this point, NHCS does not dispute that pre-K students are not entitled to enrollment under the statutes, but instead argues that because it is required to serve a population of pre-K students under this Court's holding in *Hoke County Bd. of Educ. v. State of North Carolina*, __ N.C. App. __, 731 S.E.2d 691 (2012), *appeal dismissed and opinion vacated*, __ N.C. __, 749 S.E.2d 451 (2013), it should be allowed to include them in its calculations of the per pupil local current expense appropriation. Again, we disagree.

In *Hoke County*, this Court upheld the trial court's order "mandating the State to not deny any eligible 'at-risk' four year old admission to the North Carolina Pre-Kindergarten Program." _ N.C. App. at _, 731 S.E.2d at 695. That decision, however, is not controlling in the present case for two reasons. First, the trial court's mandate in *Hoke County* was issued by order dated 18 July 2011 and upheld by this Court in 2012, subsequent to the years at issue in this case. Second, and more importantly, our Supreme Court recently vacated this Court's *Hoke County*

decision and remanded the case to this Court with instructions to vacate the trial court's order. *See Hoke County Bd. of Educ. v. State of North Carolina*, __ N.C. __, 749 S.E.2d 451 (2013). As a result, there is no mandate that the State admit at-risk students into the North Carolina Pre-Kindergarten Program.

Without a mandate requiring pre-K admissions, we are left with the holdings of *Leandro v. State of North Carolina*, 346 N.C. 336, 488 S.E.2d 249 (1997) (*Leandro I*), and *Hoke County Bd. of Educ. v. State of North Carolina*, 358 N.C. 605, 599 S.E.2d 365 (2004) (*Leandro II*). In *Leandro I*, our Supreme Court held "Article I, Section 15 and Article IX, Section 2 of the North Carolina constitution combine to guarantee every child of this state an opportunity to receive a sound basic education in our public schools." 346 N.C. at 347, 488 S.E.2d at 255. Thereafter, in *Leandro II*, our Supreme Court recognized that the issue with pre-K programs was "whether the State must help prepare those students who enter the schools to avail themselves of an opportunity to obtain a sound basic education." 358 N.C. at 639, 599 S.E.2d at 391. Yet, while recognizing the challenges of at-risk enrollees in *Leandro II*, the Court expressly rejected the portion of the trial court's order mandating a pre-K program. *Id.* at 645, 599 S.E.2d at 395. Thus, while NHCS was required to prepare students to obtain a sound basic education, they were not required to enroll any students in a pre-K program.

We hold the trial court did not err in ordering NHCS to exclude pre-K students from the calculations of the per pupil local current expense appropriation.

III. Conclusion

For the reasons discussed above, we reverse the trial court's decision to the extent it includes the entire fund balance in the per pupil local current expense appropriation calculations and we affirm the trial court's decision to the extent it excludes pre-K students from the per pupil local current expense appropriation calculations.

Reversed in part, affirmed in part.

Judges ELMORE and DAVIS concur.

ANJELIKA DECHKOVSKAIA, PLAINTIFF
v.
ALEX DECHKOVSKAIA, (MALE'S NAME SPELLED DESHKOVSKI), DEFENDANT

No. COA13-766

Filed 18 February 2014

1. Divorce—equitable distribution—valuation of marital estate—houses titled in minor child's name

The trial court erred in an equitable distribution action in its valuation of the marital estate by classifying two houses titled in the divorcing couple's minor child's name as martial property, including them in the valuation of the marital estate, and distributing them to defendant.

2. Divorce—equitable distribution—value of marital residence—stipulation

The trial court erred in an equitable distribution action by determining that the marital residence was worth $210,000 when the parties stipulated that it was worth $205,000. The matter was remanded to fix this apparent typographical error.

3. Divorce—alimony—marital misconduct—findings of fact supported—indignities

Defendant's argument that the trial court abused its discretion in a divorce proceeding by awarding plaintiff $3,500 per month in alimony because its findings relating to marital misconduct were unsupported by competent evidence was overruled. There was evidence to support the trial court's finding of marital misconduct by defendant. Furthermore, even assuming that a "want of provocation" is still an element of indignities under N.C.G.S. § 50-16.1A, the trial court did not err in finding that defendant had subjected plaintiff to indignities constituting marital misconduct.

Appeal by defendant from Orders entered 26 July 2012 by Judge Beverly A. Scarlett and 3 December 2012 by Judge Joseph M. Buckner in District Court, Orange County. Heard in the Court of Appeals 12 December 2013.

Sandlin & Davidian, PA, by Lisa Kamarchik, for plaintiff-appellee.

Wait Law, P.L.L.C., by John L. Wait, for defendant-appellant.

STROUD, Judge.

Alex Deshkovski[1] ("defendant") appeals from an equitable distribution and alimony order entered 26 July 2012 distributing property the trial court classified as marital and awarding Anjelika Dechkovskaia ("plaintiff") $3,500 per month in alimony for twelve years. Defendant also appeals from an order entered 3 December 2012 denying his motion for a new trial and for a stay of proceedings.

I. Background

Plaintiff and defendant were married on 7 July 1990 in the Soviet Union, in what is now Belarus, separated on or about 25 February 2011, and divorced on 30 April 2012. They have two children—one born September 1991 and a minor child born December 2004. They are both highly educated and both work in scientific fields—defendant as a professor and lecturer, and plaintiff as a researcher. Defendant moved to the United States in 1996 to pursue his higher education, achieving a master's degree and two doctorates. Within a year, plaintiff followed defendant to the United States and, in 1997, began working as a scientific research assistant and lab technician.

On 4 March 2011, plaintiff filed a complaint in Orange County requesting permanent custody of the parties' minor child, child support, postseparation support, alimony, and equitable distribution. Plaintiff alleged in the complaint that defendant had committed marital misconduct by "engaging in indignities which have rendered the condition of the plaintiff intolerable and life burdensome in that defendant has controlled the plaintiff and the plaintiff's life throughout most of the marriage." Defendant denied the allegation, but did not allege that plaintiff had herself engaged in marital misconduct. The trial court awarded sole legal and physical custody of the parties' minor child to plaintiff and visitation for defendant by order entered 15 February 2012.

After a hearing on 30 April 2012, at which plaintiff was represented by counsel and defendant appeared *pro se*, the trial court resolved the equitable distribution and alimony issues by order entered 25 July 2012. The trial court classified various pieces of property acquired by the parties as marital property, including two houses titled in the name of the minor child. The trial court valued the parties' total estate at $591,702.00,

1. There is some confusion in the record regarding how to spell defendant's last name—the order lists his name both as Dechkovskaia and Deshkovski, but in various pleadings defendant has spelled his name Deshkovski, so we will use that spelling.

found that an equal distribution of property would be equitable, and distributed the marital property accordingly. The trial court also found that defendant was a supporting spouse, that plaintiff was a dependent spouse, that defendant had committed marital misconduct by offering indignities to plaintiff during the marriage, and that defendant's post-separation conduct corroborated its finding of marital misconduct prior to separation. The trial court awarded plaintiff $3,500 per month in alimony for twelve years and attorney's fees.

On 13 August 2012, defendant, now represented by counsel, filed a motion for a new trial and stay of execution under Rules 59 and 62 of the North Carolina Rules of Civil Procedure. The trial court denied defendant's motion by order entered 3 December 2012. Defendant filed notice of appeal on 2 January 2013 both from the order denying his post-trial motion and the order addressing equitable distribution and alimony.[2]

II. Equitable Distribution

[1] Defendant first argues that the trial court erred in its valuation of the marital estate because it included two houses in the estate not owned by either party on the date of separation. We agree.

> [T]he standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment. The trial court's findings of fact are binding on appeal as long as competent evidence supports them, despite the existence of evidence to the contrary.
>
> The trial court's findings need only be supported by substantial evidence to be binding on appeal. We have defined substantial evidence as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. As to the actual distribution ordered by the trial court, when reviewing an equitable distribution order, the standard of review is limited to a determination of whether there was a clear abuse of discretion. A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason.

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2. Although defendant appealed from both orders, he makes no argument on appeal regarding the order denying his post-trial motions. Therefore, any argument concerning that order has been abandoned. N.C.R. App. P. 28(a).

Peltzer v. Peltzer, ___ N.C. App. ___, ___, 732 S.E.2d 357, 359-60 (citations, quotation marks, and brackets omitted), *disc. rev. denied*, 366 N.C. 417, 735 S.E.2d 186 (2012).

The trial court determined that two houses purchased by the parties during the marriage were marital property despite being titled in the name of the parties' minor child. On the date of separation, neither party owned the houses at issue. The trial court specifically found that both properties were titled "in the minor child's name upon acquisition." Nevertheless, plaintiff now argues that even if the houses were titled in the minor child's name, defendant had an equitable interest in the property, such as a constructive trust, with the minor child as trustee.[3]

"In an equitable distribution proceeding, only marital property is subject to distribution by the court. G.S. 50–20(a)." *Lawrence v. Lawrence*, 100 N.C. App. 1, 16, 394 S.E.2d 267, 275 (1990). For purposes of N.C. Gen. Stat. § 50-20, "marital property" "means all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned . . . ." N.C. Gen. Stat. § 50-20(b)(1) (2011). Based upon the unchallenged finding by the trial court, it appears that the houses were titled to the minor child when they were purchased, and it is uncontested that only the parties' minor child held title to the two contested houses on the date of separation.

First, we must consider whether this issue has been preserved for our review. We conclude that it has. As discussed below, the trial court must join the title owner, in this case the minor child, as a necessary party to the action in order to adjudicate ownership of the two houses. "Otherwise the trial court would not have jurisdiction to enter an order affecting the title to that property." *Upchurch v. Upchurch*, 122 N.C. App. 172, 176, 468 S.E.2d 61, 64, *disc. rev. denied*, 343 N.C. 517, 472 S.E.2d 26 (1996). Our review of this issue has not been waived by defendant's failure to raise it below. *See Kor Xiong v. Marks*, 193 N.C. App. 644, 652, 668 S.E.2d 594, 600 (2008) ("An appellate court has the power to inquire into jurisdiction in a case before it at any time . . . .").

To the extent that plaintiff claims that the minor child holds the properties only in some sort of constructive trust for the marital estate, that issue cannot be determined unless the minor child—who holds title to the property—is made a party to the action. *See Upchurch*, 122 N.C.

3. We note that the property was apparently acquired some time prior to the child's seventh birthday.

App. at 176, 468 S.E.2d at 63-64 (discussing the classification of property allegedly held in trust for the marital estate and holding that "when a third party holds legal title to property which is claimed to be marital property, that third party is a necessary party to the equitable distribution proceeding, with their participation limited to the issue of the ownership of that property."). Where, as here, a minor child's property interests are adverse to that of his parent, the trial court must appoint a guardian ad litem to represent his interests.[4] *Kohler v. Kohler*, 21 N.C. App. 339, 341, 204 S.E.2d 177, 178 (1974) (concluding that "an infant must appear by guardian or guardian ad litem" to determine his property interests); *Irvin v. Harris*, 189 N.C. 465, 468, 127 S.E. 529, 531 (1925) (observing that the better practice to determine property rights when the parent's interests are not identical to that of the minor child owner is to appoint a guardian ad litem). Without the presence of the minor as a party to the action, represented by a guardian ad litem or next friend, the trial court cannot divest him of his ownership interest in the real property. *See Dorton v. Dorton*, 77 N.C. App. 667, 676, 336 S.E.2d 415, 421 (1985) ("Defendant's mother was not a party to this action, and the trial court cannot deprive her of rights as a creditor without affording her the due process rights to notice and an opportunity to be heard."); *Lawrence*, 100 N.C. App. at 16, 394 S.E.2d at 274 (holding that the trial court could not order the minor children of the divorcing parties to pay certain taxes when they are not parties to the action); *Parker v. Moore*, 263 N.C. 89, 90-91, 138 S.E.2d 821, 822 (1964) ("Before funds belonging to infants and incompetents may be taken from them, the law requires that they be represented by guardian, guardian *ad litem*, or next friend as the situation may require."). Moreover, once the minor child is made a party to the action, if the trial court were to determine that the houses were held in a constructive trust created during the marriage, it must make appropriate findings to that effect based on clear and convincing evidence. *Glaspy v. Glaspy*, 143 N.C. App. 435, 441, 545 S.E.2d 782, 786 (2001). No such findings have been made here. Therefore, the trial court lacked authority to classify the two houses as martial property, to include them in the valuation of the marital estate, and to distribute them to defendant.

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4. Here, the trial court did appoint a guardian ad litem, but the order appointing the guardian specifically limited his duties to investigation of custodial issues and to file a report ("GAL report") addressing the parties' treatment of each other and the minor child, not to represent the minor's property interests. The GAL's report indicates that he considered only the issues as directed by the trial court's order.

[2] Defendant also challenges the trial court's finding that the parties had stipulated that their marital residence had a net value of $210,000. He contends, and plaintiff concedes, that they had actually stipulated that the marital residence was worth $205,000. The $5,000 difference appears to be simply a typographical error, and *de minimis* at best, given that the trial court found the total marital estate to be worth $591,702. *See Cohoon v. Cooper*, 186 N.C. 26, 28, 118 S.E. 834, 835 (1923) (declaring that an error of 95 cents out of a $663 verdict would be *de minimis*). Nevertheless, since we must remand on the other equitable distribution issue, the trial court should also correct this finding on remand.

To determine ownership of the two houses, the trial court must join the minor child as a party and appoint a guardian ad litem to represent his property interests. Because it failed to do so here, it had no authority to classify the houses as marital property and distribute them as such. Additionally, it made no finding that the houses were held in constructive trust for the martial estate. Although the findings of fact also do not reveal the parties' reasons, if any, for vesting title to real estate in a young child, the trial court on remand may also consider, as appropriate and if raised by the parties, whether an unequal distribution of the marital property may be equitable under N.C. Gen. Stat. § 50-20(c). Therefore, we must vacate the equitable distribution order and remand for further proceedings. *See Boone v. Rogers*, 210 N.C. App. 269, 272, 708 S.E.2d 103, 106 (2011) (vacating judgment where the trial court failed to join all necessary parties); *Balawejder v. Balawejder*, ___ N.C. App. ___, ___, 721 S.E.2d 679, 691 (2011) (vacating order entered without jurisdiction).

III. Alimony

[3] Defendant next argues that the trial court abused its discretion in awarding plaintiff $3,500 per month in alimony and that its findings relating to marital misconduct are unsupported by competent evidence. Defendant does not otherwise challenge the appropriateness of the alimony award or the adequacy of the trial court's findings. Nor does defendant challenge the amount or duration of the alimony award on the basis that it is not supported by the evidence as to the parties' incomes, needs, and expenses. Therefore, we deem any such arguments abandoned. N.C.R. App. P. 28(a). It is uncontested that plaintiff is a dependent spouse, that defendant is the supporting spouse, and that plaintiff is entitled to alimony. Yet it does appear from the findings that the trial court considered the marital misconduct as a factor in establishing the amount and term of alimony. The only disagreement concerns whether the trial court's findings on the marital misconduct factor were supported by competent evidence.

> Decisions regarding the amount of alimony are left to the sound discretion of the trial judge and will not be disturbed on appeal unless there has been a manifest abuse of that discretion. When the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. An abuse of discretion has occurred if the decision is manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision.

Kelly v. Kelly, ___ N.C. App. ___, ___, 747 S.E.2d 268, 272-73 (2013) (citations and quotation marks omitted).

One of the factors that a trial court must take into account in awarding alimony, when relevant, is marital misconduct. N.C. Gen. Stat. § 50-16.3A(b)(1) (2011). Marital misconduct includes "[i]ndignities rendering the condition of the other spouse intolerable and life burdensome" during the marriage and on or before the date of separation. N.C. Gen. Stat. § 50-16.1A(3)(f) (2011).

> Our courts have declined to specifically define "indignities," preferring instead to examine the facts on a case by case basis. Indignities consist of a course of conduct or repeated treatment over a period of time including behavior such as unmerited reproach, studied neglect, abusive language, and other manifestations of settled hate and estrangement.

Evans v. Evans, 169 N.C. App. 358, 363-64, 610 S.E.2d 264, 269 (2005) (citations and quotation marks omitted).[5]

The trial court found that defendant had engaged in marital misconduct by offering indignities to plaintiff. Specifically, the trial court found that defendant had:

> a. Refused to live with Plaintiff and the children in the marital home separate and apart from his mother;

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5. *See also Barwick v. Barwick*, 228 N.C. 109, 112, 44 S.E.2d 597, 599 (1947) (noting the difficulty of creating a clear definition of indignities); *Traywick v. Traywick*, 28 N.C. App. 291, 295, 221 S.E.2d 85, 88 (1976) (observing that indignities must consist of a course of conduct, "*repeated and persisted in* over a period of time." (citation and quotation marks omitted)).

b. Refused to allow Plaintiff and the children to associate with others who are not Russian;

c. Controlled the food eaten by Plaintiff and the children. Consistently telling Plaintiff and the children American food was bad for them and would not let them eat at public places.

d. Refused to allow the Parties' minor son to attend public school resulting in the Plaintiff receiving letters from the Durham County District Attorney's office pursuant to the truancy laws of this State. As a result, Plaintiff sought and obtained an emergency order which ordered the minor child attend school.

Additionally, the trial court found that "Defendant has controlled all the finances during the marriage without giving Plaintiff access to the bank accounts or PINs for the accounts," that "Defendant has engaged in parental alienation prior to the date of separation and after the date of separation," and that defendant's actions had been intentional and malicious.[6]

The trial court further found that plaintiff had suffered emotional abuse from defendant's control and his attempts to make plaintiff and their children reliant upon him by isolating them from the larger community. Finally, it found that defendant's post-separation conduct corroborated its finding that defendant had subjected plaintiff to indignities during the marriage, as permitted by N.C. Gen. Stat. § 50-16.3A(b)(1).

Defendant argues that these findings are unsupported by the evidence. First, we note that defendant concedes that several of the challenged findings may be supported by the GAL report, but argues that the report was inadmissible for purposes of alimony. Defendant did not object to the trial court's consideration of this report in considering alimony, so any objection thereto has not been preserved. N.C.R. App. P. 10(a)(1).

The GAL report does in fact fully support all of the trial court's relevant findings and supports its ultimate finding that defendant offered indignities to plaintiff. It paints a picture of defendant as controlling and verbally abusive, and describes a pattern of isolating plaintiff and

6. The trial court included these findings in its section on post-separation conduct, but taken in context, the plain language of the findings indicates that the trial court found that defendant had engaged in this conduct prior to separation.

the parties' children from broader society.[7] This type of overwhelming control and attempted isolation supports the trial court's findings on indignities, especially considering that plaintiff was a relatively recent immigrant to this country. *See Barwick*, 228 N.C. at 112, 44 S.E.2d at 599 (noting that indignities are not specifically defined in part because "[t]he station in life, the temperament, state of health, habits and feelings" of the persons concerned can be quite varied). Moreover, despite defendant's arguments to the contrary, the findings show that these indignities were part of a long-standing course of conduct and not an isolated incident. Therefore, we hold that there was evidence to support the trial court's finding of marital misconduct by defendant.

Defendant further argues that the trial court failed to find that the indignities he offered to plaintiff were "without adequate provocation." Defendant has not alleged that plaintiff provoked the indignities found by the trial court, nor even argued on appeal that there was evidence which could support such a finding. Indeed, the argument that a spouse—of either sex—could legally justify emotional or verbal abuse of the nature found by the trial court by some sort of "provocation" strains credulity, at least based upon modern sensibilities and values.[8] N.C. Gen. Stat. § 50-16.1A does not mention the word "provocation" and we have found no case decided under that statute requiring that the trial court explicitly find an absence of provocation to find that one of the spouses had offered indignities to the other. It is not entirely clear that such a finding is required at all, although as we will discuss below, there is case law to support this argument.

Many of the old cases discussing indignities under the former statutes on fault-based divorce and divorce from bed and board did require a very specific factual allegation that there was no provocation for the indignities offered. Although the words "without provocation" have been repeated and cited since the early 1800s in North Carolina and they continue to be used, an examination of the old cases where the phrase originated reveals that these cases are based not only on antiquated beliefs about the roles of husband and wife, but also upon specific statutes and rules of pleading which existed at that time but have long since been changed by amendments to the relevant substantive statutes and adoption of the North Carolina Rules of Civil Procedure.

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7. We are only describing the GAL report in general terms because it remains under seal by stipulation of the parties and order of the trial court.

8. Such justification was accepted by our Supreme Court as early as the 1800s and as recently as 1955, as we will discuss more fully below.

One early and enlightening example is *Joyner v. Joyner*, 59 N.C. (6 Jones Eq.) 322 (1862). The wife brought a claim against the husband for divorce from bed and board and alimony and was awarded alimony *pendente lite*, from which the husband appealed. *Joyner*, 59 N.C. (6 Jones Eq.) at 322. The wife alleged that the husband had

> manifested great coarseness and brutality, "and even inflicted the most severe corporal punishment. This he did on two different occasions, once with a horse-whip, and once with a switch, leaving several bruises on her person." "He used towards her abusive and insulting language, accused her of carrying away articles of property from his premises to her daughter by a former husband; refused to let said child live with her; has frequently at night, after she had retired, driven her from bed, saying that it was not hers, and that she should not sleep upon it. He has also forbade her sitting down to his table in company with his family," and that "by such like acts of violence and indignity has forced her to leave his house, and that she is now residing with her friends and relatives, having no means of support for herself and an infant son born within the four past weeks."

Id. She further alleged that during her entire marriage to defendant she had "been a dutiful, faithful and affectionate wife." *Id.*

The Supreme Court first addressed the specific requirements of the statute regarding the grounds upon which divorces may be granted and the pleading requirements for these grounds, noting that

> as a check or restraint on applications for divorces, and to guard against abuses, it is provided that the cause or ground on which the divorce is asked for shall be set forth in the petition "particularly and specially." It is settled by the decisions of this Court that this provision of the statute must be strictly observed, and the cause or causes for which the divorce is prayed must be set forth so "particularly and specially," as to enable the Court to see on the face of the petition, that if the facts alleged are true the divorce ought to be granted . . . .

Id. at 323.

At that time, "[b]y the rules of pleading in actions at the common law, every allegation of fact, [had to] be accompanied by an allegation of

'time and place.' " *Id.* at 324. Yet the Supreme Court held that the wife's claim was not defeated by her failure to allege "time and place" of her physical abuse, since those facts were not "material." *Id.*[9] Instead, the wife's fatal pleading error was that she failed to allege what she had done to induce the husband to beat her—apparently based upon the unstated assumption that she clearly did something, and the relevant question would be whether what she did justified the husband's actions. *Id.* The Supreme Court held that she must allege

> the circumstances under which the blow with the horse-whip and the blows with the switch were given; for instance, what was the conduct of the petitioner; what had she done, or said to induce such violence on the part of the husband? . . . . [T]here was an obvious necessity for some explanation, and the cause of divorce could not be set forth "particularly and specially," without stating the circumstances which gave rise to the alleged grievances.

Id.

The Court explained that such "discipline" would be justified in certain circumstances for two reasons. The first reason is the husband's role as set forth in Genesis 3:16: "Thy desire shall be to thy husband, and he shall rule over thee." *Id.* at 325. The Court reasoned that "It follows that the law gives the husband power to use such a degree of force as is necessary to make the wife behave herself and know her place." *Id.* Second, the Court noted that the husband is legally responsible for the wife's behavior "under the principles of the common law," noting that a husband is responsible to pay damages if "a wife slanders or assaults and beats a neighbor" and that a wife is not responsible for commission of "a criminal offense, less than felony, in the presence of her husband." *Id.* The Court also noted that the wife "cannot make a will disposing of her land" and "cannot sell her land without a privy examination, separate and apart from her husband." *Id.* For these reasons, the Court concluded that the law must give "this power to the husband over the person of the wife, and has adopted proper safe-guards to prevent an abuse of it." *Id.*

The Supreme Court then helpfully discussed some hypothetical situations in which a husband might be justified in horse-whipping his wife:

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9. The reason they were not material is not—as we today might think—because there simply is no proper time or place to horse-whip your wife, but because she did not allege some time or place-sensitive abuse, such as that she was pregnant while he was beating her, or that he had beat her in a public place. *Id.*

> It is sufficient for our purpose to state that there may be circumstances which will mitigate, excuse, and so far justify the husband in striking the wife "with a horse-whip on one occasion and with a switch on another, leaving several bruises on the person," so as not to give her a right to abandon him and claim to be divorced. For instance: suppose a husband comes home and his wife abuses him in the strongest terms—calls him a scoundrel, and repeatedly expresses a wish that he was dead and in torment! and being thus provoked in the *furor brevis*, he strikes her with the horse-whip, which he happens to have in his hands, but is afterwards willing to apologise, and expresses regret for having struck her: or suppose a man and his wife get into a discussion and have a difference of opinion as to a matter of fact, she becomes furious and gives way to her temper, so far as to tell him he *lies*, and upon being admonished not to repeat the word, nevertheless does so, and the husband taking up a switch, tells her if she repeat it again, he will strike her, and after this notice, she again repeats the insulting words, and he thereupon strikes her several blows; these are cases, in which, in our opinion, the circumstances attending the act, and giving rise to it, so far justify the conduct of the husband as to take from the wife any ground of divorce for that cause, and authorise the Court to dismiss her petition, with the admonition, "if you will amend your manners, you may expect better treatment;" see Shelford on Divorce. So that there are circumstances, under which a husband may strike his wife with a horse-whip, or may strike her several times with a switch, so hard as to leave marks on her person, and these acts do not furnish sufficient ground for a divorce.

Id. at 325-26.

Thus the Supreme Court held that mere verbal statements by the wife—calling her husband a "scoundrel" or "liar" or wishing him dead—would legally justify his striking her with a horsewhip (if he then apologizes) or striking her "several times with a switch, so hard as to leave marks on her person." *Id.*[10]

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10. Just a few years later, in *State v. Oliver*, 70 N.C. 60 (1874), a criminal case, the Supreme Court rejected the prior cases which allowed a husband to whip his wife "provided he used a switch no larger than his thumb," stating that this "is not law in North

N.C. Gen. Stat. § 50-16.1A(3)(f) does not mention lack of provocation as an element of "indignities." It simply states that one form of marital misconduct consists of "[i]ndignities rendering the condition of the other spouse intolerable and life burdensome." N.C. Gen. Stat. § 50-16.1A(3)(f). Yet it is also true that the definition of indignities under N.C. Gen. Stat. § 50-16.1A(2)(f) is the same as it is under N.C. Gen. Stat. § 50-7, and as it was under the repealed § 50-16.1 and the repealed § 50-16, for which the courts of this state have required an allegation that the indignities were offered without provocation. *See*, *e.g.*, *Puett v. Puett*, 75 N.C. App. 554, 557, 331 S.E.2d 287, 290 (1985), *Vandiver v. Vandiver*, 50 N.C. App. 319, 328, 274 S.E.2d 243, 249 (1981), *and Cushing v. Cushing*, 263 N.C. 181, 187, 139 S.E.2d 217, 222 (1964). Indeed, this same language can be found in every version of the North Carolina divorce and alimony statutes from 1814 onward. *See* 2 Laws of the State of North Carolina 1292, 1294 (Raleigh, Henry Potter 1821). The requirement of a lack of provocation has simply been a judicial gloss on this simple language, added generations ago in cases like *Joyner* and repeated over the years, usually without any consideration of its origins.

In considering how this ancient rule applies to the modern alimony statute, we cannot ignore the substantial changes in procedural law, substantive family law, or "the vast changes in the status of woman—the extension of her rights and correlative duties—whereby a wife's legal submission to her husband has been wholly wiped out, not only in the English-speaking world generally but emphatically so in this country." *State v. Stroud*, 147 N.C. App. 549, 560, 557 S.E.2d 544, 551 (2001) (quoting *United States v. Dege*, 364 U.S. 51, 54, 4 L.Ed.2d 1563, 1565 (1960)), *cert. denied*, 356 N.C. 623, 575 S.E.2d 758 (2002).

First, since this doctrine was created, there have been vast changes in the pleading requirements and procedural law applicable in domestic cases. *See Shingledecker v. Shingledecker*, 103 N.C. App. 783, 786, 407 S.E.2d 589, 591 (1991) (noting that the "defendant's contention [that the plaintiff's complaint was fatally deficient in that it failed to allege lack of provocation of the indignities alleged] was supported by cases decided prior to the enactment of the North Carolina Rules of Civil Procedure at

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Carolina. Indeed, the Courts have advanced from that barbarism until they have reached the position, that the husband has no right to chastise his wife, under any circumstances." *Oliver*, 70 N.C. at 61. Yet the Court still recognized that not all physical abuse would be worthy of intervention by the courts: "But from motives of public policy,—in order to preserve the sanctity of the domestic circle, the Courts will not listen to trivial complaints. If no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive." *Id.* at 61-62.

G.S. § 1A-1," but holding that that issue is not reviewable after a motion to dismiss is denied by the trial court). In addition, a dependent spouse no longer has to plead fault in order to receive a divorce or alimony from a supporting spouse. *See* N.C. Gen. Stat. § 50-6.; N.C. Gen. Stat. § 50-16.3A(a).

Second, the substantive changes to North Carolina family law severely undermine the rationale for the provocation rule. It appears to us that, to the extent this rule is relevant at all, the old consideration of provocation may now be addressed under the various statutory forms of marital misconduct, which the trial court now weighs with other factors in considering the amount of alimony. *See Romulus v. Romulus*, ___ N.C. App. ___, ___, 715 S.E.2d 308, 325 (2011) (explaining that for all forms of marital misconduct other than "illicit sexual behavior," "the trial court has the discretion to weigh all of the other forms of "marital misconduct" and to determine what effect, if any, the misconduct should have upon the alimony award."). For instance, if a husband excessively uses alcohol "so as to render the condition of the other spouse intolerable," N.C. Gen. Stat. § 50-16.1A(3)(h), while his wife constantly verbally abused him, N.C. Gen. Stat. § 50-16.1A(3)(f), a trial court might justifiably find that both parties had engaged in marital misconduct but could still award alimony, after weighing their misconduct in light of the other alimony factors to determine the equitable amount of alimony. *See Romulus*, ___ N.C. App. at ___, 715 S.E.2d at 325. Looking back to the ancient cases on "provocation," perhaps a less enlightened way of looking at this would be to say that the wife must prove that if she verbally abused the husband, she did so only because her husband's excessive drinking "provoked" her to do so, and not that she had driven her husband to drink by her incessant nagging.

But this sort of reasoning as to provocation seems inconsistent with the factor analysis now required by N.C. Gen. Stat. § 50-16.3A, as it would require the complaining spouse to prove a negative—that she did not "provoke" the misconduct of the other spouse—before the trial court may consider the misconduct as a factor supporting an award of alimony.[11] Our Supreme Court has recognized that "[t]o require the complaining party to allege and prove lack of provocation at first blush may seem illogical and out of place." *Allen v. Allen*, 244 N.C. 446, 450, 94 S.E.2d 325, 329 (1956). It justified such a seemingly illogical pleading requirement on the basis that it would allow the courts to ensure "that

11. Of course, fault is no longer required for an award of alimony; it is simply a factor which may be considered if raised by the parties. *See* N.C. Gen. Stat. § 50-16.3A.

the assistance of the law in breaking up the family is used for the benefit of the injured party only." *Id.* at 451, 94 S.E.2d at 329. This rationale no longer applies. Unlike under the former fault-based divorce statutes, a dependent spouse seeking alimony does not have to show that the supporting spouse offered her indignities for the trial court to award the relief she seeks, *see* N.C. Gen. Stat. § 50-16.3A, and, as a result, has no bearing on the state's interest in stable family units.

Finally, it is clear that there have been vast societal changes since the Supreme Court created the provocation rule. In 1920, women obtained the right to vote by the 19th Amendment to the United States Constitution. Husbands are no longer legally responsible for a wife's slander or assault of a neighbor; wives are now responsible for their own criminal offenses of all sorts, felony or misdemeanor. Women can now own and convey property separate and apart from their husbands. Women are now competent to testify against their husbands as to a criminal charge of "assault and battery" even if it does not "inflict[] or threaten[] a lasting injury or great bodily harm."[12] N.C. Gen. Stat. § 8-57 (b)(2) (2013). Husbands and wives are now considered separate legal persons capable of criminal conspiracy between themselves. *Stroud*, 147 N.C. App. at 561, 557 S.E.2d at 551. Beating your wife with a horsewhip, switch, or any other weapon, for that matter, is now both a crime and grounds for entry of a Domestic Violence Protective Order, and the fact that the wife may have verbally "abuse[d] him in the strongest terms," even by calling him a scoundrel and wishing him dead is no defense. *See* N.C. Gen. Stat. § 14-33(c)(2) (assault on a female) (2013); N.C. Gen. Stat. § 50B-2 (2013) (providing for legal relief from domestic violence).

Despite these changes in law and society, as well as many others, our courts have continued on occasion to cite the language of these old cases. *See*, *e.g.*, *Ollis v. Ollis*, 241 N.C. 709, 711, 86 S.E.2d 420, 421-22 (1955) ("It is not enough for the wife to allege the husband has been abusive and violent toward her, ... but also she must set forth what, if anything, she did to start or feed the fire of discord so that the court may determine whether she provoked the difficulty."). This rule required such an allegation despite a similar absence of any such language in

12. *Cf. State v. Hussey*, 44 N.C. (Busb.) 123, 127 (1852) ("The rule, as we gather it from authority and reason, is, that a wife may be a witness against her husband from felonies perpetrated, or attempted to be perpetrated on her, and we would say for an assault and battery which inflicted or threatened a lasting injury or great bodily harm; but in all cases of a minor grade she is not. In this case, there is no pretence that any lasting injury was inflicted; on the contrary, the case states that the injury was temporary.").

the relevant statutes.[13] Even fifty years ago, our Supreme Court stated that this "lack of provocation" rule is one of "debatable" benefits that is "so very old that the years have barnacled it in numberless cases upon our practice," *Cushing*, 263 N.C. at 187, 139 S.E.2d at 222, but the Court did not go so far as to overrule these cases. As discussed above, the rule appears to stem from an ancient understanding of marriage which required that a wife show adequate cause to leave her "proper place" and that she would be unable to procure a divorce if she "provoked" the indignities of which she complained.[14] This Court has previously noted that "[t]hese notions no longer accurately represent the society in which we live, and our laws have changed to reflect this fact." *Vann v. Vann*, 128 N.C. App. 516, 518, 495 S.E.2d 370, 372 (1998) (citation and quotation marks omitted).

"It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." *Stroud*, 147 N.C. App. at 561, 557 S.E.2d at 551 (quoting *Dege*, 364 U.S. at 53-54, 4 L.Ed.2d at 1565). In 1912, Chief Justice Clark presciently observed that

> Even statutes have been held obsolete and unenforcible [sic] because of changed conditions and the long lapse of time. Certainly this ought to be true of decisions which

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13. *See* N.C. Gen. Stat. § 50-7 (1984); *Puett*, 75 N.C. App. at 557, 331 S.E.2d at 290 ("We agree that in North Carolina a party relying on G.S. 50-7(4) must not have provoked the 'indignities' of which he complains." (citations omitted)); N.C. Gen. Stat. § 50-16.1 (1978); *Vandiver*, 50 N.C. App. at 328, 274 S.E.2d at 249 (under N.C. Gen. Stat. § 50-16.1, approving of jury instructions that required the jury to decide whether the indignities were offered "without provocation"); N.C. Gen. Stat. § 50-16 (1966); *Cushing*, 263 N.C. at 187, 139 S.E.2d at 222 (holding that under N.C. Gen. Stat. § 50-7, "which G.S. § 50-16 incorporates," a wife seeking to prove indignities "is required, therefore, not only to set out with particularity those of her husband's acts which she contends constituted such indignities as to render her condition intolerable and her life burdensome but also to show that those acts were without adequate provocation on her part.").

14. *See Wilcox v. Wilcox*, 36 N.C. (1 Ired.Eq.) 36, 42-43 (1840) ("[I]t cannot for a moment be pretended, that every act of improper conduct, on the part of a husband, will authorise a wife to leave her proper place--his side, and his home--and if she alleges that he has been guilty of such gross misconduct as to justify this seeming revolt from her duty, she must so charge the misconduct, that it may be judicially seen, when the fact is ascertained, whether it be of that character which induces a forfeiture of his right to her society, and that he may have a full opportunity of answering distinctly to the misconduct charged, and of explaining or disproving it."); *Foy v. Foy*, 35 N.C. (13 Ired.) 90, 96 (1851) ("If a wife leave a husband, and refuses to live with him, *without sufficient cause*, and he afterwards lives in adultery, this is no cause of divorce; for, the consequence may be ascribed to her prior violation of the duty of a wife.").

> rest upon no statute and which are now contrary to every sense of right and opposed to the spirit of our Constitution and of the age in which we live.
>
> The "common law" has been praised because of the very fact that, being "judge-made," it was flexible and could be molded from time to time to fit the changing conditions of society. But it loses this sole excellence when it is used to thwart beneficial statutes, expressing the demand of the age for more just and benign laws, by construing them according to the darkened and narrow views of the judges of the fourteenth century, and not according to the intendment of legislators imbued with the enlightened ideas of the twentieth century. . . .
>
> There are of course principles of the common law which are eternally just and which will survive throughout the ages. But this is not because they are found in a mass of error or were enunciated by judges in an ignorant age, but because they are right in themselves and are approved, not disapproved as much of the common law must be, by the intelligence of today.
>
> As, however, common-law views as to the status of women still survive among a few and are still urged as law, it would not be amiss should the General Assembly make such enactment in this regard as that body may deem just and proper. Every age should have laws based upon its own intelligence and expressing its own ideas of right and wrong. Progress and betterment should not be denied us by the dead hand of the Past. The decisions of the courts should always be in accord with the spirit of the legislation of to-day [sic] . . . .

Price v. Charlotte Electric Ry. Co., 160 N.C. 450, 456-57, 76 S.E. 502, 504-05 (1912) (Clark, C.J., concurring).

Nevertheless, we cannot overrule our Supreme Court's opinions or those issued by other panels of this Court simply because the rule they recite is old and developed under statutes repealed long ago. *See Andrews ex rel. Andrews v. Haygood*, 188 N.C. App. 244, 248, 655 S.E.2d 440, 443 (2008) ("[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 our Supreme Court." (citation, quotation marks, brackets, and ellipses omitted)); *In re Appeal from*

Civil Penalty, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (holding that one panel of the Court of Appeals cannot overrule another). The State of North Carolina, its families, and its courts could benefit from the Supreme Court's reconsideration of this ancient doctrine that appears to be inconsistent with our existing statutory scheme of post-separation support and alimony and "inconsistent with the marked trend in this jurisdiction toward gender neutrality in the family law area." *Vann*, 128 N.C. App. at 519, 495 S.E.2d at 372.[15]

Here, even assuming the rule as to provocation does apply, defendant did not raise plaintiff's failure to allege a "lack of provocation" below and did not present any evidence which could sustain a finding of "provocation" on plaintiff's part. The trial court is not normally required to make findings on issues not raised by the evidence. *See Friend-Novorska v. Novorska*, 143 N.C. App. 387, 395 n.3, 545 S.E.2d 788, 794 n.3 (2001) ("The ultimate facts at issue in the case are facts relating to the factors set forth in section 50-16.3A(b) for which evidence is presented at trial."). Moreover, the trial court's findings, taken as a whole, make clear that plaintiff did nothing that could be considered "adequate provocation" of defendant's abuse. Therefore, even assuming that a "want of provocation" is still an element of indignities under N.C. Gen. Stat. § 50-16.1A, the trial court here did not err in finding that defendant had subjected plaintiff to indignities constituting marital misconduct.

As noted above, defendant only argues that the trial court abused its discretion in awarding plaintiff $3,500 per month in alimony for twelve years because its findings on marital misconduct are unsupported by the evidence. Defendant does not otherwise challenge the alimony order or the trial court's consideration of other alimony factors. Therefore, any such arguments have been abandoned. N.C.R. App. P. 28(a). There was sufficient evidence to support the trial court's findings on marital misconduct, and defendant has shown no abuse of discretion in the trial court's consideration of this misconduct in setting the amount and term of the alimony award.

Yet our ruling cannot end here, since we realize that the alimony award was made in conjunction with the equitable distribution award, and the trial court may need to reconsider the alimony amount in

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15. Although the concept is technically "gender neutral" as it is now applied to both husbands and wives, it is clear that in the past the rule was often used in practice as a means for a husband to justify his refusal to continue to support, or even to justify his physical abuse of, a wife who had failed to fulfill her proper role as a wife and mother, and the cases all reflect this background.

light of any changes to the property distribution. *See* N.C. Gen. Stat. § 50-16.3A(a); *Lamb v. Lamb*, 103 N.C. App. 541, 547, 406 S.E.2d 622, 625 (1991). Therefore, we remand the alimony award only so that the trial court may reconsider the amount and term of alimony based upon the new equitable distribution determination.

This opinion does *not* permit the parties to revisit the issue of marital misconduct on remand, as we have found that the trial court did not err as to this issue, and this opinion does not dictate that the trial court should or should not change the alimony award on remand; we merely permit the trial court to exercise its discretion on remand to reconsider the alimony amount and term, as the trial court must have the ability to consider the alimony award in light of the new equitable distribution award entered on remand, since they were considered together in the prior trial and order.

IV. Conclusion

For the foregoing reasons, we vacate the portion of the trial court's order concerning equitable distribution and remand for the trial court to appoint a GAL, or expand the existing GAL's responsibilities, to represent the property interests of the minor child, who is the uncontested holder of legal title to the two houses distributed to defendant. We remand the portion of the trial court's order concerning alimony only for the limited purpose of reconsideration of the amount and term based upon the ultimate equitable distribution award.

VACATED in part and REMANDED.

Judge DILLON concurs.

Judge HUNTER, JR., Robert N. concurs in the result only.

DUNCAN v. DUNCAN

[232 N.C. App. 369 (2014)]

BARBARA R. DUNCAN, PLAINTIFF
v.
JOHN H. DUNCAN, DEFENDANT

No. COA12-399-2

Filed 18 February 2014

1. Marriage—ceremony—declaration of invalidity

N.C.G.S. § 50-4 applied to defendant's counterclaim to declare his first marriage ceremony invalid, even though defendant did not seek to annul his entire marriage.

2. Marriage—ceremony—not properly solemnized

The trial court erred by concluding that a marriage ceremony was properly solemnized as the individual who officiated the ceremony, a minister ordained by the Universal Life Church, was not authorized under the applicable version of N.C.G.S. § 51-1 to solemnize the ceremony.

3. Marriage—validity of ceremony—judicial estoppel

The trial court erred by concluding that defendant was judicially estopped from contesting the validity of his first marriage ceremony. The trial court's order did not contain any finding that defendant took the position in this or any other judicial proceeding that the ceremony was valid.

4. Marriage—validity of ceremony—equitable estoppel

The trial court did not err by concluding that defendant was equitably estopped from contesting the validity of his first marriage ceremony where both plaintiff and defendant were equally negligent in relying on the credentials of the individual who officiated the ceremony.

5. Divorce—dependent spouse—conclusion of law—findings of fact

Defendant's argument that the trial court erred in its conclusion of law that plaintiff was actually substantially dependent on defendant for her support as of the date of separation was overruled. Because defendant failed to argue which, if any, of the findings of fact were unsupported, the findings were binding on appeal. The Court of Appeals thus held that the trial court did not err in finding plaintiff to be actually substantially dependent on defendant.

Judge McGEE concurring in result in separate opinion.

Appeal by Defendant from the following orders and judgment entered in the District Court, Macon County: order entered 15 October 2007 by Judge Monica Leslie; orders entered 31 March and 4 September 2008 by Judge Richard K. Walker; order entered 18 September 2009 and judgment entered 2 September 2010 by Judge Steven J. Bryant; and orders entered 14 April 2011 and 18 January 2012 by Judge Richard K. Walker. Originally heard in the Court of Appeals 11 September 2012, with opinion filed 2 October 2012. Reconsidered pursuant to an opinion of the North Carolina Supreme Court, entered 13 June 2013.

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

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

DILLON, Judge.

I. Factual & Procedural Background

Barbara R. Duncan (Plaintiff) and John H. Duncan (Defendant) exchanged vows in two separate marriage ceremonies in North Carolina occurring twelve years apart. The first ceremony occurred on 15 October 1989 (the 1989 ceremony) and was presided over by Hawk Littlejohn, who held himself out to be a Cherokee medicine man[1] and who was ordained as a minister by the Universal Life Church. In 2001, the parties' estate planning attorney expressed his concern that the 1989 ceremony was not valid; and, accordingly, on 14 October 2001, Plaintiff and Defendant participated in a second ceremony at the First Presbyterian Church in Franklin, North Carolina (the 2001 ceremony).

In 2005, Plaintiff commenced this action seeking, *inter alia*, divorce, equitable distribution, alimony, and child support, alleging that the parties' date of marriage was 15 October 1989, the date of the 1989 ceremony. Defendant filed responsive pleadings alleging, *inter alia*, that Hawk Littlejohn was not authorized under North Carolina law to perform a valid marriage ceremony; and, therefore, the parties'

1. In Defendant's verified complaint, he alleged that Hawk Littlejohn was not, in fact, a Native American but had changed his name from his given name, Larry Snyder.

date of marriage was 14 October 2001, the date of the 2001 ceremony. Accordingly, Defendant prayed the trial court to declare the 1989 ceremony invalid under North Carolina law.

Following a hearing, the trial court entered an order on 15 October 2007 (the 2007 order), concluding that the 1989 ceremony resulted in a valid marriage, that 15 October 1989 was "the date of marriage for all matters related to this Chapter 50 action" and that Defendant was estopped from contesting the validity of the 1989 ceremony.[2]

The trial court subsequently entered a number of additional orders and an equitable distribution judgment. Defendant appeals from the 2007 order and from a number of subsequently entered orders that he contends were affected by the 2007 order. Defendant also appeals from an order in which the trial court concluded that Plaintiff was "actually substantially dependent on [] Defendant for her support as of the date of separation" and a separate order in which the trial court held open the issue of whether to award attorney's fees. Because the trial court left open the award of attorney's fees, this Court, relying on our Supreme Court's decision in *Bumpers v. Cmty. Bank of N. Va.*, 364 N.C. 195, 695 S.E.2d 442 (2010), reasoned that Defendant's appeal was interlocutory and dismissed it as untimely. *Duncan v. Duncan*, ___ N.C. App. ___, ___, 732 S.E.2d 390, 392 (2012).

Following discretionary review, our Supreme Court reversed, holding that an open request for attorney's fees does not prevent a judgment on the merits from being final. *Duncan v. Duncan*, 366 N.C. 514, 742 S.E.2d 799 (2013). On remand from our Supreme Court, we now consider the merits of Defendant's appeal.

II. Analysis

Defendant's arguments on appeal are essentially that (1) the trial court erred in its 2007 order by determining that 15 October 1989 was the date of marriage for all matters related to this action; and (2) the trial court erred in its order in which it determined that Plaintiff was actually substantially dependent on Defendant for her support as of the date of separation. For the reasons stated below, we affirm the orders of the trial court.

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2. In late 2007, Defendant appealed from the 2007 order. However, this Court dismissed the interlocutory appeal for lack of jurisdiction. *Duncan v. Duncan*, 193 N.C. App. 752, 761 S.E.2d 71, 2008 WL 4911807 (2008) (unpublished).

A. Date of Marriage

[1] Defendant argues that the 1989 ceremony was invalid; and, therefore, that the trial court erred in establishing the date of marriage based on the 1989 ceremony. As an initial matter, we hold that the issue regarding the validity of the 1989 ceremony was properly before the trial court. A marriage based on a ceremony in North Carolina not properly solemnized pursuant to the requirements of N.C. Gen. Stat. § 51-1 is voidable. *See Fulton v. Vickery*, 73 N.C. App. 382, 387, 326 S.E.2d 354, 358 (1985) (stating that a marriage performed by a minister of the Universal Life Church, not otherwise cured by N.C. Gen. Stat. § 51-1.1, was voidable). A party may apply to the court for a declaration that a voidable marriage "be declared void from the beginning[.]" N.C. Gen. Stat. § 50-4 (2013). However, a voidable marriage remains valid "for all civil purposes, until annulled by a competent tribunal *in a direct proceeding*." *Geitner v. Townsend*, 67 N.C. App. 159, 161, 312 S.E.2d 236, 238 (1984) (emphasis added).

Here, in his counterclaim, Defendant prays the court for an order "to declare [the 1989 ceremony] invalid[,]" which we believe is an application under N.C. Gen. Stat. § 50-4 for an order to "declare [a voidable] marriage void[,]" to the extent that the parties' marriage is based on the 1989 ceremony. In other words, we believe that N.C. Gen. Stat. § 50-4 applies in this case even though Defendant does not seek to annul his marriage *in toto* — indeed, he admits that he and Plaintiff were lawfully married by virtue of their 2001 ceremony — but merely requests that the court declare the marriage invalid insomuch as it is based on the 1989 ceremony. Further, where one party sues for divorce, we believe that a counterclaim by the opposing party seeking an order to declare the marriage invalid constitutes a "direct proceeding." *See Sprinkle v. N.C. Wildlife*, 165 N.C. App. 721, 735, 600 S.E.2d 473, 482 (2004) (holding that "a counterclaim is in the nature of an independent proceeding[, and] the filing of a counterclaim is to initiate a 'civil action' ").

In this case, Defendant argues that the trial court erred by concluding that the 1989 ceremony was properly solemnized and by concluding that he "was judicially and equitably estopped from arguing" otherwise. For the reasons below, we believe that the trial court erred by concluding that the 1989 ceremony was properly solemnized and that Defendant was *judicially* estopped from contesting the validity of the 1989 ceremony; however, we do not believe that the trial court erred by concluding that Defendant was *equitably* estopped from contesting the validity of the 1989 ceremony. Therefore, we affirm the 2007 order to the extent that it concludes that Defendant is equitably estopped from challenging the

validity of the 1989 ceremony and the date of marriage, for purposes of this action, to be 15 October 1989.

1. The 1989 Ceremony Was Voidable

[2] Regarding the validity of the 1989 ceremony, Defendant does *not* argue that the ceremony did not take place. Rather, he contends that Hawk Littlejohn, who officiated the ceremony, was not authorized under the North Carolina law in effect at that time to solemnize a marriage.

Our Supreme Court has held that "[a] common law marriage or marriage by consent is not recognized by this State." *State v. Lynch*, 301 N.C. 479, 487, 272 S.E.2d 349, 354 (1980). Rather, "[t]o constitute a valid marriage in this State, the requirements of G.S. 51-1 must be met." *Id.* at 486, 272 S.E.2d at 353. The version of N.C. Gen. Stat. § 51-1 in effect in 1989 required, in pertinent part, that the parties " 'express their solemn intent to marry in the presence of (1) an ordained minister of any religious denomination; or (2) a minister authorized by his church; or (3) a magistrate.' " *Pickard v. Pickard*, 176 N.C. App. 193, 196, 625 S.E.2d 869, 872 (2006) (quoting *Lynch*, 301 N.C. at 487, 272 S.E.2d at 354).[3] However, when it is established that a marriage ceremony has occurred – as is the case here – "the burden of showing that it was an invalid marriage rests on the party asserting its invalidity." *Overton v. Overton*, 260 N.C. 139, 143, 132 S.E.2d 349, 352 (1963); *see also Kearney v. Thomas*, 225 N.C. 156, 163, 33 S.E.2d 871, 876 (1945) (stating that where there is "proof that a marriage ceremony took place, it will be presumed that it was legally performed and resulted in a valid marriage"). Accordingly, Defendant bore the burden of demonstrating that Hawk Littlejohn was not authorized under N.C. Gen. Stat. § 51-1 to solemnize the 1989 marriage ceremony. Based on the evidence that was before the trial court, we believe that Defendant met this high burden.

The record on appeal contains a statement of the evidence that was presented to the trial court, pursuant to Rule 9(c) of our Appellate Rules.[4] With regard to the evidence presented before the trial court concerning Hawk Littlejohn's authority to solemnize the 1989 ceremony, the Rule 9(c) statement sets forth that the parties made the court aware of the Supreme Court's 1980 opinion in *Lynch*, *supra*; and, further, that the

3. N.C. Gen. Stat. § 51-1 was amended in 2001 to add a provision which authorizes a ceremony to be valid as long as it is held "[i]n accordance with any mode of solemnization recognized by any religious denomination, or federally or State recognized Indian Nation or Tribe." N.C. Gen. Stat. § 51-1(2) (2013).

4. The record states that the audio recording of the hearing has been lost.

parties stipulated that Hawk Littlejohn had performed the 1989 ceremony, that he was a minister ordained by the Universal Life Church, and that the relevant facts regarding the Universal Life Church as it applies in this case were essentially the same as described by the Supreme Court in *Lynch*.

In *Lynch*, our Supreme Court reversed a bigamy conviction of a defendant where one of his two marriages was solemnized before a Universal Life Church minister. *Lynch*, *supra*. The Court described the Universal Life Church as a church, headquartered in Modesto, California, with "no traditional doctrine" who "will ordain anyone, without question to his/her faith," and that their ministers, which number over 7 million, have the authority to officiate at marriages but otherwise are "not require[d] to give up [their] membership with any other church to be a minister of the ULC, Inc." *Id.* at 483, 272 S.E.2d at 351. The Court further described that the process of receiving certification as an ordained minister in the Universal Life Church involved simply mailing one's name, address and ten dollars to the Church's California headquarters, and that the Church did not require any further proceedings or training as a requirement for ordination. *Id.* In reversing the bigamy conviction, the Court stated as follows:

> A ceremony solemnized by a [layman] who bought for $10.00 a mail order certificate giving him 'credentials of minister' in the Universal Life Church, Inc. — whatever that is – is not a ceremony of marriage to be recognized for purposes of a bigamy prosecution in the State of North Carolina. *The evidence does not establish — rather, it negates the fact — that [the "minister"] was authorized under the laws of this State to perform a marriage ceremony.*

Id. at 488, 272 S.E.2d at 355 (emphasis added).

Since the record shows that Plaintiff stipulated that the "relevant facts" concerning the Universal Life Church and Hawk Littlejohn's ordination as a minister therein were essentially the same as described by our Supreme Court in *Lynch*, and since our Supreme Court in *Lynch* stated that evidence that an individual was ordained by the Universal Life Church — as the Church is described in that case — "negates the fact that [the individual] was authorized under the laws of this State to perform a marriage ceremony," we are compelled in the present case to conclude that Defendant met his high burden of demonstrating that

Hawk Littlejohn was not authorized under the applicable version of N.C. Gen. Stat. § 51-1 to solemnize the 1989 ceremony.

We do not agree with the trial court's conclusion that N.C. Gen. Stat. § 51-1.1 passed by our Legislature in 1981, the year after *Lynch* was decided, renders the 1989 ceremony valid. Specifically, the trial court correctly found that "the Legislature passed N.C. Gen. Stat. Sec. 51-1.1 in 1981, prior to the parties [sic] marriage, which expressly validated all marriages performed by ministers of the Universal Life Church prior to July 3, 1981[,]" but then erroneously concluded that "the effect of [N.C. Gen. Stat. § 51-1.1] is to give legislative approval to marriages performed by ministers of the Universal Life Church[.]"

In other words, we believe the trial court erred by concluding that our Legislature intended to give its approval to marriage ceremonies performed by ministers of the Universal Life Church, even if they were performed *after* 3 July 1981, because we believe the express terms of the statute validated only those otherwise voidable marriages solemnized by a minister of the Universal Life Church before 3 July 1981. *See Meza v. Div. of Soc. Servs.*, 364 N.C. 61, 66, 692 S.E.2d 96, 100 (2010) (stating that "[w]hen the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required").

Indeed, in *Fulton v. Vickery*, this Court described N.C. Gen. Stat. § 51-1.1 as a "curative statute." 73 N.C. App. at 385, 326 S.E.2d at 357. In other words, by limiting the scope of the statute only to those marriages performed prior to 3 July 1981, the Legislature intended to provide relief to any "innocent" couple whose marital status was suddenly put in doubt by the *Lynch* decision. However, had the Legislature intended to validate otherwise voidable marriages solemnized by the Universal Life Church *for all time*, it could have easily done so.[5]

In this case, since the trial court found that the parties were married by Hawk Littlejohn on a date *after* 3 July 1981, the curative effect of N.C. Gen. Stat. § 51-1.1 would not apply. Accordingly, the parties' marriage — as based on the 1989 ceremony — was voidable, and subject to attack in a direct proceeding pursuant to N.C. Gen. Stat. § 50-4.

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5. There is no evidence in the record regarding the current criteria for ordination in the Universal Life Church; and, accordingly, we express no opinion about marriages that might have been solemnized by other Universal Life Church ministers since *Lynch*. Further, we express no opinion regarding the voidability of marriages solemnized by a Universal Life Church minister under the current version of N.C. Gen. Stat. § 51-1.

2. Judicial Estoppel

[3] Defendant argues that the trial court erred by concluding that, even if the 1989 ceremony was voidable, Defendant was judicially estopped from contesting its validity. We agree.

Our Supreme Court has stated that three factors are to be considered in applying the doctrine of judicial estoppel: (1) whether a party's position in a legal proceeding is clearly inconsistent with an earlier position taken in a legal proceeding; (2) whether the party succeeded in persuading a court to accept the party's earlier position; and (3) whether the party seeking to assert the inconsistent position would derive some unfair advantage or impose an unfair detriment on the opposing party. *Whitacre v. BioSignia, Inc.*, 358 N.C. 1, 29, 591 S.E.2d 870, 888-89 (2004).

In this case, the trial court's order does not contain any finding that Defendant took the position in this or any other judicial proceeding that the 1989 ceremony was valid. Rather, the record reflects that Defendant *denied* in his initial pleading in this action Plaintiff's allegation that they were married in 1989. Accordingly, we hold that the trial court erred by concluding that Defendant was judicially estopped from contesting the validity of the 1989 ceremony.

3. Equitable Estoppel

[4] Defendant argues that the trial court erred by concluding that he is equitably estopped from challenging the validity of the 1989 ceremony. Specifically, he argues that Plaintiff is barred from asserting equitable estoppel because she has "unclean hands" by having participated in the 1989 ceremony. Plaintiff, on the other hand, argues that estoppel[6] does apply in this case. In support of their respective positions, each party has cited opinions from this Court and our Supreme Court which address the propriety of estopping a party from challenging the validity of a void or voidable marriage. We have carefully reviewed these cases and believe that the trial court correctly concluded that Defendant was equitably estopped from challenging the validity of the 1989 ceremony.

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6. The trial court concluded that Defendant was "equitably estopped" from challenging the validity of the 1989 ceremony. In the cases cited by the parties, the reviewing courts employ both the doctrines of "equitable estoppel" and "quasi-estoppel." Our Supreme Court has described "quasi-estoppel" as a "branch of equitable estoppel" with the key distinction being that the former "may operate without detrimental reliance on the part of the party invoking the estoppel." *Whitacre*, 358 N.C. at 18, 591 S.E.2d at 882. We believe that the distinction is insignificant in the present case and believe that the cases considering either doctrine are helpful in our resolution of this issue. *See Mayer v. Mayer*, 66 N.C. App. 522, 532-36, 311 S.E.2d 659, 666-69 (1984) (relying on analyses in cases applying "equitable estoppel" though applying "quasi-estoppel" principles).

Whether principles of estoppel apply "turn[s] on the particular facts of each case." *Mayer*, 66 N.C. App. at 535, 311 S.E.2d at 668. The application of estoppel in divorce actions in North Carolina can be illustrated in three cases decided by this Court, *Hurston v. Hurston*, 179 N.C. App. 809, 635 S.E.2d 451 (2006); *Redfern v. Redfern*, 49 N.C. App. 94, 270 S.E.2d 606 (1980); and *Mayer*, *supra*, each of which involved (1) a wife seeking post-marriage support from her husband; (2) the husband seeking to avoid such obligation by asserting that the marriage was void based on the fact that either he or his putative wife had failed to obtain a valid divorce from a prior marriage; and (3) the wife contending that her putative husband was estopped from contesting the validity of their marriage. We compare each of these decisions below.

Hurston, a case relied upon by Defendant, involved facts at one extreme of the spectrum. There, it was the wife who had been previously married and who had obtained an invalid Dominican Republic divorce. Therefore, we held in *Hurston* that the wife could *not* assert estoppel because she had "unclean hands," reasoning that though her putative husband "might have been negligent" by not ever questioning during the marriage the validity of the wife's first divorce, "it was the [wife] who did not obtain the valid divorce decree before attempting to enter into another marriage[,]" describing her as being "culpably negligent." *Hurston*, 179 N.C. App. at 815, 635 S.E.2d at 454. Accordingly, we held that the husband *was no*t equitably estopped from contesting the validity of the marriage.

Redfern involved facts on the other extreme of the spectrum. Specifically, in *Redfern*, it was the husband — and not the wife — who had been previously married and had entered the second marriage before, unbeknownst to his putative wife, the divorce decree from his first marriage had been signed. This Court determined that the husband was culpably negligent in failing to obtain a signed divorce decree; and, therefore, he was estopped from contesting the validity of the second marriage as his defense to avoid paying support to his putative wife. *Redfern*, 49 N.C. App. at 97, 270 S.E.2d 608-09.

The facts in *Mayer* fall between the extremes of *Hurston* and *Redfern*. Like the wife in *Hurston*, the wife in *Mayer* had obtained an invalid Dominican Republic divorce in an attempt to end her first marriage. However, unlike the putative second husband in *Hurston*, the putative second husband in *Mayer* was involved in helping his wife obtain the invalid Dominican divorce from her first husband. Specifically, the putative second husband had insisted that his wife obtain the Dominican divorce and had accompanied her there to help her obtain the divorce.

The putative second husband, nonetheless, argued that his wife should not be able to assert estoppel since "the equities in this case weigh no more heavily for [the wife] than for him since [*inter alia*] she and he are *in pari delicto* [in that she participated equally with him to obtain the Dominican divorce]." *Mayer*, 66 N.C. App. at 531, 311 S.E.2d at 666. This Court concluded that even though no children had been born to the marriage and though the parties had not been married for that long, the scales of equity still tipped towards allowing the wife to assert estoppel to bar her putative second husband's defense to her claim for spousal support. *Id.* at 66 N.C. App. at 535, 311 S.E.2d at 668. Specifically, this Court stated that to allow a party to a marriage to challenge the validity of that marriage where he was actively involved in obtaining an invalid divorce for his putative spouse and which was relied upon by his putative spouse would cause "matrimonial uncertainty." *Id.* We note that in *Taylor v. Taylor*, our Supreme Court cited our analysis in *Mayer* with approval, quoting our reasoning that " 'in spite of the criticism that the application of a quasi-estoppel doctrine circumvents a state's divorce law, it would be even more inimical to our law and to our public policy to permit [the husband] to avoid his marital obligations by acting inconsistently with his prior conduct." 321 N.C. 244, 250-51, 362 S.E.2d 542, 546-47 (1987) (citation omitted) (alteration in original).

We believe that the facts in the present case — as found by the trial court in the 2007 order — are most similar to the facts in *Mayer*. Specifically, the findings suggest that both Plaintiff and Defendant were equally negligent in relying on Hawk Littlejohn's credentials. Accordingly, we believe that the trial court correctly applied the law in concluding that Defendant was equitably estopped from challenging the validity of the 1989 ceremony.

The scales of equity might have tipped towards Defendant had the evidence shown that Plaintiff had actually known at the time of the 1989 ceremony that Hawk Littlejohn was not authorized to solemnize a North Carolina marriage *or* that she had misrepresented to Defendant prior to the 1989 ceremony that she had engaged in some due diligence to determine the validity of Hawk Littlejohn's credentials where she, in fact, had not done so. Further, had Plaintiff not agreed to participate in the 2001 ceremony, the scales of equity would have swayed against her, at least with respect to any benefit she seeks in this action that relates to the period of the marriage occurring after she had learned in 2001 that her marriage was voidable. However, there is no evidence in the record indicating that Plaintiff was any more culpable than the wife in *Mayer*. We note that Defendant has pled allegations that might enhance Plaintiff's

culpability, including allegations about her expertise in Native American culture and her desire and insistence that she and Defendant participate in the traditional Cherokee ceremony officiated by Hawk Littlejohn. However, there is nothing in the Rule 9(c) statement indicating that any testimony or other evidence was presented to the trial court regarding these allegations. Rather, the Rule 9(c) statement simply recites that the parties both testified and that the testimonial evidence supported many of the trial court's findings in the 2007 order.

Accordingly, we affirm the trial court's determination that the date of marriage for purposes of this action is 15 October 1989. Further, because we hold that the trial court did not err in concluding that 15 October 1989 was the date of marriage for all matters related to this action, we necessarily hold that the trial court did not err in basing all subsequent orders on that date of marriage.

III. Dependent Spouse Determination

In his final argument, Defendant contends that, in its 31 March 2008 order, the trial court erred in making its conclusion of law 2, which states as follows:

> Taking into account the income and expenses of the parties living as [a] family unit for the several months prior [to] the separation of the parties, . . . Plaintiff is without sufficient means to maintain her accustomed standard of living and . . . Plaintiff is, therefore, a dependent spouse in that she is actually substantially dependent on . . . Defendant for her support as of the date of separation. Further, given that . . . Plaintiff's income is not sufficient to meet her monthly expenses, . . . Plaintiff is substantially in need of maintenance and support.

Defendant, however, makes no argument in his brief that any specific findings in the order are not supported by competent evidence. Defendant only nonspecifically argues that "the trial court erred in its legal conclusion #2 that . . . [P]laintiff is 'actually substantially dependent on . . . Defendant for her support as of the date of separation,' . . . as that conclusion was based on a finding that is not supported by the evidence." "Findings of fact to which no error is assigned 'are presumed to be supported by competent evidence and are binding on appeal.' " *Pascoe v. Pascoe*, 183 N.C. App. 648, 650, 645 S.E.2d 156, 157 (2007) (citation omitted). This Court has held that when an appellant, as here, fails to argue specifically in his brief that contested findings of fact were unsupported by the evidence, any such argument is abandoned. *Peters*

v. Pennington, 210 N.C. App. 1, 16, 707 S.E.2d 724, 735 (2011) (citation omitted). Since Defendant made no argument as to which, if any, of the findings of fact in the trial court's 31 March 2008 order were unsupported, "this Court is therefore bound to accept as true the information therein." *Pascoe*, 183 N.C. App. at 651, 645 S.E.2d at 158 (citation omitted). We have nevertheless reviewed the relevant findings of fact and conclude that they are supported by competent record evidence and are binding on appeal. Therefore, we hold that the trial court did not err in finding Plaintiff to be actually substantially dependent on Defendant, and Defendant's argument to the contrary is without merit.

AFFIRMED.

Judge DAVIS concurs.

McGEE, Judge, concurring in result with separate opinion.

I concur in Section II A. 3., Equitable Estoppel, and in Section III, Dependent Spouse Determination, of the majority's opinion. I agree that the trial court did not err in ruling that Defendant was equitably estopped from denying 15 October 1989 as the date of marriage. I write separately because I believe the remainder of Section II of the majority opinion is dicta, which unnecessarily, and perhaps erroneously, addresses issues better left to future panels of this Court, should these issues again arise.

I.

Though I do not believe we need to, or should, address any issues beyond equitable estoppel in Section II, I am concerned with the statement of the majority that "Defendant met his high burden [of] show[ing] that Hawk Littlejohn was not authorized under the applicable version of N.C. Gen. Stat. § 51-1 to solemnize the 1989 ceremony." I am not at all certain Defendant met his burden in this regard, and would much prefer we not address this issue in dicta.

Initially, pursuant to N.C. Gen. Stat. § 51-1, a marriage ceremony results in a valid marriage if, *inter alia*, it is conducted "[i]n the presence of a minister authorized by a church[.]" N.C. Gen. Stat. § 51-1 (2013). Though I tend to agree with the majority opinion that Hawk Littlejohn's association with the Universal Life Church does not satisfy the requirements of N.C.G.S. § 51-1 in light of precedent of this Court and our Supreme Court, the majority fails to consider Hawk Littlejohn's uncontested status as a Cherokee Medicine Man.

The trial court made the following relevant findings of fact in its 15 October 2007 order:

> 10. That, on . . . October 15th, 1989, . . . Plaintiff and Defendant participated in a marriage ceremony performed by Hawk Littlejohn, a Cherokee Medicine Man;
>
> . . . .
>
> 12. That the ceremony was attended by friends and family, had several sweat lodges, there was an exchange of corn and blankets, bagpipes were played and the exchanging of gold wedding bands took place. Further, . . . Defendant wore a kilt for the ceremony;
>
> . . . .
>
> 27. That the parties in this case expressed their solemn intent to marry at a traditional Cherokee ceremony attended by family and friends[.]
>
> . . . .
>
> 29. That . . . Defendant failed to produce any evidence or offer controlling law that Hawk Littlejohn was not . . . "authorized by his church" to perform weddings in accordance with the traditions of the Cherokee Indian Nation or in accordance with N.C. Gen. Stat. Sec. 51-1.

Defendant does not challenge the portion of finding of fact twenty-nine that states: "Defendant failed to produce any evidence or offer controlling law that Hawk Littlejohn was not . . . 'authorized by his church' to perform weddings in accordance with the traditions of the Cherokee Indian Nation or in accordance with N.C. Gen. Stat. Sec. 51-1." Because Defendant does not challenge this portion of finding of fact twenty-nine, it is binding on appeal. *Bethea v. Bethea*, 43 N.C. App. 372, 374, 258 S.E.2d 796, 798 (1979). Further, Defendant does not argue on appeal that Hawk Littlejohn, as a Cherokee Medicine Man, was not authorized to perform weddings. Having failed to challenge this finding, or the conclusions based upon it, Defendant has abandoned any such challenge. N.C.R. App. P. 28(b)(6) ("Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned."); *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 200, 657 S.E.2d 361, 367 (2008).

Because Defendant has failed to challenge the validity of the 1989 marriage based on one of the grounds found by the trial court in support of its ruling, Defendant has abandoned that challenge. I therefore disagree with the majority opinion's statement that "Defendant met his high burden [of] show[ing] that Hawk Littlejohn was not authorized under the applicable version of N.C. Gen. Stat. § 51-1 to solemnize the 1989 ceremony" on this ground as well.

I would also note that the issue of whether Hawk Littlejohn, or another Native American religious figure, could validly perform marriages pursuant to N.C.G.S. § 51-1 before it's amendment on 1 October 2001 has never been answered by our appellate courts. In dissenting from the majority opinion in *Pickard*, *supra*, that a marriage performed by Hawk Littlejohn in 1991 was valid through the application of judicial estoppel, the dissenting judge made the argument that the marriage was valid as performed, due in part to Hawk Littlejohn's status as a Cherokee Medicine Man. *Pickard*, 176 N.C. App. at 203-04, 625 S.E.2d at 876. Though the dissent in *Pickard* does not constitute controlling law, the argument included therein has never been directly addressed in North Carolina, and the majority does not address it here, though the trial court in this matter ruled the 1989 marriage valid, in part, for similar reasons.

II.

Finally, though not an issue argued on this appeal, I disagree with the definitive statement of the majority declaring the 1989 ceremony invalid, and thus the resulting marriage "voidable," because I recognize a possibility, as of yet undecided by any appellate court of this state, that the 1989 ceremony resulted in a valid marriage by action of statute.

Our General Assembly, on 10 May 2001, approved legislation to amend N.C.G.S. § 51-1 and other statutes ("the Act"). The Act was titled, in part: "MARRIAGE—LICENSING—SOLEMNIZATION[:] AN ACT TO AMEND THE MARRIAGE STATUTES TO BROADEN THE LIST OF PERSONS AUTHORIZED TO SOLEMNIZE MARRIAGES; *TO VALIDATE A MARRIAGE LICENSED AND SOLEMNIZED BY A FEDERALLY RECOGNIZED INDIAN TRIBE OR NATION*[.]" 2001 North Carolina Laws S.L. 2001-62 (H.B. 142) (emphasis added). By Section 1 of H.B. 142, N.C.G.S. § 51-1 was amended in part to read:

> A valid and sufficient marriage is created by the consent of a male and female person who may lawfully marry, presently to take each other as husband and wife, freely, seriously and plainly expressed by each in the presence of the other, either:

(1) a. In the presence of an ordained minister of any religious denomination, a minister authorized by a church, or a magistrate; and

b. With the consequent declaration by the minister or magistrate that the persons are husband and wife; or

(2) *In accordance with any mode of solemnization recognized by any religious denomination, or federally or State recognized Indian Nation or Tribe.*

N.C.G.S. § 51-1 (emphasis added).

The relevant enacting language of H.B. 142 is as follows: "[Section 1] of this act becomes effective October 1, 2001." 2001 North Carolina Laws S.L. 2001-62 (H.B. 142), Section 18. Because the Act was enacted in part to *validate* marriages performed in accordance with recognized Native American nations or tribes, and because there is no temporal restriction in the enacting language[1], I would not declare the 1989 marriage in this matter invalid and voidable, and would not imply that other marriage ceremonies performed in a similar manner before 1 October 2001, are invalid and therefore voidable.

I therefore limit my concurrence in Section II to the following: Assuming, *arguendo*, the 1989 marriage ceremony was invalid, and the resulting marriage was voidable, Defendant is equitably estopped from denying the validity of that marriage.

1. For example, the General Assembly could have used language similar to "The remainder of this act applies to marriage ceremonies performed *on or after* October 1, 2001," but did not.

EQUITY SOLUTIONS OF THE CAROLINAS, INC., PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF STATE TREASURER, RESPONDENT

No. COA13-300

Filed 18 February 2014

1. Appeal and Error—appealability—review of agency—no agency ruling

The merits of Equity Solutions' arguments were not before the trial court or the Court of Appeals where Equity Solutions, which assisted people with the recovery of surplus funds from foreclosure sales, requested from the State Treasurer a declaratory ruling that N.C.G.S. § 116B-78 did not apply to its business plan. The State Treasurer never rendered a declaratory ruling, despite investigative actions, letters, and allegations in an enforcement action complaint.

2. Administrative Law—trial court review of agency denial—de novo—properly applied

The trial court properly applied the *de novo* standard of review when reviewing Equity Solutions' petition for review of the State Treasurer's denial of its request for a declaratory ruling. The order demonstrated that the court properly reviewed the record, found there was evidence supporting the State Treasurer's reasons for declining to issue a ruling, and concluded that the State Treasurer's reasons, separately or together, constituted good cause for the denial.

3. Administrative Law—request for declaratory ruling—denied—good cause

The State Treasurer and the trial court properly determined that good cause existed to decline to issue a ruling on Equity Solutions' request for a declaratory ruling that N.C.G.S. § 116B-78 did not apply to its business plan, as it related to business practices at the time of the request. The State Treasurer was not obligated to ignore the existence of information discovered during an investigation that led to an enforcement action, it would have been a waste of administrative resources to issue a ruling on a matter that would likely be judicially determined in pending litigation, and the State Treasurer was not required to allow Equity Solutions to preempt the enforcement proceedings by requesting a declaratory ruling.

4. Administrative Law—request for declaratory ruling—hypothetical question

In a case which involved a company (Equity Solutions) that assisted people with the recovery of surplus funds from foreclosure sales, the State Treasurer could properly determine that good cause existed to deny Equity Solutions' request for a declaratory ruling as to potential future agreements because material terms were missing from the contracts. Any ruling would have been purely hypothetical.

Appeal by petitioner from order entered 11 September 2012 by Judge W. Osmond Smith, III in Wake County Superior Court. Heard in the Court of Appeals 9 September 2013.

Ward and Smith, P.A., by A. Charles Ellis and Joseph A. Schouten, for petitioner-appellant.

Attorney General Roy Cooper, by Assistant Solicitor General Gary R. Govert, Special Deputy Attorney General K.D. Sturgis, and Special Deputy Attorney General M.A. Kelly Chambers, for respondent-appellee.

GEER, Judge.

Petitioner Equity Solutions of the Carolinas, Inc. appeals from the trial court's order affirming the North Carolina Department of State Treasurer's decision to deny Equity Solutions' request for a declaratory ruling and dismissing Equity Solutions' petition for judicial review of the State Treasurer's decision. On appeal, while Equity Solutions contends that the trial court applied an improper standard of review when reviewing the State Treasurer's decision to deny Equity Solutions' request for a declaratory ruling, we hold that the trial court employed the correct standard of review.

Further, Equity Solutions contends that the State Treasurer in fact issued a "*de facto* ruling" against Equity Solutions on the merits that the trial court should have reviewed. We disagree. The State Treasurer never rendered a declaratory ruling, and the merits of Equity Solutions' arguments were, therefore, not before the trial court and are not before this Court.

Facts

Equity Solutions is a business that identifies the possible existence of surplus funds remaining from foreclosure sales and contacts people

or entities it believes are entitled to some or all of the surplus funds. After then entering into an agreement with the owner of the surplus funds, Equity Solutions files before the clerk of the superior court holding the surplus funds a special proceeding pursuant to N.C. Gen. Stat. § 1-339.71 (2013).

Equity Solutions asserts that it attached to its "Petition for Surplus Funds" initiating the special proceeding a copy of its agreement with the owner of the surplus funds, which purports to assign the right to the funds to Equity Solutions in exchange for payment of a percentage of the amount of the funds. If the clerk of court allows the petition and directs that the foreclosure surplus funds be paid to Equity Solutions, then Equity Solutions pays the owner of the surplus funds the portion of the funds designated in the agreement.

The State has contended that Equity Solutions' business constitutes the recovery of abandoned and unclaimed property governed by the Unclaimed Property Act, N.C. Gen. Stat. §§ 116B-51 *et seq*. (2013). N.C. Gen. Stat. § 116B-78(a1) (2013) governs an "agreement . . . if its primary purpose is to locate, deliver, recover, or assist in the recovery of property that is distributable to the owner or presumed abandoned." Agreements covered by the statute must be in writing and include certain disclosures regarding the property at issue and the fee being charged for the property's recovery. N.C. Gen. Stat. § 116B-78(b). The statute also generally limits the maximum allowable property finder's fee. N.C. Gen. Stat. § 116B-78(b)(6). A violation of the provisions of the statute constitutes an unfair or deceptive act or practice in violation of N.C. Gen. Stat. § 75-1.1 (2013). N.C. Gen. Stat. § 116B-78(g).

On 11 May 2010, the Attorney General of North Carolina issued an investigative demand to Equity Solutions seeking documents relating to Equity Solutions' business, claiming that it involved the recovery of abandoned or unclaimed property located in North Carolina. In April and June 2010, Allen Martin, an employee of the State Treasurer's office, sent letters to two county clerks of court stating that the agreements between Equity Solutions and its clients filed by Equity Solutions in superior court violated N.C. Gen. Stat. § 116B-78 and were, therefore, invalid.

On 18 June 2010, Equity Solutions submitted a letter to the State Treasurer describing its business model and attaching two sets of business documents that Equity Solutions claimed were representative of those it had used in the past and those it planned to use in the future. Equity Solutions requested that the State Treasurer issue "a declaratory ruling as to the applicability of N.C. Gen. Stat. § 116B-78 to the

assignment agreements which Equity Solutions has employed in its business operations in the past . . . and the agreements it intends to employ in the future . . . ."

On 13 August 2010, the State, through the Attorney General and the State Treasurer, filed an action against Equity Solutions and several individuals alleging claims for racketeering, unfair and deceptive practices, and unjust enrichment (the "enforcement action"). The complaint alleged that the assignment agreements referred to in Equity Solutions' request for a declaratory ruling were, in fact, "sham agreements" that were not supported by consideration. The complaint further alleged that Equity Solutions' business model included inducing "the apparent owners to agree to pay defendant Equity Solutions a 'contingency fee' and other fees and charges" that exceed the statutory maximum property finder's fee under the Unclaimed Property Act and that those contingency fee agreements constituted the real agreements between the parties. The complaint alleged that since the contingency fee agreements did not comply with N.C. Gen. Stat. § 116B-78 for several reasons, they were unenforceable.

On 16 August 2010, the State Treasurer sent a letter to Equity Solutions declining to issue a declaratory ruling and stating:

> Pursuant to N.C.G.S. § 150B-4 and 20 N.C.A.C. 01F 0205, I have determined that the issuance of a declaratory ruling is undesirable. Therefore, the Petitioner's request is denied for the following reasons:
>
> 1. The subject matter of the request is the subject of active litigation in Wake County between Equity Solutions, the State Treasurer, and the Attorney General.
>
> 2. The request seeks application of N.C.G.S. § 116B-78 to an "Absolute Assignment" and "Conveyance Agreement" without disclosing the full factual setting surrounding these documents, including any representations made to induce the apparent owner to sign these documents, and the manner in which any of these documents may have been used in court proceedings seeking disbursement of unclaimed or abandoned funds.
>
> 3. The request involves disputed issues of material fact, including whether the "Absolute

Assignment" represents an actual agreement between the parties.

4. The proposed "Purchase Agreement" offers only blank spaces for its material terms, such as the amount of the finder's fee, and the amount of the costs and expenses to be borne by the apparent owner.

On 15 September 2010, Equity Solutions filed a petition for judicial review of the State Treasurer's denial of its request for a declaratory ruling. On 15 October 2010, the State Treasurer moved to dismiss Equity Solutions' petition for judicial review pursuant to Rules 12(b)(1), (6), and (7) of the Rules of Civil Procedure.

On 18 October 2010, the defendants in the enforcement action, including Equity Solutions, filed an answer, motions to dismiss, a motion for Rule 11 sanctions, counterclaims against the State, and a third-party complaint against State Treasurer Janet Cowell, individually. On 17 November 2010, the State filed a motion to dismiss the third-party complaint against the State Treasurer, individually, and the counterclaims against the State. On 11 September 2012, the trial court entered an order denying the defendants' motions to dismiss in the enforcement action, but granting the State's motion to dismiss the counterclaims and third-party complaint in the enforcement action.

Also on 11 September 2012, the trial court entered an order affirming the State Treasurer's decision to deny Equity Solutions' request for a declaratory ruling and dismissing Equity Solutions' petition for judicial review. Equity Solutions timely appealed the order to this Court.

Discussion

"This Court's review of 'a superior court order entered upon review of an administrative agency decision, . . . [involves a] two-fold task: (1) [to] determine whether the trial court exercised the appropriate scope of review and, if appropriate; (2) [to] decide whether the court did so properly.' " *In re Denial of NC IDEA's Refund of Sales*, 196 N.C. App. 426, 433-34, 675 S.E.2d 88, 94-95 (2009) (quoting *Cnty. of Wake v. N.C. Dep't of Env't & Natural Res.*, 155 N.C. App. 225, 233–34, 573 S.E.2d 572, 579 (2002)).

Here, Equity Solutions sought a declaratory ruling from the State Treasurer pursuant to N.C. Gen. Stat. § 150B-4(a) (2009).[1] N.C. Gen. Stat.

1. The General Assembly enacted a revised version of N.C. Gen. Stat. § 150B-4 in 2011 N.C. Sess. Law ch. 398, § 56 (effective June 18, 2011). Given the date of Equity

§ 150B-4(a) provides in relevant part: "On request of a person aggrieved, an agency shall issue a declaratory ruling as to the validity of a rule or as to the applicability to a given state of facts of a statute administered by the agency or of a rule or order of the agency, except when the agency for good cause finds issuance of a ruling undesirable."

After the State Treasurer denied Equity Solutions' request for a declaratory ruling, Equity Solutions petitioned the trial court for judicial review. The trial court's review of the State Treasurer's denial was governed by N.C. Gen. Stat. § 150B-51(b) (2009).[2] N.C. Gen. Stat. § 150B-51(b) provides that the trial 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.

"During judicial review of an administrative agency's final decision, the substantive nature of each assignment of error dictates the standard of review." *In re Denial*, 196 N.C. App. at 432, 675 S.E.2d at 94. The first four grounds for reversing or modifying an agency's decision provided in N.C. Gen. Stat. § 150B-51(b) give rise to questions of law and the trial court, accordingly, reviews arguments based on those grounds de novo. *In re Denial*, 196 N.C. App. at 433, 675 S.E.2d at 94. However, the fifth and sixth grounds for reversing or modifying an agency's decision set

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Solutions' request for a declaratory ruling and the State Treasurer's denial of Equity Solutions' request, the revised version of N.C. Gen. Stat. § 150B-4 does not apply to this case.

2. The General Assembly's revised version of N.C. Gen. Stat. § 150B-51, enacted in 2011 N.C. Sess. Law ch. 398, § 27, applies "to contested cases commenced on or after" 1 January 2012 and, therefore, does not apply to this case. *Id.*

out in N.C. Gen. Stat. § 150B-51(b) involve factual inquiries, and the trial court, therefore, reviews arguments on those two grounds under the whole record test. *In re Denial*, 196 N.C. App. at 433, 675 S.E.2d at 94.

"Under the *de novo* standard of review, the trial court 'consider[s] the matter anew[] and freely substitut[es] its own judgment for the agency's[.]' " *Id.* (quoting *Mann Media, Inc. v. Randolph Cnty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002)). "In conducting 'whole record' review, the trial court must examine all the record evidence in order to determine whether there is substantial evidence to support the agency's decision." *Id.* "When the trial court reviews an administrative decision under the whole record test, it 'may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*.' " *Id.* (quoting *Watkins v. N.C. State Bd. of Dental Exam'rs*, 358 N.C. 190, 199, 593 S.E.2d 764, 769 (2004)).

In this case, in reviewing the State Treasurer's decision, the trial court concluded (1) that "[t]here is substantial, competent evidence to support each of the State Treasurer's reasons for denying the requested declaratory rulings" and (2) that "[t]he State Treasurer's reasons for denying the request, each standing alone or taken together, constitute 'good cause' for the denial." The trial court further observed that "material factual representations in, and omissions from, Equity Solutions' request . . . presented merely hypothetical circumstances and did not provide 'a given state of facts' regarding genuine and legally valid 'assignments' about which Equity Solutions is presently 'aggrieved' within the meaning of N.C. Gen. Stat. § 150B-4."

The order additionally found:

> Regarding Equity Solutions' proposed new "Purchase Contracts," on the face of the record and Equity Solutions' pleadings, these documents are simply possible future contracts, with several material terms not provided by Equity Solutions. Therefore, Equity Solutions is not presently "aggrieved" regarding the possible validity or invalidity of those potential contracts under N.C. Gen. Stat. § 116B-78 (whatever their material terms may end up being), and the State Treasurer therefore could not have lawfully rendered an advisory opinion on that matter as well.

The trial court ultimately concluded that "[t]he State Treasurer's denial of the request for declaratory rulings was not arbitrary, capricious, an

abuse of discretion, or otherwise in violation of substantive or procedural law."

I

[1] Equity Solutions first argues that the trial court erred in limiting its decision to whether the State Treasurer properly declined to give a declaratory ruling. Equity Solutions argues that the trial court should have reached — and this Court should reach — the merits of Equity Solutions' request for a declaratory ruling and hold that N.C. Gen. Stat. § 116B-78 does not apply to its business model. Equity Solutions contends that the State Treasurer issued a "*de facto* ruling" denying its request on the merits since the State Treasurer "made [her] position very clear, through [her] Complaint in the State Action and by the actions taken by Allen Martin and the Attorney General's Office, that Section 116B-78 *did* apply to Equity Solutions' business arrangements."

However, investigative actions by the Attorney General's Office, letters from a State Treasurer's Office employee to two county clerks of court, and allegations in the enforcement action complaint do not individually or collectively constitute a formal decision by a State agency that is legally binding on Equity Solutions and the State Treasurer, as a formal declaratory ruling would be. *See* N.C. Gen. Stat. § 150B-4(a) ("A declaratory ruling is binding on the agency and the person requesting it unless it is altered or set aside by the court."). Since there has been no declaratory ruling that actually binds Equity Solutions and the State Treasurer, there was no decision on the merits before the trial court or this Court.

Equity Solutions nonetheless contends that because its request sought a decision on a solely legal issue — whether N.C. Gen. Stat. § 116B-78 applies to its business model as described in its request to the State Treasurer — and because this Court reviews legal issues de novo, this Court can properly reach the merits of the request for a declaratory ruling. Equity Solutions' argument appears to confuse the concept of a trial de novo, in which a court conducts a " 'new trial on the entire case . . . as if there had been no trial in the first instance[,]' " *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 661 n.3, 599 S.E.2d 888, 895 n.3 (2004) (quoting *Black's Law Dictionary* 1512 (7th ed. 1999)), with the concept of a de novo standard of review "that applies when the trial court acts, as here, in the capacity of an appellate court and reviews an agency decision for errors of law and procedure," *id.* (internal citation omitted). Again, because there has been no agency decision on the

merits in this case, there is no decision to which this Court can apply a de novo standard of review.

We, therefore, offer no opinion on the merits of Equity Solutions' request for a declaratory ruling. That issue was not before the trial court and is not before this Court.

II

[2] Equity Solutions next argues that the trial court applied an improper standard of review when reviewing the petition from the State Treasurer's denial of its request for a declaratory ruling. We disagree.

When reviewing the issue whether an agency had good cause to decline to issue a declaratory ruling, the reviewing court must first determine whether the record supports the reasons given by the agency for declining to issue a ruling. *Cf. Charlotte-Mecklenburg Hosp. Auth. v. Bruton*, 145 N.C. App. 190, 191-92, 550 S.E.2d 524, 525-26 (2001) (setting out pertinent facts in record supporting agency's determination that good cause existed to decline to issue declaratory ruling). If the reviewing court determines there is record support for the reason given by the agency, the reviewing court then reviews de novo whether the reason given constitutes good cause to decline to issue a ruling. *Id.* at 193, 550 S.E.2d at 526.

Here, the trial court's order detailed the facts in the record supporting the State Treasurer's reasons for declining to issue a ruling. The court then determined that there was "substantial, competent evidence to support each of the State Treasurer's reasons for denying the requested declaratory rulings." Thus, the order demonstrates that the court properly reviewed the record and found there was evidence supporting the State Treasurer's reasons for declining to issue a ruling.

After determining that the record supported the reasons given by the State Treasurer, the trial court further concluded, in a separately numbered conclusion of law, that the "State Treasurer's reasons for denying the request, each standing alone or taken together, constitute 'good cause' for the denial." Given this language, we hold that the trial court properly applied a de novo standard of review to the issue whether the reasons set forth by the trial court constituted good cause to decline to issue a ruling. We note, however, that the better practice is for a trial court reviewing an agency decision to expressly state which standard of review it has applied to each distinct issue decided in an order.

Equity Solutions nonetheless points to the language in the trial court's order stating that the court "reviewed the whole record to

determine whether there is substantial, competent evidence to support the denial of the request for declaratory rulings" in support of its contention that the court erroneously applied the whole record test rather than de novo review. However, this language supports our determination that the trial court first properly concluded that the record contained evidence supporting the State Treasurer's reasons for declining to issue a ruling, and it does not demonstrate that the trial court erroneously applied whole record review to the legal issue before the trial court: whether the reasons given by the State Treasurer constituted good cause. The trial court, therefore, applied the proper standard of review.

III

[3] Equity Solutions next contends that even if the trial court did apply the proper standard of review, the court erred in affirming the State Treasurer's determination that good cause existed to decline to issue a ruling. We, like the trial court, review this issue de novo. *Id.*

The first three reasons given by the State Treasurer in declining to issue a ruling were (1) that the subject matter of the request was "the subject of active litigation in Wake County between Equity Solutions, the State Treasurer, and the Attorney General"; (2) that the request failed to disclose the "full factual setting" of Equity Solutions' business model, including "any representations made to induce the apparent owner" to sign the conveyance and assignment agreements used by Equity Solutions; and (3) that the request involved "disputed issues of material fact," including whether the assignment agreements represented "an actual agreement between the parties." The trial court agreed.

Equity Solutions has conceded on appeal that this declaratory ruling action concerns "the same subject matter" as the enforcement action and that the issues presented in its request for a declaratory ruling will probably be decided in the course of the enforcement action. In addition, in its request for a declaratory ruling, Equity Solutions did not disclose that it entered into contingency fee agreements with the owners of surplus funds prior to entering into subsequent conveyance and assignment agreements. Equity Solutions later filed an affidavit of its vice president in superior court that acknowledged its practice of entering into an initial "Authority to Represent & Contingency Fee Agreement" with the apparent owners. It was these contingency fee agreements that the Attorney General and State Treasurer contended, in the enforcement action, constituted, in whole or in part, the actual agreements between the parties.

This Court has previously held that an agency had good cause to decline to issue a ruling where the agency had already issued a ruling on the same matter and issuing a second ruling would, therefore, constitute a waste of administrative resources. *Id.* at 192-93, 550 S.E.2d at 526-27; *Catawba Mem'l Hosp. v. N.C. Dep't of Human Res.*, 112 N.C. App. 557, 563, 436 S.E.2d 390, 393 (1993). Although the State Treasurer had not, in this case, already decided the issue presented in Equity Solutions' request, we believe that the principle underlying the holdings in *Charlotte-Mecklenburg Hospital* and *Catawba Memorial Hospital* is also applicable here.

It would be a waste of administrative resources for the State Treasurer to issue a ruling on a matter that would likely be judicially determined during the course of pending litigation between Equity Solutions and the State Treasurer. This is particularly true since the trial court ruling on the issues in the enforcement action will have the benefit of a fully developed factual record following discovery, while Equity Solutions' request to the State Treasurer presented only an alleged factual basis for a ruling that did not mention the contingency fee agreements that Equity Solutions has since admitted were part of its business model. Indeed, the State Treasurer was aware that the request submitted by Equity Solutions presented the State Treasurer with an inadequate record from which to issue a ruling.

Equity Solutions, however, asserts that the State Treasurer should not be allowed to "manufacture 'good cause' to avoid issuing a ruling" by, as here, "filing a complaint on the same subject matter *after* receiving the request for a ruling." However, the record shows that the Attorney General and State Treasurer were openly investigating Equity Solutions at least one month prior to the time of Equity Solutions' request and that Equity Solutions was aware of that investigation. We do not believe that the Attorney General or the State Treasurer's discretion in determining when to file their enforcement action resulting from months of investigation should have been curtailed because of the timing of Equity Solutions' decision to request a declaratory ruling from the State Treasurer. The State Treasurer was not required to allow Equity Solutions to preempt the enforcement proceedings by requesting a declaratory ruling.

With respect to the issue of a factual dispute, Equity Solutions contends that the "sole purpose" of N.C. Gen. Stat. § 150B-4 is for an agency to aid an aggrieved person by applying the statute to a "given set of facts." Equity Solutions asserts that "[t]he agency is not charged with a broader authority to investigate the 'given set of facts' to determine

whether other legal issues exist or to otherwise assess the legal validity or viability of the proposed transaction . . . ."

However, in *Catawba Memorial Hospital*, this Court determined that the set of facts provided by the petitioner in its belated request for a declaratory ruling would not control where the agency had already closed the record of a contested case hearing on the same matter, and the agency had determined, in the contested case, the actual facts to be inconsistent with the set of facts provided in the petitioner's request. *See* 112 N.C. App. at 563, 436 S.E.2d at 393 ("Whereas a declaratory ruling by definition involves the application of a statute or agency rule to a given state of facts, the facts regarding [the petitioner's] proposed surgical services were established by the record in the contested case."). Similarly, here, the State Treasurer was not obligated to ignore the existence of the information regarding this same matter that had been discovered during the investigation that led to the enforcement action when deciding whether good cause existed to decline to issue a ruling on Equity Solutions' request.

Equity Solutions also cites *Hope-A Women's Cancer Ctr., P.A. v. N.C. Dep't of Health & Human Servs.*, 203 N.C. App. 276, 691 S.E.2d 421 (2010), *disc. review denied*, 365 N.C. 87, 706 S.E.2d 254 (2011), in support of its argument that its failure to provide a more factually complete request for a declaratory ruling did not constitute good cause for the State Treasurer to decline to issue a ruling. However, the Court in *Hope* did not address whether circumstances existed, in that case, that would have constituted good cause to deny issuing a ruling since the agency, in fact, issued a ruling on the relevant request. *Id.* at 279, 282, 691 S.E.2d at 423, 425. *Hope* does not, therefore, support Equity Solutions' argument.

We, accordingly, hold that the State Treasurer, and the trial court, properly determined that good cause existed to decline to issue a ruling on Equity Solutions' request, based on the first three grounds asserted by the State Treasurer, as it related to the business practices already used by Equity Solutions at the time of the request.

[4] The issue remains whether the State Treasurer had good cause to decline to issue a ruling as to the business practice that Equity Solutions planned to employ in the future. With respect to the agreements that Equity Solutions' request stated that it proposed to use, the State Treasurer declined to issue a ruling regarding the propriety of those agreements because "[t]he proposed 'Purchase Agreement[]' offer[ed] only blank spaces for its material terms, such as the amount of the finder's fee, and the amount of the costs and expenses to be borne by the

apparent owner." As the State Treasurer noted, the purchase agreement Equity Solutions claimed it planned to use in the future had blank spaces for material terms, including the percentage of the surplus funds which would be paid by Equity Solutions to the apparent owner in exchange for the apparent owner's selling Equity Solutions the owner's right to the funds — in other words, Equity Solutions' fee.

In *Diggs v. N.C. Dep't of Health & Human Servs.*, 157 N.C. App. 344, 345, 578 S.E.2d 666, 667 (2003), the petitioner was a custodial parent of three children and had previously been the caretaker of her niece, and she petitioned an agency for a declaratory ruling that the practice of calculating the debt owed to the State when an adult caretaker accepts payment of benefits under certain government programs was invalid. In order to demonstrate that she was a "person aggrieved" under N.C. Gen. Stat. § 150B-4, the petitioner set out "two hypothetical situations involving whether child support paid by the biological father of petitioner's children . . . pursuant to a court order for the support of their biological children may be taken by the State for reimbursement of earlier and separate public assistance grants made solely for the use and benefit of petitioner's niece . . . ." *Diggs*, 157 N.C. App. at 347, 578 S.E.2d at 668.

On appeal, this Court held that the petitioner was not entitled to a declaratory ruling since she was "not presently aggrieved." *Id.* at 348, 578 S.E.2d at 668. The Court reasoned that the petitioner's request presented merely hypothetical scenarios that were not certain to occur and, therefore, the petitioner could not show that her legal rights had, in some way, been impaired. *Id.*, 578 S.E.2d at 668-69. Because the agency had, nonetheless, issued a ruling on the petitioner's request, the court further held that "the request was ineffective to trigger the issuance of a declaratory ruling, and the declaratory ruling has no effect, binding or otherwise, on petitioner . . . ." *Id.* at 349, 578 S.E.2d at 669.

Similarly, here, the State Treasurer could properly determine that good cause existed to deny Equity Solutions' request for a declaratory ruling as to the potential future agreements since, given the missing material terms of the contracts, any ruling on whether the contracts were in compliance with N.C. Gen. Stat. § 116B-78 would be purely hypothetical. Notably, the allegations in the enforcement action that the agreements actually used by Equity Solutions in the past violated N.C. Gen. Stat. § 116B-78 are focused, in part, on allegations that the fees charged by Equity Solutions exceeded the statutory limit for property finder's fees. Yet, the proposed purchase agreements did not specify the amount of the finder's fee.

In the absence of a proposed agreement setting out all terms material to the request for a declaratory ruling, the State Treasurer did not have authority to issue a ruling because, as in *Diggs*, she was presented only with a hypothetical scenario, and Equity Solutions could not show that any of its legal rights were legally impaired. We, therefore, hold that the State Treasurer had good cause to decline to issue a ruling as to the future purchase agreements based upon the fourth ground provided by the State Treasurer.

In sum, the trial court applied the proper standard of review and did not err in affirming the State Treasurer's decision to decline to issue a ruling on Equity Solutions' request based upon all four grounds provided by the State Treasurer. Consequently, we affirm the trial court's order.

Affirmed.

Chief Judge MARTIN and Judge STROUD concur.

DOUGLAS SCOTT FILE, EMPLOYEE-PLAINTIFF
v.
NORANDAL USA, INC., EMPLOYER, ACE USA, CARRIER, DEFENDANTS

No. COA13-977

Filed 18 February 2014

Workers' Compensation—occupational disease—brain cancer—denial of claim

The Industrial Commission did not err in a workers' compensation case by denying plaintiff's claim alleging that his close proximity to high energy machinery at his workplace exposed him to radiation that contributed to the development of brain cancer. The Commission properly considered all of the evidence, made findings of fact that were supported by competent evidence, appropriately accepted evidence of causation, and correctly found that the claim was not compensable. Further, the evidence supported the Commission's finding that plaintiff did not have a greater exposure to radiation than the general public.

Appeal by Douglas Scott File from Opinion and Award entered 10 May 2013 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 January 2014.

Wallace and Graham, P.A., by Edward L. Pauley, for plaintiff.

Hedrick, Gardner, Kincheloe, & Garofalo, L.L.P., by Paul C. Lawrence, Zachary V. Renegar, and M. Duane Jones, for defendants.

ELMORE, Judge.

Douglas Scott File (plaintiff) appeals from the North Carolina Industrial Commission's denial of his claim for workers' compensation benefits pursuant to N.C. Gen. Stat. § 97-53. After careful review, we affirm the Opinion and Award of the Industrial Commission.

I. Background

On 28 April 2005, plaintiff filed a Form 18 "Notice of Accident to Employer and Claim of Employee" alleging that his close proximity to high energy machinery at his workplace exposed him to radiation that contributed to the development of brain cancer. Plaintiff's employer, Norandal USA, Inc. (defendant), denied plaintiff's claim. Thereafter, the claim was assigned for hearing before the Industrial Commission, and Deputy Commissioner J. Brad Donovan denied plaintiff's claim for workers' compensation benefits. Plaintiff subsequently appealed to the Full Commission (the Commission). In an Opinion and Award filed 10 May 2013, the Commission ruled that plaintiff failed to "prove that he suffer[ed] from an occupational disease compensable within the meaning of N.C. Gen. Stat. § 97-53(13)" and denied his claim. Plaintiff now appeals to this Court from the Commission's 10 May 2013 Opinion and Award.

II. Facts

Defendant is a company that owns an aluminum plant (the plant) in Salisbury and manufactures aluminum foil. Plaintiff worked for defendant in the plant from 1984 until 2007. Between the years of 1984 and 1994, plaintiff was employed as a mill operator. The mill is a machine that transforms a thick sheet of aluminum to a thin sheet of aluminum foil. The plant has five mills in operation, and each utilizes a "Measurex" device (collectively "the devices"), which sends x-ray beams through an aluminum sheet to measure its thickness. Once the thickness is determined, the device sends the data to a computer that modifies the mill rolls to make sure the aluminum thickness is appropriate.

Plaintiff worked in the maintenance department from 1994 until his retirement in 2007. Plaintiff was diagnosed with brain cancer in 2000, had surgery to remove a benign tumor, and returned to work after six

months. The brain cancer returned in 2004, and once again plaintiff missed time from work to treat his condition. Plaintiff returned to work, only to be diagnosed with brain cancer again and develop a malignant tumor in 2007. Due to complications from the third surgery, plaintiff was unable to perform his occupational responsibilities and he retired on disability.

During plaintiff's employment, his work duties included preventative maintenance and repairs on the mills, which exposed him to the devices on a daily basis. Plaintiff testified that he worked within three to five feet of the devices while they were running. This was corroborated by Terry Walker, a colleague of plaintiff's, who performed the same job responsibilities. Plaintiff called Dr. Max Costa and Dr. David Schwartz as expert witnesses. They both opined that plaintiff's employment increased his risk of developing brain cancer due to radiation exposure from the devices.

The devices were manufactured by Honeywell Corporation, and Robert Kesslick was Honeywell's on-site technician during plaintiff's employment. Kesslick maintained the devices' control system and made repairs on the devices. Defendant called Kesslick as a witness, and he testified that the closest an individual could get to Mills #2 and #3 was five feet and ten feet on Mills #1 and #4. He further stated that throughout his years testing the devices, he "never received a dosage of any recordable level of radiation." Defendant tendered Dr. Robert Dixon as an expert in x-ray physics with subspecialties in radiation shielding and radiation dosimetry. He concluded that any radiation exposure to employees from the devices would be "virtually non-existent[.]"

At the hearing, plaintiff introduced the on-site device safety manual provided by Honeywell to defendant, an "Ionizing Radiation Fact Book[,]" and the "BEIR Study" to contradict defendant's witnesses about the devices' radiation levels and the effects of radiation on humans.

III. Analysis

a.) Consideration of Evidence

Plaintiff argues that the Commission erred by disregarding documentary evidence introduced by him during Dixon's testimony and Kesslick's deposition. We disagree.

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) (citation omitted) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). This Court conducts a *de novo* review of the Commission's conclusions of law. *Starr v. Gaston Cnty. Bd. of Educ.*, 191 N.C. App. 301, 305, 663 S.E.2d 322, 325 (2008).

Before the Commission makes findings of fact, it "must consider and evaluate all of the evidence. Although the Commission may choose not to believe the evidence after considering it, it may not wholly disregard or ignore competent evidence." *Lineback v. Wake Cnty. Bd. of Comm'rs*, 126 N.C. App. 678, 680, 486 S.E.2d 252, 254 (1997) (citations omitted). Where the Commission's Opinion and Award fails to indicate that it considered testimony "relevant to the exact point in controversy," it "must be vacated, and the proceeding remanded to the Commission to consider all the evidence, make definitive findings and proper conclusions therefrom, and enter the appropriate order." *Jenkins v. Easco Aluminum Corp.*, 142 N.C. App. 71, 78-79, 541 S.E.2d 510, 515 (2001) (citation and quotation omitted). However, we have specifically declined to "require findings of fact regarding a report" used during depositions. *Hunt v. N. Carolina State Univ.*, 194 N.C. App. 662, 666, 670 S.E.2d 309, 312 (2009).

In *Hunt*, the plaintiff argued on appeal that the Commission erroneously ignored an opinion of an expert "by not considering or mentioning [the expert's] vocational report" in its Opinion and Award. *Id.* at 664-65, 670 S.E.2d at 311. The expert did not testify at the hearing in front of the Commission or by deposition. *Id.* at 665, 670 S.E.2d at 312. Instead, two doctors relied on the expert's report during their testimony. *Id.* at 666, 670 S.E.2d at 312. Because the Commission made specific findings as to the doctors' testimony, this Court ruled that "[i]t was not necessary for the Commission to make further findings regarding the documents used during the depositions." *Id.*

Similarly, plaintiff in this case introduced the safety manual, the "Ionizing Radiation Fact Book[,]" and the "BEIR Study" to contradict Dixon's testimony about the devices' radiation levels and the effects of radiation on humans. The safety manual was also discussed in detail during Kesslick's deposition. While the Commission did not specifically mention the documents in its Opinion and Award, it made detailed findings about both Dixon's and Kesslick's testimony. Thus, similar to *Hunt*, the Commission was not required to make specific findings of fact related to the documents used during the testimony of Dixon and Kesslick. *See Bryant v. Weyerhaeuser Co.*, 130 N.C. App. 135, 139, 502

S.E.2d 58, 62 (1998) (quotation omitted) (acknowledging that while the Commission "did not specifically find that it was rejecting the evidence" in support of appellant's contention, "[s]uch negative findings are not required"); *See also Graham v. Masonry Reinforcing Corp. of Am.*, 188 N.C. App. 755, 763, 656 S.E.2d 676, 682 (2008)("[T]he Commission is not required to make findings as to each fact presented by the evidence[.]").

b.) Findings of Fact

Next, plaintiff argues that the trial court erred in making findings of fact that were not supported by any competent evidence. Specifically, plaintiff challenges findings of fact #11, #13, #6, and #8. We disagree.

"If there is any competent evidence supporting the Commission's findings of fact, those findings will not be disturbed on appeal despite evidence to the contrary." *Graham*, 188 N.C. App. at 758, 656 S.E.2d at 679.

First, plaintiff challenges part of finding #11, which states:

> 11. It is Dr. Dixon's opinion that plaintiff was not exposed to radiation above background levels, and therefore, that his employment did not contribute to his development of brain cancer.

Dixon testified that he measured the level of background radiation (radiation levels found in the general environment) outside the facility and next to the device while it emitted x-rays. Dixon stated that he "couldn't detect anything above the natural background when [he] made the measurement." He "got as close as [he] could with [his] detector, got nothing, and also made a measurement where people would normally be around called the bridle area." He "looked around and nothing could be found." Based on his measurements, Dixon concluded that "the chances of any radiation above — significantly above background would be very, very small, if any. I couldn't measure any. And I got a lot closer than [plaintiff] would normally be if he were exposed. . . . In other words, it couldn't have produced this cancer." Clearly, finding #11 is supported by competent evidence.

Plaintiff also challenges finding #13, which states, in relevant part,

> 13. Dr. Costa's opinion that plaintiff's employment with defendant-employer placed him at an increased risk of developing brain cancer and that it was a significant contributing factor to his development of brain cancer was predicated on a belief that there was a "general leakage

> of radiation" in the area in which plaintiff worked, an assumption which is not borne out by the testimony of Mr. Kesslick and Dr. Dixon. With regard to increased risk specifically, Dr. Costa testified, "I imagine those machines give off radiation so I think that that [sic] would be higher than the general public . . ." When Dr. Costa testified on cross examination that "these machines tend to leak all over, . . ." he offered no basis in fact for that opinion and went on to concede that he is not an expert in x-ray leaks. Dr. Costa did not know how much or how far radiation is emitted from the Honeywell/Measurex devices, nor did he have any information about how much radiation above background, if any, plaintiff might have been exposed to in his employment.

Costa admitted that he did not know "the amount of any radiation that [plaintiff] might have been exposed to[.]" He testified that plaintiff's "exposure would be greater than the general population" if plaintiff was merely "near" the machine. However, he conceded that he did not know how far the devices emit radiation. Costa then testified that "[t]hese machines tend to leak all over, so, you know, I just assumed that there was a . . . general leakage of radiation[.]" This assertion contravenes Dixon's testimony that the "x-ray tube is shielded against leakage" and has a "very little chance of scatter." Furthermore, Costa stated that he is "not an expert" with regard to radiation machines or x-ray leaks. The aforementioned testimony indicates that the Commission's finding #13 is supported by competent evidence.

Plaintiff also contests a portion of finding #6, which states:

> 6. During operation, it is impossible for any employee to get within ten feet of the Measurex device on Mills #1 and #4. An employee can get no closer than five feet to the sensor on Mills #2, #3, and #5.

Kesslick testified that a person "couldn't get within ten feet" of the device on Mill #1 or #4. While Mills #2, #3, and #5 were in operation, Kesslick stated that an individual "couldn't get within five feet of [them]." Thus, Kesslick's testimony provided the Commission with competent evidence to support finding #6.

Plaintiff also argues that the Commission's finding of fact #8 is not supported by competent evidence because it relies on Kesslick's radiation badge readings to conclude that no excessive radiation levels emitted in the work area. Specifically, plaintiff argues that when Kesslick

worked on the devices, the mills would be shut down such that the devices were unable to emit any radiation. Finding of fact #8 states:

> 8. [a]ccording to Mr. Kesslick, the Honeywell/Measurex control system has multiple safety interlock devices that function to prevent the x-ray from emitting radiation when not in operation. These safety devices were checked at six-month intervals and were never found to be malfunctioning. Mr. Kesslick also wore a radiation dosimetry badge designed to record any type of radiation dose. During the time he worked at defendant-employer's plant, Mr. Kesslick never received a dosage of any recordable level of radiation.

The testimony indicates that Kesslick has worked for Honeywell-Measurex for twenty-five years as a maintenance control technician. One of his responsibilities is to conduct radiation safety tests on the devices every six months. When Kesslick performed these tests, he always wore a radiation badge, which is "designed to record any type of radiation dose[.]" During the testing, Kesslick ensured that amber lights were illuminated on the device. This indicated that power was supplied to the x-ray tube, allowing the device to produce x-rays. He also verified that a red lamp was on, which indicated that the device's shutter was open. When the shutter was open, x-rays were emitted. Thus, when Kesslick tested the devices, they emitted x-rays, and his radiation badge could appropriately measure any radiation exposure. Accordingly, the Commission's find of fact #8 is supported by competent evidence.

c.) Causation

Next on appeal, plaintiff argues that the Commission erroneously relied on Dixon's testimony that plaintiff's "employment did not contribute to his development of brain cancer." We disagree.

Plaintiff bears the burden of establishing the elements of an occupational disease pursuant to N.C. Gen. Stat. § 97–53(13). *Gibbs v. Leggett & Platt, Inc.*, 112 N.C. App. 103, 107, 434 S.E.2d 653, 656 (1993). Plaintiff must show that the occupational disease is

> (1) characteristic of persons engaged in the particular trade or occupation in which the claimant is engaged; (2) not an ordinary disease of life to which the public generally is equally exposed with those engaged in that particular trade or occupation; and (3) there must be a causal connection between the disease and the [claimant's] employment.

Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983) (citations and quotation omitted). Thus, the Commission must, in part, determine that plaintiff's employment "exposed him to a greater risk of [disease] than members of the public generally[.]" *Perry v. Burlington Indus., Inc.*, 80 N.C. App. 650, 655, 343 S.E.2d 215, 219 (1986). Only once such a determination is made can the Commission decide whether the "occupational exposure substantially contributed to development of the disease." *Id.* Once the issue of causation is reached, if an "injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury." *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980) (citation omitted).

Here, plaintiff mischaracterizes Dixon's testimony as an opinion about causation rather than testimony about the level of exposure to radiation. Plaintiff urges us to rule, pursuant to *Click*, that Dixon's testimony was not competent evidence because he is not an expert in providing medical causation testimony. However, we find *Click* inapplicable in the present case because the crux of Dixon's testimony related to whether plaintiff's exposure to the devices subjected him to higher radiation levels than the general public. Through this lens, Dixon's testimony was competent within the subject matter of his expertise in "x-ray and physics with subspecialties in radiation shielding and radiation dosimetry." The Commission reflected Dixon's exposure testimony in its finding of fact, which states "[i]t is Dr. Dixon's opinion that plaintiff was not exposed to radiation above background levels, and therefore, that his employment did not contribute to his development of brain cancer." Since the Commission found that plaintiff was not exposed to radiation above background levels, it did not need to rely on testimony as to whether such exposure substantially contributed to the development of plaintiff's brain cancer. Thus, the Commission properly relied on Dixon's testimony and concluded that plaintiff's theory was mere "speculation of exposure which is not supported by the greater weight of the record" and "[p]laintiff has failed to show that his condition . . . was caused by exposure to radiation."

d.) Compensable Claim

Plaintiff argues that contrary to the Commission's decision, he met his burden as to each element for a compensable claim under N.C. Gen. Stat. § 97–53(13). Specifically, plaintiff argues that there was no competent evidence to support the Commission's finding that plaintiff was not at an increased risk for the development of cancer from radiation exposure compared to the general public. We disagree.

A plaintiff is not required to prove that he was exposed to a specific quantity of a harmful agent to present a compensable claim. *Gay v. J.P. Stevens & Co., Inc.*, 79 N.C. App. 324, 333-34, 339 S.E.2d 490, 496 (1986). However, a plaintiff must establish that "the substance [to which he was exposed] is one to which the worker has a greater exposure on the job than does the public generally, either because of the nature of the substance itself or because the concentrations of the substance in the workplace are greater than concentrations to which the public generally is exposed." *Matthews v. City of Raleigh*, 160 N.C. App. 597, 605-06, 586 S.E.2d 829, 836-37 (2003) (citation omitted).

Here, the Commission considered all the evidence and assigned weight to each piece of evidence in making its final determination. Defendant's evidence showed the following: 1.) the device's shield against radiation leakage and has an extremely low probability of scatter; 2.) employees cannot stand within five feet of the devices; 3.) employees have no direct contact with the devices; 4.) Kesslick never received a measurable level of radiation during his testing of the devices; and 5.) the radiation levels next to the devices were no different than normal background radiation that is found in all environments. Furthermore, the Commission found that plaintiff did not meet his burden, not because of his own failure to quantify the degree of exposure, but because the Commission "plac[ed] greater weight on the testimony of [Kesslick] and . . . Dr. Dixon" than plaintiff's witnesses. Thus, the evidence supports the Commission's finding that plaintiff did not have a greater exposure to radiation than the general public.

IV. Conclusion

In sum, the Commission properly considered all of the evidence, made findings of fact that were supported by competent evidence, appropriately accepted evidence of causation, and correctly found that the claim was not compensable. Thus, we affirm the 10 May 2013 Opinion and Award of the Commission.

Affirmed.

Judge McGEE and Judge HUNTER, Robert C., concur.

IN RE A.N.B.

[232 N.C. App. 406 (2014)]

IN THE MATTER OF A.N.B.

No. COA13-554

Filed 18 February 2014

1. Appeal and Error—appealability—voluntary admission of minor to psychiatric treatment facility—capable of repetition yet evading review exception—public policy exception

Orders of voluntary admission of a minor to a twenty-four hour psychiatric treatment facility can only be for a maximum length of ninety days under N.C.G.S. § 122C-224.3(g), and thus, appeals from these orders fall into the "capable of repetition, yet evading review" exception. Because of the State's great interest in preventing unwarranted admission of juveniles into these treatment facilities, appeal from these orders also falls into the public policy exception.

2. Costs—expert witnesses—denial of motion for funds—failure to meet burden of proof

The trial court did not abuse its discretion in a voluntary admission of a minor to a twenty-four hour psychiatric treatment facility case by denying respondent minor's motion for funds to hire an expert witness. Respondent failed to meet his burden to convince the trial court that there existed some valid concern or reason to provide funds for an "independent" expert.

3. Witnesses—expert witnesses—better qualified than jury to form opinion

The trial court did not abuse its discretion in a voluntary admission of a minor to a twenty-four hour psychiatric treatment facility case by qualifying two witnesses as experts in the fields of counseling and diagnosis and treatment of mental illness and substance abuse in minors. There was substantial evidence presented on *voir dire* to support the trial court's determination that they were better qualified than the jury to form an opinion on the particular subject of their testimony.

4. Evidence—expert opinion—continued inpatient treatment

The trial court did not err in a voluntary admission of a minor to a twenty-four hour psychiatric treatment facility case by overruling respondent minor's objections to an expert's opinion that respondent was in need of continued inpatient treatment. There was evidence presented that the expert relied on her own assessments of

respondent, as well as evidence such as patient history and group clinical discussion, reasonably relied upon by similar experts.

5. Mental Illness—minor's continued admission to twenty-four hour psychiatric treatment facility—no medical evaluation required

Respondent minor's continued admission to a twenty-four hour psychiatric treatment facility was lawful even though respondent contended that the record did not show he was evaluated by a physician within twenty-four hours. There was insufficient record evidence that medical care was an integral component of treatment at the facility, and there was no statutory requirement that respondent receive a medical examination within twenty-four hours of admission. Respondent made no argument that the requirements of N.C.G.S. § 122C-211(d) were violated.

6. Evidence—failure to make ultimate findings of fact—voluntary admission of minor to twenty-four hour psychiatric treatment facility

The trial court erred in a voluntary admission of a minor to a twenty-four hour psychiatric treatment facility case by failing to make a finding that respondent minor was in need of further treatment at the facility. The required ultimate findings of fact must be made explicitly.

Appeal by Respondent from order entered 29 October 2012 by Judge Don W. Creed, Jr. in District Court, Moore County. Heard in the Court of Appeals 5 November 2013.

Attorney General Roy Cooper, by Assistant Attorney General M. Elizabeth Guzman, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Hannah Hall, for Respondent-Appellant.

McGEE, Judge.

A.N.B. ("Respondent"), a minor, was voluntarily admitted by his guardian to Jackson Springs Treatment Facility ("Jackson Springs") on 2 October 2012. Jackson Springs is a secure twenty-four hour, or inpatient, psychiatric treatment facility. Respondent was assessed by Freida Green ("Green") on 2 October 2012, and Green filed an evaluation for admission on the following day. Respondent was appointed counsel

on 4 October 2012. Respondent moved for funds to hire a psychiatric expert on 8 October 2012. A hearing was conducted on 15 October 2012 to determine if the trial court concurred in Respondent's admission to Jackson Springs. At the 15 October hearing, the trial court deferred ruling on Respondent's 8 October 2012 motion for funds, and continued the matter until 29 October 2012 to allow time for Respondent's attorney to interview experts from Jackson Springs. At the 29 October 2012 hearing, the trial court denied Respondent's 8 October 2012 motion for funds to hire an expert. Two witnesses from Jackson Springs, Green and Leah McCallum ("McCallum"), were allowed to testify as experts at the hearing. The trial court, by order entered 29 October 2012, concurred with the voluntary admission of Respondent to Jackson Springs, and Respondent's admission at Jackson Springs was continued for ninety days, the statutory maximum. Respondent appeals.

Appealability

[1] The order continuing Respondent's admission at Jackson Springs for ninety days was entered on 29 October 2012. This meant the order expired in late January 2013. Because Respondent is not currently being affected by the 29 October 2012 order, this appeal would normally be dismissed as moot. " 'The general rule is that an appeal presenting a question which has become moot will be dismissed.' " *Thomas v. N.C. Dept. of Human Resources*, 124 N.C. App. 698, 705, 478 S.E.2d 816, 820 (1996) (citation omitted). However, there are exceptions to this general rule, including "that courts may review cases that are otherwise moot but that are 'capable of repetition, yet evading review[,]' " and "that the court has a 'duty' to address an otherwise moot case when the 'question involved is a matter of public interest.' " *Id.* at 705, 478 S.E.2d at 820-21 (citations omitted).

Because orders of voluntary admission of a minor to a twenty-four hour psychiatric treatment facility can only be for a maximum length of ninety days, N.C. Gen. Stat. § 122C-224.3(g) (2013), we hold that appeal from orders of voluntary admission of a minor to a twenty-four hour facility falls into the "capable of repetition, yet evading review" exception. Because of the State's great interest in preventing unwarranted admission of juveniles into these treatment facilities, we further hold that appeal from these orders falls into the public policy exception. This appeal is properly before us.

I.

The issues on appeal are whether: (1) the trial court erred by denying Respondent's motion for funds to hire an expert, (2) the trial

court abused its discretion by qualifying two witnesses as experts, (3) the trial court erred by allowing certain expert opinion testimony, (4) Respondent's continued admission to Jackson Springs was contrary to law because a medical examination should have been performed on Respondent within twenty-four hours of admission and, (5) the trial court's findings of fact were insufficient to support its conclusions and order.

II.

[2] Respondent first argues that the trial court abused its discretion in denying Respondent's motion for funds to hire an expert witness. We disagree.

> It is State policy to encourage voluntary admissions to facilities. It is further State policy that no individual shall be involuntarily committed to a 24-hour facility unless that individual is mentally ill or a substance abuser and dangerous to self or others. All admissions and commitments shall be accomplished under conditions that protect the dignity and constitutional rights of the individual.

N.C. Gen. Stat. § 122C-201 (2013). Commitment hearings are civil proceedings. *In re Underwood*, 38 N.C. App. 344, 347, 247 S.E.2d 778, 780 (1978). Voluntary admission of minors is covered by N.C. Gen. Stat. § 122C-221:

> Except as otherwise provided in this Part, a minor may be admitted to a facility if the minor is mentally ill or a substance abuser and in need of treatment. Except as otherwise provided in this Part, the provisions of G.S. 122C-211 shall apply to admissions of minors under this Part. Except as provided in G.S. 90-21.5, in applying for admission to a facility, in consenting to medical treatment when consent is required, and in any other legal procedure under this Article, the legally responsible person shall act for the minor.

N.C. Gen. Stat. § 122C-221(a) (2013).

Respondent was provided counsel as required. "Within 48 hours of receipt of notice that a minor has been admitted to a 24-hour facility wherein his freedom of movement will be restricted, an attorney shall be appointed for the minor in accordance with rules adopted by the Office of Indigent Defense Services." N.C. Gen. Stat. § 122C-224.1(a) (2013). N.C. Gen. Stat. § 7A-498.3 states:

> (a) The Office of Indigent Defense Services shall be responsible for establishing, supervising, and maintaining a system for providing legal representation and related services in the following cases:
>
> (1) Cases in which an indigent person is subject to a deprivation of liberty or other constitutionally protected interest and is entitled by law to legal representation;
>
> . . . .
>
> (3) Any other cases in which the Office of Indigent Defense Services is designated by statute as responsible for providing legal representation.
>
> . . . .
>
> (c) In all cases subject to this Article, appointment of counsel, determination of compensation, appointment of experts, and use of funds for experts and other services related to legal representation shall be in accordance with rules and procedures adopted by the Office of Indigent Defense Services.

N.C. Gen. Stat. § 7A-498.3 (2013). "In . . . non-criminal cases, the court may approve fees for the service of expert witnesses, investigators, and others providing services related to legal representation in accordance with all applicable IDS rules and policies." NC R IND DEF SERV Rule 1.10 (Amended eff. Dec. 9, 2011). There are no statutes or rules that more definitively state when fees for expert witnesses should be granted in a situation such as the one before us. The decision to grant or deny fees in the present case was discretionary. *In re Hardy*, 294 N.C. 90, 97, 240 S.E.2d 367, 372 (1978) (citation omitted) ("Ordinarily when the word 'may' is used in a statute, it will be construed as permissive and not mandatory.").

Similar language from Article 36 of Chapter 7A of our General Statutes, "Entitlement of Indigent Persons Generally," has been held to be discretionary:

> N.C. Gen. Stat. § 7A–454 (2003) states, "[f]ees for the services of an expert witness for an indigent person and other necessary expenses of counsel shall be paid by the State in accordance with rules adopted by the Office of Indigent Defense Services." . . . . [I]t is in the trial court's discretion whether to grant requests for expenses to retain an expert witness or to conduct a deposition.

In re D.R., 172 N.C. App. 300, 304-05, 616 S.E.2d 300, 304 (2005) (citations omitted). In the Article 36, Chapter 7A context, our Courts have held that funds for an expert witness should be provided when there is a reasonable likelihood that the expert witness will be of material assistance in the preparation of the defense, or that without such help it is probable that the respondent or defendant will not receive a fair trial. *D.R.*, 172 N.C. App. at 305, 616 S.E.2d at 304-05 (holding trial court did not abuse its discretion in denying funds for expert witness in termination of parental rights hearing). " 'Mere hope or suspicion that favorable evidence is available is not enough to require that such help be provided.' " *Id.* at 305, 616 S.E.2d at 304 (citations omitted). We hold the same rule applies in a voluntary commitment proceeding of a minor.

However, what is required to show that an expert witness will be of material assistance in the preparation of the defense or, that without such help, it is probable the respondent will not receive a fair hearing, is different in a commitment hearing than it is in a criminal trial or a termination of parental rights proceeding. *See Addington v. Texas*, 441 U.S. 418, 429, 431, 60 L. Ed. 2d 323, 333 (1979) ("the initial inquiry in a civil commitment proceeding is very different from the central issue in either a delinquency proceeding or a criminal prosecution").

This Court has held that a minor, facing commitment pursuant to the voluntary commitment statute, is entitled to due process protections. *In re Long*, 25 N.C. App. 702, 706-07, 214 S.E.2d 626, 628-29 (1975). "It is not disputed that a child, in common with adults, has a substantial liberty interest in not being confined unnecessarily for medical treatment and that the state's involvement in the commitment decision constitutes state action under the Fourteenth Amendment." *Parham v. J. R.*, 442 U.S. 584, 600, 61 L. Ed. 2d 101 (1979) (citations omitted).

When addressing constitutional issues involving a child and his parent or guardian, the law starts with the presumption that the parent or guardian acts with the best interests of the child as the primary goal. *Parham v. J. R.*, 442 U.S. 584, 602, 61 L. Ed. 2d 101, 117 (1979). However:

> As with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point; the incidence of child neglect and abuse cases attests to this. That some parents "may at times be acting against the interests of their children" . . . creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests. The statist notion that governmental power should supersede parental authority in

> *all* cases because *some* parents abuse and neglect children is repugnant to American tradition.
>
> Nonetheless, we have recognized that a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized.

Id. at 602-03, 61 L. Ed. 2d at 119.

> In defining the respective rights and prerogatives of the child and parent in the voluntary commitment setting, we conclude that our precedents permit the parents to retain a substantial, if not the dominant, role in the decision, absent a finding of neglect or abuse, and that the traditional presumption that the parents act in the best interests of their child should apply. We also conclude, however, that the child's rights and the nature of the commitment decision are such that parents cannot always have absolute and unreviewable discretion to decide whether to have a child institutionalized.

Id. at 604, 61 L. Ed. 2d at 120.

Due process requires an inquiry by a "neutral factfinder" to determine whether constitutionally adequate procedures are followed before a child is voluntarily committed based upon his guardian's affirmations. *See Id.* at 606, 61 L. Ed. 2d at 121. The Second Circuit has held:

> We conclude that the due process clause does not require a state to provide an indigent patient with a consulting psychiatrist in every commitment or retention proceeding. Such a psychiatrist would perform two functions: (i) providing testimony favorable to non-commitment or release if the psychiatrist's professional judgment so warrants; and (ii) providing assistance to counsel in preparing the patient's case even where the doctor favors commitment or retention. These functions are not of sufficient import to implicate due process in every proceeding.

Goetz v. Crosson, 967 F.2d 29, 34-35 (2d Cir. 1992). The Second Circuit further stated that it has "no basis for assuming that psychiatrists associated with the state have a bias toward institutionalization." *Id.*

> Unlike civil or criminal proceedings, the interests of the parties to a civil commitment proceeding are not entirely

> adverse. The state's concerns are to provide care to those whose mental disorders render them unable to care for themselves and to protect both the community and the individuals themselves from dangerous manifestations of their mental illness. A major component of the state policy is thus the protection of mentally ill individuals[.]

Id. at 34-35 (citation omitted). We agree with and adopt the Second Circuit's reasoning. The analysis may change somewhat when the mental health professional or professionals, testifying as experts, do not work for the State. As an example, it is conceivable, though certainly not expected, that self-serving financial motivations could affect the neutrality of mental health professionals working for private institutions. Institutional pressure to "fill the beds" in an effort to maximize profits is a hypothetical possibility. However, we do not mean to suggest that a different standard should apply to private institutions, only that there might be different concerns for the trial court to consider, depending on the facts of any particular admission.

In the present case, it appears Respondent was voluntarily committed to a private institution. It was Respondent's burden to convince the trial court that there existed some valid concern or reason to provide funds for an "independent" expert.

> [T]he Due Process Clause does not grant an indigent individual subject to involuntary commitment an absolute right to the assistance of a consulting psychiatrist. Such a right might arise in a case in which counsel has shown a compelling fact-specific need for the assistance of a psychiatrist to educate counsel in particular aspects of a case.

Id. at 36. In the present case, Respondent argues funding for an additional expert was necessary because that expert might find something objectionable in the determinations of the experts who did testify, might help Respondent's attorney better understand the testimony of the other experts, or might provide expert testimony that continued admission was not appropriate. However, Respondent failed to provide the trial court with any evidence from which it could have determined that the motivations of the testifying experts were suspect, or that there existed some particularized reason, outside reasons that would be found in a standard case, why this case required funding an expert for Respondent. Because we hold that Respondent has failed to meet this burden, we further hold that the trial court did not abuse its discretion in refusing to order fees for an expert witness for Respondent. Respondent fails

to meet his burden of showing an abuse of discretion. This argument is without merit.

III.

[3] In Respondent's second argument, he contends the trial court abused its discretion by qualifying McCallum and Green as experts. We disagree.

> It is well-established that trial courts must decide preliminary questions concerning the qualifications of experts to testify or the admissibility of expert testimony. When making such determinations, trial courts are not bound by the rules of evidence. In this capacity, trial courts are afforded "wide latitude of discretion when making a determination about the admissibility of expert testimony." Given such latitude, it follows that a trial court's ruling on the qualifications of an expert or the admissibility of an expert's opinion will not be reversed on appeal absent a showing of abuse of discretion.

Howerton v. Arai Helmet, Ltd., 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004) (citations omitted). "Opinion testimony given by an expert witness is competent when evidence is presented showing 'that, through study or experience, or both, the witness has acquired such skill that he is better qualified than the jury to form an opinion on the particular subject of his testimony.'" *Cannizzaro v. Food Lion*, 198 N.C. App. 660, 666, 680 S.E.2d 265, 269 (2009) (citation omitted).

McCallum testified on *voir dire* that, at the time of the hearing, that she taught mental health "diagnosis and assessment courses" at an accredited online program in mental health counseling. She also testified that she worked for Jackson Springs, conducting their "comprehensive clinical assessments for all the new admissions[.]" She had a master's degree in counseling, a post-master's degree in advanced school counseling and a doctorate in counselor education and supervision. McCallum had worked in the mental health and substance abuse field since 1996, and had the Licensed Professional Counselor credential, which allowed her to diagnose and treat mental illness patients in North Carolina. McCallum had also been a school counselor for ten years, had previously worked in a day treatment facility, working mostly with children and adolescents, and had been conducting comprehensive clinical assessments since 2009.

Green testified on *voir dire* that she was currently employed with Pinnacle Management Group ("Pinnacle"), which owned Jackson Springs, and that she was providing clinical oversight for the patients in the facilities owned by Pinnacle. Green testified she had a master's degree in clinical counseling, had the Licensed Professional Counselor license for North Carolina, and the Licensed Clinical Addiction Specialist license for North Carolina, which allowed her to diagnose and treat substance abuse, and that she was nationally accredited as a clinical counselor. She testified that she had "provided treatment in mental health and substance abuse for families, adults and children in both public and private sectors and in several different settings to include inpatient treatment as well as the judicial system." Green testified that she had been providing these services since 1988, "but in a professional capacity since the year 2001."

We hold that there was substantial evidence presented on *voir dire* to support the trial court's determination that McCallum and Green were "better qualified than the jury to form an opinion on the particular subject of [their] testimony." *Cannizzaro*, 198 N.C. App. at 666, 680 S.E.2d at 269 (citation omitted). The trial court did not abuse its discretion in allowing McCallum and Green to testify as experts in the fields of counseling and diagnosis and treatment of mental illness and substance abuse in minors. This argument is without merit.

IV.

[4] In Respondent's third argument, he contends the trial court erred in overruling his objections to McCallum's opinion that Respondent was in need of continued inpatient treatment because McCallum relied on conclusions of the clinical staff and failed to form an independent opinion. We disagree.

> N.C.R. Evid. 703 provides that the facts or data upon which an expert bases her opinion may be those (1) perceived by the witness or (2) made known to her at or before the hearing. The expert's opinion may even be based upon facts not otherwise admissible in evidence, provided the facts so considered are of the type reasonably relied upon by similar experts in forming opinions on the subject.

State v. Black, 111 N.C. App. 284, 293, 432 S.E.2d 710, 716-17 (1993) (citation omitted). "We emphasize that the expert must present an independent opinion obtained through his or her own analysis and not merely 'surrogate testimony' parroting otherwise inadmissible statements."

State v. Ortiz-Zape, __ N.C. App. __, __, 743 S.E.2d 156, 162 (2013) (citation omitted).

McCallum interviewed and assessed Respondent when Respondent was first admitted to Jackson Springs. McCallum testified concerning her approach to her 23 May 2012 interview of Respondent:

> [B]efore I look at the records I like to talk with the client, and I always tell my clients the record is what other people say about you. I want to hear from you because you're the best source of information.
>
> Once I interview the child and get a current bio, psycho-social history, I then proceed to the record and start looking for inconsistencies maybe in what the client said and what's in the record and begin to sort of sort through all of that.
>
> Sometimes I have access to a case manager or a legal guardian. And I have noted in here that I did not speak with his legal guardian. I think I called and got an answering machine and did not ever speak with his legal guardian directly.
>
> So I depended on notes, the case manager, and my interview with him to come up with a diagnosis and to determine that he did in fact meet the criteria for PRTF placement.

McCallum assessed Respondent again on 2 October 2012. McCallum was asked: "And based on your examinations of [Respondent], especially the one most recently conducted in October, is it your expert opinion that he continues to suffer from a mental illness?" McCallum answered: "It is." She testified concerning the criteria required to admit a person into a twenty-four hour treatment facility and was asked on cross-examination: "But you have to look at him individually and decide whether or not he meets [the criteria for inpatient treatment][.]" McCallum replied: "Absolutely. And I did." McCallum testified that she also consulted with the clinical staff at least monthly, and factored their discussions into her diagnoses. We hold there was evidence presented that McCallum relied on her own assessments of Respondent, as well as evidence such as patient history and group clinical discussion, reasonably relied upon by similar experts. *Black*, 111 N.C. App. at 293, 432 S.E.2d at 716-17. This argument is without merit.

V.

[5] In Respondent's fourth argument, he contends Respondent's continued admission to Jackson Springs was unlawful because "the record does not show that [Respondent] was evaluated by a physician within twenty-four hours" as required by law. We disagree.

Respondent contends this issue is controlled by N.C. Gen. Stat. § 122C-211(c), which states in part: "Any individual who voluntarily seeks admission to a 24-hour facility in which medical care is an integral component of the treatment shall be examined and evaluated by a physician of the facility within 24 hours of admission." N.C. Gen. Stat. § 122C-211(c) (2013). However, there is not sufficient record evidence that Jackson Springs is a "facility in which medical care is an integral component of the treatment." Respondent argues that he receives prescription medication at Jackson Springs, but we do not believe the use of prescription medications at Jackson Springs is sufficient to define Jackson Springs as such a facility. N.C.G.S. § 122C-211(d) states in part:

> Any individual who voluntarily seeks admission to any 24-hour facility, other than one in which medical care is an integral component of the treatment, shall have a medical examination within 30 days before or after admission if it is reasonably expected that the individual will receive treatment for more than 30 days or shall produce a current, valid physical examination report, signed by a physician, completed within 12 months prior to the current admission.

N.C.G.S. § 122C-211(d). Because there is insufficient record evidence that medical care is an integral component of treatment at Jackson Springs, there was no statutory requirement that Respondent receive a medical examination within twenty-four hours of admission. Respondent makes no argument that the requirements of N.C.G.S. § 122C-211(d) have been violated in the present case. This argument is without merit.

VI.

[6] In Respondent's final argument, he contends the trial court erred in failing to make a finding that Respondent was in need of further treatment at Jackson Springs. We agree.

Hearings for review of voluntary admission of minors to twenty-four hour treatment facilities are covered by N.C. Gen. Stat. § 122C-224.3, which states in relevant part:

> (f) For an admission to be authorized beyond the hearing, the minor must be (1) mentally ill or a substance abuser and (2) in need of further treatment at the 24-hour facility to which he has been admitted. Further treatment at the admitting facility should be undertaken only when lesser measures will be insufficient. It is not necessary that the judge make a finding of dangerousness in order to support a concurrence in the admission.
>
> (g) The court shall make one of the following dispositions:
>
> (1) If the court finds by clear, cogent, and convincing evidence that the requirements of subsection (f) have been met, the court shall concur with the voluntary admission and set the length of the authorized admission of the minor for a period not to exceed 90 days[.]

N.C. Gen. Stat. § 122C-224.3 (2013). When reviewing a prior but substantially similar statute, this Court held that making the required findings is mandatory, and that failure to do so will result in reversal of the commitment order. *In re Hiatt*, 45 N.C. App. 318, 319, 262 S.E.2d 685, 686 (1980) ("We hold that under G.S. 122-56.7(b) before a court can concur with a voluntary commitment for an incompetent, it must find that the incompetent is mentally ill or an inebriate and is in need of further treatment at the treatment facility.").

In the case before us, the trial court found in the 29 October 2012 order that Respondent was mentally ill, and that no less restrictive measures would be sufficient. The trial court then "authorize[d] the continued admission of . . . [R]espondent[.]" However, the trial court failed to specifically find that Respondent was in need of further treatment. Under the conclusions section of the AOC-SP-913M form, "Order Voluntary Admission of Minor," there are boxes to indicate whether the trial court "concludes" that the minor is "mentally ill," a "substance abuser," "in need of continued treatment at the 24-hour facility to which [Respondent] has been admitted," and whether "less restrictive measures would not be sufficient." The trial court checked the boxes indicating that Respondent was mentally ill and that less restrictive measures would not be sufficient. The trial court failed to check a box to indicate that Respondent either was or was not in need of continued treatment at Jackson Springs. Though need for further treatment is a reasonable inference of the findings and conclusions made, we hold that the required ultimate findings of fact must be made explicitly and reverse the order

of the trial court. *Id.* at 319-20, 262 S.E.2d at 686. We realize there will be no practical effect to Respondent in reversal of the 29 October 2012 order, as the order is no longer in effect, but this Court held in similar circumstances in *Hiatt* that failure to make the required findings results in reversal. *See Id.*

Reversed.

Judges BRYANT and STROUD concur.

IN THE MATTER OF P.Q.M.

No. COA13-899

Filed 18 February 2014

1. Sentencing—juvenile delinquency—prior history level—consolidation of offenses—calculation

The trial court did not err in a juvenile delinquency case when it calculated a juvenile's prior delinquency history level and in entering a Level 3 rather than a Level 2 disposition. The trial court was not required to consolidate the offenses for disposition, and the consolidation requirement of N.C.G.S. § 7B-2508(h) did not apply.

2. Juveniles—delinquency—prior adjudication

The trial court did not improperly consider a larceny of a firearm offense as a prior adjudication under N.C.G.S. § 7B-2507(a) in a juvenile delinquency case. Although the dispositional hearing for the offenses was not held until 4 March 2013, the adjudication, which was similar to a conviction, of his larceny of a firearm offense occurred prior to the 4 March 2013 disposition hearing and entry of the disposition.

3. Sentencing—juvenile delinquency—Level 3 disposition—extraordinary needs—no abuse of discretion

The trial court did not err in a juvenile delinquency case by ordering a Level 3 disposition even though the juvenile contended that the evidence supporting extraordinary needs warranted a Level 2 disposition. The juvenile failed to show that the trial court's decision to impose a Level 3 disposition amounted to an abuse of discretion.

IN RE P.Q.M.

[232 N.C. App. 419 (2014)]

Appeal by juvenile from order entered 7 March 2013 by Judge Ralph C. Gingles in Gaston County District Court. Heard in the Court of Appeals 8 January 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Gerald K. Robbins, for the State.

James N. Freeman, Jr., for juvenile-appellant.

CALABRIA, Judge.

Juvenile P.Q.M. ("Paul")[1] appeals from a disposition order committing him to a youth development center ("YDC") of the North Carolina Division of Juvenile Justice for a minimum of six months and a maximum term not to exceed his eighteenth birthday. We affirm.

I. Background

Paul was adjudicated delinquent on 29 November 2012 in Cleveland County for robbery with a dangerous weapon ("RWDW"), a Class D felony pursuant to N.C. Gen. Stat. § 14-87 (2011). On 5 January 2012, Paul was adjudicated delinquent for, *inter alia*, communicating threats pursuant to N.C. Gen. Stat. § 14-277.1 (2011), a Class 1 misdemeanor. On 3 December 2012, Paul was again adjudicated delinquent in Gaston County for, *inter alia*, larceny of a firearm, a Class H felony pursuant to N.C. Gen. Stat. § 14-72 (2011). The Cleveland County adjudication for RWDW was transferred to Gaston County and all of Paul's adjudications were calendared for disposition in Gaston County.

The disposition hearing on 4 March 2013 in Gaston County District Court included all three of Paul's adjudications. The trial court found three delinquency history points, a high delinquency level, that Paul had previously been adjudicated delinquent for two or more felony offenses, and that he had previously been committed to a YDC. Therefore, the trial court entered a Level 3 disposition. On 7 March 2013, the trial court entered an amended Level 3 disposition ("the amended order"). In both the original and the amended order, the trial court found that Paul's most serious offense was RWDW. The amended order indicated that Paul had been adjudicated for a violent or serious offense pursuant to N.C. Gen. Stat. § 7B-2508 (2011). In the amended order, the trial court again found,

1. We use this pseudonym to protect the juvenile's privacy and for ease of reading.

pursuant to N.C. Gen. Stat. § 7B-2507(a) (2011), Paul had three delinquency history points: two for the larceny of a firearm offense, and one for the communicating threats offense. The trial court imposed a Level 3 disposition. However, the amended order added Paul's adjudication for communicating threats on 5 January 2012 and deleted Paul's 3 December 2012 Breaking and Entering ("B & E") offense.[2]

The trial court amended Paul's delinquency history level and found that Paul had a medium delinquency level rather than a high delinquency level. The trial court ordered Paul committed to a YDC for a minimum of six months and a maximum term not to exceed his eighteenth birthday. Paul appeals only the amended order. Paul's adjudications are undisputed.

II. Standard of Review

On appeal, this Court "will not disturb a trial court's ruling regarding a juvenile's disposition absent an abuse of discretion, which occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *In re J.B.*, 172 N.C. App. 747, 751, 616 S.E.2d 385, 387 (2005) (citation and quotation marks omitted). "Although the trial court has discretion under N.C. Gen. Stat. § 7B-2506 [] in determining the proper disposition for a delinquent juvenile, the trial court shall select a disposition that is designed to protect the public and to meet the needs and best interests of the juvenile[.]" *In re Ferrell*, 162 N.C. App. 175, 176, 589 S.E.2d 894, 895 (2004) (citations omitted). Accordingly, the court "shall select the most appropriate disposition both in terms of kind and duration for the delinquent juvenile." N.C. Gen. Stat. § 7B-2501(c) (2011).

III. Consolidation of Offenses

[1] Paul argues that the trial court erroneously calculated his prior history level and erred in entering a Level 3 rather than a Level 2 disposition. In addition to the improper calculation, Paul contends the trial court failed to properly consolidate his offenses and also failed to consider his extraordinary needs that warranted a Level 2 rather than a Level 3 disposition. We disagree.

---

2. Paul's B & E and larceny of a firearm offenses are both Class H felonies adjudicated in the same session of juvenile court, and pursuant to N.C. Gen. Stat. § 7B-2507(d) (2011), only one of these offenses could be included in the disposition. ("For purposes of determining the delinquency history level, if a juvenile is adjudicated delinquent for more than one offense in a single session of district court, only the adjudication for the offense with the highest point total is used.")

After a juvenile is adjudicated delinquent, the level of punishment depends on "the juvenile's delinquency history and the type of offense committed." *In re Robinson*, 151 N.C. App. 733, 737, 567 S.E.2d 227, 229 (2002). The court determines the delinquency history level "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[.]" N.C. Gen. Stat. § 7B-2507(a) (2011). "If a juvenile is adjudicated of more than one offense during a session of juvenile court, the court shall consolidate the offenses . . . and impose a single disposition . . . . The disposition shall be specified for the class of offense and delinquency history level of the most serious offense." N.C. Gen. Stat. § 7B-2508(h) (2011). "'Session' is not defined within the definitions section of the Juvenile Code, but is defined in case law as that which designates the typical one-week assignment to a particular location during the term." *In re D.R.H.*, 194 N.C. App. 166, 169, 668 S.E.2d 919, 921 (2008) (citation and quotation marks omitted).

In the instant case, Paul was adjudicated delinquent on three different days in three different calendar weeks in three different sessions. Paul was first adjudicated on 5 January 2012 for communicating threats pursuant to N.C. Gen. Stat. § 14-277.1 (2011), a Class 1 misdemeanor. On Thursday, 29 November 2012, he was adjudicated delinquent for RWDW, a Class D felony pursuant to N.C. Gen. Stat. § 14-87 (2011), in Cleveland County, which is in Judicial District 27B. On Monday, 3 December 2012, Paul was adjudicated delinquent for larceny of a firearm, a Class H felony pursuant to N.C. Gen. Stat. § 14-72 (2011), in Gaston County, which is in Judicial District 27A.

The trial court clearly transferred Paul's RWDW adjudication from Cleveland County to Gaston County for disposition. The Cleveland County adjudication order states that "[t]he legal file and disposition are to be transferred to Gaston County." Merely transferring an adjudication to another county for disposition does not require the court to consolidate offenses that were adjudicated in separate sessions of juvenile court in a disposition. In addition, the order on its face did not require or order the Cleveland County adjudication consolidated with the Gaston County adjudication for disposition. Therefore, the trial court was not required to consolidate the offenses for disposition, and the consolidation requirement of N.C. Gen. Stat. § 7B-2508(h) does not apply.

IV. Prior Adjudication

[2] Paul further contends that since his adjudication for larceny of a firearm was on 3 December 2012 and for RWDW was on 29 November 2012,

the trial court improperly considered the larceny of a firearm offense as a prior adjudication. Since the Juvenile Code does not provide a definition of "prior adjudication," we turn to criminal law in order to resolve this procedural issue. This Court has compared and analogized criminal statutes with juvenile statutes to resolve procedural issues. *See In re D.R.H.*, 194 N.C. App. at 170, 668 S.E.2d at 921 (analogizing proof of prior juvenile adjudications with proof of prior criminal convictions); *see In re Griffin*, 162 N.C. App. 487, 493, 592 S.E.2d 12, 16 (2004) (analogizing juvenile petitions with felony indictments). "A person has a prior conviction when, on the date a criminal judgment is entered, the person being sentenced has been previously convicted of a crime[.]" N.C. Gen. Stat. § 15A-1340.11(7) (2011). *See also* N.C. Gen. Stat. § 15A-1331(b) (2011) ("For the purpose of imposing sentence, a person has been convicted when he has been adjudged guilty or has entered a plea of guilty or no contest.").

In the instant case, Paul was adjudicated for RWDW on Thursday, 29 November 2012. The following week, on Monday, 3 December 2012, in a different session of court from the prior week, Paul was adjudicated for larceny of a firearm. Although the dispositional hearing for Paul's offenses was not held until 4 March 2013, the adjudication, which is similar to a conviction, of Paul's larceny of a firearm offense occurred prior to the 4 March 2013 disposition hearing and entry of the disposition. Therefore, the trial court properly considered Paul's larceny of a firearm offense as a "prior adjudication" pursuant to N.C. Gen. Stat. § 7B-2507(a) (2011).

V. Level 3 Disposition

[3] Paul also argues the trial court erred in ordering a Level 3 disposition when evidence supporting extraordinary needs warranted a Level 2 disposition. We disagree.

"Based upon the delinquency history level determined pursuant to G.S. § 7B-2507, and the offense classification for the current offense, N.C. Gen. Stat. § 7B-2508 then dictates the dispositional limits available." *In re Allison*, 143 N.C. App. 586, 597, 547 S.E.2d 169, 176 (2001). When the dispositional chart prescribes a Level 3 disposition, the trial court shall commit the adjudicated juvenile to a YDC. N.C. Gen. Stat. § 7B-2508(e) (2011). "However, a court may impose a Level 2 disposition rather than a Level 3 disposition if the court submits written findings on the record that substantiate extraordinary needs on the part of the offending juvenile." *Id.* "[C]hoosing between two appropriate dispositional levels is within the trial court's discretion. Absent an abuse of

discretion, we will not disturb the trial court's choice. An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *In re Robinson*, 151 N.C. App. at 737, 567 S.E.2d at 229 (citation and quotation marks omitted). In choosing a disposition,

> the court shall select a disposition that is designed to protect the public and to meet the needs and best interests of the juvenile, based upon:
>
> (1) The seriousness of the offense;
>
> (2) The need to hold the juvenile accountable;
>
> (3) The importance of protecting the public safety;
>
> (4) The degree of culpability indicated by the circumstances of the particular case; and
>
> (5) The rehabilitative and treatment needs of the juvenile indicated by a risk and needs assessment.

N.C. Gen. Stat. § 7B-2501(c) (2011). This Court has previously upheld a Level 3 disposition for a juvenile who had no prior delinquency history, had a low risk of re-offending, and a low needs assessment. *In re N.B.*, 167 N.C. App. 305, 310-11, 605 S.E.2d 488, 491-92 (2004). The juvenile in *N.B.* had been adjudicated delinquent for assault with a deadly weapon inflicting serious injury, and the trial court had the authority to impose either a Level 2 or Level 3 disposition pursuant to N.C. Gen. Stat. § 7B-2508(f). *Id.* at 311, 605 S.E.2d at 492. This Court held that the juvenile failed to show the trial court's decision to impose a Level 3 disposition amounted to an abuse of discretion. *Id.*

In the instant case, since Paul was previously adjudicated delinquent, the trial court determined Paul's delinquency history level to be medium. With a violent offense and a medium delinquency level, a Level 3 disposition is required pursuant to N.C. Gen. Stat. § 7B-2508(f) (2011). However, the court had the discretion to impose either a Level 2 disposition with written findings of Paul's extraordinary needs or a Level 3 disposition. N.C. Gen. Stat. § 7B-2508(e) (2011).

The trial court heard evidence from several witnesses involved in Paul's case to determine which level of disposition to impose. Specifically, the court heard evidence from Juvenile Court Counselor Stephania Sarvis ("Sarvis"); Dr. Stephen Strezlecki ("Dr. Strezlecki"), a psychologist working with juveniles involved with the court system; family therapist Logan Cohen ("Cohen"); and mental health professional

Rory Barrington ("Barrington"). The court also considered and incorporated by reference a predisposition report, a risk assessment, and a needs assessment. Paul had been evaluated in the assessments as presenting a medium risk and having medium needs.

At the disposition hearing, Sarvis testified that Paul was suspended from the alternative school he had been attending when the alternative school was notified of the pending RWDW offense. Sarvis recommended a Level 3 disposition and commitment to a YDC where Paul could resume his schooling immediately, receive individual, group, and family counseling, and remain on any currently prescribed medications. According to Sarvis, the counseling available at the YDC enables juvenile offenders to "understand the seriousness of their offense [sic] and they can get a perspective from the victim's point of view[.]" She also indicated that placement with a YDC would provide Paul with his treatment needs, be rehabilitative, and also provide some measure of protection to public safety.

Dr. Strezlecki performed a psychological evaluation on Paul on 9 January 2013 as part of Paul's involvement in the juvenile court system. Dr. Strezlecki testified that, based upon "a combination of reviewing [Paul's] history in terms of involvement with the juvenile court system, as well as behavioral difficulties at school, and also looking at his more recent history" of detention and house arrest, Paul needed a high level of structure. Dr. Strezlecki specifically recommended to the court that Paul should have "a highly structured supervised residential placement," because it did not appear that Paul could receive the level of structure he needed at home.

Cohen and Barrington both testified on Paul's behalf regarding the therapeutic services they provided through Support, Incorporated ("Support"). Cohen had been providing Paul with in-home therapy since November 2012. At the time of the hearing, Cohen was providing Paul with therapy for two hours per day, four days a week. Barrington testified that he and Paul had been participating in volunteer work for a local animal shelter as part of Paul's therapy. Cohen and Barrington stressed the importance of Paul's awareness of his behavior and acknowledging accountability for his actions as part of his treatment plan, and both testified to Paul's positive progress in the Support therapy program. However, while Cohen and Barrington both indicated Paul was making positive progress in the Support program, the risk and needs assessments in the record indicated that Paul presented a medium risk and had medium needs.

The court heard and considered the evidence of all the witnesses, as well as the needs and risk assessments. There is nothing in the record to indicate that the court's failure to find that Paul had extraordinary needs was so arbitrary that it could not have been the result of a reasoned decision. Just as the juvenile in *N.B.* with a low risk and low needs assessment failed to show that the trial court abused its discretion by imposing a Level 3 disposition, here Paul also has failed to show that the trial court's decision to impose a Level 3 disposition amounted to an abuse of discretion. *In re N.B.* at 311, 605 S.E.2d at 492.

VI. Conclusion

The trial court heard and considered the evidence presented at the disposition hearing and properly selected a Level 3 disposition based on the seriousness of the offense; the need to hold Paul accountable; the importance of public safety; Paul's degree of culpability; and Paul's rehabilitative and treatment needs as indicated by the risk and needs assessments. N.C. Gen. Stat. § 7B-2501(c) (2011). In addition, the trial court selected the Level 3 disposition after considering Paul's rehabilitation and treatment needs and decided the disposition would meet Paul's best interests. *Id.* Therefore, the trial court made a reasoned decision and did not abuse its discretion in imposing the Level 3 disposition. We affirm the trial court's order committing Paul to a YDC for a minimum of six months and a maximum term not to exceed his eighteenth birthday.

Affirmed.

Judges BRYANT and GEER concur.

LEXISNEXIS RISK DATA MANAGEMENT INC., A FLORIDA CORPORATION, AND LEXISNEXIS RISK SOLUTIONS INC., A GEORGIA CORPORATION, PLAINTIFFS

v.

NORTH CAROLINA ADMINISTRATIVE OFFICE OF THE COURTS; JOHN W. SMITH II, IN HIS OFFICIAL CAPACITY AS THE DIRECTOR OF THE NORTH CAROLINA ADMINISTRATIVE OFFICE OF THE COURTS; AND NANCY LORRIN FREEMAN, IN HER OFFICIAL CAPACITY AS THE CLERK OF THE WAKE COUNTY SUPERIOR COURT, DEFENDANTS

No. COA13-547

Filed 18 February 2014

1. Public Records—ACIS database—electronic data-processing record—AOC custodian

The trial court erred in an action concerning whether the Automated Criminal/Infraction System database (ACIS) is subject to public disclosure under the North Carolina Public Records Act, N.C.G.S. § 132-1 *et seq.* by granting defendants judgment on the pleadings. The ACIS database falls squarely within the definition of a public record as an electronic data-processing record and the Administrative Office of the Courts (AOC) is its custodian.

2. Public Records—ACIS database—no statutory exemption from disclosure

The trial court erred in an action concerning whether the Automated Criminal/Infraction System database (ACIS) is subject to public disclosure under the North Carolina Public Records Act (Act), N.C.G.S. § 132-1 *et seq.* by concluding that requiring the Administrative Office of the Courts (AOC) to provide a copy of the ACIS database upon request would negate the provisions of N.C.G.S. § 7A-109(d). There is no clear statutory exemption or exception to the Act applicable to the ACIS database.

Appeal by Plaintiffs from order entered 8 February 2013 by Judge James E. Hardin, Jr., in Wake County Superior Court. Heard in the Court of Appeals 24 October 2013.

Nelson Mullins Riley & Scarborough LLP, by Reed J. Hollander, and Meyer, Klipper & Mohr, PLLC, by Christopher A. Mohr, for Plaintiffs.

Attorney General Roy Cooper, by Special Deputy Attorney General Grady L. Balentine, Jr., for Defendants.

Arnall Golden Gregory LLP, by W. Jerad Rissler, for amicus curiae Consumer Data Industry Association.

Stevens Martin Vaughn & Tadych, PLLC, by Hugh Stevens, for amici curiae The News and Observer Publishing Co.; Capitol Broadcasting Company, Inc.; Time-Warner Entertainment-Advance Newhouse Partnership; DTH Media Corp.; and the North Carolina Press Foundation, Inc.

STEPHENS, Judge.

Procedural History and Factual Background

This appeal raises the issue of whether the Automated Criminal/Infraction System database ("ACIS") is subject to public disclosure under the North Carolina Public Records Act, N.C. Gen. Stat. § 132-1 *et seq.* ("the Act"). In its order dismissing the matter on the pleadings, the trial court summarized the factual background of the case as follows:

> 1. The parties agree there are no facts in dispute and the matter before the [trial c]ourt is a question of law.
>
> 2. Plaintiffs' corporations [(collectively "Lexis")], which aggregate information from a variety of public sources, load and operate databases, and offer information services to government and private sector clients, bring this action pursuant to the Public Records Act.
>
> 3. Defendant Administrative Office of the Courts [("the AOC")] administers, supports, and maintains [ACIS] for the elected [c]lerks of [s]uperior [c]ourt for the 100 counties of the State of North Carolina for use as the electronic storage index of their criminal records.
>
> 4. ACIS is a real-time criminal records database that is a compilation of the criminal court records, including records subject to disclosure and records not subject to disclosure, of the 100 [c]lerks of [s]uperior [c]ourt.
>
> 5. The various [c]lerks of [s]uperior [c]ourt enter the information contained in the database in real time from the physical records contained in each of their respective offices.[1] As such, the compilation of records stored in ACIS

1. Some information contained in ACIS is entered by other public officials.

> is constantly changing. The information in the database is exactly what is entered by the [c]lerks of [s]uperior [c]ourt, and changes to the information are made by the various [c]lerks accordingly. Not every employee in each [c]lerk of [s]uperior [c]ourt's office can access all of the information in ACIS, nor can one [c]lerk of [s]uperior [c]ourt access the records for modification of another [c]lerk.
>
> 6. Clerks of [s]uperior [c]ourt have the ability to make electronic and paper copies of criminal records information they enter in the ACIS database that is subject to disclosure, and they routinely make such records available pursuant to public records requests. None of the 100 [c]lerks of [s]uperior [c]ourt has the ability to make an electronic copy of the entire ACIS database.
>
> 7. Criminal records information contained in the ACIS database that is subject to disclosure is made available by [the] AOC to the public via remote public access and extracts of certain information in the ACIS database is also made available by [the] AOC to private vendors pursuant to agreements entered into between them and [the] AOC under N.C. Gen. Stat. § 7A-109. [The] AOC also makes criminal records information contained in the ACIS database available to various governmental agencies pursuant to agreements and various statutory mandates.

In the fall of 2011, Lexis sent letters to Defendant John W. Smith II, in his official capacity as Director of the AOC, and to Defendant Nancy Lorrin Freeman, in her official capacity as the elected Clerk of the Wake County Superior Court ("the clerk"). Citing the Act, Lexis requested an *index*[2] of all computer databases and an electronic copy of the entire ACIS database.[3] In a written response, the AOC agreed to provide Lexis with "the indexing done to date for databases maintained by the []AOC and subject to [section] 132-6.1[,]" but maintained that the statute's requirement for compiling indexes "does not apply to databases created before the effective date [of section 132-6.1, and] ACIS pre-dates

2. Under the Act, an "index" is a description of various form and content details about an agency's database, and it is undisputed that these indexes are public records. N.C. Gen. Stat. § 132-6.1(b) (2013).

3. Lexis requested only "non-confidential or non-restricted information" in ACIS.

[the effective date.] A]s a result there is no index of ACIS that we can provide you."[4] Both the AOC and the clerk refused Lexis's request for a copy of the ACIS database itself. The AOC asserted that ACIS is a mainframe application which serves as a record-keeping tool for clerks of court statewide, but that the individual clerks are the custodians of the actual records. Because the Act provides that the duty to disclose public records lies with their custodian, the AOC asserted that it had "no records responsive to" Lexis's request for an electronic copy of ACIS. The clerk asserted that, while she could enter information from her county's criminal records into ACIS, she lacked the ability to make a copy of the entire database. Accordingly, the clerk also informed Lexis that she had "no records responsive to" its request.

On 13 October 2011, Lexis filed a complaint alleging that the clerk's and the AOC's refusal to provide an electronic copy of the ACIS database violates the Act. Lexis sought declarations that the ACIS database is a public record under the Act and that the AOC and/or the clerk are custodians of ACIS, as well as an order requiring the release of ACIS as a public record pursuant to the Act. Defendants filed a joint answer on 15 December 2011. On 6 February 2012, Lexis moved for judgment on the pleadings. Following a hearing, by order entered 8 February 2013, the trial court denied Lexis's motion, granted judgment on the pleadings in favor of Defendants, and dismissed the matter. Lexis appeals.

Discussion

On appeal, Lexis brings forward four arguments: that the trial court (1) misapplied the standard for judgment on the pleadings by assuming the counter-allegations in Defendants' answer to be true, and erred in (2) failing to address whether ACIS is a public record subject to disclosure under the Act, (3) concluding that the AOC is not the custodian of ACIS, and (4) denying disclosure of ACIS pursuant to N.C. Gen. Stat. § 7A-109(d). Because they are closely related and are dispositive of the merits of Lexis's position on appeal, we address Lexis's second and third arguments together. We reverse and remand the trial court's order as to the AOC. In light of this result, we do not address Lexis's first argument. We affirm as to the clerk.[5]

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4. Lexis's complaint, discussed *supra*, did not contain any allegations regarding an index of ACIS and did not seek a copy thereof. Accordingly, the AOC's refusal to provide Lexis with an index of ACIS was not before the trial court and is not before this Court on appeal.

5. Despite having named the clerk as a defendant, Lexis did not contend in the trial court or on appeal that the clerk is actually the custodian of the ACIS database. As discussed herein, under the Act, only the "custodian" of public records has a duty to provide

Standard of Review

We review a trial court's ruling on a motion for judgment on the pleadings *de novo*. *Toomer v. Branch Banking & Trust. Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335, *disc. review denied*, 360 N.C. 78, 623 S.E.2d 263 (2005). "Under a *de novo* review, the [appellate] 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) (citation and internal quotation marks omitted).

I. ACIS is a public record and the AOC is its custodian

[1] Lexis argues that the ACIS database is a "public record" as defined in the Act and the AOC is its custodian. We agree.

The Act provides that

> "[p]ublic record" or "public records" shall mean all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, *electronic data-processing records*, *artifacts*, or *other documentary material*, *regardless of physical form or characteristics*, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions. . . .

N.C. Gen. Stat. § 132-1(a) (2013) (emphasis added). Further,

> [e]very custodian of public records shall permit any record in the custodian's custody to be inspected and examined at reasonable times and under reasonable supervision by any person, and shall, as promptly as possible, furnish copies thereof upon payment of any fees as may be prescribed by law. As used herein, "custodian" does not mean an agency that holds the public records of other agencies solely for purposes of storage or safekeeping or solely to provide data processing.

N.C. Gen. Stat. § 132-6(a).

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copies thereof upon request. N.C. Gen. Stat. § 132-6(a) (2013) (providing that "[e]very custodian of public records shall . . . furnish copies thereof . . . ."). All parties agree that the clerk did not create ACIS and does not have the ability to make a copy of the database. On appeal, Lexis does not argue that the trial court erred in concluding that the clerk did not violate the Act when she refused Lexis's request for a copy of the ACIS database. Accordingly, we affirm the order to the extent it concludes that the clerk did not violate the Act.

Both parties agree that the individual criminal records of the clerks of court are public records and that the clerks are the custodians of those records. As required by the Act, the clerk of court in each county will, upon request, provide copies of the criminal records for his or her county.[6] The disputed issues are whether ACIS, the database compiling information from those records, is a public record and, if so, whether the AOC is its custodian.

As for the first issue, we agree with Lexis's assertion that, once the clerks of court enter information from their criminal records into ACIS, the database becomes a new public record "existing distinctly and separately from" the individual criminal records from which it is created.[7] The plain language of the Act includes "electronic data-processing records" in its definition of public records. N.C. Gen. Stat. § 132-1(a). In turn, a database is a

> *[c]ollection of data or information organized for rapid search and retrieval, especially by a computer. Databases are structured to facilitate storage, retrieval, modification, and deletion of data in conjunction with various data-processing operations.* A database consists of a file or set of files that can be broken down into records, each of which consists of one or more fields. Fields are the basic units of data storage. Users retrieve database information primarily through queries. Using keywords and sorting commands, users can rapidly search, rearrange, group, and select the field in many records to retrieve or create reports on particular aggregates of data according to the rules of the database management system being used.

"Database." Merriam-Webster.com. Concise Encyclopedia, http://www.merriam-webster.com/concise/database (last visited Jan. 23, 2014) (emphasis added). Thus, we conclude that the ACIS database falls squarely within the definition of a public record as an electronic data-processing record.[8]

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6. As noted *supra*, the trial court found, and Lexis does not dispute, that the individual clerks of court cannot provide the records from any other counties or make a copy of the entire ACIS database.

7. As Lexis correctly observes, the trial court's order does not contain a conclusion of law about whether ACIS is a public record.

8. Further, we note that the ACIS database would certainly be encompassed under the Act's broadly worded catch-all provision including "other documentary material" in the definition of public records. N.C. Gen. Stat. § 132-1(a).

Next, as noted *supra*, the Act provides that the custodian of public records has the duty to provide the public with copies of those records when requested. N.C. Gen. Stat. § 132-6(a). The AOC argues that it is not the custodian of the criminal records whose information is used to create ACIS. We agree, but find this assertion inapposite. Lexis is not seeking copies of the criminal records, but rather a copy of ACIS.

We also reject as misplaced the AOC's related argument that it is not the custodian of the *information* contained in ACIS. The Act does not refer to custodians of *information* but of *records*. *See id.* The plain language of the Act requires custodians to provide copies of their public *records* and nothing in the Act suggests that this requirement is obviated because the *information* contained in a public record is publically available from some other source. Many public records contain information that is derived from and/or contained in other public records. For example, a city council might use information from its police department to create a report about crime statistics within its borders during a given year. Even though the *information* in the city council's report came from the police department and is available in the police department's own public records, the city council's report is still a public record and the city council is the custodian of its report. Our State's Department of Justice might use information from the city council's report in creating a chart comparing crime rates in many different cities. That chart would in turn become a new public record in the custody of the Department. Here, the AOC has admitted that it created, maintains, and controls ACIS and is the only entity with the ability to copy the database. Thus, ACIS is not the public record of another agency. Rather, ACIS is a record *of the AOC* and *in the AOC's custody*.

Further, we find irrelevant the AOC's observations that individual clerks of court input information from their counties' criminal records into ACIS and retain the sole ability to alter the information they input. In opposing the AOC's argument on this point, Lexis cites *News & Observer Pub. Co. v. Poole*, 330 N.C. 465, 412 S.E.2d 7 (1992). In *Poole*, the plaintiffs sought

> materials . . . compiled on behalf of a commission appointed by the president of the University of North Carolina system of higher education. The Commission's purpose was to investigate and report on certain alleged improprieties relating to the men's basketball team at North Carolina State University (NCSU), one of the system's component universities. . . .

> The records sought to be disclosed [we]re *investigative reports prepared for the Commission by special agents of the State Bureau of Investigation (SBI)*, Commission minutes, and draft reports prepared by individual Commission members.

Id. at 470, 412 S.E.2d at 10 (emphasis added). The Commission acknowledged that many of the materials it generated or gathered were public records, but argued that the reports prepared by the SBI were not public records, citing a statutory provision which specifically exempts records and evidence created by the SBI from the definition of public records under the Act. *Id.* (citation omitted). The Supreme Court disagreed, concluding that, "when the SBI submitted its investigative reports to the Commission, they became Commission records. As such they are subject to the Public Records Law and must be disclosed to the same extent that other Commission materials must be disclosed under that law." *Id.* at 473, 412 S.E.2d at 12. Thus, the rule established by *Poole* is that, even when one government agency wholly creates a record and then simply delivers a copy of that record to a second agency, the second agency becomes a custodian of the record under the Act. *See id.*

Here, the case for disclosure under the Act is even stronger than in *Poole*. The clerks of court have not simply made copies of their records and sent them to the AOC. Rather, as explained *supra*, the clerks have acted at the direction of the AOC to create an entirely new and distinct public record, to wit, ACIS. *See* N.C. Gen. Stat. § 7A-109(a) (2013) ("Each clerk [of court] shall maintain such records, files, dockets[,] and indexes as are prescribed by rules of the Director of the [AOC]."). For all the reasons stated above, we hold that ACIS is a public record in the custody of the AOC.

II. Effect of section 7A-109(d)

[2] We also agree with Lexis that the trial court erred in concluding that requiring the AOC to provide a copy of ACIS upon request would "negate the provisions of N.C. Gen. Stat. § 7A-109(d)[.]"

Subsection (d) of the statute provides:

> In order to facilitate public access to court records, except where public access is prohibited by law, the Director [of the AOC] may enter into one or more nonexclusive contracts under reasonable cost recovery terms with third parties to provide remote electronic access to the records by the public. . . .

N.C. Gen. Stat. § 7A-109(d). Nothing in this subsection limits the public's ability to obtain *copies* of public records under the Act. The plain language of this subsection simply allows the AOC to offer an additional method of access to "court records" via "remote electronic access[.]" *Id.* Here, Lexis is not seeking remote electronic access to ACIS, but rather has requested a copy of the entire database. As such, the provisions of section 7A-109(d) are inapposite.

We are sympathetic to the AOC's argument that, if copies of the entire ACIS database are available upon request under the Act, third parties may be discouraged from entering into "contracts under reasonable cost recovery terms . . . to provide remote electronic access to [court] records . . . ." *Id.* However, we note that section 7A-109(d) is expressly permissive, rather than mandatory. *See id.* (providing that "the Director [of the AOC] *may* enter into one or more nonexclusive contracts under reasonable cost recovery terms with third parties") (emphasis added). If provision of copies of ACIS under the Act renders the option of providing remote electronic access unnecessary or not cost-effective, the AOC can simply decline to offer this additional method of access.

Our Supreme Court has directed "that in the absence of *clear statutory exemption or exception*, documents falling within the definition of 'public records' in the [Act] must be made available for public inspection." *Poole*, 330 N.C. at 486, 412 S.E.2d at 19 (emphasis added). We conclude there is no clear statutory exemption or exception applicable to the ACIS database. Accordingly, as to the AOC, the order of the trial court is reversed. We remand the matter to the trial court with directions to enter judgment for Lexis.

AFFIRMED in part; REVERSED and REMANDED in part.

Judges GEER and ERVIN concur.

MOUNT ULLA HISTORICAL PRESERVATION SOCIETY, INC., ET AL., PETITIONERS
v.
ROWAN COUNTY, DAVIDSON COUNTY BROADCASTING, INC., RICHARD AND DORCAS PARKER, AND MAURICE E. AND MARY LEE PARKER, RESPONDENTS

No. COA13-447

Filed 18 February 2014

Res Judicata and Collateral Estoppel—res judicata—conditional use permit application—no material change

The superior court did not err by reversing the Rowan County Board of Commissioners' approval of a conditional use permit application because the application was barred by the doctrine of res judicata. Res judicata generally applies to quasi-judicial land use decisions unless there is a material change in the facts or circumstances since the prior decision was rendered. In this case, a whole record review provided no evidence that the lowering of a proposed tower by 150 feet in the 2010 CUP application constituted a material change from a 2005 application.

Appeal by respondent from order entered 27 September 2012 by Judge W. David Lee in Rowan County Superior Court. Heard in the Court of Appeals 23 October 2013.

Smith Moore Leatherwood LLP, by Thomas E. Terrell, Jr. and Elizabeth Brooks Scherer; Kluttz, Reamer, Hayes, Randolph, Adkins & Carter, L.L.P., by Richard R. Reamer; and Sherrill and Cameron, PLLC, by Carlyle Sherrill, for petitioner-appellees.

Parker Poe Adams & Bernstein LLP, by Anthony Fox and Benjamin Sullivan, for respondent-appellant Rowan County.

CALABRIA, Judge.

Respondent Rowan County ("the County") appeals from the trial court's order reversing the decision of the Rowan County Board of Commissioners ("the Board") to issue a conditional use permit ("CUP") to respondent Davidson County Broadcasting, Inc. ("DBCI") on the basis that the CUP application was barred by the doctrines of *res judicata* and collateral estoppel. We affirm.

I. Background

On 18 January 2005, DCBI applied to the Board for a CUP ("the 2005 CUP application") to construct a 1,350 foot radio tower ("the tower") on property owned by respondents Richard and Dorcas Parker ("the Parkers"). After conducting a public hearing regarding the application, the Board voted to deny the CUP. The written decision denying the application indicated that it was denied because the proposed tower would pose an air safety hazard to Miller Airpark, a nearby private airport.

DCBI and the Parkers then filed a petition for writ of *certiorari* in Rowan County Superior Court to review the Board's decision. The court granted the petition and affirmed the denial of the CUP. DCBI and the Parkers appealed to this Court, which affirmed the decision of the superior court. *Davidson Cty. Broadcasting, Inc. v. Rowan Cty. Bd. of Comm'rs*, 186 N.C. App. 81, 649 S.E.2d 904 (2007)("DCBI I").

On 26 May 2010, DCBI applied to the Board for a CUP for a 1,200 foot radio tower ("the 2010 CUP application") in substantially the same proposed location as the tower in the 2005 application that had been denied. On 24 March 2011, DCBI filed a supplemental application to include property owned by respondents Maurice E. Parker and Mary Lee Parker as a fall zone. Petitioners[1] moved to dismiss the 2010 CUP application as being barred by the doctrines of *res judicata* and collateral estoppel. The Board denied the motion on 5 July 2011. Beginning 1 August 2011, the Board held a quasi-judicial hearing to consider the new application. On 6 September 2011, the Board entered a written decision approving the CUP. The Board found, *inter alia*, that the proposed tower would not create any hazardous safety conditions.

On 3 October 2011, petitioners filed a petition for writ of *certiorari* in Rowan County Superior Court, seeking review of the Board's CUP approval. Petitioners once again argued that the 2010 CUP application was barred by *res judicata* and collateral estoppel. Petitioners also alleged that the approved CUP did not conform to the Rowan County Zoning Ordinance.

On 27 September 2012, the superior court entered an order reversing the Board's approval of the 2010 CUP application. The court concluded that the 2010 CUP application was barred by *res judicata* and collateral estoppel. Respondents appeal.[2]

1. Petitioners consist of Mt. Ulla Historical Preservation Society, Inc., Miller Air Park Owners Association, and several dozen private individuals.

2. While all respondents entered notice of appeal from the superior court's order, only respondent Rowan County filed a brief with this Court.

II. Standard of Review

"Special and conditional use permit decisions are quasi-judicial zoning decisions." *County of Lancaster v. Mecklenburg County*, 334 N.C. 496, 508, 434 S.E.2d 604, 613 (1993). "Our task, in reviewing a superior court order entered after a review of a board decision is two-fold: (1) to determine whether the trial court exercised the proper scope of review, and (2) to review whether the trial court correctly applied this scope of review." *Whiteco Outdoor Adver. v. Johnston County Bd. of Adjust.*, 132 N.C. App. 465, 468, 513 S.E.2d 70, 73 (1999).

> The proper standard for the superior court's judicial review depends upon the particular issues presented on appeal. When the petitioner questions (1) whether the agency's decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the whole record test. However, [i]f a petitioner contends the [b]oard's decision was based on an error of law, de novo review is proper. Moreover, the trial court, when sitting as an appellate court to review a [decision of a quasi-judicial body], must set forth sufficient information in its order to reveal the scope of review utilized and the application of that review.

Mann Media, Inc. v. Randolph Cty. Planning Bd., 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002) (internal quotations and citations omitted).

III. *Res Judicata*

The County argues that the superior court erred by reversing the Board's approval of the 2010 CUP application because the application was barred by the doctrine of *res judicata*. We disagree.

"Under the doctrine of *res judicata*, a final judgment on the merits in a prior action in a court of competent jurisdiction precludes a second suit involving the same claim between the same parties or those in privity with them." *Nicholson v. Jackson Cty. School Bd.*, 170 N.C. App. 650, 654, 614 S.E.2d 319, 322 (2005) (internal quotations and citation omitted). "The purpose of the doctrine of *res judicata* is to protect litigants from the burden of relitigating previously decided matters and to promote judicial economy by preventing unnecessary litigation." *Holly Farm Foods v. Kuykendall*, 114 N.C. App. 412, 417, 442 S.E.2d 94, 97 (1994). "[W]hether the doctrine of *res judicata* operates to bar a cause of action is a question of law reviewed *de novo* on appeal." *Housecalls Home Health Care, Inc. v. State*, ___ N.C. App. ___, ___, 738 S.E.2d 753, 758 (2013).

Our Supreme Court has specifically held that *res judicata* "is available with respect to the proceedings and final decision of a judicial or *quasi*-judicial body." *Little v. Raleigh*, 195 N.C. 793, 795, 143 S.E. 827, 828 (1928). In *Little*, a building permit to construct a gasoline filling station was denied by the building inspector and the board of adjustment, and the denial was upheld by our Supreme Court. *See Harden v. Raleigh*, 192 N.C. 395, 135 S.E. 151 (1926). The property owner then petitioned the building inspector to reopen the case. *Little*, 195 N.C. at 793, 143 S.E. at 827. The building inspector reversed his prior determination and the previously-denied building permit was issued. *Id.* The issuance of the permit was upheld by the board of adjustment and the superior court. *Id.* at 793-94, 143 S.E. at 827-28. On appeal, our Supreme Court reversed the issuance of the building permit on the basis of *res judicata*:

> There is no allegation, no proof, and no finding by the trial court that the facts in the case at bar are in anywise different from the facts in the case of *Harden v. Raleigh*. Indeed, the trial judge finds that Mrs. Harden applied to the building inspector "to reopen and rehear its former decision upon the building of the filling station upon her said lot."
>
> Upon these circumstances we are constrained to hold that the plea of *res judicata*, duly filed in apt time by the petitioners, was available, and therefore that the owner of the lot is not entitled to reopen and rehear the case upon the identical facts presented in the former record.

Id. at 795, 143 S.E. at 828.

Little was subsequently distinguished by *In re Broughton Estate*, 210 N.C. 62, 185 S.E. 434 (1936). In *Broughton*, a permit was issued to construct a filling station. *Id.* at 62, 185 S.E. at 434. The permit issuance was challenged because, *inter alia*, a similar application had been denied three years earlier. *Id.* The superior court reversed the granting of the permit based upon *Little*, concluding that there had been "no substantial change in conditions" since the prior permit denial. *Id.* at 62-63, 185 S.E. at 434. That decision was then appealed to our Supreme Court, which reversed the superior court after determining that *Little* was inapplicable:

> The trial court held that the case was controlled by the decision in *Little v. Raleigh*, 195 N. C., 793, 143 S. E., 827. The two cases are not alike. In the first place, the cited

> case was on application "to reopen and rehear" a former decision which had received judicial approval *sub nomine Harden v. Raleigh*, 192 N. C., 395, 135 S. E., 151. Not so here. In the next place, *Little's case*, *supra*, was not only identical in allegation and fact with the original case, but was in truth the same case. Here, the traffic conditions as found by the board, "have materially changed since the former application was acted on . . . ."

Id. at 63, 185 S.E. at 435.

The County contends that, when read together, *Little* and *Broughton* stand for the proposition that *res judicata* applies to quasi-judicial land use decisions only when the applicant is attempting to "reopen and rehear the case upon the identical facts presented in the former record." *Little*, 195 N.C. at 795, 143 S.E. at 828. However, the County reads the *Broughton* Court's interpretation of *Little* too narrowly.

The *Broughton* Court determined that the use of *res judicata* by the trial court was improper based upon two differences between the permit approval before it and the permit approval at issue in *Little*. First, the permit issued in *Little* was based upon an "application 'to reopen and rehear' a former decision which had received judicial approval . . . ." *Broughton*, 210 N.C. at 63, 185 S.E. at 435. Second, the Court noted that "the traffic conditions as found by the board, 'have *materially changed* since the former application was acted on . . . .'" *Id.* (emphasis added). Thus, the *Broughton* Court did not conclude that *res judicata* did not apply merely because the two applications at issue in that case were not exactly the same. The Court's conclusion also depended upon the board's finding that there was a material change in conditions between the prior permit application and the subsequent permit application. This requirement of a material change in order to preclude the use of the defense of *res judicata* for quasi-judicial land use decisions is consistent with the law in other jurisdictions which have considered the question, *see*, *e.g.*, *Curless v. County of Clay*, 395 So. 2d 255, 258 (Fla. Dist. Ct. App. 1981); *Whittle v. Board of Zoning Appeals*, 125 A.2d 41, 46 (Md. 1956); *Fisher v. City of Dover*, 412 A.2d 1024, 1027 (N.H. 1980); and *Cohen v. Fair Lawn*, 204 A.2d 375, 377 (N.J. Super. Ct. App. Div. 1964), as well as with general *res judicata* principles. *See* Restatement (Second) of Judgments § 24 cmt. f. (1982)("Material operative facts occurring after the decision of an action with respect to the same subject matter may in themselves, or taken in conjunction with the antecedent facts, comprise a transaction which may be made the basis of a second action not precluded by the first.").

Although our Courts have not specifically defined what constitutes a material change, the consensus among other jurisdictions which have analyzed whether *res judicata* bars a quasi-judicial land use decision appears to be that

> [t]he change in conditions or circumstances which would justify the reconsideration of an action must be a change in the particular circumstance or condition which induced the prior denial. The change in circumstances must be such that the application for the same or a substantially similar special exception or variance no longer can be characterized as the same claim.

83 Am. Jur. 2d Zoning and Planning § 700 (2013)(footnotes omitted). This definition of material change makes sense in the context of quasi-judicial land use decisions because

> [w]hen the facts and circumstances which actuated an order or a decision are alleged and shown to have so changed as to vitiate or materially affect the reasons which produced and supported it and no vested rights have intervened, it is reasonable and appropriate to the functions of the board that the subject-matter be re-examined in the light of the altered circumstances.

St. Patrick's Church Corp. v. Daniels, 154 A. 343, 345 (Conn. 1931).

We find the preceding authorities persuasive and utilize them to formulate the following definition of "material change" in the context of quasi-judicial land use decisions in North Carolina: a material change which precludes the use of the defense of *res judicata* occurs when the specific facts or circumstances which led to the prior quasi-judicial land use decision have changed to the extent that they "vitiate . . . the reasons which produced and supported" the prior decision such that the application "can no longer can be characterized as the same claim." *Id.*; 83 Am. Jur. 2d Zoning and Planning § 700.

In the instant case, the 2005 CUP application was denied because the proposed tower was determined to be a safety hazard to Miller Airpark. *See DCBI I*, 186 N.C. App. at 91-92, 649 S.E.2d at 912. Accordingly, in order to avoid being barred by *res judicata*, DCBI's 2010 CUP application must have materially changed the design of the proposed tower in such a way as to vitiate the concerns regarding air safety which led to the denial of the 2005 CUP application.

Although the Board denied petitioners' motion to dismiss on the basis of *res judicata*, it did not include, as part of its written decision approving the 2010 CUP application, any findings which suggest that there was a material change from the denied 2005 CUP application. However, by denying petitioners' motion to dismiss, the Board necessarily found that there was a material change between the two applications. This inference is consistent with Rowan County Commissioner Jim Sides, Jr.'s explanation of his motion to deny petitioners' motion to dismiss:

> [t]here has been considerable change in this application from the previous application, and I realize that the previous decision was made based primarily on safety factors. We do not know, at this point, based on a 1200 feet (sic) tower versus a 1350 feet (sic) tower, what the facts would be in relation to safety. Based on that, I would move against the motion to dismiss . . . ."

The County makes substantially the same argument to this Court, contending that the lowering of the tower by 150 feet in the 2010 CUP application was a material change that would preclude the use of *res judicata*.

Prior to determining whether the Board's finding of a material change was correct, we must first determine the proper standard of review, which our Courts have not explicitly considered previously. The consensus from other jurisdictions is that the determination of whether a subsequent application demonstrates a material change from a prior application is a factual question, with deference given to the quasi-judicial body's finding. *See Russell v. Bd. of Adjustment of Borough of Tenafly*, 155 A.2d 83, 88 (N.J. 1959)("Whether the requirement [of a material change] has been met is for the board, in the first instance, to determine. This finding, as any other made by the board, will be overturned on review only if it is shown to be unreasonable, arbitrary or capricious." (internal citation omitted)); *Freeman v. Ithaca Zoning Bd. of Appeals*, 403 N.Y.S.2d 142, 143 (N.Y. App. Div. 1978)("[I]t is for the board to determine whether or not changed facts or circumstances are presented and, in so doing, it may give weight even to slight differences not easily discernible[.]" (internal quotations and citation omitted). This deferential standard is consistent with *Broughton*, in which our Supreme Court overturned the superior court's conclusion "that there had been no substantial change in conditions" based upon the board of adjustment's finding that "traffic conditions . . . 'have materially changed since the former application was acted on . . . .' " 210 N.C. at 63, 185 S.E.

at 434-35. Accordingly, we conclude that the deferential whole record test applies to the Board's finding of a material change. We note that the superior court correctly applied this standard of review below, holding that "[a] whole record review . . . fails to disclose competent, material or substantial evidence that the height variance materially alters the proposed use from that use proposed in the earlier application."

"When utilizing the whole record test, . . . the reviewing court must examine all competent evidence (the "whole record") in order to determine whether the agency decision is supported by substantial evidence." *Mann Media*, 356 N.C. at 14, 565 S.E.2d at 17 (internal quotations and citation omitted). "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*." *Thompson v. Board of Education*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977).

The County is correct that the lowering of the tower by 150 feet constituted a change from the denied 2005 CUP application. However, a review of the whole record does not reveal any evidence that this change would undermine the reasoning behind the denial of the 2005 CUP application. The County points to general evidence presented during the 2010 CUP application hearing that the proposed 1,200 foot tower would be safe for air travel, but fails to connect this evidence in any way to the change in the height of the tower from the 2005 CUP application. The safety evidence cited by the County would be equally applicable to both a 1,350 foot tower and a 1,200 foot tower. As this Court explicitly recognized in *DCBI I*, the 2005 CUP application was supported by "evidence from which the Board could have found that the tower would not pose an unreasonable or unjustifiable safety hazard" to air travel, but the Board nonetheless found that evidence to be outweighed by other evidence that the tower would create such a hazard. 186 N.C. App. at 92, 649 S.E.2d at 913. Since there is nothing in the whole record which suggests that the prior evidence regarding the tower's potential safety hazard to air travel from the 2005 CUP application hearing was vitiated by lowering the tower by 150 feet, the Board's finding in the instant case that there was a material change in the 2010 CUP application was not supported by the evidence. *See St. Patrick's Church*, 154 A. at 345. The whole record reflects that the Board essentially considered the same information in both the 2005 and 2010 CUP applications and reached different decisions. *Res judicata* forbids such a result. *See King v. Grindstaff*, 284 N.C. 348, 355, 200 S.E.2d 799, 804 (1973)("(W)hen a fact has been agreed upon or decided in a court of record, neither of the

parties shall be allowed to call it in question, and have it tried over again at any time thereafter, so long as the judgment or decree stands unreversed." (internal quotation and citation omitted)). Ultimately, as there was no material change between the 2005 and 2010 CUP applications, *res judicata* barred the Board from reconsidering its previous decision. Therefore, the superior court properly concluded that *res judicata* required the Board to dismiss the 2010 CUP application. This argument is overruled.

IV. Conclusion

Res judicata generally applies to quasi-judicial land use decisions unless there is a material change in the facts or circumstances since the prior decision was rendered. In the instant case, a whole record review provides no evidence that the lowering of the proposed tower by 150 feet in the 2010 CUP application constituted a material change. Therefore, the superior court properly concluded that the 2010 CUP application was barred by *res judicata*. The superior court's order is affirmed.

Affirmed.

Judges BRYANT and HUNTER, Jr., Robert N. concur.

JERMAINE S. PETERS, Plaintiff/Husband/Father
v.
RASHEEDAH PETERS, Defendant/Wife/Mother

No. COA13-816

Filed 18 February 2014

Child Support—retroactive child support—interlocutory order—no substantial right

Defendant's appeal from an order denying her retroactive child support was dismissed as interlocutory. Defendant's statement of grounds for appellate review included no citation to a statute permitting review and defendant failed to offer any legal reason that the trial court's order affected a substantial right. Furthermore, defendant's appeal was improper because it was based on an interlocutory order not affecting a substantial right.

Appeal by Defendant from Order entered 8 April 2013 by Judge Ralph C. Gingles in Gaston County District Court. Heard in the Court of Appeals 11 December 2013.

Law Office of Yolanda M. Trotman, PLLC, by Yolanda M. Trotman, for Plaintiff.

The Blain Law Firm, PC, by Sabrina Blain, for Defendant.

STEPHENS, Judge.

Factual and Procedural History

This case arises from the separation on 19 April 2011 of Plaintiff Jermaine Peters and Defendant Rasheedah Peters. The couple was married on 28 September 2002. They have one minor child and reside in Gaston County. On 5 August 2012, acting *pro se*, Plaintiff submitted his divorce complaint in Mecklenburg County. Defendant submitted her answer two months later, on 8 October 2012, counterclaiming for child custody, child support, retroactive child support, equitable distribution, resumption of the use of her maiden name, and attorneys' fees. On 13 November 2012, venue was changed from Mecklenburg County to Gaston County pursuant to a consent order filed in Mecklenburg County District Court.[1] Despite that change, Plaintiff filed a reply to Defendant's answer with the assistance of counsel on 11 December 2012 in Mecklenburg County.[2] Defendant thereafter replied to Plaintiff's reply on 14 January 2013 in Gaston County.

The case was heard in Gaston County District Court during the 21 February 2013 civil session. During the hearing, Plaintiff made a motion to "dismiss/deny" Defendant's claim for retroactive child support on grounds that Defendant "failed to state a claim for which relief can be granted[] and failed to submit an [a]ffidavit of reasonable and necessary expenses as required by case law cited in the North Carolina

1. Though the consent order was not included in the record on appeal, its existence is not disputed by the parties. Therefore, we take judicial notice of the order for purposes of appellate review. *E.g.*, *West v. G. D. Reddick, Inc.*, 302 N.C. 201, 203, 274 S.E.2d 221, 223 (1981) ("[G]enerally a judge or a court may take judicial notice of a fact which is either so notoriously true as not to be the subject of reasonable dispute or *is capable of demonstration by readily accessible sources of indisputable accuracy*.") (citations omitted; emphasis in original).

2. There is nothing in the record to explain why Plaintiff filed his reply in Mecklenburg County instead of Gaston County, and the parties do not discuss it in their briefs.

Trial Judge's Bench Book."[3] Defendant argued that "such an [a]ffidavit is not required and that the child's expenses could be established through testimony." The district court issued an order on 8 April 2013, *nunc pro tunc*, to 21 February 2013, which denied Defendant's claim for retroactive child support. Defendant appeals from that order.

Discussion

On appeal, Defendant contends that the trial court erred in denying her claim because (1) her factual allegations regarding retroactive child support were adequate and (2) she was not required to file an affidavit to show the necessary and reasonable expenses incurred by the parties' child. Plaintiff responds by arguing, *inter alia*, that Defendant's appeal is interlocutory and should be dismissed. We agree with Plaintiff and dismiss Defendant's appeal as interlocutory. Accordingly, we do not address the parties' other arguments.

"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) (citations omitted). In contrast, a final judgment "disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Id.* at 361–62, 57 S.E.2d at 381. "Generally there is no right of immediate appeal from interlocutory orders and judgments." *Goldson v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). "The reason for this rule is to prevent fragmentary, premature[,] and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts." *Harbin Yinhai Tech. Dev. Co. v. Greentree Fin. Grp., Inc.*, 196 N.C. App. 615, 619–20, 677 S.E.2d 854, 857–58 (2009).

Despite this general rule,

> [i]mmediate appeal of interlocutory orders and judgments is available in at least two instances. First, immediate review is available when the trial court enters a final judgment as to one or more, but fewer than all, claims or parties and certifies there is no just reason for delay [pursuant to Rule 54(b)]. . . . Second, immediate appeal is available from an interlocutory order or judgment which affects a substantial right.

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3. There is no transcript of the proceedings in the record on appeal. This recitation of events comes from the trial court's 8 April 2013 order.

Sharpe v. Worland, 351 N.C. 159, 161–62, 522 S.E.2d 577, 579 (1999) (citations omitted). "When an appeal is interlocutory [and not certified for appellate review pursuant to Rule 54(b)], the appellant must include in [the] statement of grounds for appellate review sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338 (citing N.C.R. App. P. 28(b)(4)), *affirmed per curiam*, 360 N.C. 53, 619 S.E.2d 502 (2005). Otherwise, the appeal is subject to dismissal. *Rousselo v. Starling*, 128 N.C. App. 439, 444, 495 S.E.2d 725, 729 (1998) (noting that failure on the part of the appellant to establish that the trial court's order affects a substantial right "subjects an appeal to dismissal").

In this case, Defendant provided the following statement regarding the grounds for her appeal of the trial court's order:

> At the time this appeal was filed, other claims remained outstanding between the parties in the trial court, so this appeal from [the o]rder is interlocutory. However, the [o]rder affects [Defendant's] substantial right in that it deprives her [of r]etroactive [s]upport and more particularly deprives her of the use of funds expended in supporting the child prior to the date of filing her claim for [c]hild [s]upport and impedes her ability to support the child in the future.

This statement is insufficient.

> It is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order; instead, the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits.

Jeffreys v. Raleigh Oaks Joint Venture, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994). In making such a showing, "[t]he appellant[] must present more than a bare assertion that the order affects a substantial right; [she] must demonstrate *why* the order affects a substantial right." *Hoke Cnty. Bd. of Educ. v. State*, 198 N.C. App. 274, 277–78, 679 S.E.2d 512, 516 (2009) (emphasis in original). Rule 28 of the North Carolina Rules of Appellate Procedure clarifies that, at a minimum, a party's statement of grounds for appellate review must "include citation of the statute or statutes permitting appellate review. . . . When an appeal is interlocutory, the statement must contain sufficient facts and argument

to support appellate review on the ground that the challenged order affects a substantial right." N.C.R. App. P. 28(b)(4).

Defendant's statement of grounds for appellate review in this case includes no citation to the statute permitting review. In addition, Defendant fails to offer any legal reason that the trial court's order affects a substantial right. Instead, she simply asserts that it does. Where the appellant fails to carry her burden in this circumstance, the appeal will be dismissed. *Jeffreys*, 115 N.C. App. at 380, 444 S.E.2d at 254 ("[The defendant] presented neither argument nor citation to show this Court that [the defendant] had the right to appeal the order dismissing its counterclaims."). Because Defendant presents no argument to show that she has the right to immediate review of the trial court's order, we hold that she failed to carry her burden and dismiss her appeal as interlocutory. *See id*; *Plomaritis v. Plomaritis*, 200 N.C. App. 426, 429, 684 S.E.2d 702, 704 (2009) (dismissing as interlocutory the defendant-husband's appeal of an order modifying his monthly child support obligation because the defendant "offers no argument that the . . . order has affected a substantial right, and we decline to construct one for him").

Nevertheless, we also conclude that Defendant's appeal is improper because it is based on an interlocutory order not affecting a substantial right. "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) (citation and internal quotation marks omitted).

> The test for whether a substantial right has been affected consists of two parts: (1) the right itself must be substantial; and (2) the deprivation of that substantial right must potentially work injury to the appealing party if not corrected before appeal from final judgment. Whether a substantial right is affected is determined on a case-by-case basis and should be strictly construed.

Builders Mut. Ins. Co. v. Meeting Street Builders, LLC, __ N.C. App. __, __, 736 S.E.2d 197, 199 (2012) (citations, internal quotation marks, and brackets omitted).

> The right to immediate appeal [of an order affecting a substantial right] is reserved for those cases in which the normal course of procedure is inadequate to protect the substantial right affected by the order sought to be appealed. Our courts have generally taken a restrictive view of the substantial right exception.

Turner, 137 N.C. App. at 142, 526 S.E.2d at 670. While this Court has not determined whether an ordering denying *retroactive* child support, standing alone, affects a substantial right, *cf. Appert v. Appert*, 80 N.C. App. 27, 33, 341 S.E.2d 342, 345 (1986) (holding that an order regarding *prospective* child support affects a substantial right), we have addressed the substantial right question in a number of similar, instructive scenarios.

In *Stephenson v. Stephenson*, we held that an order awarding alimony *pendente lite*, child support *pendente lite*, and attorneys' fees *pendente lite* constituted an interlocutory decree, which could not be immediately appealed. 55 N.C. App. 250, 251, 285 S.E.2d 281, 282 (1981). There we noted that, "[i]n the majority of appeals from *pendente lite* awards[,] it is obvious that a final hearing may be had in the district court and final judgment entered much more quickly than this Court can review and dispose of the *pendente lite* order." *Id.* (italics added). Therefore, we reasoned,

> [t]here is an inescapable inference drawn from an overwhelming number of appeals involving *pendente lite* awards that the appeal too often is pursued for the purpose of delay rather than to accelerate determination of the parties' rights. The avoidance of deprivation due to delay is one of the purposes for the rule that interlocutory orders are not immediately appealable.

Id. (italics added). The following year we applied the reasoning of *Stephenson* to an award of child support and a *pendente lite* award of alimony, concluding that "child support orders entered in conjunction with orders for alimony *pendente lite*" are not subject to immediate appellate review even when the child support order is not designated "*pendente lite*." *Fliehr v. Fliehr*, 56 N.C. App. 465, 466, 289 S.E.2d 105, 106 (1982) (citing the delay rationale articulated in *Stephenson*). Relying on *Stephenson* and other similar cases, we stated in 2001 that "[i]nterlocutory appeals [challenging] *only the financial repercussions* of a separation or divorce generally have not been held to affect a substantial right." *Embler v. Embler*, 143 N.C. App. 162, 165, 545 S.E.2d 259, 262 (2001) (collecting cases) (emphasis added).

In certain *limited* factual contexts, however, we have nonetheless determined that an order pertaining to the financial repercussions of a separation or divorce affects a substantial right. In *McGinnis v. McGinnis*, for example, we held that an order enforcing an out-of-state order, which granted the plaintiff's claim for $4,225.00 in arrearages

for alimony and child support and *imposed a continuing support obligation*, affected a substantial right and was immediately appealable. 44 N.C. App. 381, 387, 261 S.E.2d 491, 495 (1980) (citations omitted). Six years later, in *Appert*, we determined that an order affected a substantial right when it directed that *prospective* child support funds be placed in escrow if the parties' minor children failed or refused to abide by certain visitation privileges. 80 N.C. App. at 28, 33, 341 S.E.2d at 342, 345. There, in determining that the order affected a substantial right, we focused on the trial court's statement that the support was "*reasonably necessary for the support and maintenance of the children*." *Id.* at 33, 341 S.E.2d at 345 (noting that "[i]t is usually necessary to resolve the question in each case by considering *the particular facts of that case and the procedural context* in which the order from which appeal is sought was entered") (citation and internal quotation marks omitted; emphasis added).

In both *McGinnis* and *Appert*, we elected to review the parties' appeals as affecting a substantial right when the trial courts' respective orders dealt, in part, with whether *future* child support payments would be available. In those cases, one party's right to receive or access future payments, if actually owed, was in jeopardy. Therefore, we correctly determined that the right was substantial as implicating the child's right to receive support. In this case, however, Defendant is appealing the trial court's denial of her claim for *past* child support payments. While such payments might be owed, the right to receive reimbursement cannot be lost by our decision to refrain from granting immediate appellate review. The funds have already been expended, and Defendant's right to reimbursement cannot be irremediably adversely affected by waiting until the natural conclusion of the proceedings below. The harm done to Defendant, if any, has already occurred and cannot intensify. This is distinct from the harm that *could be* done in the context of *prospective* child support payments. There, immediate appellate review might function to reverse or mitigate such harm if child support payments were improvidently granted or denied. Therefore, we believe we are bound by the general rule articulated in *Embler* and applied in *Stephenson* and *Fliehr*.

For the above reasons, Defendant's appeal is dismissed as based on an interlocutory order not affecting a substantial right.

DISMISSED.

Judges STEELMAN and DAVIS concur.

STATE OF NORTH CAROLINA
v.
HAROLD GOINS, JR.

No. COA13-998

Filed 18 February 2014

1. Constitutional Law—speedy trial—balancing factors—no violation

Defendant's right to a speedy trial was not violated, balancing all of the factors in *Barker v. Wingo*, 407 U.S. 514. Although the length of delay was greater than one year, defendant's failure to show neglect or willfulness by the State and his failure to argue how his defense was prejudiced weighed heavily against his claim.

2. Witnesses—impeachment of own witness—testimony vital—limiting instruction

The trial court did not abuse its discretion by allowing the State to impeach the credibility of its own witness with a recording where the witness was unable to remember an interview with a detective. The record indicates impeachment was permissible because the witness's testimony was vital to the State's case and the trial court both preceded and followed the recording with a limiting instruction.

3. Evidence—prior crimes or bad acts—defendant's recent incarceration—admissible

The trial court did not err by admitting evidence that defendant had very recently been incarcerated where the State elicited testimony from a witness regarding why she corresponded via postal mail with defendant. Defendant offers no case holding that discussing the mere fact of recent incarceration amounts to evidence of other crimes, wrongs, or acts.

4. Criminal Law—prosecutor's closing argument—defendant's failure to produce evidence

There was no error in a prosecution for rape and other offenses where defendant argued that the State was allowed to comment on his invocation of his right to remain silent. The prosecution may comment on a defendant's failure to produce witnesses or exculpatory evidence to contradict or refute evidence presented by the State. Moreover, in this case the State actually noted defendant's right to remain silent rather than highlighting his failure to testify.

Appeal by Defendant from judgments entered 11 April 2013 by Judge Arnold O. Jones, II in Superior Court, New Hanover County. Heard in the Court of Appeals 21 January 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General K.D. Sturgis, for the State.

Ryan McKaig for Defendant.

McGEE, Judge.

Harold Goins, Jr. ("Defendant") appeals from his convictions for first-degree rape, first-degree kidnapping, three counts of first-degree sexual offense, assault with a deadly weapon, communicating threats, and being a violent habitual felon. At trial, the State's witnesses included Johnathan Stevens ("Mr. Stevens"), who testified that he drove Defendant to the apartment of Jacquelyn Goins ("Ms. Goins") on 21 July 2010. Ms. Goins testified that Defendant is her cousin and that Defendant came to her apartment with his brother, Mr. Stevens. She testified that Mr. Stevens left the apartment after about twenty minutes, and Defendant subsequently attacked her. The facts relevant to the issues on appeal are discussed in greater detail in the analysis section of this opinion.

I. Speedy Trial

[1] Defendant first argues the trial court "abused its discretion when it denied [Defendant's] motion to dismiss for lack of a speedy trial." To determine whether a defendant's right to a speedy trial has been infringed, we consider four factors: "(1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) prejudice to the defendant resulting from the delay." *State v. McBride*, 187 N.C. App. 48;96, 498, 653 S.E.2d 218, 220 (2007); *see also Barker v. Wingo*, 407 U.S. 514, 530, 33 L. Ed. 2d 101, 117 (1972).

A. Length of Delay

For speedy trial analysis, the relevant period of delay begins at indictment. *State v. Friend*, ___ N.C. App. ___, ___, 724 S.E.2d 85, 90, *disc. review denied*, 366 N.C. 402, 735 S.E.2d 188 (2012). In the present case, the relevant period began 18 January 2011 and ended upon Defendant's trial, on 1 April 2013. Thus, the relevant period for the first *Barker* factor is approximately twenty-seven months, from 18 January 2011 to 1 April 2013.

B. Reason for the Delay

As to the reason for the delay, Defendant bears the burden of "offering *prima facie* evidence showing that the delay was caused by the neglect or willfulness of the prosecution[.]" *State v. Washington*, 192 N.C. App. 277, 283, 665 S.E.2d 799, 804 (2008). Only after the defendant has carried his burden "must the State offer evidence fully explaining the reasons for the delay and sufficient to rebut the *prima facie* evidence." *Id.* The "constitutional guarantee does not outlaw good-faith delays which are reasonably necessary for the State to prepare and present its case." *Id.*

Defendant failed to carry this burden. In his brief to this Court, Defendant concedes there is no "deliberate delay in an attempt to hamper the defense" by the State. In his motion for a speedy trial, Defendant offered no evidence showing that the State's neglect or willfulness caused a delay. Furthermore, in arguing to the trial court that the charges should be dismissed for speedy trial violations, defense counsel alleged merely that "the defense has never, to my knowledge, made a motion to continue, joined in any motion to continue, asked for any continuance or delay for this trial." Defendant made no allegations as to neglect or willfulness of the State.

Nevertheless, the State offered reasons to explain the delay. Defendant contends the State's reasons — a backlog at the State Bureau of Investigation ("SBI") crime lab, the SBI's failure to fully analyze the rape kit, other cases on the docket, the need to have an out-of-county judge, and Defendant's motion for a change of venue — "were entirely caused by or under the control of the [S]tate to rectify."

In *State v. Tann*, 302 N.C. 89, 93, 273 S.E.2d 720, 723 (1981), a speedy trial case, the defendant moved for an examination to determine competency. Further delay resulted when defense counsel withdrew. The case was calendared for trial "one or more times" but not reached due to the length of the calendar. *Id.* at 95, 273 S.E.2d at 724. Our Supreme Court held that "[a]ll such reasons have been recognized consistently as valid justification for delay." *Id.* "Inherent in every criminal prosecution is the probability of some delay . . . and for that reason the right to a speedy trial is necessarily relative." *Id.* at 94, 273 S.E.2d at 724.

As in *Tann*, there is no indication in the present case that the State either negligently or purposefully underutilized court resources. Accordingly, we conclude the delay was caused by neutral factors. Defendant failed to carry his burden to show that delay was caused by

the State's neglect or willfulness. This factor weighs against Defendant's speedy trial claim.

C. Assertion of the Right to a Speedy Trial

Defendant asserted his right to a speedy trial in November 2011. "Defendant's failure to assert his right to a speedy trial, or his failure to assert his right sooner in the process, does not foreclose his speedy trial claim, but does weigh against his contention[.]" *State v. Grooms*, 353 N.C. 50, 63, 540 S.E.2d 713, 722 (2000). In *Grooms*, the defendant's assertion came three years after indictment. *Id.* This Court held that his delay in asserting the speedy trial right weighed against his claim. *Id.* In the present case, Defendant's assertion came nearly a year after the indictments, which are dated 18 January 2011. Given the relative speed with which he asserted the right, this factor tends to weigh in favor of Defendant's claim.

D. Prejudice

The "defendant must show actual, substantial prejudice." *State v. Spivey*, 357 N.C. 114, 122, 579 S.E.2d 251, 257 (2003). "The right to a speedy trial is designed: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *State v. Lee*, ___ N.C. App. ___, ___, 720 S.E.2d 884, 893, *disc. review improvidently allowed*, 366 N.C. 329, 734 S.E.2d 371 (2012) (quoting *State v. Webster*, 337 N.C. 674, 680-81, 447 S.E.2d 349, 352 (1994)).

In the present case, Defendant argues he suffered "oppressive" pre-trial incarceration in federal prison because he was "labeled a sex offender by the United States Bureau of Prisons," causing him anxiety and concern. However, as Defendant acknowledges, he was a federal inmate before the trial at issue in this case.

Defendant next argues his appointed attorney "left the case," and Defendant "had an attorney who was forced to play catch-up." However, Defendant does not indicate how his second attorney was deficient and how that deficiency prejudiced him. Similarly, in *Webster*, the defendant "appears to concede that there has been no actual impairment of her ability to defend caused by the delay in trial." *Webster*, 337 N.C. at 681, 447 S.E.2d at 352.

Defendant also contends there were "potential defense witnesses who were originally ready and willing to testify" who "became reticent." In *Lee*, the defendant argued his defense was impaired because an eye-witness to the incident became unavailable. *Lee*, ___ N.C. App. at ___,

720 S.E.2d at 893. The defendant did not state what evidence he might have obtained. *Id.* This Court held the defendant failed to show "any actual or substantial prejudice resulting from the delay." *Lee*, ___ N.C. App. at ___, 720 S.E.2d at 893.

In the present case, Defendant does not explain how the delay caused reticence or what evidence Defendant would have elicited had the witnesses testified. Finally, Defendant notes that "the victim's story kept changing between the accusation, indictment and trial." Defendant does not explain how the delay caused the victim's story to change or how a changing story impaired Defendant's defense. Because Defendant has not shown actual, substantial prejudice, this factor weighs against his claim.

E. Balancing of the *Barker* Factors

Our Courts have described a one-year trial delay as "presumptively prejudicial." *Webster*, 337 N.C. at 678, 447 S.E.2d at 351 (quoting *Doggett v. United States*, 505 U.S. 647, 652, 120 L. Ed. 2d 520, 528 (1992)). However, where the other factors weigh against a defendant's claim, our Courts have found no violation of the right to a speedy trial in a delay of three years and seven months. *McBride*, 187 N.C. App. at 498-99, 653 S.E.2d at 220. The four *Barker* factors must be balanced against one another. "No single factor is regarded as either a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial." *Id.* at 498, 653 S.E.2d at 220.

In the present case, balancing the *Barker* factors reveals Defendant's right to a speedy trial was not violated. Although the length of delay was greater than one year, Defendant's failure to show neglect or willfulness of the State and failure to argue how his defense was prejudiced weigh heavily against his claim. We conclude Defendant's right to a speedy trial was not violated.

II. Allowing the State to Impeach Its Own Witness

[2] Defendant next argues the trial court erred "by allowing the State to impeach the credibility of its own witness[,]" Mr. Stevens, because the trial court allowed the State to "mask impermissible hearsay as impeachment evidence." We disagree.

A. Standard of Review

"Rulings by the trial court concerning whether a party may attack the credibility of its own witness are reviewed for an abuse of discretion." *State v. Banks*, 210 N.C. App. 30, 37, 706 S.E.2d 807, 814 (2011).

"Abuse of discretion occurs 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 38, 706 S.E.2d at 814.

B. Analysis

"The credibility of a witness may be attacked by any party, including the party calling him." N.C. Gen. Stat. § 8C-1, Rule 607 (2013). "[W]hile North Carolina Rule of Evidence 607 allows a party to impeach its own witness on a material matter with a prior inconsistent statement, impeachment is impermissible where it is used as a mere subterfuge to get evidence before the jury which is otherwise inadmissible." *State v. Riccard*, 142 N.C. App. 298, 304, 542 S.E.2d 320, 324 (2001) (citing *State v. Hunt*, 324 N.C. 343, 349, 378 S.E.2d 754, 757 (1989)).

"Although unsworn prior statements are not hearsay when not offered for their truth, the difficulty with which a jury distinguishes between impeachment and substantive evidence and the danger of confusion that results has been widely recognized." *Hunt*, 324 N.C. at 349, 378 S.E.2d at 757.

> Circumstances indicating good faith and the absence of subterfuge . . . have included the facts that the witness's testimony was extensive and vital to the government's case . . . ; that the party calling the witness was genuinely surprised by his reversal . . . ; or that the trial court followed the introduction of the statement with an effective limiting instruction. . . .

Riccard, 142 N.C. App. at 304, 542 S.E.2d at 324 (alterations in original). Our Supreme Court in *Hunt* analyzed the State's introduction of impeachment evidence to determine if the witness's testimony either "was critical to the state's case or that it was introduced altogether in good faith and followed by effective limiting instructions." *Hunt*, 324 N.C. at 351, 378 S.E.2d at 758.

In the case before us, the State asked Mr. Stevens on direct examination about his interview with detectives. Mr. Stevens testified that he remembered the interview, but that looking at the video recording of the interview would not refresh his recollection of what he told the detectives. The State asked the trial court for permission to treat Mr. Stevens as a hostile witness and to play a video recording of the interview. The State had a video recording that had been redacted to remove information regarding Defendant "being in prison, the amount of time he spent in prison[,]" and various rumors.

Defendant objected to the introduction of the recording, citing *Hunt*, *supra*. The prosecutor contended that he met with Mr. Stevens before trial and asked him if he remembered speaking with detectives in 2010 and that Mr. Stevens responded affirmatively. The prosecutor also said that he read portions of the interview to Mr. Stevens and that Mr. Stevens had no questions. The prosecutor then stated:

> [Mr. Stevens] didn't express to me that he was going to refuse to testify. He didn't express any interest to me that he was not going to cooperate. There was no indication of anything -- what he said on the stand today, that he wanted to take the Fifth, that he didn't want to testify, that he didn't want to answer questions, that he didn't remember talking to the cops, he didn't remember the specific questions, or that he was so intoxicated. . . . None of that came up in the short conversation that I had with him.

We need not decide whether the record shows the State was genuinely surprised by Mr. Stevens' reversal because the testimony was critical to the State's case. Mr. Stevens testified that Defendant is his brother; that he met Ms. Goins when he drove Defendant and dropped him off at Ms. Goins' apartment; that he went into her apartment, observed her there alone, and stayed for about five minutes before returning home; that he left Defendant and Ms. Goins alone at her apartment; and that he returned "[a]bout two or three hours" later to pick up Defendant because he got a phone call from Ms. Goins. Mr. Stevens' testimony was critical to the State's case because Mr. Stevens had the best opportunity to observe Defendant's demeanor and hear his statements just before and just after the alleged offenses.

By contrast, in *Hunt*, the witness's testimony "consisted entirely of responding to challenges to her credibility and bias[,]" except for "brief testimony about the color of her bicycle, which another of the state's witnesses thought he had seen [the] defendant riding[.]" *Hunt*, 324 N.C. at 351, 378 S.E.2d at 758. In the present case, the record indicates impeachment was permissible because Mr. Stevens' testimony was vital to the State's case.

Furthermore, the trial court both preceded and followed the introduction of the recording with a limiting instruction. As discussed in *Hunt*, the use of an effective limiting instruction weighs against the claim that the State's witness was impermissibly impeached. *Hunt*, 324 N.C. at 349, 378 S.E.2d at 758. Because the record indicates that Mr. Stevens' testimony was vital to the State's case and the trial court gave

an effective limiting instruction, the trial court did not err in allowing the State to impeach its own witness.

III. Evidence of Defendant's Recent Incarceration

[3] Defendant next argues the trial court erred in admitting evidence that Defendant "had very recently been incarcerated[.]" Defendant contends that the admission of evidence of Defendant's recent incarceration violated N.C. Gen. Stat. § 8C-1, Rule 404(b) (2013).

Although Defendant alleges that the "transcript is replete with references to [Defendant's] recent incarceration," the only reference Defendant pinpoints in his brief is page 447 of the trial transcript. The testimony relevant to this issue is as follows:

> [The State]. [W]hy did you -- why did you start writing [Defendant] letters at the age of 18?
>
> [Ms. Goins]. My brother, the one that's incarcerated, asked me to.
>
> [The State]. And if you know, where was [D]efendant when you wrote him these letters?
>
> [Ms. Goins]. Incarcerated.
>
> > [Defense Counsel]. Your Honor, I'm sorry. At this point I would renew my prior objections that we argued based on due process, under Article 1, Section 23 of the North Carolina Constitution.
> >
> > The Court: Overruled.
>
> [The State]. Where was [D]efendant? Where did you send these letters to?
>
> [Ms. Goins]. To the incarceration where he was.
>
> Q. Was he in jail, prison?
>
> A. In prison.
>
> > [Defense Counsel]. I'm sorry, Your Honor, I would note that, that is a standing objection to this line of questioning.
> >
> > The Court: Okay, standing objection. It's overruled.

The subsequent examination reveals no details identifying or describing the conviction or convictions that led to Defendant's incarceration.

Rule 404(b) governs the admission of evidence "of other crimes, wrongs, or acts[.]" N.C.G.S. § 8C-1, Rule 404(b). Defendant cites *State v. McClain*, 240 N.C. 171, 81 S.E.2d 364 (1954), for support of his argument. In *McClain*, our Supreme Court noted that "[p]roof that a defendant has been guilty of another crime equally heinous prompts to a ready acceptance of and belief in the prosecution's theory that he is guilty of the crime charged." *Id.* at 174, 81 S.E.2d at 366.

However, in the present case, the State introduced no evidence of other crimes, wrongs, or acts. Rather, the State elicited testimony from Ms. Goins regarding why she corresponded via postal mail with Defendant. Defendant offers no case holding that discussing merely the fact of recent incarceration amounts to evidence of other crimes, wrongs, or acts. Furthermore, our research reveals no case holding that recent incarceration, in and of itself, amounts to evidence of other crimes, wrongs, or acts. Defendant therefore has not shown that the trial court erred on the basis of violation of N.C.G.S. § 8C-1, Rule 404(b).

IV. State's Closing Remarks

[4] Defendant next argues the trial court erred in allowing the State to "comment on [Defendant's] invocation of his right to remain silent[.]" We disagree.

"A criminal defendant cannot be compelled to testify, and any reference by the State regarding his failure to do so violates an accused's constitutional right to remain silent." *State v. Reid*, 334 N.C. 551, 554, 434 S.E.2d 193, 196 (1993). However, in the present case, the State did not refer to Defendant's failure to testify. The relevant part of the State's closing is as follows:

> [The State]. And again, [D]efendant doesn't have to testify. He has the right to remain silent, you can't hold that against him, and the judge is going to instruct you on that, and you know that already. But again, kind of like earlier this week when I got up and told you, if their defense was these two judgments don't belong to [D]efendant, they could have presented --
>
> [Defense Counsel]. Objection, your Honor.
>
> The Court: Overruled.
>
> [The State]. You have heard no evidence contrary to the fact that this is [D]efendant, and both of these judgments are [D]efendant.

"The prosecution may comment on a defendant's failure to produce witnesses or exculpatory evidence to contradict or refute evidence presented by the State." *Id.* at 555, 434 S.E.2d at 196. As shown above, the State actually noted Defendant's right to remain silent, rather than highlighting Defendant's failure to testify. Furthermore, the State commented on the failure to present evidence that the two prior judgments relevant to Defendant's violent habitual felon status did not belong to Defendant, which is permissible under *Reid*. The trial court did not err in allowing the State's comment.

No error.

Judges HUNTER, Robert C. and ELMORE concur.

STATE OF NORTH CAROLINA
v.
WILLIAM ROSCOE MILLS, JR.

No. COA13-590

Filed 18 February 2014

1. Appeal and Error—preservation of issues—satellite-based monitoring—notice of basis for eligibility—no objection at hearing

Defendant in a satellite-based monitoring (SBM) case waived his right to raise on appeal the issue of adequate notice of the basis for his eligibility for SBM because he failed to object at the SBM hearing.

2. Appeal and Error—preservation of issues—satellite-based monitoring—hearing not in defendant's county—not raised at hearing

A satellite-based monitoring defendant waived his objection to the hearing not being in the county where he resided by not raising the issue at the hearing. N.C.G.S. § 14–208.40B(b) addresses venue, not subject matter jurisdiction, and a defendant who does not challenge venue at the trial level fails to preserve the issue for appellate review.

3. Appeal and Error—preservation of issues—satellite-based monitoring—notice of hearing

A satellite-based monitoring (SBM) defendant waived his right to raise on appeal a constitutional challenge to his notice of the date of his hearing. In his motion to dismiss the State's petition, defendant put forth no argument that due process was violated by the State's failure to provide him proper notice of the hearing as specified in N.C.G.S. § 14-208.40B(b). Furthermore, defendant did not raise any issue related to notice at the SBM hearing.

4. Sentencing—satellite-based monitoring—civil regulatory scheme—no ex post facto or double jeopardy implications

The North Carolina Supreme Court has held that the satellite-based monitoring program is a civil regulatory scheme that does not implicate constitutional protections against either *ex post facto* laws or double jeopardy. *State v. Bowditch*, 364 N.C. 335.

Appeal by defendant from order entered 22 January 2013 by Judge Mark E. Powell in Buncombe County Superior Court. Heard in the Court of Appeals 20 November 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Joseph Finarelli, for the State.

Jon W. Myers for defendant.

HUNTER, Robert C., Judge.

Defendant William Mills, Jr. appeals the order entered 22 January 2013 requiring him to enroll in Satellite-Based Monitoring ("SBM") for the remainder of his life. On appeal, defendant argues that the trial court's order must be vacated because: (1) the trial court erred in finding that defendant was given proper notice of the basis for which the Department of Correction believed him eligible for SBM and that defendant was given notice of the date of the scheduled SBM hearing; (2) the trial court lacked subject matter jurisdiction to hold the SBM hearing; (3) the trial court erred in concluding defendant had adequate and proper notice of the SBM hearing in violation of his due process rights; and (4) the SBM statutes violate the prohibition against *ex post facto* laws and double jeopardy as applied. After careful review, we affirm the trial court's order.

Background

On 2 June 2003, defendant pled guilty to one count of second degree rape and three counts of second degree sex offense in exchange for the consolidation of the offenses for sentencing, a sentence in the presumptive range, and an agreement by the State to not prosecute defendant for any additional charges involving other victims. The trial court sentenced him to a minimum term of 73 months to a maximum term of 97 months imprisonment.

After defendant served his sentence, the trial court conducted a bring-back hearing to determine defendant's eligibility for enrollment in an SBM program. The State's petition requesting the hearing is not included in the record on appeal. Prior to the hearing, defendant's counsel filed a motion to dismiss the petition, arguing that: (1) retroactive application of the SBM program violates the *ex post facto* provision of the United States and North Carolina Constitutions; (2) ordering defendant to enroll in an SBM program violates the double jeopardy clause; (3) the SBM hearing violates defendant's right to a jury trial and due process by increasing his punishment for prior offenses without submitting the issue to a jury; and (4) the SBM program interferes with defendant's right to travel and the right to be free from warrantless searches.

The matter came on for hearing on 22 January 2013 before Judge Mark E. Powell in Buncombe County Superior Court. The trial court marked the following findings on a preprinted, standard form: (1) defendant was convicted of a reportable offense but the sentencing court made no determination of whether defendant should be required to enroll in SBM; (2) the Department of Correction (the "DOC") determined that defendant fell into at least one of the categories requiring SBM pursuant to N.C. Gen. Stat. § 14-208.40 and gave notice to defendant of this category; (3) the District Attorney scheduled a hearing in the county of defendant's residence and the DOC provided notice to defendant required under 14-208.40B, and the hearing was not held sooner than 15 days after that notice; and (4) the offense defendant was convicted of was an aggravated offense. Based on these findings, the trial court ordered defendant enroll in SBM for the remainder of his natural life. Additionally, the trial court denied defendant's motion to dismiss the petition. Defendant timely appealed.

Arguments

[1] Defendant first argues that there was no evidence presented at the determination hearing establishing that defendant had been provided adequate notice of the basis for which the DOC believed him eligible

for SBM or that defendant had been served the notice of the hearing in compliance with N.C. Gen. Stat. § 14-208.40B(b). Specifically, defendant contends that none of the findings marked on the standard preprinted form were supported by competent evidence at the hearing. Based on the record, we conclude that defendant has waived his right to raise this issue on appeal because he failed to object to these findings at the SBM hearing.

Initially, we note that our Supreme Court has classified an SBM hearing as a civil regulatory proceeding. *State v. Bowditch*, 364 N.C. 335, 352, 700 S.E.2d 1, 13 (2010); *State v. Arrington*, __ N.C. App. __, __, 741 S.E.2d 453, 457 (2013). For SBM enrollment, "the trial court is statutorily required to make findings of fact to support its legal conclusions." *State v. Morrow*, 200 N.C. App. 123, 126, 683 S.E.2d 754, 757 (2009), *aff'd*, 364 N.C. 424, 700 S.E.2d 224 (2010). On appeal, this Court "review[s] the trial court's findings of fact to determine whether they are supported by competent record evidence[.]" *State v. Kilby*, 198 N.C. App. 363, 367, 679 S.E.2d 430, 432 (2009).

Pursuant to N.C. Gen. Stat. § 14-208.40B(b),

> [i]f the [DOC] determines that the offender falls into one of the categories described in [N.C. Gen. Stat. §] 14-208.40(a), the district attorney, representing the [DOC], shall schedule a hearing in superior court for the county in which the offender resides. The [DOC] shall notify the offender of the [DOC'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. Receipt of notification shall be presumed to be the date indicated by the certified mail receipt. Upon the court's determination that the offender is indigent and entitled to counsel, the court shall assign counsel to represent the offender at the hearing pursuant to rules adopted by the Office of Indigent Defense Services.

Moreover, this Court has concluded that "N.C. Gen. Stat. § 14–208.40B(b)'s requirement that the [DOC] 'notify the offender of [its] determination' mandates that the [DOC], in its notice, specify the category set out in N.C. Gen. Stat. § 14–208.40(a) into which the [DOC] has determined the offender falls and briefly state the factual basis for that conclusion." *State v. Stines*, 200 N.C. App. 193, 204, 683 S.E.2d 411, 418 (2009).

At the hearing, both defendant and his counsel were present. The following colloquy took place:

> THE COURT: I want to state for the record that—I'll just go down through the form. And I'm reading this out loud so I don't make a mistake when I go through it. The defendant was convicted of a reportable conviction, but no determination was made back in 2002. Check number 2. I think I should, but—
>
> [THE STATE]: Yes, I believe you would, Your Honor.
>
> THE COURT: Sir, do you wish to say anything about that? Counsel, do you wish to respond to me checking number 2 or not?
>
> [DEFENSE COUNSEL]: No, sir.
>
> THE COURT: I'm just not as familiar with this form. I've checked number 2 and 3 on the form. As to number 4, the defendant falls into at least one of the categories requiring satellite-based monitoring in that the offense of which the defendant was convicted was an aggravated offense. Based on the foregoing, the defendant is subject to satellite-based monitoring for the remainder of his natural life. Counsel, anything else?
>
> [THE STATE]: No, Your Honor.

As defendant correctly notes, there was no evidence presented at the hearing establishing that defendant received proper notice, by certified mail, of the hearing or that defendant received notice of the basis upon which the State believed him eligible for SBM. However, the record is clear that defendant failed to object at the hearing when the trial court was reviewing the findings of fact on the preprinted form. The trial court even invited defendant to argue or challenge them by asking defendant's counsel whether he wanted to "say anything about that." However, defense counsel declined to do so. Furthermore, neither the petition nor the notice of the SBM hearing were included in the record on appeal even though defendant's motion to dismiss referenced the petition. "It is well settled that a silent record supports a presumption that the proceedings below are free from error, and it is the duty of the appellant to see that the record is properly made up and transmitted to the appellate court." *State v. Perry*, 316 N.C. 87, 107, 340 S.E.2d 450, 462 (1986). Finally, we find it pertinent that defendant made a motion to dismiss the State's petition for SBM but included no argument that

he was not afforded proper notice of the hearing nor did he argue that he received no notice of the category in which he fell that made him eligible for SBM. Consequently, defendant has waived any objection to these findings on appeal.

[2] Next, defendant argues that the trial court lacked subject matter jurisdiction to conduct defendant's SBM hearing because there was no competent evidence presented at the hearing that defendant resided in Buncombe County. Because N.C. Gen. Stat. § 14-208.40B(b)'s requirement that an SBM hearing be brought in the county in which the offender resides addresses venue, not subject matter jurisdiction, defendant's failure to object at the hearing waives this argument on appeal.

N.C. Gen. Stat. § 14–208.40B(b) requires that SBM petition hearings be held "in superior court for the county in which the offender resides." Defendant argues that although he did not object at the hearing that it was not being held in the county in which he resided, this issue may be raised for the first time on appeal since it addresses subject matter jurisdiction. Defendant's argument relies on his contention that only the superior court in the county in which he resides has subject matter jurisdiction over the hearing. However, defendant confuses the concepts of subject matter jurisdiction and venue. "Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it." *In re McKinney*, 158 N.C. App. 441, 443, 581 S.E.2d 793, 795 (2003) (quoting *Haker–Volkening v. Haker*, 143 N.C. App. 688, 693, 547 S.E.2d 127, 130 (2001)). "The question of subject matter jurisdiction may be raised at any time, even in the Supreme Court." *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 85-86 (1986) (citation omitted). In contrast, "[v]enue means the place wherein the cause is to be tried" and "is not jurisdictional." *Jones v. Brinson*, 238 N.C. 506, 509, 78 S.E.2d 334, 337 (1953). A defendant who does not challenge venue at the trial level fails to preserve the issue for appellate review. *See generally*, *State v. Walters*, 357 N.C. 68, 78, 588 S.E.2d 344, 350 (2003); *In re Estate of Hodgin*, 133 N.C. App. 650, 652, 516 S.E.2d 174, 175 (1999). Thus, subject matter jurisdiction and venue are two distinct concepts, each with its own rules regarding the ability of a party to challenge it for the first time on appeal.

Pursuant to N.C. Gen. Stat. § 14–208.40B(b), while the superior court has subject matter jurisdiction over SBM hearings, the requirement that the hearing be held in the superior court in the county in which the offender resides relates to venue. As noted, SBM hearings are civil in nature, *Bowditch*, 364 N.C. at 352, 700 S.E.2d at 13, and our Courts have recognized the distinction between subject matter jurisdiction

and venue in other common civil proceedings, *see generally*, *Smith v. Smith*, 56 N.C. App. 812, 813, 290 S.E.2d 390, 391 (1982) (noting that, while the district court has subject matter jurisdiction over divorce actions, "G.S. § 50-3, which states that summons for divorce proceedings shall be returnable to the court of the county in which either plaintiff or defendant resides, and G.S. § 50-8, which states that a complainant who is a nonresident of this State shall bring any divorce action in the county of defendant's residence, are not jurisdictional, and relate only to venue."); *In re Estate of Hodgin*, 133 N.C. App. at 651, 516 S.E.2d at 175 (concluding that although "the clerk of superior court in each county has exclusive original jurisdiction over the administration of estates[,]" venue is based on the county in which the decedent was domiciled at the time of his death or in the county in which the decedent left property and assets if he is not a resident of the State).

While N.C. Gen. Stat. § 14-208.40B(b) confers subject matter jurisdiction to the superior court, it also sets out the method for determining the proper venue. Defendant is mistakenly characterizing his venue challenge as a challenge to the trial court's subject matter jurisdiction in order to preserve his right to raise this issue for the first time on appeal. However, venue "is waivable by any party . . . if objection thereto is not made 'in apt time.'" *In re Estate of Hodgin*, 133 N.C. App. at 652, 516 S.E.2d at 175. Accordingly, since defendant failed to challenge the venue of his SBM hearing either in his motion to dismiss or in arguments at the hearing, he has waived this issue on appeal.

[3] Next, defendant argues that the trial court erred by ordering him to enroll in SBM when he did not receive adequate and proper notice of the date of the SBM hearing as required by law in violation of the Fourteenth Amendment of the United States Constitution and Article 1, section 19 of the North Carolina Constitution. We conclude that defendant has waived his right to raise this constitutional challenge on appeal.

Our appellate courts will only review constitutional questions raised and passed upon at trial. N.C. R. App. P. 10(b)(1) (2012); *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982); *State v. Wilkerson*, 363 N.C. 382, 420, 683 S.E.2d 174, 198 (2009). Here, in his motion to dismiss the State's petition, defendant puts forth no argument that his constitutional protection of due process was violated by the State's failure to provide him proper notice of the hearing as specified in N.C. Gen. Stat. § 14-208.40B(b). Furthermore, defendant did not raise any issue related to notice at the SBM hearing. Therefore, defendant has failed to preserve this constitutional issue for appeal.

Finally, defendant also argues that SBM violates the *ex post facto* and double jeopardy prohibitions of the United States and North Carolina Constitutions. Defendant acknowledges that the North Carolina Supreme Court has previously held that the SBM program is a civil regulatory scheme that does not implicate constitutional protections against either *ex post facto* laws or double jeopardy, *Bowditch*, 364 N.C. 335, 700 S.E.2d 1, but raises this issue for "preservation purposes." As we are bound by the decisions of our Supreme Court, *Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993), defendant's argument is overruled.

Conclusion

Because defendant failed to object at trial to the trial court's finding that he was afforded proper notice of the hearing and of the category into which he fell that made him eligible for SBM, defendant has waived this issue on appeal. Since defendant failed to challenge the venue of the hearing at the trial level, he waived his right to raise it for the first time on appeal. We will not address defendant's contention that his due process rights were violated when the State did not follow the proper statutory requirements of notice because he did not raise this issue before the trial court either at the SBM hearing or in his motion to dismiss. Finally, defendant's argument that the imposition of SBM violates the prohibition against *ex post facto* laws and double jeopardy is overruled based on *Bowditch*.

AFFIRMED.

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

STATE v. THORPE

[232 N.C. App. 468 (2014)]

STATE OF NORTH CAROLINA
v.
DEVINE DRAKKAR THORPE

No. COA13-791

Filed 18 February 2014

Confessions and Incriminating Statements—motion to suppress—failure to make adequate findings—extended detention

The trial court erred in a felonious breaking and/or entering and conspiracy to commit felonious breaking and entering case by denying defendant's motion to suppress his statements. The trial court failed to make adequate findings to permit review of its determination that defendant was not placed under arrest when he was detained for nearly two hours. On remand, the trial court must make appropriate findings about whether the officer diligently pursued his investigation so as to justify an extended detention.

Appeal by defendant from order entered 28 July 2011 by Judge Orlando Hudson and judgment entered 3 August 2011 by Judge Carl R. Fox in Durham County Superior Court. Heard in the Court of Appeals 12 December 2013.

Attorney General Roy Cooper, by Assistant Attorney General Melissa H. Taylor, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Paul M. Green, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Devine Thorpe ("Defendant") appeals from the denial of his motion to suppress, arguing (1) that the conduct and duration of his detention constituted a warrantless arrest that required probable cause; (2) that statements taken at the police station after his arrest were impermissible fruits of the unlawful arrest; (3) that Defendant's statement taken in a police car was done in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966); (4) that Defendant's statements to the arresting officer were coerced; and (5) that Defendant's statements taken at the police station were also taken in violation of the United States Supreme Court's ruling in *Missouri v. Seibert*, 542 U.S. 600 (2004).

We conclude that the trial court failed to make adequate findings to permit review of its determination that Defendant was not placed under arrest when he was detained for nearly two hours. Specifically, on remand the trial court must make appropriate findings about whether Officer Mellown diligently pursued his investigation so as to justify an extended detention.

I. Facts & Procedural History

On 7 February 2011, Defendant was indicted in Durham County on one count of Felonious Breaking and/or Entering and one count of Conspiracy to Commit Felonious Breaking and Entering. On 25 April 2011, Defendant moved to suppress the oral and written statements he made to investigating officers, alleging that they were taken in violation of his Fourth, Fifth, Sixth and Fourteenth Amendment rights. The State moved to dismiss Defendant's motion. Durham Superior Court Judge Orlando Hudson held a suppression hearing on Defendant's motion on 29 June 2011. The trial court denied Defendant's motion to suppress orally at the hearing and filed a written order on 28 July 2011. The transcript of the hearing tended to show the following facts.

T.J. Mellown ("Officer Mellown") is an investigator with the Durham County Sheriff's Office, where he has worked since August 1997. Officer Mellown testified that on 10 December 2010, he was on duty as radio calls were made about the incident around 11:00 a.m. Officer Mellown said there were "various calls on the radio that there had been a subject who had been found shot" and that a residence was broken into in the southern part of Durham County. Officer Mellown also said there were conflicting radio reports of multiple subjects fleeing the scene. Officer Mellown said he heard that a number of other officers were heading to the scene, so instead he went to Duke Hospital arriving around 11:00 a.m. Officer Mellown previously worked in emergency medicine and said

> I've seen situations like this that have happened before where people have been shot during the commission of a crime. My experience has been that, lots of times, people will drive themselves to the hospital. I thought that if one person had been shot, there was a chance that other people had been shot, and so I went to the ER to see if anybody would show up.

When Officer Mellown reached Duke Hospital, he testified that he parked his vehicle in front of the emergency department and stepped inside the hospital. Officer Mellown told the security guards why he was present and that he "was waiting to see if anyone would show up

from this incident." Officer Mellown said he began "calling the emergency departments over at Durham Regional Hospitals and also at UNC Hospitals" to ask them to contact him if anyone arrived in a personally owned vehicle with a gunshot wound.

After "approximately ten minutes," Officer Mellown testified he saw a white Dodge Charger pull in front of the emergency room. Officer Mellown said two men, Defendant and Gary Brady ("Brady"), pulled a critically injured passenger from the front passenger seat. Officer Mellown believed the man was shot and said "it looked like he was going to die in about the next hour or so." Officer Mellown saw Defendant as one of the men pulling the passenger from the car, although he "wasn't sure what his role was in relation to this incident at all," but that he had a "hunch" that Defendant was involved.

Officer Mellown said he was concerned about the safety of Defendant and the public, and so he attempted to detain Defendant and the other young man as they approached the front of the hospital. Officer Mellown frisked both Defendant and Brady, although he "did not know what was going on" at that time. Officer Mellown said Defendant and Brady were "very emotionally charged up. They were upset, they were excited. When I tried to tell them that I needed to pat them down, that I needed to figure out what was going on before anything else happened, there was a lot of yelling back and forth." Officer Mellown said Defendant and Brady "told [him] that [he] did not have the right to detain them, that [he] didn't have the right to pat them down." Officer Mellown said it took a few minutes to calm everyone down to a level where he could proceed. Officer Mellown then performed a pat down and found no weapons on Defendant or Brady. During the pat down, Officer Mellown noticed a gunshot wound to Brady's arm and subsequently Brady was taken by the Duke nursing staff for treatment.

Officer Mellown said he then handcuffed Defendant, took Defendant to his police car, put Defendant in the front passenger seat, and then sat in the driver's seat next to Defendant. Officer Mellown told Defendant "he was being detained, and I had to find out what was going on before I knew what to do." Officer Mellown explicitly told Defendant he was not under arrest, but also said Defendant was not free to leave his vehicle.

Officer Mellown said Defendant "made no verbal threats," but that Defendant "was edging into personal space" while Officer Mellown was frisking Brady. Officer Mellown did not provide *Miranda* warnings at that time to Defendant, and began asking where the man who was shot came from, Defendant's date of birth, and other demographic questions.

Defendant responded to Officer Mellown's questioning by telling him he was playing "video games with some people on the house on Rowena Avenue, and that he [received] a phone call saying that his cousin had been shot in some area behind Parkwood, and that he went there, picked up his cousin, and drove him to the hospital." Officer Mellown said he went through this story a few times with Defendant, who at that point did not admit to anything beyond that statement. Officer Mellown's "concern[s] about gang reprisals kind of went away after [Defendant] told me where they picked up the gentleman who had been shot at."

After ten or fifteen minutes of questioning, Officer Mellown placed Defendant with one of the security guards at the hospital, and "left him sort of in the care of him," while Defendant was still handcuffed. Officer Mellown then went to speak with Brady, saying that there was not a "solemn decision that [Defendant] was going to be arrested" at that time. Defendant was not placed under formal arrest until he was taken to the police station at around 1 p.m.

Officer Mellown said he placed Defendant under formal arrest because he received "statements from some of the other persons involved as to why they had been there . . . that they were involved in breaking into the residence, that this was related to the shooting for which I had gone out to the ER." Officer Mellown also researched the location of Rowena Avenue and said Defendant's statements of traveling from Rowena to Parkwood to retrieve his wounded cousin were not feasible given the timing and sequence of events. Officer Mellown also spoke with Brady, who stated that "they" were driving around, broke into a home, and were shot. After Brady was given *Miranda* warnings, he declined to make any further statements.

Defendant was transported by other officers in a "marked car, with the cage in the back" to the police station. At the police station, Defendant was advised that he was under arrest and given *Miranda* warnings. Defendant asked why he was under arrest and began to cry once being informed he was under arrest. Officer Mellown was present during the videotaped interview and was accompanied by Sergeant Davis. Officer Mellown said Sergeant Davis raised his voice during the interview, pointed his finger at Defendant, and told Defendant to cooperate with Officer Mellown. Defendant waived his *Miranda* rights at that time orally and shortly after by written waiver. After the videotaping ceased, Officer Mellown asked Defendant to clarify his statement to add an admission of breaking and entering, which Officer Mellown said Defendant admitted during their conversation.

In the videotaped interview, Officer Mellown said Defendant admitted to taking part in the breaking and entering of the home:

> He told me that he had spent the night at a house on Ruby Ridge, which is a small housing development in eastern Durham, and that he had spent the night there. Some people came over and woke him up at, I believe, about 8:30 in the morning.
>
> They asked him to -- they asked him to drive them around. Eventually, they drove to a small area behind Parkwood, where they asked him to let them off at a small house that he described as, I think, being tucked back in the woods.
>
> He drove around a little bit. They gave him a call on a cell phone. He drove back to the area, and found that his -- I believe the gentleman's name was Omari Eubanks had been shot in the back. And he was lying on the -- on the yard outside one of the neighboring residences.
>
> And, I'm sorry, I'm not sure if it was Omari that he picked up or the other one. But one of his companions had been shot in the back, was lying in the -- in the yard in a nearby house.
>
> . . . .
>
> Initially in the car, he just told me that he had been playing video games on Rowena Avenue and that he received a phone call, drove to Parkwood and drove around, found where his cousin had been shot, picked him up and drove him to -- drove him to Duke.
>
> When we Mirandized him and he made a statement, he changed that to he took these -- his companions to, I believe, a Shell station that was off of Highway 54 near Southpoint, dropped them off at the Shell station.
>
> We kind of explored that a little bit further, and he told me that he actually picked them -- or they actually left Ruby Ridge, started driving around, found the house that was tucked back in in [sic] the woods.
>
> He dropped them off at the house, drove around for a few minutes, got a phone call to come pick up his cousin, who had been shot, drove back to the residence, picked up his cousin and then drove to Duke.

Defendant was indicted on 7 February 2011. On 25 April 2011 Defendant filed a motion to suppress his statements made to Officer Mellown and at the police station, which was denied on 28 July 2011 via written order. In the trial court's written order, the trial court made the following findings of fact:

> 1. On or about December 10, 2010 at or about 11:19 a.m., Investigator Mellown of the Durham Police Department arrived at Duke Emergency Department.
>
> 2. At or about 11:30 a.m. Investigator Mellown was standing in the area near the entrance to the waiting room when he saw two black males dragging a third black male from a white Dodge Charger. Investigator Mellown observed that the black male being dragged from the car was "limp and appeared to have a diminished level of consciousness."
>
> 3. After emergency room staff took that third person to the patient care area for treatment, Investigator Mellown attempted to detain the other two persons. The other two persons were "both aggressive, belligerent, and noncompliant with orders."
>
> 4. Investigator Mellown was able to determine that the shorter of the two persons had been shot in the arm. A security officer escorted him to the triage nurse for treatment, and the other person, subsequently identified as defendant Devine Thorpe, was handcuffed and searched.
>
> 5. After approximately ten minutes, Defendant had calmed down to the point where Investigator Mellown was able to talk to him without raising his voice. Investigator Mellown escorted Defendant to his vehicle, and placed him in the front passenger's seat. Defendant remained handcuffed.
>
> 6. Investigator Mellown advised Defendant that "he was not under arrest, but that I was going to be detaining him until I could determine what was taking place. I told him that I did not know why he was there, or why his friend had been shot, and that I had to find out what was going on before I knew how to proceed with this situation."
>
> 7. In response, Defendant told Investigator Mellown his name and date of birth. Defendant also stated that "he was at this residence at 1134 Rowena Ave when he got a

call from someone stating that his cousin had been shot. This person told Thorpe to go pick up his cousin near Parkwood. Thorpe said that he drove to Parkwood and found his brother lying on the side of the road. He stated that he put his cousin in the car, and then drove to Duke. Thorpe clarified his story to tell me that his cousin's name was Omari Mitchell."

8. Investigator Mellown told Defendant that he was having a hard time working out a time line of these events, and asked him to tell him again what happened. Defendant stated the same thing.

9. After approximately fifteen minutes, Investigator Mellown escorted Defendant back to the security office at the Emergency Room and left him with a security guard.

10. It is unclear how long Defendant remained held in the security office until Investigator Mellown took Defendant down to the police station.

11. At approximately 1:18 p.m. Investigator Mellown advised Defendant of his Miranda Rights.

12. At or about 1:20 p.m. Defendant signed the waiver of his rights form. He then made a statement that "This morning I woke up and was asked to ride with Omari, James, and Feet. An [sic] we rode to Parkwood where a lot of houses were and I let them out of the car. So they get out and I pulled off. After about 20 mins,[sic] I get a phone call saying that Omari, James, and Feet has [sic] been shot. So, I turn the car around and drive through parkwood [sic] to find them as I come to an entersection [sic] I see Omari laying in the road and I helped him in the car and took him to the hospital. /s/ Devin Thorpe 9-24-1990."

The trial court then made the following conclusions of law:

1. Investigator Mellown had reasonable suspicion to detain the Defendant and perform an investigative stop.

2. The Defendant was not in custody at the time he gave his first statement to Detective Mellown.

3. No Miranda warning was necessary during the investigative stop of the defendant at Duke Hospital.

> 4. The Defendant's statements to Detective Mellown at Duke Hospital were voluntarily made.
>
> 5. The defendant was later placed under arrest.
>
> 6. The Defendant waived his Miranda Rights orally and in written form.
>
> 7. The Defendant's statements made after he waived his right to remain silent were voluntarily given.
>
> 8. Based on the totality of the circumstances, no threat or promises induced the Defendant to make his confession.
>
> 9. None of the [Defendant's] substantive rights were denied by law enforcement during the investigation and arrest of the Defendant.

On 3 August 2011, Defendant entered a negotiated guilty plea to both counts of the indictment before Judge Carl R. Fox, but reserved his right to appeal. The factual basis of the plea stated that on 10 December 2010 at around 11 a.m., Timothy Nelson, Omari Mitchell, and Gary Brady broke into Charles Dellerman's ("Dellerman") home. Dellerman, a photographer by profession, was asleep for around five hours prior to his alarm sounding at that time, as he had worked late the night before. When Dellerman awoke, he heard dogs barking and "a crash and a bang." Dellerman was confused as to the noise's origin, but then heard "another bang." Dellerman retrieved his .45 caliber Taurus firearm and proceeded downstairs to investigate the noises. As he descended, Dellerman "continued to hear rummaging." Dellerman continued to the room where he performed his photographic work and heard someone say "Get him."

Dellerman immediately began "blazing" and discharged several shots. Dellerman later said that there were three individuals in his home, all of whom he hit with his gunshots. Neighbors also reported seeing two individuals limping down the street. The plea also recounted that Defendant was not present at the time Dellerman shot the three intruders, and that he later retrieved Omari Mitchell, who was shot in the abdomen, and brought him to the hospital. Dellerman was not charged, as "he felt like his life was threatened" when the three individuals were within his home. The other three codefendants all pled guilty prior to Defendant's plea.

Defendant was found a Prior Record Level I offender with no prior convictions. On 9 August 2011, the trial court sentenced Defendant to a five to six-month suspended sentence suspended for thirty months of

supervised probation. Defendant also was sentenced to fifty hours of community service and required to pay restitution. Defendant was also required to enroll in a graduate equivalency degree program leading to obtaining his high school diploma.

Defendant filed a timely, but defective written notice of appeal of the order denying suppression on 8 August 2011. *See* N.C. R. App. P. 4(a). This Court dismissed Defendant's appeal on 18 September 2012 for lack of jurisdiction due to the defective notice of appeal. *State v. Thorpe*, COA12-229, 731 S.E.2d 862, 2012 WL 4078409 at *1–2 (N.C. Ct. App. 2012) (unpublished). Specifically, Defendant appealed from the denial of the motion to suppress, but did not appeal the trial court's judgment, which left this Court without jurisdiction to hear the appeal. *Id.* (citing *State v. Miller*, 205 N.C. App. 724, 725, 696 S.E.2d 542, 542 (2010)). Defendant then filed a petition for writ of certiorari, which this Court granted on 15 October 2012.

II. Jurisdiction & Standard of Review

> Except as provided in subsections (a1) and (a2) of this section and G.S. 15A-979, and except when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari.

N.C. Gen. Stat. § 15A-1444(e) (2013). However, "[a]n order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty." N.C. Gen. Stat. § 15A-979(b) (2013). As Defendant previously did not appeal the trial court's judgment, a writ of certiorari was required, which Defendant obtained and this Court granted. N.C. R. App. P. 21.

Defendant argues that the trial court erred in denying his motion to suppress based on Fourth and Fifth Amendment violations. In considering a trial court's ruling on a motion to suppress, this Court must consider whether the lower court's findings of fact are supported by competent evidence, though its factual findings are binding where the appellant does not challenge them. *State v. Richmond*, ___ N.C. App. ___, ___, 715 S.E.2d 581, 583 (2011). This Court must then determine whether the trial court's conclusions of law are supported by its findings of fact. *State v. Milien*, 144 N.C. App. 335, 339, 548 S.E.2d 768, 771 (2001). However, "a trial court's conclusions of law as to whether law

enforcement had reasonable suspicion or probable cause to detain a defendant are reviewable *de novo*." *State v. Baublitz, Jr.*, 172 N.C. App. 801, 806, 616 S.E.2d 615, 619 (2005).

III. Analysis

Defendant argues that his statements taken while he was in Officer Mellown's car were taken in violation of the Fourth Amendment. Defendant also argues that the subsequent statements made at the police station were taken in violation of the Fourth Amendment because they were fruits of impermissible police conduct. We conclude that the trial court failed to make adequate findings to justify its conclusion that defendant was not under arrest, given his nearly two-hour detention. Accordingly, we reverse the order denying defendant's motion to suppress and remand to allow the trial court to make adequate findings on this issue. Therefore, we do not address Defendant's remaining arguments.

A. Seizure and Arrest of Defendant

Defendant first argues that Detective Mellown seized Defendant and functionally arrested Defendant without a warrant. Defendant argues that such an arrest was illegal, as it required probable cause not present in this case, and any resulting evidence is subject to the exclusionary rule under *Wong Sun v. United States*, 371 U.S. 471 (1963). We agree.

The Fourth Amendment of the United States Constitution prohibits unreasonable searches and seizures. U.S. Const. amend. IV. This prohibition applies to the states through the Due Process Clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). Article I, Section 20 of the North Carolina Constitution similarly prohibits unreasonable searches and seizures. *State v. Arrington*, 311 N.C. 633, 643, 319 S.E.2d 254, 260 (1984). There are generally two types of "seizures" under the Fourth Amendment: "(1) arrests and (2) investigatory stops." *Milien*, 144 N.C. App. at 339, 548 S.E.2d at 771. Arrests require that the arresting officer have "probable cause," whereas investigatory stops do not. *Id.*

Under the standard first laid out in *Terry v. Ohio*, 392 U.S. 1 (1968), officers temporarily detaining someone for investigatory purposes only require "reasonable suspicion of criminal activity." *Florida v. Royer*, 460 U.S. 491, 498 (1983). The detaining officer "must be able to articulate something more than an 'inchoate and unparticularized suspicion, or 'hunch.'" *United States v. Sokolow*, 490 U.S. 1, 7 (1989). The officer's reasonable suspicion

> must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed

> through the eyes of a reasonable, cautious officer, guided by [the officer's] experience and training.

State v. Watkins, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994). In reviewing the validity of a *Terry* stop, the Court must consider "the totality of the circumstances." *Id.* (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)).

Even if a brief detention is justified under *Terry* and its progeny, "[t]he characteristics of the investigatory stop, including its length, the methods used, and any search performed should be the least intrusive means reasonably available to effectuate the purpose of the stop." *State v. Carrouthers*, ___ N.C. App. ___, ___, 714 S.E.2d 460, 464, *disc. rev. denied* 365 N.C. 361, 718 S.E.2d 392 (2011) (alteration in original, quotation marks and citations omitted). "It is the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." *Royer*, 460 U.S. at 500. "Where the duration or nature of the intrusion exceeds the permissible scope, a court may determine that the seizure constituted a *de facto* arrest that must be justified by probable cause." *Milien*, 144 N.C. App. at 340, 548 S.E.2d at 772.

In sum, the reasonableness of the methods used in the investigatory stop depends on the circumstances. *Id.* ("The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case." (citation and quotation marks omitted)). During a *Terry* stop, police can use "measures of force such as placing handcuffs on suspects, placing the suspect in the back of police cruisers, drawing weapons, and other forms of force typically used during an arrest." *State v. Campbell*, 188 N.C. App. 701, 709, 656 S.E.2d 721, 727 (2008)(quotation marks and citation omitted).

This Court has held that the use of handcuffs is permissible to "'maintain the status quo.'" *Id.* at 709, 727 (quoting *United States v. Hensley*, 469 U.S. 221, 235 (1985)). Additionally, in *Carrouthers*, this Court outlined some of the circumstances in which handcuffs might be reasonable, including when "(1) the suspect is uncooperative . . . or (6) the suspects outnumber the officers." *Carrouthers*, ___ N.C. App. at ___, 714 S.E.2d at 465 (quotation marks and citations omitted).

Here, the trial court made three findings of fact relevant to the initial detention of Defendant:

> 2. At or about 11:30 a.m. Investigator Mellown was standing in the area near the entrance to the waiting room when

> he saw two black males dragging a third black male from a white Dodge Charger. Investigator Mellown observed that the black male being dragged from the car was "limp and appeared to have a diminished level of consciousness."
>
> 3. After emergency room staff took that third person to the patient care area for treatment, Investigator Mellown attempted to detain the other two persons. The other two persons were "both aggressive, belligerent, and noncompliant with orders."
>
> 4. Investigator Mellown was able to determine that the shorter of the two persons had been shot in the arm. A security officer escorted him to the triage nurse for treatment, and the other person, subsequently identified as defendant Devine Thorpe, was handcuffed and searched.

As a result of these facts, the trial court concluded that "Investigator Mellown had reasonable suspicion to detain the Defendant and perform an investigative stop."

Here, Officer Mellown's initial use of handcuffs was reasonable under the circumstances. Both Defendant and his companion were acting aggressively. Officer Mellown was dealing initially with two individuals, while being the only police officer present. Officer Mellown then led Defendant, still handcuffed, to his car and placed Defendant in the front passenger seat. When dealing with aggressive, noncooperative individuals, handcuffs and placing the suspect in the officer's car are acceptable methods of effecting an investigatory stop. *See Carrouthers*, ___ N.C. App. at ___, 714 S.E.2d at 464–65. Thus, the stop was not simply a *de facto* arrest as a result of Officer Mellown's initial use of handcuffs or the placement of Defendant in his car.

However, the length of Defendant's detention may have turned the investigative stop into a *de facto* arrest, necessitating probable cause by Officer Mellown for the detention. An investigative stop becomes a *de facto* arrest requiring probable cause when its "duration or nature . . . exceeds the permissible scope" of a *Terry* stop. *Milien*, 144 N.C. App. at 340, 548 S.E.2d at 772.

One of the key elements of a valid *Terry* stop is brevity. *United States v. Place*, 462 U.S. 696, 709 (1983) ("[T]he brevity of the invasion of the individual's Fourth Amendment interests is an important factor."); *see Milien*, 144 N.C. App. at 340, 548 S.E.2d at 772 (" '[A]n investigative detention *must be temporary* and last no longer than is necessary.' " (emphasis added) (quoting *Royer*, 460 U.S. at 500)).

The Supreme Court of the United States has never approved a *Terry* stop lasting nearly two hours. *Place*, 462 U.S. at 709–10 ("[W]e have never approved a seizure of the person for the prolonged 90-minute period involved here[.]"); *but see Illinois v. McArthur*, 531 U.S. 326, 332 (2001) (holding that preventing defendant from re-entering his home, where probable cause existed showing that drugs were in the defendant's house, was reasonable when the police were waiting for a warrant to search the house). However, the Supreme Court has never adopted an outer limit to the permissible duration of a *Terry* stop. *Place*, 462 U.S. at 709.

To assess whether a seizure under *Terry* is excessive, the court must decide whether the police could have "minimized the intrusion" by more diligently pursuing their investigation through other means. *Id.* According to the United States Supreme Court, a reviewing court should

> examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.

United States v. Sharpe, 470 U.S. 675, 686 (1985). Thus, it is only when the police *unnecessarily* prolong the seizure that an otherwise valid investigative stop becomes a *de facto* arrest. *See id.*

In *Place*, the Supreme Court invalidated a seizure which lasted for approximately ninety minutes. *Place*, 462 U.S. at 709. In that case, DEA agents seized the defendant's bags as he deplaned in New York's La Guardia Airport and waited for the narcotics dogs to arrive. *Id.* at 698–99. The Court reasoned that the since the DEA knew that Place was on his way to New York, they had ample time to prepare the narcotics dogs for Place's arrival, which would have obviated the need to hold him without probable cause for a ninety-minute period. *Id.* at 709–10. Therefore, the Court concluded that the government could have pursued their investigation through more expeditious means and the ninety-minute seizure was unconstitutional. *Id.* at 710.

Here, the trial judge found that the initial conversation between Defendant and Officer Mellown lasted "approximately fifteen minutes" and that Defendant was at the police station by 1:18pm (less than two hours after the first encounter between Officer Mellown and the Defendant). Officer Mellown told Defendant that he was going to be detained until Officer Mellown could "determine what was taking place." It is unclear precisely how long Defendant was held between the end of his conversation with Officer Mellown in the car and his formal arrest at

the police station, but it is clear that Defendant was in handcuffs during this entire period, even after he had calmed down.

Additionally, the trial judge made no findings about what Officer Mellown was doing from the time he "escorted" Defendant to the security office to the point at which he was placed under arrest. Therefore, on the record before us we cannot say that the nearly two-hour delay was reasonably necessary for Officer Mellown's investigation. *See id.* (holding a two-hour restraint while waiting for a warrant was reasonable where "the record reveals [that] this time period was no longer than reasonably necessary").

Although length in and of itself will not normally convert an otherwise valid seizure into a *de facto* arrest, where the detention is more than momentary, as here, there must be some strong justification for the delay to avoid rendering the seizure unreasonable. *See McArthur*, 531 U.S. at 332 (two-hour seizure reasonable when waiting for search warrant); *Place*, 462 U.S. at 709 ("The [90-minute] length of the detention of respondent's luggage *alone* precludes the conclusion that the seizure was reasonable in the absence of probable cause." (emphasis added)); *Royer*, 460 U.S. at 500 ("The scope of the detention must be carefully tailored to its underlying justification."). This detention lasted longer than the normal *Terry* stop. *See*, *e.g.*, *State v. Sanchez*, 147 N.C. App. 619, 626, 556 S.E.2d 602, 608 (2001), *disc. rev. denied* 355 N.C. 220, 560 S.E.2d 358 (2002) (five-minute detention); *State v. Cornelius*, 104 N.C. App. 583, 590, 410 S.E.2d 504, 509 (1991), *disc. rev. denied* 331 N.C. 119, 414 S.E.2d 762 (1992) (considering a ten-minute investigative stop). Here, without any factual findings addressing the justifications for the extended detention, we cannot properly review whether the trial court erred in concluding that defendant was not under arrest.

The evidence contained in the transcript of the suppression hearing would support a finding that Officer Mellown went almost immediately from speaking with Defendant to interviewing Brady. During this conversation, Brady admitted to Officer Mellown that "they had gone out to go into a house." This evidence could support a finding that Officer Mellown was not unnecessarily delaying Defendant's detention. Thus, the trial judge could justifiably conclude that Officer Mellown was diligently pursuing his investigation. *See Cornelius*, 104 N.C. App. at 590, 410 S.E.2d at 509 (ten-minute delay permissible where "the officers acted diligently in their investigation"). If the trial judge does so find, a conclusion that the detention was not unnecessarily prolonged might also be justified. Therefore, we remand the case for findings on whether the extended detention was justified, and if it was not, whether and

when Officer Mellown developed probable cause to arrest Defendant. As a result, we do not address the remainder of Defendant's arguments.

IV. Conclusion

For the reasons stated above, the trial court's denial of Defendant's motion to suppress is

REVERSED AND REMANDED IN PART FOR FURTHER FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Judges STROUD and DILLON concur.

STATE OF NORTH CAROLINA
v.
TERRANCE WILKERSON

No. COA13-365

Filed 18 February 2014

1. Appeal and Error—certiorari granted by prior panel—authority to issue writs

Defendant's contention that the Court of Appeals lacked authority to grant *certiorari* for the State was decided by a prior panel in the course of granting the State's *certiorari* petition. Additionally, according to N.C.G.S. § 7A-32(c), the Court of Appeals has the authority to issue writs of *certiorari* in aid of its own jurisdiction, or to supervise and control the proceedings of any of the trial courts.

2. Criminal Law—motion for appropriate relief—constitutional challenge—trial court jurisdiction

The trial court had jurisdiction to consider defendant's motion for appropriate relief to challenge his original sentence as cruel and unusual punishment under evolving standards of decency. The fact that defendant did not cite N.C.G.S. § 15A-1415(b)(4) before the trial court was irrelevant to the required jurisdictional determination given the fact that the constitutional nature of defendant's challenge to Judge Gore's original judgments was clearly stated in defendant's motion for appropriate relief and the fact that the trial court has the authority, in appropriate cases, to grant postconviction relief on its own motion.

3. Constitutional Law—Eighth Amendment—former sentence—evolving standards of decency

The trial court erred by determining that the sentences that defendant was currently serving subjected him to cruel and unusual punishment in violation of the Eighth Amendment. The trial court failed to make a determination that defendant's sentence was grossly disproportionate before considering the extent to which defendant would have been subject to a less severe sentence under current law. Additionally, the Court of Appeals was unable to say that the sentence embodied in the original judgments was grossly disproportionate in light of the number of felony offenses for which defendant was convicted, the fact that one of the offenses for which defendant was convicted was a particularly serious one, and the fact that defendant's conduct involved great financial harm and led to criminal activity on the part of a younger individual.

Review stemming from the allowance of a petition for the issuance of a writ of certiorari filed by the State challenging an order entered 17 December 2012 by Judge Mary Ann Tally in Cumberland County Superior Court. Heard in the Court of Appeals 26 September 2013.

Attorney General Roy Cooper, by Assistant Attorney General Daniel P. O'Brien, for the State.

Sarah Jessica Farber, for Defendant-Appellee.

ERVIN, Judge.

The State has sought appellate review of an order granting Defendant Terrance Wilkerson's motion for appropriate relief; vacating judgments entered on 5 December 1991 stemming from Defendant's convictions for second degree burglary, three counts of felonious breaking or entering, four counts of felonious larceny, and two counts of possession of stolen property; and resentencing Defendant to a term of 21 years imprisonment. On appeal, the State contends that the trial court erroneously concluded that the sentences contained in the original judgments entered in these cases resulted in the imposition of a cruel and unusual punishment upon Defendant. After careful consideration of the State's challenges to the trial court's order in light of the record and the applicable law, we conclude that the trial court's order should be reversed and that this case should be remanded to the Cumberland County Superior Court for reinstatement of the original judgments imposed in these cases.

I. Factual Background

Between 14 December 1990 and 12 January 1991, Defendant broke into several homes and stole various items of property. At the time that he committed these criminal offenses, Defendant was sixteen years old and had no prior criminal record.

On 13 January 1991, warrants for arrest were issued charging Defendant with two counts of possession of stolen property, second degree burglary, two counts of felonious breaking or entering, and three counts of felonious larceny. On 2 April 1991, the Cumberland County grand jury returned bills of indictment charging Defendant with two counts of second degree burglary, four counts of felonious breaking or entering, six counts of felonious larceny, and six counts of possession of stolen property. On 4 December 1991, Defendant entered pleas of guilty to one count of second degree burglary, four counts of felonious larceny, three counts of felonious breaking or entering, and two counts of possession of stolen property. In return for Defendant's guilty pleas, the State voluntarily dismissed the remaining charges that had been lodged against him. At the conclusion of the proceedings that occurred in connection with the entry of Defendant's guilty pleas, Judge William C. Gore, Jr., found as aggravating factors that "[t]he defendant involved a person under the age of 16 in the commission of the crime" and that "[t]he offense involved the actual taking of property of great monetary value"; found as mitigating factors that "[t]he defendant ha[d] no record of criminal convictions" and that, "[a]t an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer"; determined that the "factors in aggravation outweigh[ed] the factors in mitigation"; and entered a judgment in the case in which Defendant had been convicted of second degree burglary sentencing him to a term of 40 years imprisonment. In addition, based upon the same findings in aggravation and mitigation, Judge Gore consolidated one of Defendant's convictions for felonious breaking or entering and one of Defendant's convictions for felonious larceny for judgment and sentenced Defendant to a consecutive term of ten years imprisonment. Finally, Judge Gore entered judgments sentencing Defendant to a concurrent term of three years imprisonment based upon a conviction for felonious larceny, to a concurrent term of three years imprisonment based upon consolidated convictions for felonious breaking or entering and felonious larceny, to a concurrent term of three years imprisonment based upon a conviction for possession of stolen property, to a concurrent term of three years imprisonment based upon convictions for felonious breaking or entering

and felonious larceny, and to a concurrent term of three years imprisonment based upon a conviction for possession of stolen property. As a result, Judge Gore's judgments effectively required Defendant to serve a term of fifty years imprisonment based upon these convictions.

On 27 June 2012, Defendant filed a motion for appropriate relief in which he requested the court to "arrest" his sentences and resentence him in such a manner as to avoid subjecting him to cruel and unusual punishment. Defendant's motion for appropriate relief rested upon the contention that his fifty year sentence for a series of nonviolent property crimes committed when he was sixteen years old was grossly disproportionate to the maximum sentence that he could receive in the event that he was sentenced for committing the same crimes under the current sentencing statutes and contravened the protections against the imposition of cruel and unusual punishment contained in the Eighth Amendment to the United States Constitution and N.C. Const. art. I, § 27.[1] On 25 July 2012, the trial court entered an order concluding that "Defendant's Motion for Appropriate Relief has merit, that summary disposition is inappropriate, and that a hearing is necessary." The State filed a written response to Defendant's motion for appropriate relief on 24 August 2012 in which it requested that Defendant receive no relief.

A hearing was held with respect to Defendant's motion for appropriate relief on 11 December 2012. On 17 December 2012, the trial court entered an order granting Defendant's motion for appropriate relief on the grounds that, "[u]nder evolving standards of decency," the sentence embodied in the judgments entered by Judge Gore was excessive and disproportionate to the crimes for which Defendant had been convicted in violation of the Eighth Amendment and was, for that reason, invalid. As a result, the trial court vacated the judgments that had been entered by Judge Gore, resentenced Defendant to a term of 21 years imprisonment, gave Defendant credit for 21 years and 6 days in pretrial confinement, and ordered that Defendant be immediately released.

On 17 December 2012, the State filed petitions seeking the issuance of a writ of *certiorari* authorizing appellate review of the 17 December 2012 order and the issuance of a writ of *superseadeas* staying the trial

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1. Although Defendant argued that his sentences violated N.C. Const. art. I, § 27, in his motion for appropriate relief, the trial court made no reference to this provision of the state constitution in its order and Defendant has not advanced any argument stemming from the state constitution in his brief. For those reasons, we will treat this case as arising solely under the relevant provision of the United States constitution.

court's order pending the completion of the appellate review process. On 2 January 2013, this Court granted the State's petitions.

II. Substantive Legal Analysis

A. Appellate Jurisdiction

[1] As an initial matter, we are required to address Defendant's contention that this Court lacked the authority to grant the State's petition for the issuance of a writ of *certiorari*. In view of the fact that a panel of this Court has previously rejected this contention in the course of granting the State's *certiorari* petition, we are required to do so as well. *N.C.N.B. v. Virginia Carolina Builders*, 307 N.C. 563, 567, 299 S.E.2d 629, 631-32 (1983) (stating that, "once 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" and that, "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"). In addition, for the reasons set forth in detail below, we also believe that this Court had the authority to grant the State's *certiorari* petition.

"The Court of Appeals shall have such appellate jurisdiction as the General Assembly may prescribe." N.C. Const. art. IV, § 12(2). According to N.C. Gen. Stat. § 7A-32(c), this Court has the authority to issue writs of *certiorari* "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." N.C. Gen. Stat. § 32(c). As a result, given that a "[trial] court's ruling on a motion for appropriate relief pursuant to [N.C. Gen. Stat. §] 15A-1415 is subject to review . . . [i]f the time for appeal has expired and no appeal is pending, by writ of *certiorari*," N.C. Gen. Stat. § 15A-1422(c)(3), *see State v. Dammons*, 128 N.C. App. 16, 22, 493 S.E.2d 480, 484 (stating that "[t]his Court may review a trial court's ruling on a motion for appropriate relief if 'the time for appeal has expired and no appeal is pending, by writ of certiorari' ") (quoting N.C. Gen. Stat. § 15A-1422(c)(3)), *disc. review denied*, 342 N.C. 660, 465 S.E.2d 547 (1997); *State v. Morgan*, 118 N.C. App. 461, 463, 455 S.E.2d 490, 491 (1995) (stating that "[a] trial 'court's ruling on a motion for appropriate relief pursuant to [N.C. Gen. Stat. §] 15A-1415 is subject to review . . . [i]f the time for appeal has expired and no appeal is pending, by writ of certiorari' ") (citations omitted), and given that the issuance of a writ of *certiorari* in situations such as this one is necessary to "supervise and control" proceedings in the trial courts, *see Troy v. Tucker*, 126 N.C. App. 213, 215,

484 S.E.2d 98, 99 (1997) (recognizing the existence of our supervisory jurisdiction over the trial courts as authorized by N.C. Const. art. IV, § 12 and N.C. Gen. Stat. § 7A–32(c)); *In re Robinson*, 120 N.C. App. 874, 875, 464 S.E.2d 86, 87 (1995) (granting *certiorari* "pursuant to [this Court's] supervisory power under [N.C. Gen. Stat. §] 7A–32(c)"), we clearly had ample authority to grant the State's request for the issuance of a writ of *certiorari* authorizing review of the trial court's order in this case.

In support of his contention to the contrary, Defendant cites a previous decision by this Court refusing to issue a writ of *certiorari* requested by the State on the grounds that the issuance of the requested writ was not authorized by N.C. R. App. P. 21(a)(1), which provides that a writ of certiorari may be issued in appropriate circumstances by either appellate court to " 'permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to [N.C. Gen. Stat.] § 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief.' " *State v. Starkey*, 177 N.C. App. 264, 268, 628 S.E.2d 424, 426, *cert denied*, __ N.C. __, 636 S.E.2d 196 (2006) (quoting N.C. R. App. P. 21(a)(1). According to the logic enunciated in *Starkey*, since N.C. R. App. P. 21 limits *certiorari* review of orders granting or denying motions for appropriate relief to orders denying such motions and since the State sought review of an order granting a defendant's motion for appropriate relief, we lacked authority to issue the requested writ. *Id.* As a result, however, of the fact that *Starkey* conflicts with several decisions of the Supreme Court that authorize review of trial court decisions granting motions for appropriate relief filed by a defendant, our decision in *Starkey* does not stand as an obstacle to the allowance of the State's *certiorari* petition. *See State v. Whitehead*, 365 N.C. 444, 445-46, 722 S.E.2d 492, 494 (2012) (granting the State's petition for the issuance of a writ of *certiorari* for the purpose of reviewing a trial court order granting a motion for appropriate relief); *State v. Frogge*, 359 N.C. 228, 230, 607 S.E.2d 627, 628-29 (2005) (granting a petition for the issuance of a writ of *certiorari* authorizing review of a trial court order granting a defendant's motion for appropriate relief), *cert. denied*, 531 U.S. 994, 121 S. Ct. 487, 148 L. Ed. 2d 459 (2000); *State v. McDowell*, 310 N.C. 61, 62, 310 S.E.2d 301, 301 (1984) (allowing a petition for the issuance of a writ of *certiorari* filed by the State seeking review of a trial court order granting defendant's motion for appropriate relief). As a result of the fact that the logic adopted in *Starkey* would be equally applicable to the situations at issue in *Whitehead*, *Frogge*, and *McDowell*, and since nothing in N.C. R. App. P. 21 makes any distinction between our authority to issue writs

of *certiorari* in response to petitions filed by the State seeking review of orders granting a motion for appropriate relief and that of the Supreme Court, we believe that our decision in *Starkey* is inconsistent with prior and subsequent decisions of the Supreme Court and is not, for that reason, controlling in the present case.[2] *See State v. Davis*, 198 N.C. App. 443, 449, 680 S.E.2d 239, 244 (2009) (this Court "decline[d] to follow" an earlier Court of Appeals decision "inconsistent with prior decisions of this Court and our Supreme Court"); *Cissell v. Glover Landscape Supply, Inc.*, 126 N.C. App. 667, 670 n.1, 486 S.E.2d 472, 473 n.1 (1997), *rev'd on other grounds*, 348 N.C. 67, 497 S.E.2d 283 (1998) (stating that, "because that case is inconsistent with prior decisions of this Court and our Supreme Court, we decline to follow it."). Our conclusion to this effect is reinforced by our recognition of the fact that the rules of appellate procedure "shall not be construed to extend or limit the jurisdiction of the courts of the appellate division as that is established by law," N.C. R. App. P. 1(c); the fact that our authority to grant *certiorari* for the purpose of reviewing orders granting or denying motions for appropriate relief is established by N.C. Gen. Stat. § 15A-1422(c)(3); and the fact that the approach adopted in *Starkey*, contrary to N.C. R. App. P. 1, treats N.C. R. App. P. 21 as limiting the jurisdiction afforded to this Court by the General Assembly. As a result, we have no hesitation in concluding that this Court did, in fact, have the authority to grant the State's petition for the issuance of a writ of *certiorari* in this case and will proceed to address the merits of the State's challenge to the trial court's order.

B. Validity of Trial Court's Order

1. Standard of Review

"When considering rulings on motions for appropriate relief, we review the trial court's order to determine 'whether the findings of fact

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2. In addition, this Court has granted petitions for writs of *certiorari* filed by the State for the purpose of seeking review of orders allowing motions for appropriate relief in previous cases. *See State v. Bonsteel*, 160 N.C. App. 709, __ S.E.2d __ (2003) (unpublished) (granting the State's petition for the issuance of a writ of *certiorari* for the purpose of reviewing a trial court order granting a defendant's motion for appropriate relief); *State v. Rubio*, __ N.C. App. __, 732 S.E.2d 393 (2012) (unpublished), *disc. review dismissed*, __ N.C. __, 735 S.E.2d 824 (2013) (citing N.C. Gen. Stat. § 15A-1422(c)(3) as the basis for asserting jurisdiction over an order granting a defendant's motion for appropriate relief). Although we are not bound by our prior unpublished decisions, *see United Services Automobile Assn. v. Simpson*, 126 N.C. App. 393, 396, 485 S.E.2d 337, 339, *disc. review denied*, 347 N.C. 141, 492 S.E.2d 37 (1997) (holding that this Court is not bound by a prior unpublished decision of another panel of this Court), we believe that *Bonsteel* and *Rubio* shed additional light on our authority to grant the State's request for *certiorari* review of an order granting a defendant's motion for appropriate relief.

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.' " *Frogge*, 359 N.C. at 240, 607 S.E.2d at 634 (quoting *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982)). " 'When a trial court's findings on a motion for appropriate relief are reviewed, these findings are binding if they are supported by competent evidence and may be disturbed only upon a showing of manifest abuse of discretion. However, the trial court's conclusions are fully reviewable on appeal.' " *State v. Lutz*, 177 N.C. App. 140, 142, 628 S.E.2d 34, 35 (2006) (quoting *State v. Wilkins*, 131 N.C. App. 220, 223, 506 S.E.2d 274, 276 (1998)). "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). Because the facts underlying this case as described in the trial court's findings of fact are essentially undisputed, the only issue that we are required to address in this case is whether the trial court correctly concluded that, on the basis of the present record, Defendant was entitled to relief from Judge Gore's original judgments on Eighth Amendment grounds.

2. Trial Court's Jurisdiction Over Defendant's Motion

[2] In its initial challenge to the trial court's judgment, the State argues that the trial court lacked jurisdiction to vacate Judge Gore's original judgments. More specifically, the State contends that no provision of N.C. Gen. Stat. § 15A-1415 authorized the trial court to enter an order vacating Defendant's original judgments, resentencing Defendant, and ordering that he be released. We do not find this aspect of the State's argument persuasive.

According to N.C. Gen. Stat. § 15A–1415(b), a convicted criminal defendant is entitled to seek relief from a trial court judgment by means of a motion for appropriate relief filed more than ten days after the entry of judgment on the basis of certain specifically enumerated grounds. *See* N.C. Gen. Stat. § 15A–1415(b). As we have recently stated, "N.C. Gen. Stat. § 15A–1415(b) clearly provides that the eight specific grounds listed in that statutory subsection are 'the only grounds which the defendant may assert by a motion for appropriate relief made more than 10 days after the entry of judgment,' " so that "a trial court lacks jurisdiction over the subject matter of a claim for postconviction relief which does not fall within one of the categories specified in N.C. Gen. Stat. § 15A–1415(b)." *State v. Harwood*, __ N.C. App. __, __, 746 S.E.2d 445, 450, *disc. review dismissed*, __ N.C. __, 748 S.E.2d 320 (2013).

In its order, the trial court concluded that it had the authority to grant the requested relief pursuant to N.C. Gen. Stat. §§ 15A-1415(b)(4) and (b)(8), which authorize an award of postconviction relief in the event that "[t]he 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," N.C. Gen. Stat. § 15A-1415(b)(4), or that "[t]he 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. Gen. Stat. § 15A-1415(b)(8). The fact that Defendant did not cite N.C. Gen. Stat. § 15A-1415(b)(4) before the trial court is irrelevant to the required jurisdictional determination given the fact that the constitutional nature of Defendant's challenge to Judge Gore's original judgments was clearly stated in Defendant's motion for appropriate relief and the fact that the trial court has the authority, in appropriate cases, to grant postconviction relief on its own motion. N.C. Gen. Stat. § 15A-1420(d) (stating that, "[a]t any time that a defendant would be entitled to relief by motion for appropriate relief, the court may grant such relief upon its own motion"). Similarly, the fact that the sentences imposed in Judge Gore's original judgments were not unauthorized, invalid, or otherwise unlawful at the time that they were imposed does not, contrary to the State's argument, preclude an award of relief based on N.C. Gen. Stat. § 15A-1415(b)(8) given that the reference to "at the time imposed" in the relevant statutory language does not modify the language authorizing a grant of relief in the event that the defendant's sentence "is otherwise invalid as a matter of law." In fact, acceptance of the State's argument that the trial court lacked the authority to enter the challenged order would necessarily mean that trial judges have no authority to grant postconviction sentencing relief on Eighth Amendment grounds after the time for noting a direct appeal has expired, an outcome which we do not believe to have been within the General Assembly's contemplation and which is not consistent with our postconviction jurisprudence. *State v. Bonds*, 45 N.C. App. 62, 64, 262 S.E.2d 340, 342 (stating that, "[i]f a judgment is invalid as a matter of law, the courts of North Carolina have always had the authority to vacate such judgments pursuant to petition for writ of habeas corpus and, more recently, by way of postconviction proceedings"), *app. dismissed*, 300 N.C. 376, 267 S.E.2d 687, *cert. denied*, 449 U.S. 883, 101 S. Ct. 235, 66 L. Ed. 2d 107 (1980). As a result of the fact that Defendant has asserted in his motion for appropriate relief that the sentences imposed in Judge Gore's original judgment are disproportionate to the offenses for which he was convicted in violation

of the Eighth Amendment and that those sentences were, for that reason, invalid, the trial court clearly had jurisdiction to reach the merits of Defendant's challenge to Judge Gore's original judgments pursuant to N.C. Gen. Stat. §§ 15A-1415(b)(4) and (b)(8).

This Court has recently addressed and rejected the same argument in a case in which the trial court granted a defendant's motion for appropriate relief and vacated his life sentence, which had been imposed upon him in 1973 as the result of his conviction for second degree burglary, on the basis of a conclusion that, "under evolving standards, [defendant's] sentence violated the Eighth Amendment and is invalid as a matter of law." *State v. Stubbs*, __ N.C. App. __, __, __ S.E.2d __, __ (2014). Although the State argued before this Court in that case, as it has here, that nothing in N.C. Gen. Stat. § 15A-1415 authorized the trial court to modify the defendant's original sentence, *Id.* at __, __ S.E.2d at __, we concluded that "the trial court had jurisdiction over the [original] judgment to consider whether defendant's sentence was 'invalid as a matter of law.' " *Id.* at __, __ S.E.2d at __ (quoting N.C. Gen. Stat. § 15A-1415(b)(8)).[3] As a result, in light of the literal language of N.C. Gen. Stat. §§ 15A-1415(b)(4) and (b)(8) and our decision in *Stubbs*, we hold that the trial court had jurisdiction to consider Defendant's challenges to Judge Gore's original judgments on the merits.

3. Gross Disproportionality

[3] Secondly, the State contends that, even if the trial court had jurisdiction to consider the validity of Defendant's challenge to Judge Gore's original judgments, it erred by determining that the sentences that Defendant was currently serving subjected him to cruel and unusual punishment in violation of the Eighth Amendment. We agree.

The Eighth Amendment to the United States Constitution, which has been made applicable to the states through the Fourteenth Amendment, provides that "[e]xcessive bail shall not be required, nor excessive fines

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3. In support of its argument that the trial court lacked the authority to consider Defendant's challenge to the judgments at issue here, the State cites the Supreme Court's decision in *Whitehead* to the effect that, "[h]aving concluded that defendant is not entitled to resentencing under the [Structured Sentencing Act], we also note that defendant's [motion for appropriate relief] provides no appropriate grounds for resentencing under the [Fair Sentencing Act]." *Whitehead*, 365 N.C. at 448, 722 S.E.2d at 495. In this case, unlike *Whitehead*, Defendant has advanced a constitutional, rather than a merely statutory, challenge to the validity of Judge Gore's original judgments, a fact which distinguishes this case from *Whitehead* and gave the trial court the authority to consider the merits of Defendant's motion for appropriate relief.

imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. "The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution's ban on cruel and unusual punishments is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.' " *Graham v. Florida*, 560 U.S. 48, 59, 130 S. Ct. 2011, 2021, 176 L. Ed. 2d 825, 835 (2010) (quoting *Weems v. United States*, 217 U.S. 349, 367, 30 S. Ct. 544, 549, 54 L. Ed. 793, 798 (1910)). We view the concept of proportionality according to " 'the evolving standards of decency that mark the progress of a maturing society.' " *Miller v. Alabama*, __ U.S. __, __, 132 S. Ct. 2455, 2463, 183 L. Ed. 2d 407, 417 (2012) (quoting *Estelle v. Gamble*, 429 U.S. 97, 102, 97 S. Ct. 285, 290 50 L. Ed. 2d 251, 259 (1976)). "The Eighth Amendment does not[, however,] require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are grossly disproportionate to the crime." *Harmelin v. Michigan*, 501 U.S. 957, 1001, 111 S. Ct. 2680, 2705, 115 L. Ed. 2d 836, 869 (1991) (Justice Kennedy, joined by Justices O'Connor and Souter, concurring) (internal quotations and citations omitted). As a result, " '[o]nly in exceedingly unusual non-capital cases will the sentences imposed be so grossly disproportionate as to violate the Eighth Amendment's proscription of cruel and unusual punishment.' " *State v. Clifton*, 158 N.C. App. 88, 94, 580 S.E.2d 40, 45 (quoting *State v. Ysaguire*, 309 N.C. 780, 786, 309 S.E.2d 436, 441 (1983)), *cert. denied*, 357 N.C. 463, 586 S.E.2d 266 (2003). "[I]n the absence of legal error, it is not the role of the judiciary to engage in discretionary sentence reduction," since "that power resides in the executive branch, as established by the state constitution and acts of the General Assembly," *Whitehead*, 365 N.C. at 448, 722 S.E.2d at 496, and since "our General Assembly has directed the Post-Release Supervision and Parole Commission to review matters of proportionality" arising from the changes in the statutory provisions governing the sentencing of convicted criminal defendants that have been enacted in recent years. *Stubbs*, __ N.C. App. at __, __ S.E.2d at __.[4]

As the United States Supreme Court has explained, "cases addressing the proportionality of sentences fall within two general classifications[:]" first, "challenges to the length of term-of-years sentences given all the circumstances in a particular case[;]" and second, "cases in which the

4. Although the State has argued at length that, "outside the capital context, there is no general proportionality principle inherent in the prohibition against cruel and unusual punishment," we believe that the relevant decisions of the United States Supreme Court clearly state the "gross disproportionality" test discussed in the text of this opinion for use in non-capital cases and do not understand the State to be advancing a contrary assertion.

Court implements the proportionality standard by certain categorical restrictions on the death penalty." *Graham*, 560 U.S. at 59, 130 S. Ct. at 2021, 176 L. Ed. 2d at 836. "In the first classification the Court considers all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive" *Id.*, with that determination beginning with a comparison of "the gravity of the offense and the severity of the sentence." *Graham*, 560 U.S. at 60, 130 S. Ct. at 2022, 176 L. Ed. 2d at 836 (citing *Harmelin*, 501 U.S. at 1005, 111 S. Ct. at 2707, 115 L. Ed. 2d at 871 (Justice Kennedy, joined by Justices O'Connor and Souter, concurring)). " '[I]n the rare case in which [this] threshold comparison . . . leads to an inference of gross disproportionality[,]' the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions." *Id.* "Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare." *Rummel v. Estelle*, 445 U.S. 263, 272, 100 S. Ct. 1133, 1138, 63 L. Ed. 2d 382, 390 (1980).

The trial court reached the conclusion that Defendant had been subjected to cruel and unusual punishment based upon a consideration of "(1) the gravity of the offense, (2) the harshness of the penalty, and (3) the sentences for other crimes within the jurisdiction." In seeking to persuade us to uphold the trial court's order, Defendant notes that he was a juvenile at the time that the offenses in question were committed, points out that he would receive a significantly shorter term of imprisonment in the event that he were to be sentenced under current law, and argues that his sentence of 50 years imprisonment with the possibility of parole based upon his convictions for second degree burglary, felonious breaking or entering, felonious larceny, and possession of stolen property was grossly disproportionate to the crimes committed. We do not find Defendant's argument persuasive.[5]

The first problem with the trial court's order is that the trial court claimed to have erroneously considered a comparison of the sentence

5. The parties do not appear to agree upon the sentence upon which we should focus our attention in analyzing the validity of the State's challenge to the trial court's order. On the one hand, Defendant's argument rests upon the assumption that we should view the sum total of the sentences embodied in Judge Gore's original judgments as a single term of imprisonment while the State appears to suggest that we should focus our attention on the specific sentence that Defendant is currently serving. As a result of the fact that we do not believe that this difference of opinion has any bearing on the ultimate outcome that we should reach in this case, we will assume, without deciding, that the approach taken by Defendant is the correct one.

imposed upon Defendant with sentences imposed upon others under more recent statutory sentencing provisions in the course of determining whether Defendant's sentence was grossly disproportionate. However, a comparison of the sentence imposed upon Defendant to the sentences that have been or could be imposed upon other convicted felons is not relevant to the issues raised by Defendant's motion for appropriate relief until after a finding of "gross disproportionality" had been made. *See Graham*, 560 U.S. at 60, 130 S. Ct. at 2022, 176 L. Ed. 2d at 836 (stating that an evaluation of the gravity of the offense for which the defendant had been convicted and the severity of the sentence imposed upon the defendant based upon that conviction for the purpose of determining whether the defendant's sentence was grossly disproportionate must be undertaken before the court compares a defendant's sentence to the sentences of others for similar offenses); *Harmelin*, 501 U.S. at 1005, 111 S. Ct. at 2707, 115 L. Ed. 2d at 871 (stating that "[a] better reading of our cases leads to the conclusion that intrajurisdictional and interjurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality") (Justice Kennedy, joined by Justices O'Connor and Souter, concurring). For that reason, the extent to which Defendant would have been subject to a less severe sentence in the event that he had been sentenced under current sentencing law has no bearing upon the initial phase of the required Eighth Amendment analysis. As a result, the trial court erred by apparently failing to make a determination that Defendant's sentence was grossly disproportionate without taking subsequent sentencing amendments into account before concluding that Judge Gore's original judgments should be vacated and that Defendant should be resentenced.

In addition, we are unable to agree that Defendant has established that the sentence embodied in Judge Gore's original judgments was grossly disproportionate. Although Defendant was a juvenile at the time that he committed the offenses that led to the challenged trial court judgments and although the offenses for which Defendant was convicted were not violent in nature, he pled guilty to one count of second degree burglary, three counts of felonious breaking or entering, four counts of felonious larceny, and two counts of possession of stolen property, resulting in a total of ten felony convictions. Moreover, despite the fact that Defendant's convictions did, as he points out in his brief, result from the commission of nonviolent property crimes, the fact that he was convicted of committing ten felony offenses, the fact that second degree burglary is a particularly serious offense involving the breaking and entering of a residence in the nighttime with the intent to commit a

felony or any larceny, *State v. Beaver*, 291 N.C. 137, 141, 229 S.E.2d 179, 181 (1976) (stating that "[t]he distinction between the two degrees [of burglary] depends upon the actual occupancy of the dwelling house or sleeping apartment at the time of the commission of the crime"), and the fact that, in two of the cases at issue here, Defendant was found to have taken property of great value and involved a young person less than sixteen years old in the criminal activity in which he was engaged, are relevant to the constitutional validity of Judge Gore's decision to impose a particularly severe sentence in this case. Simply put, in light of the number of felony offenses for which Defendant was convicted, the fact that one of the offenses for which Defendant was convicted was a particularly serious one, and the fact that Defendant's conduct involved great financial harm and led to criminal activity on the part of a younger individual, we are unable to say that the sentence embodied in Judge Gore's original judgments was "grossly disproportionate." Our conclusion to this effect is buttressed by a careful examination of the reported appellate decisions addressing similar factual circumstances, all of which suggest that this is not one of the "exceedingly rare" and "extreme" cases in which the sentence upon Defendant is "grossly disproportionate." *See Ewing v. California*, 538 U.S. 11, 30-31, 123 S. Ct. 1179, 1190, 155 L. Ed. 2d 108, 123 (2003) (holding that a sentence of 25 years to life imprisonment for larceny pursuant to a "three strikes and you're out" law did not constitute cruel and unusual punishment in violation of the Eighth Amendment); *Harmelin*, 501 U.S. at 1008-09, 111 S. Ct. at 2709, 115 L. Ed. 2d at 874 (holding that a sentence of life imprisonment without the possibility of parole for possession of cocaine was not so grossly disproportionate as to constitute cruel and unusual punishment in violation of the Eighth Amendment) (Justice Kennedy, joined by Justices O'Connor and Souter, concurring); *State v. Green*, 348 N.C. 588, 612, 502 S.E.2d 819, 834 (1998), *cert. denied*, 525 U.S. 1111, 119 S. Ct. 883, 142 L. Ed. 2d 783 (1999) (holding that a sentence of life imprisonment with the possibility of parole based upon a thirteen year old defendant's conviction for first degree sexual offense did not constitute cruel and unusual punishment in violation of the Eighth Amendment); *State v. Ford*, 297 N.C. 28, 32, 252 S.E.2d 717, 719 (1979) (holding that a sentence of life imprisonment for first degree burglary did not constitute cruel and unusual punishment in violation of the Eighth Amendment); *State v. Sweezy*, 291 N.C. 366, 384-85, 230 S.E.2d 524, 536 (1976) (holding that a sentence of life imprisonment for first degree burglary did not constitute cruel and unusual punishment in violation of the Eighth Amendment); *Stubbs*, __ N.C. App. at __, __ S.E.2d at __ (holding that a defendant's sentence of life imprisonment for a second degree burglary

committed when the defendant was a juvenile did not constitute cruel and unusual punishment in violation of the Eighth Amendment); *State v. Pettigrew*, 204 N.C. App. 248, 258-59, 693 S.E.2d 698, 705, *app. dismissed*, 364 N.C. 439, 706 S.E.2d 467 (2010) (holding that a sentence of 32 to 40 years imprisonment for two counts of first degree sexual offense committed when the defendant was sixteen years old did not constitute cruel and unusual punishment in violation of the Eighth Amendment). For all of these reasons, we see no basis for concluding that this is one of the "exceedingly rare noncapital cases" in which the sentence imposed is "grossly disproportionate" to the crimes for which Defendant stands convicted. As a result, we conclude that the sentence imposed upon Defendant in this case, while undoubtedly severe, is "not cruel or unusual in the constitutional sense," *Green*, 348 N.C. at 612, 502 S.E.2d at 834, and, for that reason, hold that the trial court's order should be reversed and that this case should be remanded to the Cumberland County Superior Court with instructions to reinstate Judge Gore's original judgments.

III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court erred by vacating Judge Gore's original judgments, resentencing Defendant, and ordering his immediate release. 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 Cumberland County Superior Court for reinstatement of Judge Gore's original judgments.

REVERSED AND REMANDED.

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

STEPHENS v. COVINGTON

[232 N.C. App. 497 (2014)]

JOSHUA STEPHENS, PLAINTIFF
v.
SHELBY COVINGTON, JAMES HEWETT, AND GLENDA HEWETT, DEFENDANTS

No. COA13-431

Filed 18 February 2014

Animals—dog bite—landlord's liability—no knowledge of dangerous propensities

The trial court correctly granted defendant's motion for summary judgment in a negligence action against a landlord by a child bitten by a tenant's Rottweiler. The evidence failed to show that defendant knew the dog had dangerous propensities prior to his attack on plaintiff, thus failing to establish that defendant possessed sufficient control to remove the danger under *Holcomb v. Colonial Assocs., L.L.C.*, 358 N.C. 501. Plaintiff's assumption that defendant had knowledge of the dog's dangerous propensities based upon breed was misplaced, as the record indicated that the Rottweiler breed is not inherently aggressive.

Appeal by plaintiff from order entered 3 October 2012 by Judge Gary E. Trawick in New Hanover County Superior Court. Heard in the Court of Appeals 9 October 2013.

Smith Moore Leatherwood LLP, by Matthew Nis Leerberg, and The Kirby Law Firm, by Albert D. Kirby, Jr., for plaintiff-appellant.

Culbreth Law Firm, LLP, by Stephen E. Culbreth, for defendant-appellee.

CALABRIA, Judge.

Joshua Stephens ("plaintiff") appeals from an order granting summary judgment in favor of Shelby Covington ("defendant"). Defendants James and Glenda Hewett (collectively, "the Hewetts") are not parties to this appeal. Plaintiff only appeals the 3 October 2012 order granting summary judgment in defendant's favor. We affirm.

I. Background

In the early 1990s, the Hewetts leased a home located on Louisiana Avenue in Wilmington, North Carolina ("the property") from defendant's husband, John Covington ("Mr. Covington") (collectively with

defendant, "the Covingtons"). Mr. Covington knew that the Hewetts owned a Rottweiler ("Rocky"), and since the houses in the neighborhood were close together, Mr. Covington and the Hewetts contacted Animal Control regarding safety measures for keeping a dog. As a precaution and at the direction of Animal Control, the Hewetts created a fenced area in the backyard with two gates and posted "Beware of Dog" and "No Trespassing" signs on each gate.

Shortly after the Hewetts leased the property, but prior to purchasing it, Rocky grew so large that the Hewetts began keeping Rocky exclusively in the fenced area. At the time the incident in the instant case occurred, plaintiff was eight years old. Plaintiff visited his friend Jeremy Hewett ("Jeremy"), the Hewetts' nine-year-old son. During plaintiff's visit, plaintiff followed Jeremy when he entered the fenced area to refill Rocky's water dish. While the boys stood in the fenced area, Rocky bit plaintiff's lower leg. Jeremy hit Rocky with a stick to make him release plaintiff. When Jeremy was unsuccessful, he ran to get his mother. Rocky briefly released plaintiff, but then bit him again, catching plaintiff's shoulder in his teeth. Eventually Glenda Hewett managed to release plaintiff from Rocky, and a neighbor pulled plaintiff over the fence, safely away from Rocky. Plaintiff sustained "extremely severe" injuries to both his leg and shoulder. Animal Control officers investigated and took statements from witnesses. After Rocky remained at the animal shelter for a ten day mandatory quarantine period, James Hewett decided to have him euthanized.

In October 2008, after plaintiff reached majority, he filed a complaint against the Covingtons and the Hewetts. However, since Mr. Covington died in 1998, the complaint was voluntarily dismissed without prejudice. Plaintiff refiled the complaint against the Hewetts and defendant on 27 January 2011. Plaintiff alleged, *inter alia*, negligence against the Hewetts and defendant. On 21 November 2012, the trial court entered a final judgment of $500,000 against the Hewetts as compensatory damages. On 12 March 2012, defendant filed a motion for summary judgment. After a hearing in New Hanover County Superior Court, the trial court entered an order on 3 October 2012 granting defendant's motion. Plaintiff appeals the order granting summary judgment in defendant's favor.

II. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party

is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Id.* (citation omitted).

III. Landlord's Liability to Third Parties for Injuries by Tenant-Owned Dogs

Plaintiff argues the trial court erred by granting defendant's motion for summary judgment because there was a genuine issue of material fact as to whether defendant had control over the dangerous animal which attacked plaintiff. We disagree.

Plaintiff's argument relies primarily upon *Holcomb v. Colonial Assocs., L.L.C.*, in which our Supreme Court considered "whether a landlord can be held liable for negligence when his tenant's dogs injure a third party." 358 N.C. 501, 503, 597 S.E.2d 710, 712 (2004). In *Holcomb*, a contractor sustained injuries when a tenant's Rottweiler dog "lunged" at him, causing him to fall to the ground. *Id.* at 504, 597 S.E.2d at 713. The landlord had allowed the tenant to keep two Rottweiler dogs which were permitted to run freely on the property despite the landlord's awareness of two prior instances of aggression on the part of the dogs, one of which resulted in a bite. *Id.* at 504, 597 S.E.2d at 712-13. The landlord continued to allow the dogs despite a written lease agreement which required the tenant to promptly remove any pet the landlord deemed to be a nuisance or undesirable. *Id.* at 503, 597 S.E.2d at 712.

Under a premises liability theory, the *Holcomb* Court held that the landlord could be held liable because the "lease provision granted [landlord] sufficient control to *remove the danger* posed by [tenant]'s dogs." *Id.* at 508-09, 597 S.E.2d at 715 (emphasis added). Plaintiff in the instant case contends that there was a genuine issue of material fact as to whether defendant possessed similar control over Rocky at the time he was attacked.

However, as all of the cases relied upon by the *Holcomb* Court make clear, it is not mere generalized control of leased property that establishes landlord liability for a dog attack, but rather specific control of a known dangerous animal. *See Batra v. Clark*, 110 S.W.3d 126, 130 (Tex.App.-Houston 1st Dist. 2003) ("[I]f a landlord has actual knowledge of an animal's dangerous propensities and presence on the leased property, and has the ability to control the premises, he owes a duty of ordinary care to third parties who are injured by this animal."); *Uccello v. Laudenslayer*, 118 Cal. Rptr. 741 (1975) (landlord renewed tenants'

lease with knowledge that tenants' dog previously attacked two people); *Shields v. Wagman*, 714 A.2d 881 (Md. 1998) (leasing company knew dog had vicious tendencies and had control over dog's presence on the property); *McCullough v. Bozarth*, 442 N.W.2d 201, 208 (Neb. 1989) (landlord only liable for injuries caused by tenant's dog when he has "actual knowledge of the dangerous propensities of the dog and . . . nevertheless leased the premises to the dog's owner or . . . had the power to control the harboring of a dog by the tenant and neglected to exercise that power."). The *Holcomb* Court was able to presume the dog which attacked the contractor in that case was dangerous, because the undisputed evidence before it was that the landlord had knowledge of the dogs' previous attacks and dangerous propensities. *Id.* at 504, 597 S.E.2d at 712-13. Nonetheless, it was still clear from that decision that it was not merely the landlord's control of the property, but particularly the landlord's "sufficient control to *remove the danger* posed" which resulted in the landlord's liability. *Id.* at 508, 597 S.E.2d at 715 (emphasis added). Thus, pursuant to *Holcomb* and the cases cited therein, a plaintiff must specifically establish both (1) that the landlord had knowledge that a tenant's dog posed a danger; and (2) that the landlord had control over the dangerous dog's presence on the property in order to be held liable for the dog attacking a third party.

In the instant case, there is no evidence that defendant or her husband knew or had reason to know that Rocky was dangerous. While Mr. Covington requested that James Hewett contact Animal Control prior to Rocky occupying the property, deposition testimony indicates that the purpose behind this call was to obtain advice on erecting a fence to confine the dog to the yard in accordance with local ordinances, rather than because the dog had displayed any aggression. The record also indicates that there were no reported incidents of aggression, and no one had complained about Rocky to Animal Control or to the Covingtons prior to plaintiff's visit on 25 January 1996. During the investigation of the incident, Animal Control officers did not interview the Covingtons. Animal Control officer Chloe Rivenbark testified at her deposition in the matter that "there was really no need to talk to [the Covingtons]. [Animal Control officers] were dealing mainly with the children and the families that were involved." Finally, defendant specifically testified in her deposition that "the dog didn't have a bad name of biting anybody or anything that I ever heard tell of [sic]," and that Mr. Covington "would have not allowed [sic] . . . anything there that was dangerous[.]" Thus, unlike the landlord in *Holcomb*, defendant did not have knowledge of a dangerous dog on the property.

Nonetheless, plaintiff contends that defendant did not need to have actual knowledge of Rocky's dangerous propensities because this Court has previously held that dog owners in a negligence action were "chargeable with the knowledge of the general propensities of the Rottweiler animal." *Hill v. Williams*, 144 N.C. App. 45, 55, 547 S.E.2d 472, 478 (2001) (citation omitted). In *Hill*, a local veterinarian testified that the Rottweiler breed was "aggressive and temperamental, suspicious of strangers, protective of their space, and unpredictable." *Id.* at 48, 547 S.E.2d at 474. The defendants presented no evidence to refute the plaintiffs' evidence of the breed's aggressive tendencies, and as a result, they were "chargeable . . . with knowledge of the general propensities of a Rottweiler dog *as reflected in plaintiffs' evidence*[.]" *Id.* at 55, 547 S.E.2d at 478 (emphasis added).

In the instant case, plaintiff did not present any evidence demonstrating that the Rottweiler breed is generally dangerous. The only evidence regarding the general propensities of Rottweilers was the deposition testimony of Animal Control Officer Ron Currie ("Officer Currie"). Officer Currie testified that socializing individual dogs is more indicative of an animal's behavior than breed. He also testified that Rottweilers are not necessarily aggressive by their very nature. Thus, the evidence presented regarding the propensities of a Rottweiler dog, in the instant case, does not support a finding that Rottweilers are generally dangerous. Accordingly, *Hill*'s statement regarding the dangerousness of Rottweilers, which was specific to the evidence presented in that case, is not applicable to the instant case.

Ultimately, there is nothing in the record to suggest that defendant knew a *dangerous* dog was on the property. Rocky had no prior history of attacks, and neither the Covingtons nor Animal Control were aware of any complaints regarding the dog's aggression or viciousness. Defendant could not have known that Rocky was dangerous, as there was no evidence prior to 25 January 1996 that the dog exhibited vicious tendencies.

IV. Conclusion

In the light most favorable to plaintiff, the evidence fails to show that defendant knew that Rocky had dangerous propensities prior to his attack on plaintiff. Since plaintiff has failed to establish that Rocky was a danger, he has failed to establish that defendant possessed "sufficient control to remove the danger posed" under *Holcomb*. 358 N.C. at 508, 597 S.E.2d at 716. Plaintiff's assumption that defendant had knowledge of Rocky's dangerous propensities based upon breed is misplaced, as

the record indicates that the Rottweiler breed is not inherently aggressive. As such, there is no genuine issue of material fact, and the trial court correctly granted defendant's motion for summary judgment. We affirm the order of the trial court.

Affirmed.

Judges ELMORE and STEPHENS concur.

LESLIE WEBB, ADMINISTRATRIX OF THE ESTATE OF ROBERT B. WEBB, III, PLAINTIFF-APPELLANT

v.

WAKE FOREST UNIVERSITY BAPTIST MEDICAL CENTER, UNIVERSITY DENTAL ASSOCIATES, NORTH CAROLINA BAPTIST HOSPITAL, WAKE FOREST UNIVERSITY, WAKE FOREST UNIVERSITY PHYSICIANS, SHILPA S. BUSS, DDS, AND REENA PATEL, DDS, DEFENDANTS-APPELLEES

No. COA13-221

Filed 18 February 2014

1. Dentists—malpractice—prolonged anesthesia—summary judgment

In a dental malpractice action that arose from a procedure with sustained anesthesia and pneumonia, plaintiff, the nonmoving party, forecast evidence showing that defendants' treatment proximately caused the decedent's death and that there were genuine issues of material fact to be determined by the jury. The trial court erred by granting defendants' motions for summary judgment.

2. Appeal and Error—preservation of issues—exclusion of evidence—no motion to exclude—considered under summary judgment

Despite the fact that a dental malpractice action was before the Court of Appeals on appeal from a grant of summary judgment, and the record did not show a motion to exclude expert testimony, the admissibility of expert testimony was addressed because of the Supreme Court's analysis in *Crocker v. Roethling*, 363 N.C. 140.

3. Dentists—malpractice—causation—two-step showing

Defendants did not show that plaintiff's expert testimony in a dental malpractice case was not sufficiently reliable on causation.

The fact that plaintiff's causation testimony was presented in two steps, that the dental care caused his bronchopneumonia and that the bronchopneumonia caused decedent's death, did not affect this analysis.

4. Dentists—malpractice—causation—expert witness—individual considerations

Plaintiff's expert in a dental malpractice case involving anesthesia and pneumonia was qualified to render opinions on causation. Focusing on the qualifications of Dr. Behrman in particular, as opposed to the qualifications of licensed dentists in general, Dr. Behrman's knowledge, skill, experience, training, and education qualified him to opine as to the causation of bronchopneumonia.

Judge DILLON dissenting.

Appeal by Plaintiff from order entered 27 August 2012 by Judge John O. Craig, III in Superior Court, Forsyth County. Heard in the Court of Appeals 10 September 2013.

Kennedy, Kennedy, Kennedy, and Kennedy, LLP, by Harold L. Kennedy, III and Harvey L. Kennedy, for Plaintiff-Appellant.

Coffey Bomar LLP, by Tamura D. Coffey and J. Rebekah Biggerstaff, for Defendants-Appellees Wake Forest University Baptist Medical Center, North Carolina Baptist Hospital, Wake Forest University, and Wake Forest University Physicians.

Carruthers & Roth, P.A., by Kenneth L. Jones and Michal E. Yarborough, for Defendant-Appellee University Dental Associates.

McGEE, Judge.

Leslie Webb, Administratrix of the Estate of Robert B. Webb, III, ("Plaintiff"), filed a complaint against Wake Forest University Baptist Medical Center, University Dental Associates, North Carolina Baptist Hospital, Wake Forest University, Wake Forest University Physicians, Shilpa S. Buss, DDS, and Reena Patel, DDS ("Defendants") on 13 July 2010. Plaintiff alleged that Robert B. Webb, III, ("the Decedent") was under general anesthesia for oral surgery, teeth cleaning, and the extraction of four teeth performed on 13 March 2008. The Decedent was sent home the same day following the procedure. He became unresponsive at home on 14 March 2008 and was pronounced dead on 15 March 2008.

Plaintiff alleged that Defendants were negligent in their treatment of the Decedent and that this negligence was the proximate cause of his death.

Defendants Wake Forest University Baptist Medical Center, North Carolina Baptist Hospital, Wake Forest University, Wake Forest University Physicians, Shilpa S. Buss, DDS, and Reena Patel, DDS, filed an answer on 30 September 2010. Defendant University Dental Associates filed a separate answer on 5 October 2010.

Defendants Wake Forest University Baptist Medical Center, North Carolina Baptist Hospital, Wake Forest University, Wake Forest University Physicians, Shilpa S. Buss, DDS, and Reena Patel, DDS, filed a motion for summary judgment on 26 July 2012. Defendant University Dental Associates filed a separate motion for summary judgment on 31 July 2012.

The trial court granted the motions for summary judgment as to "any and all allegations, claims, and causes of action involving the dental care provided to [the D]ecedent." The trial court also granted the motion for summary judgment "as to any and all allegations, claims, and causes of action that relate to the dental care provided to [the D]ecedent involving the alleged negligence of [D]efendants Wake Forest University Baptist Medical Center, North Carolina Baptist Hospital, Wake Forest University, and Wake Forest University Physicians." The trial court denied Defendants' summary judgment motion relating to anesthesia care.

Plaintiff appeals.

I. Summary Judgment Rule

Plaintiff argues the trial court erred in granting Defendants' motions for summary judgment relating to dental care of Decedent. A trial court should grant a motion for summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2013); *see also Lord v. Beerman*, 191 N.C. App. 290, 293, 664 S.E.2d 331, 334 (2008).

Our Supreme Court has "emphasized that summary judgment is a drastic measure, and it should be used with caution. This is especially true in a negligence case[.]" *Williams v. Power & Light Co.*, 296 N.C. 400, 402, 250 S.E.2d 255, 257 (1979) (internal citation omitted). The purpose of N.C.G.S. § 1A-1, Rule 56 "is to eliminate formal trials where only questions of law are involved." *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982). "An issue is 'genuine' if it can be proven

by substantial evidence and a fact is 'material' if it would constitute or irrevocably establish any material element of a claim or a defense." *Id.*

"The moving party carries the burden of establishing the lack of any triable issue." *Lord*, 191 N.C. App. at 293, 664 S.E.2d at 334. "The movant may meet his or her burden by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim[.]" *Id.* (internal quotation marks omitted). "Generally this means that on undisputed aspects of the opposing evidential forecast, where there is no genuine issue of fact, the moving party is entitled to judgment as a matter of law." *Lowe*, 305 N.C. at 369, 289 S.E.2d at 366 (internal quotation marks omitted).

Once the moving party has met its initial burden, the nonmoving party must produce "a forecast of evidence demonstrating that the [nonmoving party] will be able to make out at least a prima facie case at trial" in order to survive summary judgment. *Diggs v. Novant Health, Inc.*, 177 N.C. App. 290, 294, 628 S.E.2d 851, 855 (2006) (alteration in original). "The opposing [nonmoving] party need not convince the court that he would prevail on a triable issue of material fact but only that the issue exists." *Lowe*, 305 N.C. at 370, 289 S.E.2d at 366.

II. Analysis

[1] Plaintiff's complaint and Defendants' answers show there are genuine issues of material fact in this matter. The complaint alleged the following:

> XII. That the oral surgery performed on [the Decedent] lasted 8 hours and 20 minutes, approximately four times longer than the time for the procedure represented to the parents of [the Decedent]. The oral surgery consisted of teeth cleaning and the extraction of four teeth. The patient was under general anesthesia for over 8 hours. . . .
>
> XIV. That the oral surgeons and the anesthesia treatment team were aware of the fact that a known risk of having a patient under general anesthesia for an extensive period of time was that the patient could develop pneumonia.
>
> XV. That in spite of the lengthy surgery and the extended period of time that the patient was under general anesthesia, upon information and belief, the anesthesia treatment team in consultation with the two oral surgeons made the

> decision to send [the Decedent] home on March 13, 2008 post surgery.
>
> XVI. On March 14, 2008, [the Decedent] became unresponsive at home. He was rushed by EMT to Moses Cone Hospital in Greensboro, North Carolina. At Moses Cone Hospital, [the Decedent] was diagnosed as having cerebral edema on CT, anoxic brain damage and cardiac arrest. . . .
>
> XVIII. An autopsy was performed, and the cause of death was determined to be bronchopneumonia following comprehensive dental care under general anesthesia.

Defendants Wake Forest University Baptist Medical Center, North Carolina Baptist Hospital, Wake Forest University, Wake Forest University Physicians, Shilpa S. Buss, DDS, and Reena Patel, DDS, denied all of the above allegations in their answer. Defendant University Dental Associates filed a separate answer in which it also denied the above allegations.

Defendants, in their briefs to this Court and at oral argument, focused on the admissibility of expert testimony under N.C. Gen. Stat. § 8C-1, Rule 702(b). The trial court also stated during the hearing that Plaintiff had "run squarely into a brick wall with Rule 702(b)."

However, we note that the record contains no motion to exclude Plaintiff's expert witnesses. Rather, at the hearing on Defendants' motions for summary judgment, Defendants argued Plaintiff failed to show causation, as follows:

> Your Honor . . . we will concede that [Plaintiff has] three expert witnesses, all who have testified about standard of care issues. That is not what we're arguing about. We are strictly arguing about whether or not they had made a causal link with these three experts to the dental care in the case.

Medical malpractice encompasses actions arising from the performance of dental care. "[T]he term 'medical malpractice action' means a civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider." N.C. Gen. Stat. § 90-21.11 (2009).[1]

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1. Our General Assembly amended this statute in 2011. 2011 N.C. Sess. Laws ch. 400 § 5. The amendment applies "to causes of actions arising on or after" 1 October 2011. *Id.*

"To survive a motion for summary judgment in a medical malpractice action, a plaintiff must forecast evidence demonstrating that the treatment administered by [the] defendant was in negligent violation of the accepted standard of medical care in the community[,] and that [the] defendant's treatment proximately caused the injury." *Lord*, 191 N.C. App. at 293-94, 664 S.E.2d at 334 (alterations in original) (internal quotation marks omitted). "Proximate cause is a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred[.]" *Id.* at 294, 664 S.E.2d at 334.

In the present case, Plaintiff forecast evidence showing that the treatment administered by Defendants was in negligent violation of the accepted standard of care in the community. Dr. Behrman, a Doctor of Dental Medicine, testified on behalf of the Decedent in a deposition that "[t]here was no clearance obtained on a significantly medically compromised person by the physician of record, the physician caring for him[.]" Dr. Behrman testified as follows regarding the necessity to consult with the physician of record prior to the dental procedure:

> This is bread and butter of training programs, the way we teach the residents, the way we've been taught; using the medical providers, obtaining the consult and such. This is what we do and what we're trained to do, what I expect my residents to do, what I have to demonstrate during accreditation visits within a residency program.

Plaintiff also forecast evidence, in depositions and in the complaint, of the proximate cause of death. The portion of Dr. Behrman's deposition relevant to causation is quoted below:

> [Plaintiff's attorney]. In your expert opinion was the violation of the standard of care that you testified about here today a proximal contributing cause to [Decedent] developing bronchopneumonia?
>
> . . . .
>
> [Dr. Behrman]. Within my knowledge as an oral and maxillofacial surgeon, yes.

---

at § 11. The cause of action in the present case arose on or about 13 March 2008. The amendment therefore is not applicable to the present case.

Plaintiff also alleged in the complaint that an "autopsy was performed, and the cause of death was determined to be bronchopneumonia following comprehensive dental care under general anesthesia." The doctor who performed the Decedent's autopsy, Dr. Gaffney-Kraft, stated in an affidavit filed by Plaintiff in this action that "it is [her] opinion within reasonable medical certainty that the cause of death of [the Decedent] was bronchopneumonia following comprehensive dental care including exam, radiographs, cleaning, restoration and extractions which were performed under general anesthesia shortly before his death[.]" Dr. Gaffney-Kraft also indicated in her report of autopsy examination that Decedent's cause of death was bronchopneumonia.

As stated above, the trial court should grant a motion for summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c); *see also Lord*, 191 N.C. App. at 293, 664 S.E.2d at 334. "Where there are genuine, conflicting issues of material fact, the motion for summary judgment must be denied so that such disputes may be properly resolved by the jury as the trier of fact." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 468, 597 S.E.2d 674, 692 (2004).

Plaintiff contends that she "presented a two-tier approach on causation." First, Dr. Behrman opined that the violation of the standard of care caused the Decedent's bronchopneumonia; second, the bronchopneumonia caused the death of the Decedent. Defendants contend the testimony of Dr. Behrman fails to establish proximate cause because his testimony fails to satisfy N.C.G.S. §8C-1, Rule 702 (2009).[2]

III. Admissibility of Expert Testimony

[2] Despite the fact that this matter is before us on appeal from the grant of summary judgment, we address the admissibility of expert testimony because of our Supreme Court's analysis in *Crocker v. Roethling*, 363 N.C. 140, 675 S.E.2d 625 (2009). In *Howerton*, our Supreme Court recognized the differences in the two issues and commented that a party "will not likely fare as well" by moving for summary judgment without a preliminary admissibility determination "because of the inherent

2. Our General Assembly amended N.C.G.S. § 8C-1, Rule 702 in 2011. 2011 N.C. Sess. Laws ch. 283 § 1.3. The amendments apply "to actions commenced on or after" 1 October 2011. *Id.* at § 4.2. The amendments are not applicable to the present case because the action was commenced on 13 July 2010.

procedural safeguards favoring the non-moving party in motions for summary judgment." *Howerton*, 358 N.C. at 468, 597 S.E.2d at 692; *see also Day v. Brant*, ___ N.C. App. ___, ___, 721 S.E.2d 238, 247, *disc. review denied*, 366 N.C. 719, 726 S.E.2d 179 (2012) ("Our Supreme Court, in *Howerton*, cautioned against the merging of the two issues.").

The decision in *Crocker* was composed of three opinions from the Supreme Court. All three opinions analyze the admissibility of expert testimony, regardless of the facts that the appeal was from an order granting summary judgment and the record indicated no motion to exclude expert testimony. *Crocker*, 363 N.C. at 143, 675 S.E.2d at 629. Our Supreme Court concluded that the trial court's ruling on summary judgment resulted from "a misapplication of Rule 702[.]" *Id.* at 144, 675 S.E.2d at 629. Because our Supreme Court in *Crocker* analyzed the admissibility of expert testimony even in the absence of a motion to exclude expert testimony, we analyze the admissibility of expert testimony in the present case.

"The trial court must decide the preliminary question of the admissibility of expert testimony under the three-step approach adopted in *State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995)." *Crocker*, 363 N.C. at 144, 675 S.E.2d at 629. "The trial court thereunder must assess: 1) the reliability of the expert's methodology, 2) the qualifications of the proposed expert, and 3) the relevance of the expert's testimony." *Id.*

A. Reliability of the Expert's Methodology

[3] As to the first step in the *Goode* analysis of the admissibility of expert testimony, Plaintiff contends that Dr. Behrman "is unquestionably qualified as an expert in the field of oral surgery." Defendants contend Plaintiff's expert testimony is "not sufficiently reliable to be admissible[,]" citing *Azar v. Presbyterian Hosp.*, 191 N.C. App. 367, 663 S.E.2d 450 (2008). When testimony on medical causation "is based merely upon speculation and conjecture, however, it is no different than a layman's opinion, and as such, is not sufficiently reliable to be considered competent evidence on issues of medical causation." *Id.* at 371, 663 S.E.2d at 453.

However, as discussed above, the opinions of Dr. Behrman and Dr. Gaffney-Kraft were not based merely upon speculation or conjecture. Neither Dr. Behrman nor Dr. Gaffney-Kraft used the words "probably" or "possibly" or otherwise indicated that their opinions were speculative or conjectural. Rather, Dr. Behrman answered the question as to his opinion on causation in the affirmative. Similarly, Dr. Gaffney-Kraft stated that "it is [her] opinion within reasonable medical certainty that the

cause of death of [the Decedent] was bronchopneumonia[.]" The fact that Plaintiff's causation testimony is presented in two steps, (1) that the dental care caused Decedent's bronchopneumonia and (2) that the bronchopneumonia caused Decedent's death, does not affect this analysis. Defendants cite no case holding that causation evidence may not be presented in sequential steps, and our research reveals none. Defendants have not shown Plaintiff's expert testimony is not sufficiently reliable to be considered competent evidence on causation.

B. Qualifications of the Proposed Expert

[4] As to the second step in the *Goode* analysis of the admissibility of expert testimony, Plaintiff contends that, because Dr. Behrman is an oral surgeon who performs surgical operations on patients, and the practice of medicine includes surgery, "there is an overlap between" statutes regulating the practice of medicine and the practice of dentistry. Defendants contend Plaintiff's experts "cannot be qualified to render expert opinions on medical causation pertaining to areas of the body outside the oral cavity."

Defendants cite *Martin v. Benson*, 125 N.C. App. 330, 481 S.E.2d 292 (1997), *rev'd on other grounds*, 348 N.C. 684, 500 S.E.2d 664 (1998), in support of their contention that only a medical doctor would be qualified to opine as to causation of bronchopneumonia. In *Martin*, this Court held the trial court erred in allowing a neuropsychologist to opine as to a closed head injury. *Id.* at 334-37, 481 S.E.2d at 294-96. However, our Supreme Court held that the plaintiffs waived the right to appellate review of the testimony because the plaintiffs failed to object to the evidence at the time it was offered at trial. *Martin*, 348 N.C. at 685, 500 S.E.2d at 665.

"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.G.S. § 8C-1, Rule 702(a). "[T]he opinion testimony of an expert witness is competent if there is evidence to show that, through study or experience, or both, the witness has acquired such skill that he is better qualified than the jury to form an opinion on the particular subject of his testimony." *Terry v. PPG Indus., Inc.*, 156 N.C. App. 512, 518, 577 S.E.2d 326, 332 (2003) (licensed clinical psychologist was qualified to testify regarding the cause of depression).

This Court in *Martin* considered "Rule 702 in light of this State's statutes defining the practice of 'psychology.' " *Martin*, 125 N.C. App. at

336, 481 S.E.2d at 295. This Court noted that N.C. Gen. Stat. § 90-270.3 (1993) required licensed psychologists to assist clients in obtaining professional help for problems that fall outside the bounds of the psychologist's competence, including "the diagnosis and treatment of relevant medical" problems. *Id.* at 337, 481 S.E.2d at 296. From this statute, this Court concluded it was evident "that the practice of psychology does not include the diagnosis of medical causation." *Id.* By contrast, in the present case, no statute requires dentists to assist their clients in obtaining professional help for problems outside the boundaries of the dentist's competence. *Martin* is thus distinguishable from the present case.

"The essential question in determining the admissibility of opinion evidence is whether the witness, through study or experience, has acquired such skill that he was better qualified than the jury to form an opinion on the subject matter to which his testimony applies." *Diggs*, 177 N.C. App. at 297, 628 S.E.2d at 856 (holding that a nurse qualified to opine as to causation of injury arising from gallbladder surgery).

Dr. Behrman earned a Doctor of Dental Medicine degree, completed an internship in anesthesia and a residency in oral and maxillofacial surgery, is licensed by the New York Board of Dentistry, and has been certified by the American Board of Oral and Maxillofacial Surgeons since 1986. As Chief of the Division of Dentistry, Oral and Maxillofacial Surgery since June 1996, Dr. Behrman oversees residency programs that provide over 10,000 patient visits each year. He is the Chair of the Institutional Review Board of a medical center in New York. In the past, he has held appointments with the University of Pennsylvania School of Dental Medicine and Memorial Sloan-Kettering Cancer Center and Hospital. Focusing on the qualifications of Dr. Behrman in particular, as opposed to the qualifications of licensed dentists in general, Dr. Behrman's knowledge, skill, experience, training, and education qualify him to opine as to the causation of bronchopneumonia. Dr. Behrman has "acquired such skill that he was better qualified than the jury to form an opinion" on the causation of bronchopneumonia. *Diggs*, 177 N.C. App. at 297, 628 S.E.2d at 856; *see also Terry*, 156 N.C. App. at 518, 577 S.E.2d at 332.

We note that Defendants do not challenge the qualification of Dr. Gaffney-Kraft to offer her expert opinion that bronchopneumonia was the Decedent's cause of death.

C. Relevance of the Expert's Testimony

Defendants do not challenge the third step of the *Goode* analysis, namely, the relevance of the expert's testimony.

IV. Conclusion

The depositions, affidavits, and pleadings show that Plaintiff, the nonmoving party, forecast evidence showing that Defendants' treatment proximately caused the Decedent's death and that there are genuine issues of material fact to be determined by the jury. The evidence constitutes a sufficient forecast of evidence for presentment of the case to the jury. The trial court erred in granting Defendants' motions for summary judgment relating to dental care.

Reversed.

Judge McCULLOUGH concurs.

DILLON, Judge, dissenting.

At the summary judgment hearing below, Plaintiff relied on the opinions of two dentists — Dr. Thomas David and Dr. David Behrman — as her forecast of evidence to establish that (1) the provision of dental care by Defendants to Robert B. Webb, III, (Decedent) violated the standard of care for dental professionals; *and* that (2) this violation proximately caused Decedent to develop bronchopneumonia.[1] Because I do not believe that the trial court abused its discretion under N.C. Gen. Stat. § 8C-1, Rule 702 by excluding from its consideration the opinions of these dentists as to the cause of Decedent's bronchopneumonia, I respectfully dissent.

Here, Plaintiff bore the burden of producing a forecast of evidence demonstrating "(1) the applicable standard of care; (2) a breach of such standard of care by [Defendants]; (3) [that] the injuries suffered by [Decedent] were proximately caused by such breach; and (4) the damages resulting to [Decedent]." *Weatherford v. Glassman*, 129 N.C. App. 618, 621, 500 S.E.2d 466, 468 (1998). Our Supreme Court has held that "[w]here 'a layman can have no well-founded knowledge and can do no more than indulge in mere speculation (as to the cause of a physical condition), there is no proper foundation for a finding by the trier without expert medical testimony.' " *Gillikin v. Burbage*, 263 N.C. 317, 325, 139 S.E.2d 753, 760 (1964) (citations omitted).

1. Plaintiff relied upon the opinion of a medical doctor that Decedent's bronchopneumonia caused his death. However, this medical doctor never expressed an opinion as to the cause of the bronchopneumonia.

The theory of Plaintiff's case, here, is that Defendants violated the standard of care applicable to licensed dentists, that this violation proximately caused Decedent to contract bronchopneumonia, and that Decedent's bronchopneumonia was the cause of his death. Defendants do not contend that Plaintiff's forecast of evidence regarding the applicable standard of care and the breach thereof was insufficient to survive summary judgment. Indeed, Plaintiff's two dental experts each stated their opinions concerning the applicable standard of care for a licensed dentist in performing Decedent's dental procedure and, moreover, that Defendants had violated that standard.[2] Rather, Defendants argue — and the trial court concluded — that these same dentists did not qualify under Rule 702 to offer an expert opinion that the violation of the dental standard of care in this case was the proximate cause of Decedent's bronchopneumonia.

The parties do not dispute that Plaintiff's burden was to forecast evidence in the form of expert testimony to lay a proper foundation from which a jury could determine the cause of Decedent's bronchopneumonia. The admissibility of expert testimony on the issue of medical causation is governed by Rule 702(a) of our Rules of Evidence, the relevant version[3] of which provides that "[i]f scientific, technical or other specialized knowledge will assist the trier of fact . . . 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[.]"

In the context of a medical malpractice action, Rule 702(a) appears less restrictive as to the qualifications of a witness to provide an expert opinion on medical causation than Rule 702(b) as to the qualifications of a witness to provide an expert opinion on the appropriate standard of care. For instance, while an expert testifying as to the standard of care must generally be "a licensed health care provider," this Court has held, in a medical malpractice case, that a witness need not be a licensed medical doctor in order to offer an expert opinion as to medical causation, *Diggs v. Novant Health*, 177 N.C. App. 290, 628, S.E.2d 851 (2006), noting that our Supreme Court has rejected the notion that

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2. Likewise, Defendants do not contend that Plaintiff's forecast of evidence regarding the causal connection between Decedent's bronchopneumonia and his death was not sufficient to survive summary judgment, as this connection was established through the opinion of a medical doctor.

3. Rule 702(a) was amended for actions commenced after October 1, 2011 to provide a stricter standard on the admissibility of expert testimony. *See State v. McGrady*, __ N.C. App. __, __ S.E.2d __ (2014).

only a medical doctor can be qualified under Rule 702 to give an opinion regarding medical causation, *id.* (citing *State v. Tyler*, 346 N.C. 187, 203-04, 485 S.E.2d 599, 608 (1997)). Accordingly, I believe we are bound to conclude that Plaintiff's two dentist experts are not disqualified, as a matter of law, from offering opinions regarding Decedent's onset of bronchopneumonia.

While it is true that the trial court is "afforded 'wide latitude of discretion when making a determination about the admissibility of expert testimony[,]' " *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004) (citation omitted), I discern no abuse of discretion in the trial court's decision to exclude the opinion testimonies of Drs. David and Behrman concerning the cause of Decedent's bronchopneumonia in the present case. Although Dr. David opined that the standard care violation was the proximate cause of Decedent's bronchopneumonia, he also testified that he was not an expert qualified to offer an opinion as to the cause of Decedent's bronchopneumonia, specifically stating: "Again, I'm not an expert in that regard, so my only opinion would be as a health care practitioner and general knowledge in that realm, but I'm not going to offer an expert opinion."

Likewise, Dr. Behrman stated in response to a question from Plaintiff's counsel that it was his opinion that the standard of care violation caused Decedent's bronchopneumonia; however, he qualified his response in stating that his opinion was "[w]ithin [his] knowledge as an oral and maxillofacial surgeon" and that he "would defer [his] opinions related to the development of [Decedent's] bronchopneumonia to a medical doctor." Further Dr. Behrman acknowledged that Decedent was a medically complex patient.

The majority cites the three-pronged analysis set out by our Supreme Court in *State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995), which the trial court must use in determining the preliminary issue of the admissibility of expert testimony. I disagree with the majority's conclusion with respect to the first prong of the analysis, that the methodology employed by Drs. David and Behrman in determining the cause of Decedent's bronchopneumonia was reliable. Plaintiff does not point to any testimony where either dentist discussed the methodology by which he determined the cause of Decedent's bronchopneumonia. Further, I disagree with the majority's conclusion regarding the second prong of the analysis, that Drs. David and Behrman were qualified to offer expert opinions as to the cause of Decedent's bronchopneumonia. Plaintiff does not point to any testimony indicating that either dentist possessed the requisite "knowledge, skill, experience, training or education" to

state an opinion with any degree of certainty that it was Defendants' conduct that caused Decedent's bronchopneumonia. In other words, I do not believe that a trial court abuses its discretion as gatekeeper in excluding the opinion testimony of a witness concerning the cause of bronchopneumonia in a patient with a complex medical history simply because the witness testified that he has worked in the health care profession and has extensive experience in dental surgery, but otherwise provided no testimony indicating that he has any expertise in determining the cause of bronchopneumonia. Accordingly, I would vote to affirm the trial court's decision to exclude this testimony.

CONNIE B. YERBY, PLAINTIFF-EMPLOYEE
v.
NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY/DIVISION OF JUVENILE JUSTICE, EMPLOYER, CORVEL CORPORATION (THIRD-PARTY ADMINISTRATOR), DEFENDANTS

No. COA13-851

Filed 18 February 2014

1. Workers' Compensation—salary continuation benefits—juvenile justice officer

The Industrial Commission did not err in a workers' compensation case by awarding salary continuation benefits pursuant to N.C.G.S. § 143-166.19 to plaintiff juvenile justice officer. A covered law enforcement officer may receive his regular salary during a period of incapacity for up to two years in lieu of workers' compensation benefits.

2. Workers' Compensation—salary continuation benefits—suitable employment analysis

The Industrial Commission erred by awarding plaintiff salary continuation benefits based on its determination that the light-duty position offered to plaintiff was not suitable employment. The Commission's award should be analyzed according to whether the duties that plaintiff was asked to resume were lawfully assigned.

Appeal by the North Carolina Department of Public Safety/Division of Juvenile Justice from Opinion and Award entered 23 April 2013 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 January 2014.

Kellum Law Firm, by J. Kevin Jones, for plaintiff.

Attorney General Roy Cooper, by Special Deputy Attorney General Sharon Patrick-Wilson, for defendant.

ELMORE, Judge.

The North Carolina Department of Public Safety/Division of Juvenile Justice (defendant) appeals from the North Carolina Industrial Commission's award of salary continuation benefits to Connie B. Yerby (plaintiff) for the period of 23 January 2012 through 9 June 2012. After careful review, the Opinion and Award of the Industrial Commission is affirmed, in part; and reversed and remanded, in part.

I. Facts

Plaintiff has been employed as a Juvenile Justice Officer/Youth Monitor for defendant since 2006. On 5 December 2011, plaintiff was injured in the course of her employment with defendant when she slipped and fell on the floor at work, causing injury to her head, neck, shoulder, back, and right arm. Defendant accepted plaintiff's injury as compensable and agreed to pay plaintiff salary continuation benefits pursuant to N.C. Gen. Stat. § 143-166. On 11 January 2012, plaintiff's physician authorized her to return to light-duty work, with the restriction of not lifting her right arm. Despite the physician's authorization, plaintiff did not return to work due to safety concerns and ongoing physical pain. Defendant requested that plaintiff return to work on 23 January 2012. Accompanying defendant's request was a "RETURN TO WORK PLAN[,]" which outlined plaintiff's modified employment duties due to her injuries. Despite defendant's request, plaintiff did not return to work because "her restrictions and physical limitations" put her safety at risk "if she [was] put in direct contact with students, who were often violent juvenile offenders." Thereafter, defendant terminated salary continuation payments effective 23 January 2012 because plaintiff did not return to work or provide an out-of-work note. Plaintiff objected to the termination of her salary continuation payments and filed a Form 33 to the Industrial Commission asking that payments continue until "[d]efendant provide[d] written assurance that [p]laintiff would not be put at an unreasonable risk of physical harm." After a hearing, Deputy Commissioner Bradley W. Houser filed an Opinion and Award in favor of plaintiff. Defendant appealed the decision to the Full Commission (the Commission), and in its Opinion and Award filed 23 April 2013, the Commission ordered that defendant "pay to [p]laintiff salary

continuation for the period of January 23, 2012 through June 9, 2012[.]" In support of its award, the Commission found that "the modified, light duty job offered to [p]laintiff was not suitable to her restrictions and physical limitations and her refusal of the job was justified. N.C. Gen. Stat. §§ 97-29 and 97-32." Defendant gave timely notice of appeal on 21 May 2013 from the Commission's Opinion and Award.

II. Analysis

a.) Authority to Award Salary Continuation Benefits

[1] Defendant argues that the Commission did not have the statutory authority to make an award of salary continuation benefits pursuant to N.C. Gen. Stat. § 143-166.19. Specifically, defendant avers that N.C. Gen. Stat. § 143-166.19 gives the Commission "an advisory role with respect to salary continuation benefits . . . but reserves final determinations of eligibility to the employee's department head." We disagree.

Review of an Opinion and Award of the Commission "is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law. This 'court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.'" *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citation omitted) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). However, this Court conducts a *de novo* review of the Commission's conclusions of law. *Starr v. Gaston Cnty. Bd. of Educ.*, 191 N.C. App. 301, 305, 663 S.E.2d 322, 325 (2008) (citation omitted).

N.C. Gen. Stat. § 143-166.13 (2013) through § 143-166.20 (2013) detail the salary continuation plan (the plan) for certain law enforcement officers. One type of law enforcement officer covered under the plan is a juvenile justice officer. N.C. Gen. Stat. § 143-166.13(a)(9) (2013). The plan mandates that the salary of a covered person

> shall be paid as long as his employment in that position continues, notwithstanding his total or partial incapacity to perform any duties to which he may be lawfully assigned, if that incapacity is the result of an injury by accident . . . arising out of and in the course of the performance by him of his official duties, except if that incapacity continues for more than two years from its inception, the person shall, during the further continuance of that incapacity, be subject to the provisions of Chapter 97 of the General Statutes pertaining to workers' compensation.

N.C. Gen. Stat. § 143-166.14 (2013). In sum, a covered law enforcement officer may receive her or his regular salary during a period of incapacity for up to two years in lieu of workers' compensation benefits. *See id.* Upon the filing of a claim for salary continuation benefits,

> the secretary or other head of the department . . . shall determine the cause of the incapacity and to what extent the claimant may be assigned to other than his normal duties. The finding of the secretary or other head of the department shall determine the right of the claimant to benefits under this Article. Notice of the finding shall be filed with the [Commission].

N.C. Gen. Stat. § 143-166.19 (2013). After notice of the finding is filed, claimant has 30 days to appeal the decision to the Commission and request a new hearing, at which point the Commission

> shall proceed to hear the matter in accordance with its regularly established procedure for hearing claims filed under the Worker's Compensation Act, and shall report its findings to the secretary or other head of the department. From the decision of [the Commission], an appeal shall lie as in other matters heard and determined by the Commission.

Id. Thus, N.C. Gen. Stat. § 143-166.19 allocates authority over salary continuation benefits to both the department that employs the claimant and the Commission. *See id.* First, the department must determine what salary continuation benefits, if any, the claimant shall receive. *Id.* Second, upon timely appeal of the department's decision, the Commission is expressly provided authority to "hear the matter in accordance with" the Workers' Compensation Act. *Id.* Consistent with the provisions of the Workers' Compensation Act, it is the Commission's duty to hear the parties' arguments, determine their disputes, decide the case, and file an Opinion and Award. N.C. Gen. Stat. § 97-84 (2013).

We first note that the case law of our State contravenes defendant's contention that the Commission does not have the statutory authority to make an award of salary continuation benefits. *See Vandiford v. N. Carolina Dep't of Correction*, 97 N.C. App. 640, 642, 389 S.E.2d 408, 409 (1990) (issue on appeal was plaintiff's eligibility to receive salary continuation benefits after the Commission denied such benefits after a hearing); *see also Ruggery v. N. Carolina Dep't of Corr.*, 135 N.C. App. 270, 276, 520 S.E.2d 77, 82 (1999) (Deputy Commissioner filed an Opinion

and Award awarding salary continuation benefits to employee). Based on this State's case law, the Commission had the statutory authority to hear the matter and issue salary continuation benefits. Here, plaintiff timely appealed defendant's decision to terminate her salary continuation benefits, filed a Form 33 with the Commission requesting a hearing on the matter, and the Commission properly ruled on the dispute.

Furthermore, based on the relevant statutory language above, we cannot agree with defendant's argument that the Commission maintains a purely "advisory role with respect to salary continuation benefits[.]" If this Court were to accept defendant's assertion, we would undermine the purpose of Article 12B to "provide additional salary benefits for law enforcement officers who are injured on the job" and to construe its provisions liberally, such that claims are "not defeated on narrow, technical grounds." *Vandiford*, 97 N.C. App. at 643, 389 S.E.2d at 409. Moreover, under defendant's interpretation of the statute, a covered individual would have no ability to appeal an employer's denial of salary continuation benefits as the Commission's determination would not be binding on the claimant's employer. Accordingly, we hold that the Commission had the statutory authority to make an award of salary continuation benefits pursuant to N.C. Gen. Stat. § 143-166.19.

b.) Suitable Employment

[2] Next, defendant argues that the Commission erred by awarding plaintiff salary continuation benefits based on its determination that the "light-duty position offered to [p]laintiff . . . was not suitable employment for [p]laintiff." Specifically, defendant avers that the Commission's award should be analyzed according to whether "the duties that [p]laintiff was asked to resume . . . were lawfully assigned[.]" We agree.

N.C. Gen. Stat. § 143-166.16 clearly states that salary continuation benefits "shall be in lieu of all compensation provided . . . by G.S. 97-29 and 97-30" of the Workers' Compensation Act for a period of up to two years. N.C. Gen. Stat. § 143-166.16 (2013). Accordingly, N.C. Gen. Stat. § 143-166.16 (salary continuation) replaces workers' compensation benefits under N.C. Gen. Stat. § 97-29 (total disability) and N.C. Gen. Stat. § 97-30 (partial disability) for a period of time. *See id.* A determination of whether an individual refused suitable employment is necessary to award or deny workers' compensation benefits pursuant to N.C. Gen. Stat. § 97-29 and 97-30. *See* N.C. Gen. Stat. § 97-32. Such a determination is absent from N.C. Gen. Stat. § 143-166.19, which denies salary continuation benefits to an individual who "refuses to perform any duties to which he may be properly assigned[.]" N.C. Gen. Stat. § 143-166.19.

The definition of suitable employment is

> employment offered to the employee or, if prohibited by the Immigration and Nationality Act, 8 U.S.C. § 1324a, employment available to the employee that (i) prior to reaching maximum medical improvement is within the employee's work restrictions, including rehabilitative or other noncompetitive employment with the employer of injury approved by the employee's authorized health care provider or (ii) after reaching maximum medical improvement is employment that the employee is capable of performing considering the employee's preexisting and injury-related physical and mental limitations, vocational skills, education, and experience and is located within a 50-mile radius of the employee's residence at the time of injury or the employee's current residence if the employee had a legitimate reason to relocate since the date of injury.

N.C. Gen. Stat. § 97-2 (2013). The definition above illustrates that the criteria required to determine a refusal of suitable employment is separate and distinct from a determination of whether a refusal "to perform any duties to which [an individual] may be properly assigned" occurred. N.C. Gen. Stat. § 143-166.19. Since the issue of salary continuation benefits is decided under N.C. Gen. Stat. § 143-166.14 and not workers' compensation benefits under N.C. Gen. Stat. § 97-29 and 97-30, the Commission erred in its use of the suitable employment analysis as a basis for its decision. Instead, the Commission's legal analysis should have been governed by whether plaintiff refused to perform "duties to which [s]he may be properly assigned[.]" N.C. Gen. Stat. § 143-166.19.

III. Conclusion

In sum, the Commission had the statutory authority to make an award of salary continuation benefits pursuant to N.C. Gen. Stat. § 143-166.19. However, the Commission erred by awarding plaintiff salary continuation benefits based on its suitable employment analysis. Thus, we reverse the Commission's Opinion and Award and remand for the Commission to apply the proper legal standard.

Affirmed, in part; reversed and remanded, in part.

Judge McGEE and Judge HUNTER, Robert C., concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 18 FEBRUARY 2014)

BALDWIN v. BALDWIN No. 13-874	Wake (11CVD6187)	Reversed and Remanded
BLANCHARD v. BRITTHAVEN, INC. No. 12-1286	Orange (09CVS1109)	Affirmed
BLANCHARD v. BRITTHAVEN, INC. No. 12-1366	Orange (09CVS1109)	No Error
BLOUNT v. LEMAIRE No. 13-946	Pitt (91CVD756)	Affirmed in part; Vacated in part.
CURRIN v. REX HEALTHCARE, INC. No. 13-515	Harnett (12CVS840)	Affirmed
DEWITT v. DEWITT No. 13-728	Transylvania (12CVD426)	Affirmed
ESTATE OF MILLS v. ESTATE OF MILLS No. 13-830	Cabarrus (12CVS471)	Dismissed
HIGGINS v. JORDAN No. 13-821	Forsyth (02CVD6068)	Affirmed
IN RE C.E.C. No. 13-930	Mecklenburg (11JT570-571)	Affirmed
IN RE E.E.L. No. 13-805	Forsyth (12J3)	Vacated and Remanded
IN RE J.G.L. No. 13-1070	Caldwell (12JT154-155)	Affirmed
IN RE L.T. No. 13-1068	Wake (12JT62)	Affirmed
IN RE M.C. No. 13-828	Vance (08J95)	Vacated
IN RE McLEAN No. 13-513	Gaston (11SP1539)	Affirmed
IN RE T.M.M. No. 13-855	New Hanover (11JT128) (11JT130)	Affirmed in part: dismissed in part.

IN RE D.F.S. No. 13-913	Macon (12JA1-2)	Affirmed
J.T. RUSSELL & SONS, INC. v. SILVER BIRCH POND, LLC No. 13-662	Stanly (08CVS1453)	Affirmed in part; Reversed in part; Remanded on the issue of damages
LASSITER v. TOWN OF SELMA No. 13-866	N.C. Industrial Commission (589062)	Affirmed
MOORE v. MOORE No. 13-803	Henderson (05CVD2007)	Reversed and Remanded
NE. RALEIGH CHARTER ACAD., INC. v. WAKE CNTY. BD. OF EDUC. No. 13-697	Wake (10CVS10858)	Reversed
PODREBARAC v. PODREBARAC No. 13-779	Union (08CVD4423)	Dismissed
SOSSAMON v. GRANVILLE-VANCE DIST. HEALTH DEP'T No. 13-900	Vance (12CVS506)	Affirmed
STATE v. ALEXANDER No. 13-580	Mecklenburg (12CRS17112) (12CRS203042) (12CRS203044)	No Error
STATE v. ALLEN No. 13-878	Alamance (04CRS54678-79)	Reversed and Remanded
STATE v. BANDY No. 13-711	Edgecombe (11CRS52228)	No Error
STATE v. FRAZIER No. 13-858	Mecklenburg (12CRS203607)	Affirmed
STATE v. GUDAC No. 13-606	Johnston (10CRS57347)	No error in part; vacated and remanded in part.
STATE v. HALL No. 13-729	Lincoln (10CRS3784) (10CRS53179)	Vacated in part and Remanded for Resentencing; No Error in part.

STATE v. HENDERSON No. 13-934	Guilford (11CRS73416-17)	Affirmed
STATE v. JONES No. 13-859	Guilford (10CRS76967) (10CRS76969) (10CRS76972)	Affirmed
STATE v. LEATH No. 13-967	Alamance (12CRS53844) (13CRS610)	No Error
STATE v. LUKOSKIE No. 13-399	Mecklenburg (10CRS209039)	Affirmed in part; No Error in part.
STATE v. McCOMBS No. 13-916	Rowan (10CRS50588) (10CRS994)	No Error
STATE v. McLEAN No. 13-1166	Cumberland (11CRS61036)	Affirmed
STATE v. PONOS No. 13-968	New Hanover (11CRS60934)	No Error
STATE v. STOCKS No. 13-879	Wayne (12CRS50818-19)	No Error
STATE v. STRANGE No. 13-1062	New Hanover (11CRS10578) (11CRS58357) (11CRS58850) (12CRS9327)	Dismissed
STATE v. WILSON No. 13-869	Gaston (12CRS57020)	No error in part; dismissed in part.
WOOD v. NUNNERY No. 13-713	Forsyth (09CVS3520)	Affirmed

AMERICAN OIL COMPANY, INC., PLAINTIFF
v.
AAN REAL ESTATE, LLC, DEFENDANT

No. COA13-1099

Filed 4 March 2014

Jurisdiction—standing—unincorporated entity—failure to allege certificate recordation—failure to show privity of contract

The trial court did not err in a breach of a lease agreement case by granting defendant's motion to dismiss plaintiff's complaint for failure to state a claim upon which relief could be granted pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6). Plaintiff, an unincorporated entity, failed to allege the location of its certificate recordation in its amended complaint pursuant to N.C.G.S. § 1-69.1(a)(3) and provided no indication of plaintiff's commonly held name. Further, the amended complaint failed to show that plaintiff was in privity of contract with lessee or a beneficiary of any kind to the lease.

Appeal by plaintiff from order entered 20 June 2013 by Judge Eric L. Levinson in Mecklenburg County Superior Court. Heard in the Court of Appeals 3 February 2014.

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

Erwin, Bishop, Capitano & Moss, P.A., by Fenton T. Erwin, Jr., for defendant.

ELMORE, Judge.

Plaintiff appeals from an order entered 20 June 2013 granting defendant's motion to dismiss plaintiff's complaint for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. After careful consideration, we affirm the trial court's order.

I. Facts

AAN Real Estate, LLC (defendant) entered into a lease agreement (the lease) with American Oil Group (lessee) on 28 June 2012, whereby lessee agreed to lease the premises at 5320 and 5324 E. Independence Boulevard in Charlotte from defendant for use as a car wash and vehicle

maintenance business. On 22 January 2013, American Oil Company, Inc. (plaintiff) filed a complaint alleging that defendant breached the lease terms by failing to "install the vehicle lifts until on or about December 1, 2012" in violation of the lease's "Lessor's Work" provision. Shortly thereafter, plaintiff filed an amended complaint on 14 February 2013 alleging more lease breaches. In addition to attaching a copy of the lease as "Exhibit A" in the amended complaint, plaintiff alleged that: 1.) its party name was "American Oil Company Inc.[;]" 2.) it was "a corporation organized and existing under the laws of the State of North Carolina with a place of business in Mecklenburg County, North Carolina[;]" and 3.) defendant was "a limited liability company organized and existing under the laws of the State of North Carolina with a place of business in Mecklenburg County, North Carolina." The amended complaint never referenced plaintiff's relationship to lessee. In response to the amended complaint, defendant filed a 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. After a hearing in Mecklenburg County Superior Court, Judge Eric L. Levinson granted defendant's motion to dismiss in an order entered 20 June 2013. Plaintiff filed a timely notice of appeal on 18 July 2013 to this Court from Judge Levinson's order.

II. Analysis

Plaintiff argues that the trial court erred in granting defendant's motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6). Specifically, plaintiff avers that its differing party name in the amended complaint and the lease was insufficient to dismiss the amended complaint. We disagree.

"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). A dismissal pursuant to Rule 12(b)(6) is appropriate when an "insurmountable bar to recovery" exists on the face of the complaint. *Meadows v. Iredell County*, 187 N.C. App. 785, 787, 653 S.E.2d 925, 927 (2007) (citation and quotation omitted). A party that lacks standing to bring a claim constitutes an insurmountable bar to recovery, and a

motion under Rule 12(b)(6) is the proper legal mechanism to seek dismissal of a complaint on such grounds. *Id.* Standing refers to "a party's right to have a court decide the merits of a dispute." *Teague v. Bayer AG*, 195 N.C. App. 18, 23, 671 S.E.2d 550, 554 (2009) (citation and quotation omitted). Without standing, the courts of this State lack subject matter jurisdiction to hear a party's claims. *Id.*

N.C. Gen. Stat. § 1-69.1(a)(1) states that

> [a]ll unincorporated associations, organizations or societies, or general or limited partnerships, foreign or domestic, whether organized for profit or not, may hereafter sue or be sued under the name by which they are commonly known and called, or under which they are doing business, to the same extent as any other legal entity established by law and without naming any of the individual members composing it.

N.C. Gen. Stat. § 1-69.1(a)(1) (2013). N.C. Gen. Stat. § 66–68 "requires that a business operating under an assumed name file a certificate, stating the name of the business and name and address of the owner(s), in the office of the register of deeds of the county in which business is conducted." *Highlands Twp. Taxpayers Ass'n v. Highlands Twp. Taxpayers Ass'n, Inc.*, 62 N.C. App. 537, 538-39, 303 S.E.2d 234, 235 (1983). Aside from some narrow exceptions inapplicable to this case, an unincorporated entity that seeks to bring suit must "allege the specific location of the [certificate's] recordation" in its complaint. N.C. Gen. Stat. § 1-69.1(a)(3) (2013); *see Highlands Twp. Taxpayers Ass'n*, 62 N.C. App. at 539, 303 S.E.2d at 236 ("The statutory language of G.S. 1-69.1 is very clear and specific, i.e., any unincorporated association desiring to commence litigation in its commonly held name *must* allege the location of the recordation required by G.S. 66-68."). The failure of an unincorporated entity to meet this statutory requirement will defeat its complaint. *Daniel v. Wray*, 158 N.C. App. 161, 166, 580 S.E.2d 711, 715 (2003).

In addition to the statutory requirements an unincorporated entity must meet in order to bring a lawsuit, the entity must be "[a] real party in interest[.]" *Woolard v. Davenport*, 166 N.C. App. 129, 135, 601 S.E.2d 319, 323 (2004) (citation and quotation omitted). "[O]ur Supreme Court has stated that for purposes of reviewing a 12(b)(6) motion made on the grounds that the plaintiff lacked standing, a real party in interest is a party who is benefited or injured by the judgment in the case." *Id.* (citation and quotation omitted). In order for a breach of contract claim to withstand a 12(b)(6) motion based on a lack of standing, the

plaintiff's allegations must "either show it was in privity of contract, or it is a direct beneficiary of the contract." *Lee Cycle Center, Inc. v. Wilson Cycle Center, Inc.*, 143 N.C. App. 1, 8, 545 S.E.2d 745, 750 (2001). Privity is "a [d]erivative interest founded on, or growing out of, contract, connection, or bond of union between parties; mutuality of interest." *Id.* at 8-9, 545 S.E.2d at 750 (citation and quotation omitted). The law implies privity "[i]f a plaintiff is an intended beneficiary to a contract[.]" *Id.* at 9, 545 S.E. 2d at 750 (citation omitted).

We first note that upon defendant's motion in the case at bar, we take judicial notice that "American Oil Company, Inc." is neither a corporation existing within this state currently nor at the time the amended complaint was filed. Thus, as an unincorporated entity, plaintiff was required to allege the location of its certificate recordation in its amended complaint pursuant to N.C. Gen. Stat. § 1-69.1(a)(3). The amended complaint did not comply with this statutory requirement and provided no indication of plaintiff's commonly held name.

Notwithstanding the mandates of N.C. Gen. Stat. § 1-69.1(a)(3), the amended complaint also fails because plaintiff did not show that it was in privity of contract with lessee or a beneficiary of any kind to the lease. The name of the lessee, American Oil Group, is different than the name of plaintiff, American Oil Company, Inc., and no alleged facts in the amended complaint link the two parties. Accordingly, the amended complaint did not sufficiently show that plaintiff suffered an injury as a result of the alleged lease breach by defendant. Since plaintiff's amended complaint failed to show that it 1.) met the requirements of N.C. Gen. Stat. § 1-69.1 and 2.) was in privity of contract or a beneficiary of the lease, plaintiff lacked standing to bring suit, and the trial court's dismissal of the amended complaint was without error.

III. Conclusion

The trial court did not err in granting defendant's motion to dismiss pursuant to Rule 12(b)(6) because plaintiff lacked standing to bring suit. Thus, we affirm the trial court's order.

Affirmed.

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

LARRY BARROW, LOIS BARROW, AND DORIS MURPHREY, PLAINTIFFS
v.
D.A.N. JOINT VENTURE PROPERTIES OF NORTH CAROLINA, LLC, CONNIE MURPHREY AND DONALD STOCKS, DEFENDANTS

No. COA13-975

Filed 4 March 2014

Collateral Estoppel and Res Judicata—guarantor liability—statute of limitations—failure to raise in bankruptcy court

Plaintiffs' failure to raise the statute of limitations during a bankruptcy adversary proceeding precluded consideration of whether the statute of limitations prevented defendant D.A.N. Joint Venture Properties of N.C., LLC from recovering from guarantors (a group that included plaintiffs). Claim preclusion applied to the bankruptcy court order because the claimants in the adversarial proceeding asked for an injunction in addition to declaratory relief, and the bankruptcy court was a court of competent jurisdiction that issued a final judgment on the merits. The superior court order granting summary judgment for plaintiffs was reversed and remanded for determination of the amount of the guarantors' liability.

Appeal by D.A.N. Joint Venture Properties of North Carolina, LLC from orders entered 10 May 2013 and 15 May 2013 by Judge Paul L. Jones in Greene County Superior Court. Heard in the Court of Appeals 6 January 2014.

White & Allen, P.A., by John P. Marshall and Ashley C. Fillippeli, for plaintiffs-appellees.

Driscoll Sheedy, P.A., by Susan E. Driscoll, for defendant-appellant D.A.N. Joint Venture Properties of North Carolina, LLC.

Miller & Audino, LLP, by Jeffrey L. Miller, for defendant-appellee Donald Stocks.

MARTIN, Chief Judge.

D.A.N. Joint Venture Properties of North Carolina, LLC appeals from two superior court orders denying D.A.N. Joint Venture's motion for summary judgment and granting Larry Barrow's, Lois Barrow's, Doris Murphrey's, and Donald Stocks's motions for summary judgment.

The facts relevant to appeal are that Larry Barrow, Lois Barrow, Doris Murphrey, Connie Murphrey, and Donald Stocks (guarantors) are all parties to a guaranty agreement guaranteeing notes issued by Wachovia Bank, N.A. to L.L. Murphrey Company. In 2000, L.L. Murphrey filed a Chapter 11 petition with the United States Bankruptcy Court for the Eastern District of North Carolina. At the time the petition was filed, L.L. Murphrey was in default on several Wachovia notes that were guaranteed by the guarantors. On 4 May 2001, L.L. Murphrey filed its Fourth Amended Plan of Reorganization with the bankruptcy court, which was later confirmed by the bankruptcy court in part because the "guarantors contributed $550,000 to [L.L. Murphrey] to make confirmation of its plan feasible."

The Plan of Reorganization divided L.L. Murphrey's Wachovia debts into two notes: Note A and Note B. Wachovia sold Note A and Note B to Cadlerock Joint Venture, L.P., which later sold the notes to D.A.N. Joint Venture. In addition to creating two notes, the Plan of Reorganization provided that the "guaranties will remain in full force and effect for the Notes except as adjusted to reflect the amount of Recapitalized Debt, defined herein."

Because L.L. Murphrey and D.A.N. Joint Venture could not agree on the amount of the recapitalized debt, L.L. Murphrey filed a motion with the bankruptcy court to reopen the Chapter 11 case on 1 April 2011. L.L. Murphrey, Larry Barrow, Lois Barrow, and Doris Murphrey then filed an adversary proceeding,[1] before the bankruptcy court, against D.A.N. Joint Venture. In the adversary proceeding, Larry Barrow, Lois Barrow, and Doris Murphrey sought a declaration that the guarantors were contingently liable for only the amount of the recapitalized debt. They also requested an injunction requiring D.A.N. Joint Venture to stop demanding payment from L.L. Murphrey and the guarantors in excess of the amount of the recapitalized debt.

In an order entered on 16 December 2011, the bankruptcy court found that the amount of the recapitalized debt was $6,186,362. D.A.N. Joint Venture filed a motion with the bankruptcy court seeking reconsideration of the 16 December 2011 order, which was not a final order because it did not resolve all of the claims between the parties. The bankruptcy court granted D.A.N. Joint Venture's motion. On 10 May 2012, the bankruptcy court issued a second order denying the claim for

1. An adversary proceeding is a "lawsuit that is brought within a bankruptcy proceeding, governed by special procedural rules, and based on conflicting claims." *Black's Law Dictionary* 58 (8th ed. 2004).

injunctive relief, because there was no showing of irreparable harm, and declaring that the liability of guarantors was capped at the amount of the recapitalized debt.

The present action was filed by Larry Barrow, Lois Barrow, and Doris Murphrey against D.A.N. Joint Venture, Connie Murphrey, and Donald Stocks in superior court after the 10 May 2012 bankruptcy court order was entered. Larry Barrow, Lois Barrow, and Doris Murphrey assert that they are entitled to a declaration that the expiration of the statute of limitations prevents D.A.N. Joint Venture from asserting any claims against the guarantors based on the guaranties. D.A.N. Joint Venture counterclaimed and crossclaimed that the guarantors were in breach of the guaranty agreements as modified by the Plan of Reorganization. The parties then filed cross-motions for summary judgment. D.A.N. Joint Venture appeals from the superior court's grant of Larry Barrow's, Lois Barrow's, Doris Murphrey's, and Donald Stocks's motions for summary judgment.

On appeal, D.A.N. Joint Venture argues that the 10 May 2012 bankruptcy court order, which addressed the guarantors' liability under the Plan of Reorganization, precluded the trial court from granting summary judgment on the grounds that the statute of limitations bars all claims asserted by D.A.N. Joint Venture against the guarantors based on the guaranties. We agree.

Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . 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). We apply a de novo standard of review when evaluating a trial court's grant of summary judgment. *Id.* Under de novo review, we "consider[] the matter anew and freely substitute [our] own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (internal quotation marks omitted).

[1] To resolve this interjurisdictional preclusion issue, which involves the preclusive effect of a bankruptcy court order in superior court, we must first determine whether state or federal law applies. In *Semtek International Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 506–09, 149 L. Ed. 2d 32, 41–43 (2001), the Supreme Court of the United States considered whether federal or state law controls the claim-preclusive effect of a federal-court judgment based on diversity jurisdiction in a later state-court proceeding. From the outset, the Court noted that "[n]either

the Full Faith and Credit Clause, U.S. Const., Art. IV, § 1, nor the full faith and credit statute, 28 U.S.C. § 1738, address the question. By their terms they govern the effects to be given only to state-court judgments." *Id.* at 506–07, 149 L. Ed. 2d at 41–42. Furthermore, there is "no other federal textual provision, neither of the Constitution nor of any statute, [that] addresses the claim-preclusive effect of a judgment in a federal diversity action," or "the claim-preclusive effect of a federal-court judgment in a federal-question case." *Id.* at 507, 149 L. Ed. 2d at 42. Federal-question cases, however, have a preclusive effect on later proceedings because the Court "has the last word on the claim-preclusive effect of *all* federal judgments," and requires that federal-question cases be given preclusive effect. *Id.* Federal common law, therefore, governs the claim-preclusive effect of federal-court judgments. *See id.* at 508, 149 L. Ed. 2d at 42.

In this case, defendant argues that the bankruptcy court order must be given preclusive effect. Therefore, we look to federal common law to determine the preclusive effect of the bankruptcy court order.[2]

Because the terminology used to describe the preclusive effect of prior adjudications can be inconsistent, we begin by defining the terms. "[*R*]*es judicata* generally refers to the law of former adjudications," *In re Varat Enters., Inc.*, 81 F.3d 1310, 1315 n.5 (4th Cir. 1996), and "encompasses two concepts: claim preclusion and issue preclusion, or collateral estoppel." *Id.* at 1315. Both claim preclusion and issue preclusion apply to bankruptcy court orders. *See id.* ("The doctrine of *res judicata* applies in the bankruptcy context.").

Claim preclusion occurs when a suit—which arises from the *same* cause of action as a second suit—precludes relitigation in a second suit of matters actually decided and every claim that might have been raised in the first suit. *Id.* (citing *Nevada v. United States*, 463 U.S. 110, 129–30, 77 L. Ed. 2d 509, 524 (1983)). Issue preclusion on the other hand, applies when the first suit and the second suit involve *different* causes of action, but involve some of the same factual or legal issues. *Id.* In this situation, issue preclusion prevents relitigation, in the second suit, of the legal and factual issues actually and necessarily decided in the first suit. *See id.* Thus, the key difference between claim and issue preclusion is whether the first suit and the second suit involve the same cause of action.

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2. To assist in our determination of federal common law, we find the common law of the Fourth Circuit Court of Appeals persuasive because it is the circuit in which the United States Bankruptcy Court for the Eastern District of North Carolina is located.

We believe that the adversary proceeding and the superior court proceeding involve the same cause of action and therefore consider whether claim preclusion applies to this case. Before addressing the requirements of claim preclusion, however, we must address whether claim preclusion applies to a declaratory judgment.

Generally, the preclusive effect of declaratory judgments is limited to matters "actually litigated by the parties and determined by a declaratory judgment." 18A Charles Allen Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4446 (2d ed. 2002). Thus, issue preclusion clearly applies to declaratory judgments. Federal courts, however, have consistently held that the general rule limiting the preclusive effect of declaratory judgments to issue preclusion "applies only if the prior action solely sought declaratory relief." *Laurel Sand & Gravel, Inc. v. Wilson*, 519 F.3d 156, 164 (4th Cir. 2008). As a result, if a claimant seeks coercive relief, like an injunction, in addition to declaratory relief, then the claimant forfeits the ability to limit the preclusive effect of a declaratory judgment to issue preclusion. *Id.* (quoting *Stericycle, Inc. v. City of Delavan*, 929 F. Supp. 1162, 1164 (E.D. Wis. 1996) (citing *Cimasi v. City of Fenton*, 838 F.2d 298, 299 (8th Cir. 1988) and *Mandarino v. Pollard*, 718 F.2d 845, 848 (7th Cir. 1983))). Accordingly, claim preclusion also applies to the bankruptcy court order in this instance because Larry Barrow's, Lois Barrow's, and Doris Murphrey's complaint in the adversary proceeding sought injunctive relief in addition to declaratory relief.

Claim preclusion applies to an adjudication when (1) a court of competent jurisdiction enters a final judgment on the merits; (2) there is a second suit involving the claimants or parties in privity with the claimants; and (3) the claims in the second suit are based on the same cause of action as the first suit or could have been asserted in the first suit. *Varat*, 81 F.3d at 1315; *Bockweg v. Anderson*, 333 N.C. 486, 492, 428 S.E.2d 157, 161 (1993). In this case, all three criteria are satisfied.

To analyze the first criterion for claim preclusion, we divide it into three subparts. Subpart one requires a court of competent jurisdiction. Subpart two requires a final judgment. Subpart three mandates that the final judgment be on the merits.

First, Larry Barrow, Lois Barrow, and Doris Murphrey assert that the bankruptcy court was not a court of competent jurisdiction. They argue that the bankruptcy court lacked subject-matter jurisdiction over the claims asserted in the adversary proceeding because they were not core bankruptcy proceedings. While federal courts are courts of limited jurisdiction, federal courts have the power to decide whether they have

jurisdiction; their determination of jurisdiction may be appealed, but it may not be collaterally attacked. *In re Bulldog Trucking, Inc.*, 147 F.3d 347, 352 (4th Cir. 1998).

In the adversary proceeding, the 10 May 2012 bankruptcy court order stated:

> [T]his adversary proceeding is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). . . . Matters related to interpreting or implementing a plan post-conformation are still considered "core" even in light of the Supreme Court's ruling in *Stern v. Marshall*, __ U.S. __, 131 S. Ct. 2594 (2011).

Furthermore, the bankruptcy court stated: "The provisions of this plan modifying guaranties are completely consistent with applicable law at the time of confirmation, particularly since 7 contributed $550,000 to the debtor to make confirmation of its plan feasible." Therefore, the bankruptcy court was a court of competent jurisdiction because it was conducting a core bankruptcy proceeding.

Next, Larry Barrow, Lois Barrow, and Doris Murphrey assert that the bankruptcy court could not issue a final order because the adversary proceeding involved a noncore proceeding that required the consent of the parties before the bankruptcy court could issue a final order. As discussed above, the bankruptcy court had subject-matter jurisdiction over the adversary proceeding because it was a core proceeding. The bankruptcy court, therefore, could issue a final judgment. *See Stern v. Marshall*, __ U.S. __, __, 180 L. Ed. 2d 475, 488 ("Bankruptcy judges may hear and enter final judgments in all core proceedings arising under title 11, or arising in a case under title 11." (internal quotation marks omitted)), *reh'g denied*, __ U.S. __, 180 L. Ed. 2d 924 (2011).

Not only did the bankruptcy court have the power to issue a final judgment but it entered a final judgment. "[A] judgment will ordinarily be considered final in respect to a claim . . . if it is not tentative, provisional, or contingent and represents the completion of all steps in the adjudication of the claim by the court." Restatement (Second) of Judgments § 13 cmnt.b (1982). The 10 May 2012 bankruptcy court order completed all steps in the adjudication of the adversary proceeding. This is clear from the order for two reasons. First, it disposed of all of the claims between the parties. Second, one of the reasons the bankruptcy court granted the motion for reconsideration was for the purpose of entering an "indisputably final [order] for purposes of appeal." Therefore, the 10 May 2012 order is a final judgment.

Finally, "judgment on the merits" is a term of art that means a judgment was " 'based on legal rights as distinguished from mere matters of practice, procedure, jurisdiction or form.' " *In re Gilson*, 250 B.R. 226, 236 (Bankr. E.D. Va. 2000) (quoting *Fairmont Aluminum Co. v. Comm'r of Internal Revenue*, 222 F.2d 622, 625 (4th Cir. 1955)). There is no dispute that the bankruptcy court order was rendered on the merits. All parties to the adversary proceeding were able to appear before the bankruptcy court at a hearing on 21 November 2011, where they could raise issues and make legal arguments. Thus, the final judgment was on the merits because it was based on the parties' legal rights.

Next, we address whether the superior court suit involves the same claimants or those in privity with the claimants in the adversary proceeding. *See Varat*, 81 F.3d at 1315. In the adversary proceeding, L.L. Murphrey, Larry Barrow, Lois Barrow, and Doris Murphrey sued D.A.N. Joint Venture. In the superior court proceeding, Larry Barrow, Lois Barrow, and Doris Murphrey sued D.A.N. Joint Venture and joined Connie Murphrey and Donald Stocks as defendants. However, for purposes of this appeal, Donald Stocks is treated the same as Larry Barrow, Lois Barrow, and Doris Murphrey for determining whether claim preclusion applies to the statute of limitations argument.

Larry Barrow, Lois Barrow, and Doris Murphrey asserted claims against D.A.N. Joint Venture in both proceedings, and claim preclusion should apply to them. Thus, the only issue is whether Donald Stocks is in privity with Larry Barrow, Lois Barrow, and Doris Murphrey.

Privity exists when a non-party to a former adjudication is "so identified in interest with a party to former litigation that [the non-party has] . . . precisely the same legal right in respect to the subject matter involved." *Martin v. Am. Bancorporation Ret. Plan*, 407 F.3d 643, 651 (4th Cir. 2005) (internal quotation marks omitted). That is, "the relationship between the one who is a party on the record and another is close enough to include that other within the res judicata." *Id.* (internal quotation marks omitted). As discussed earlier, Donald Stocks, Larry Barrow, Lois Barrow, and Doris Murphrey are all parties to a guaranty agreement and both lawsuits address the liability of guarantors. Therefore, Donald Stocks is in privity with Larry Barrow, Lois Barrow, and Doris Murphrey because they share the same legal rights with respect to the guaranty agreements.

Finally, we must address whether the adversary proceeding and the superior court proceeding involve the same cause of action. *See Varat*, 81 F.3d at 1315. The Fourth Circuit, for the purpose of claim preclusion,

has defined a cause of action as all claims that arise "out of the same transaction or series of transactions." *Pittston Co. v. United States*, 199 F.3d 694, 704 (4th Cir. 1999) (internal quotation marks omitted). "Transaction" in this context "connotes a natural grouping or common nucleus of operative facts." *Id.* (internal quotation marks omitted).

We examine the adversary proceeding and the superior court proceeding to determine if the claims asserted or which could have been asserted in each case arise from a common nucleus of operative facts. In the adversary proceeding, Larry Barrow, Lois Barrow, and Doris Murphrey sought a declaration from the bankruptcy court that guarantors were contingently liable for only the amount of the recapitalized debt. Nothing precluded guarantors from asserting that they were absolved from liability on statute of limitations grounds. The claim actually asserted in the adversary proceeding focused on how the Plan of Reorganization impacted the legal relationship between guarantors and D.A.N. Joint Venture. In fact, the bankruptcy court considered the language of the Plan of Reorganization in reaching its holding that guarantors were entitled to a declaration that "the liability of pre-petition guarantors is capped at the amount of the Recapitalized Debt."

In the superior court proceeding, Larry Barrow, Lois Barrow, and Doris Murphrey sought a declaration, and Donald Stocks relied on the affirmative defense, that the statute of limitations bars any claims that D.A.N. Joint venture might assert against guarantors based on the guaranty agreements. The logic of this argument is that the Plan of Reorganization required Wachovia to prepare new loan documents, which Wachovia apparently never prepared. As a result, they argue, that the only guaranty agreements are those executed before the Chapter 11 bankruptcy, and the statute of limitations bars enforcement of the guaranty agreements because Wachovia notified guarantors that they were in default under the guaranty agreements sometime prior to the filing of the Chapter 11 bankruptcy petition.

However, it is clear that the Plan of Reorganization has some impact on the guaranty agreements because it states: "guaranties will remain in full force and effect for the Notes except as adjusted to reflect the amount of the Recapitalized Debt, defined herein." Thus, the central focus of Larry Barrow's, Lois Barrow's, Doris Murphrey's, and Donald Stocks's superior court arguments is how the Plan of Reorganization affected the legal relationship between guarantors and D.A.N. Joint Venture. This statute of limitations claim could have been asserted in the adversary proceeding. Consequently, the adversary proceeding and the superior court proceeding arise from the same cause of action because

they both focus on how the Plan of Reorganization affects the legal relationship between guarantors and D.A.N. Joint Venture and the claims that were available to guarantors.

To summarize, claim preclusion applies to the 10 May 2012 bankruptcy court order because the claimants in the adversary proceeding asked for an injunction in addition to declaratory relief. Next, the bankruptcy court was a court of competent jurisdiction that issued a final judgment on the merits because there was a hearing concerning the substance of the legal issues in dispute between the parties on a core proceeding as well as an order disposing of all claims between claimants. Also, the adversary proceeding and the superior court proceeding involved the guarantors asserting rights against D.A.N. Joint Venture, thus both cases involved the same claimants. Finally, both cases arose from the same cause of action because both cases focused on how the Plan of Reorganization impacts the relationship of guarantors and D.A.N. Joint Venture and nothing prevented guarantors from asserting their statute of limitations claim in the adversary proceeding. Therefore, Larry Barrow's, Lois Barrow's, and Doris Murphrey's failure to raise the statute of limitations issue during the adversary proceeding precludes us from now considering whether the statute of limitations prevents defendant from recovering from the guarantors.

Accordingly, we reverse the superior court's order and remand the case to the superior court for a determination of the amount of the guarantors' liability.

Reversed and remanded.

Judges ERVIN and McCULLOUGH concur.

BOTTS v. TIBBENS

[232 N.C. App. 537 (2014)]

ELIZABETH R. BOTTS, PLAINTIFF
v.
MARK DAVID TIBBENS AND ALICIA TIBBENS, DEFENDANTS

No. COA13-827

Filed 4 March 2014

1. Contracts—breach—summary judgment—defenses of impossibility and illegality—installation agreement

The trial court did not err in a breach of contract case by granting plaintiff's motion for summary judgment on the defenses of impossibility and illegality. The contract did not require performance by someone precluded by statute from performing. Thus, the installation agreement was neither illegal nor impossible to perform.

2. Damages and Remedies—breach of contract—cost of engineering services—installation

The trial court did not err in a breach of contract case by calculating plaintiff's damages to include the cost of engineering services which were allegedly not part of defendant's obligations under the contract. The trial court considered the engineering services to be part of the "installation" portion of the contract.

Appeal by defendant Mark Tibbens from Judgment entered 7 February 2013 by Judge Michael Rivers Morgan in Superior Court, Durham County, and from Order entered 9 March 2012 by Judge Paul G. Gessner in Superior Court, Durham County. Heard in the Court of Appeals 9 January 2014.

Berman & Associates, by Gary K. Berman, for plaintiff-appellee.

Cheshire & Parker, by D. Michael Parker, for defendant-appellant.

STROUD, Judge.

Mark Tibbens ("defendant") appeals from a judgment entered on 7 February 2013 awarding Elizabeth Botts ("plaintiff") $32,331.72 for breach of contract and from an order granting plaintiff's motion for summary judgment on several affirmative defenses raised by defendant. We affirm both the summary judgment order and the judgment.

I. Background

In 2000, defendant purchased a 61.7 acre tract of land in Orange County. He later decided to subdivide the tract and, in 2007, signed an "Offer to Purchase and Contract" along with his wife, Alicia Tibbens, and plaintiff, wherein plaintiff offered to purchase 15 acres of land for $75,000. Plaintiff intended to build a home for herself on the land, but first needed a septic system installed. On 16 January 2008, the parties closed on their land purchase agreement and entered into a "Septic System Installation Agreement." Defendant's wife did not sign the installation agreement. In the installation agreement, defendant agreed to "install the septic system" for plaintiff's property and he agreed to "be responsible for all labor and job supervision associated with the installation." Plaintiff agreed to supply all necessary materials, rental equipment, and fuel for the project up to $10,000. Defendant agreed to be responsible for costs in excess of $10,000.

Defendant began the process of installing the septic system by consulting with others in the business and arranging for plaintiff's system to be designed and engineered by Summit Consulting, PLLC. Summit began its portion of the work in March 2008 and finished around February 2010. In February 2010, defendant's attorney sent plaintiff a letter informing her that defendant was not a licensed contractor and that, as a result, he could not lawfully construct her septic system. It further asserted that the installation agreement was unenforceable and void. In response, plaintiff hired a septic company to install her system. The new company charged her $33,500 for its services.

On or about 9 March 2010, plaintiff filed a complaint against defendant and his wife alleging breach of contract and seeking damages for breach of the installation agreement. Plaintiff filed an amended complaint on 11 January 2011 adding a claim of unjust enrichment against Alicia Tibbens. Defendant answered, raising affirmative defenses of impossibility, illegality, and laches. After discovery, plaintiff moved for partial summary judgment on the affirmative defenses raised by defendant. The trial court granted plaintiff's motion by order entered 9 March 2012, finding no genuine issue of material fact and concluding that plaintiff was entitled to judgment as a matter of law on the affirmative defenses.

The case was tried on 17 and 18 December 2012 by the superior court judge sitting without a jury. The trial court entered its judgment, which contained findings of fact and conclusions of law, on 7 February 2013. It found that defendant had breached the installation agreement and that he owed plaintiff $32,331.72 in damages for the total cost of her

septic system installation, $42,331.72, less the $10,000 she had agreed to spend on it. The trial court found that plaintiff had failed to prove that Alicia Tibbens was a party to the agreement and that she should also be liable for the breach. Defendant filed written notice of appeal to this Court on 5 March 2013.

II. Impossibility and Illegality

[1] Defendant first contends that the trial court erred in granting plaintiff's motion for summary judgment on the defenses of impossibility and illegality. We conclude that the trial court correctly granted summary judgment to plaintiff on these defenses because the installation agreement was neither illegal nor impossible to perform.

A. Standard of Review

> We review a trial court order granting or denying a summary judgment motion on a *de novo* basis, with our examination of the trial court's order focused on determining whether there is a genuine issue of material fact and whether either party is entitled to judgment as a matter of law. As part of that process, we view the evidence in the light most favorable to the nonmoving party.

Cox v. Roach, ___ N.C. App. ___, ___, 723 S.E.2d 340, 347 (2012) (citation omitted), *disc. rev. denied*, 366 N.C. 423, 736 S.E.2d 497 (2013).

B. Analysis

Defendant argues that the trial court erred in granting plaintiff's motion for summary judgment on the defenses of illegality and impossibility because the contract was illegal and his performance impossible under N.C. Gen. Stat. § 90A-72, which requires that a person installing a septic system be a properly certified contractor.

> The court is to interpret a contract according to the intent of the parties to the contract, unless such intent is contrary to law. If the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract. 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.

Williams v. Habul, ___ N.C. App. ___, ___, 724 S.E.2d 104, 111 (2012) (citations and quotation marks omitted). Defendant does not contend

that the contract is ambiguous or that there were genuine issues of material fact. He simply disagrees with the trial court's interpretation of the contract and its conclusion that the statute does not prevent defendant from performing.

"[A]n agreement which violates a constitutional statute or municipal ordinance is illegal and void." *Marriott Financial Services, Inc. v. Capitol Funds, Inc.*, 288 N.C. 122, 128, 217 S.E.2d 551, 555 (1975); *Carolina Water Service, Inc. of North Carolina v. Town of Pine Knoll Shores*, 145 N.C. App. 686, 689, 551 S.E.2d 558, 560 (2001) ("An agreement which cannot be performed without violation of a statute is illegal and void."), *disc. rev. denied*, 354 N.C. 360, 556 S.E.2d 298 (2001). Additionally, nonperformance may be excused for impossibility if the performing party's

> performance is rendered impossible by the law, provided the promisor is not at fault and has not assumed the risk of performing whether impossible or not. Moreover, in most cases it must be shown that the event was not reasonably foreseeable. Government actions . . . may be a basis for a finding of legal impossibility.

UNCC Properties, Inc. v. Greene, 111 N.C. App. 391, 397, 432 S.E.2d 699, 702 (1993), *cert. denied*, 335 N.C. 242, 439 S.E.2d 163 (1993).

Here, the only basis of illegality and impossibility asserted by defendant is statutory—that he was not allowed to construct a septic system for plaintiff because he was not a certified on-site wastewater contractor. We agree that N.C. Gen. Stat. § 90A-72(a) requires that construction and installation of "an on-site wastewater system" be performed by or under the supervision of a properly certified contractor. *See* N.C. Gen. Stat. § 90A-72(a) (2009); N.C. Gen. Stat. § 90A-81(d)(1) (2009) (establishing that construction of an on-site wastewater system without the proper certificate is a Class 2 misdemeanor). But the parties' contract did not require defendant to install the septic system personally.

The contract provided, in relevant part:

> 1. Tibbens will install the septic system for a residence on the property described in Exhibit A attached hereto. Tibbens will be responsible for all labor and job supervision associated with the installation.
>
> 2. Botts will provide all materials and rental and fuel for any equipment necessary for the installation of the septic

> system in an amount not to exceed TEN THOUSAND AND 00/100 DOLLARS ($10,000.00).
>
> 3. In the event that the expense of materials and rental and fuel for any equipment exceeds TEN THOUSAND AND 00/100 DOLLARS ($10,000.00), then and in said event, Tibbens shall be responsible for all materials and rental of and fuel for any equipment necessary for the installation of the septic system in excess of TEN THOUSAND AND 00/100 DOLLARS ($10,000.00).

Nothing in the plain language of this contract requires that defendant install the septic system *personally* or precludes him from employing others to effect the installation. Instead, the contract simply makes defendant responsible for the installation. Indeed, the language making Tibbens "responsible for all labor *and job supervision* associated with the installation" (emphasis added) strongly suggests that hiring others to assist in the performance of his contractual duties was permitted. Defendant could have sub-contracted to a properly licensed contractor to perform his contractual obligations. Moreover, nothing prevented him from seeking an appropriate contractor's license in the two years between the signing of the contract and the letter indicating his refusal to perform. That defendant miscalculated the costs of performing his contractual obligations does not make his performance impossible. *See* Restatement (Second) of Contracts, § 261, cmt. d (1981) ("A mere change in the degree of difficulty or expense due to such causes as increased wages, prices of raw materials, or costs of construction, unless well beyond the normal range, does not amount to impracticability since it is this sort of risk that a fixed-price contract is intended to cover. Furthermore, a party is expected to use reasonable efforts to surmount obstacles to performance (see § 205), and a performance is impracticable only if it is so in spite of such efforts.")

We conclude that the contract does not require performance by someone precluded by statute from performing. Therefore, we hold the contract was not illegal and defendant's performance was not impossible. As a result, we affirm the trial court's order granting plaintiff's motion for summary judgment on these issues.

III. Damages

[2] Defendant next argues that the trial court erred in calculating plaintiff's damages by including the cost of engineering services which were not part of defendant's obligations under the contract.

> In a bench trial in which the superior court sits without a jury, the standard of review 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 are conclusive on appeal if there is evidence to support those findings. A trial court's conclusions of law, however, are reviewable *de novo*.

Hinnant v. Philips, 184 N.C. App. 241, 245, 645 S.E.2d 867, 870 (2007) (citation and quotation marks omitted).

> Damages are allowed for breach of contract as may reasonably be supposed to have been in the contemplation of the parties when the contract was made or which will compensate the injured party for the loss which fulfillment of the contract could have prevented or the breach of it has entailed. The party seeking damages must show that the amount of damages is based upon a standard that will allow the finder of fact to calculate the amount of damages with reasonable certainty.

J.T. Russell and Sons, Inc. v. Silver Birch Pond L.L.C., ___ N.C. App. ___, ___, 721 S.E.2d 699, 704 (2011) (citations, quotation marks, and brackets omitted).

"While the amount of damages is ordinarily a question of fact, the proper standard with which to measure those damages is a question of law." *Olivetti Corp. v. Ames Business Systems, Inc.*, 319 N.C. 534, 548, 356 S.E.2d 578, 586 (1987). Where a contract has been breached,

> [t]he injured party is entitled to full compensation for his loss, and to be placed as near as may be in the condition which he would have occupied had the contract not been breached. Generally speaking, the amount that would have been received if the contract had been kept and which will completely indemnify the injured party is the true measure of damages for its breach.

Troitino v. Goodman, 225 N.C. 406, 412, 35 S.E.2d 277, 281 (1945) (citations and quotation marks omitted).

Defendant does not challenge any of the trial court's findings of fact as unsupported by the evidence. He simply contends that the trial court erred in interpreting the contract to include engineering services and including those costs in its damages calculation, but does not

argue that the standard used by the trial court to award damages was otherwise erroneous.

The trial court found that the agreement made defendant "responsible for the installation of the septic system." It further found that engineering services would be a necessary part of the installation process and that defendant was aware of that fact when he signed the contract. Indeed, defendant helped arrange for Summit Consulting to provide the necessary engineering services. Finally, the trial court found that, under the agreement, defendant was "responsible for all costs exceeding $10,000." Defendant does not specifically challenge any of these findings as unsupported by competent evidence. It is clear from these findings that the trial court considered the engineering services to be part of the "installation" portion of the contract.

The trial court found that the total cost of completing the project was $42,331.72, but reduced the damages award by $10,000, because plaintiff had agreed to be responsible for costs up to that amount. It therefore awarded plaintiff $32,331.72. This amount, based on the uncontested findings by the trial court, was clearly aimed at putting plaintiff in the same position as she would have been had defendant performed the contract—she would spend up to $10,000 and a septic system would be installed on her property appropriate for the house she was constructing. We therefore affirm the trial court's judgment and damages award.

IV. Conclusion

We affirm the trial court's order granting plaintiff's motion for summary judgment because the contract was not illegal and it was not impossible for defendant to perform his contractual obligations. Further, we affirm the trial court's judgment awarding plaintiff $32,331.72 in damages.

AFFIRMED.

Judges HUNTER, JR., Robert N. and DILLON concur.

FIRST BANK, PLAINTIFF
v.
S&R GRANDVIEW, L.L.C.; DONALD J. RHINE; JOEL R. RHINE; GORDON P. FRIEZE, JR.; MAXINE GANER; SHARON R. SILVERMAN, EXECUTRIX OF THE ESTATE OF STEVEN S. SILVERMAN; AND MARTIN J. SILVERMAN, DEFENDANTS

No. COA13-838

Filed 4 March 2014

Assignments—limited liability company—charging order does not effectuate debtor's assignment of membership interest

The trial court erred by concluding that a charging order effectuated an assignment of defendant's membership interest in a limited liability company (LLC) to plaintiff and by enjoining defendant from exercising his management rights in the LLC and ruling that these rights "lie fallow" until the judgment was satisfied. Under the plain language of N.C.G.S. § 57C-5-03, a charging order does not effectuate an assignment of a debtor's membership interest in an LLC and does not cause a debtor to cease being a member in an LLC.

Appeal by defendant Donald J. Rhine from order entered 26 February 2013 by Judge Vance Bradford Long in Montgomery County Superior Court. Heard in the Court of Appeals 10 December 2013.

Nexsen Pruet, PLLC, by M. Jay DeVaney and Brian T. Pearce, for plaintiff-appellee.

Wilson & Ratledge, PLLC, by Michael A. Ostrander, and Saffo Law Firm, P.C., by Anthony A. Saffo, for defendant-appellant.

HUNTER, Robert C., Judge.

Donald J. Rhine ("defendant") appeals from a charging order entered in favor of First Bank ("plaintiff") charging defendant's membership interest in an LLC to satisfy payment of a judgment. On appeal, defendant argues that the trial court erred by: (1) concluding that the charging order "effectuated an assignment" of defendant's membership interest in the LLC; and (2) enjoining defendant from exercising his rights as a member of the LLC and ordering that his membership rights "lie fallow" until the judgment is satisfied.

After careful review, we reverse the trial court's order and remand for entry of a new charging order consistent with this opinion.

Background

On 7 September 2012, the trial court entered monetary judgment for plaintiff against defendant in excess of $3.5 million based on defendant's default on various loans and guaranty agreements. In an effort to collect on this judgment, plaintiff filed a motion seeking a charging order against defendant's membership interest in S&R Grandview, LLC ("the LLC"), a limited liability company of which defendant was a member and manager. After a hearing on 18 February 2013, the trial court granted plaintiff's motion, and after concluding that the charging order "effectuate[d] an assignment," ordered the following:

> 1. Defendant D. Rhine's membership interest in S&R Grandview, L.L.C. is hereby charged with payment of the unsatisfied amount of First Bank's Judgment, including interest that has accrued after the date of the Judgment.
>
> 2. First Bank shall hereafter have the rights of an assignee of Defendant D. Rhine's membership interest in S&R Grandview, L.L.C., and all members and managers of S&R Grandview, L.L.C. shall treat First Bank as such an assignee.
>
> 3. Until such time as the full amount of the Judgment has been paid to First Bank, Defendant D. Rhine shall be enjoined from exercising any of the rights of a member of S&R Grandview, L.L.C.
>
> 4. First Bank shall receive any and all distributions and allocations from S&R Grandview, L.L.C. to which Defendant D. Rhine is entitled, until the full amount of the Judgment has been paid to First Bank.
>
> 5. The members and managers of S&R Grandview, L.L.C., shall not allow any distribution or allocation to Defendant D. Rhine unless and until First Bank's Judgment has been fully satisfied.
>
> 6. S&R Grandview, L.L.C. shall not allow Defendant D. Rhine to circumvent the terms or purpose of this Charging Order.
>
> 7. This order does not allow First Bank to exercise any rights of a member of S and R [sic] Grandview, LLC except as set out in paragraph 4 above. Defendant D. Rhine's

> membership right shall lie fallow until the judgement [sic] is satisfied except as set out in paragraph 4 above.

Defendant filed timely notice of appeal from this order.

Discussion

I. Effect of Charging Order on LLC Membership Interest

Defendant brings two related arguments on appeal: (1) the trial court erred by concluding that the charging order effectuated an assignment of his membership interest in the LLC to plaintiff, and (2) the trial court erred by enjoining him from exercising his management rights in the LLC and ruling that these rights "lie fallow." We agree as to both arguments and reverse the trial court's order.

Both issues on appeal involve interpretation of N.C. Gen. Stat. §§ 57C-5-02, -03 (2011). Questions of statutory interpretation are questions of law, which are reviewed *de novo* by this Court. *Dare Cnty. Bd. of Educ. v. Sakaria*, 127 N.C. App. 585, 588, 492 S.E.2d 369, 371 (1997); *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004). The primary objective of statutory interpretation is to give effect to the intent of the legislature. *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998). The plain language of a statute is the primary indicator of legislative intent. *Begley v. Emp't Sec. Comm'n*, 50 N.C. App. 432, 436, 274 S.E.2d 370, 373 (1981). However, where the plain language is unclear, this Court may also glean the General Assembly's intent from legislative history. *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001). Likewise, "[l]ater statutory amendments provide useful evidence of the legislative intent guiding the prior version of the statute." *Wells v. Consol. Judicial Ret. Sys.*, 354 N.C. 313, 318, 553 S.E.2d 877, 880 (2001). Finally, statutory provisions must be read in context: "Statutes dealing with the same subject matter must be construed *in pari materia*, as together constituting one law, and harmonized to give effect to each." *Williams v. Williams*, 299 N.C. 174, 180–81, 261 S.E.2d 849, 854 (1980) (internal citations omitted).

Section 57C-5-03 allows a judgment creditor to seek a charging order against a debtor-member's interest in an LLC to satisfy the judgment. It provides:

> On application to a court of competent jurisdiction by any judgment creditor of a member, the court may charge the membership interest of the member with payment of the unsatisfied amount of the judgment with interest. *To the extent so charged, the judgment creditor has only*

> *the rights of an assignee of the membership interest.* This Chapter does not deprive any member of the benefit of any exemption laws applicable to his membership interest.

N.C. Gen. Stat. § 57C-5-03 (emphasis added). Because section 57C-5-03 states that the judgment creditor "has only the rights of an assignee of the membership interest," it is proper to read section 57C-5-03 together with section 57C-5-02, which sets out the rights of an assignee of an LLC membership interest. *See Williams*, 299 N.C. at 180-81, 261 S.E.2d at 854. Section 57C-5-02 provides:

> Except as provided in the articles of organization or a written operating agreement, a membership interest is assignable in whole or in part. An assignment of a membership interest does not dissolve the limited liability company or entitle the assignee to become or exercise any rights of a member. *An assignment entitles the assignee to receive, to the extent assigned, only the distributions and allocations to which the assignor would be entitled but for the assignment.* Except as provided in the articles of organization or a written operating agreement, *a member ceases to be a member upon assignment of all of his membership interest.* Except as provided in the articles of organization or a written operating agreement, the pledge of, or granting of a security interest, lien, or other encumbrance in or against, all or any part of the membership interest of a member shall not cause the member to cease to be a member or the secured party to have the power to exercise any rights or powers of a member.

N.C. Gen. Stat. § 57C-5-02 (emphasis added). Membership interests are defined by N.C. Gen. Stat. § 57C-1-03(15) (2011) as "[a]ll of a member's rights in the limited liability company, including without limitation the member's share of the profits and losses of the limited liability company, the right to receive distributions of the limited liability company assets, any right to vote, and any right to participate in management."

Plaintiff argues that "[t]he only reasonable way to read N.C. Gen. Stat. § 57C-5-02 and N.C. Gen. Stat. § 57C-5-03 together and to give import to each of the clauses included in each statute is to conclude that the entry of a charging order amounts to an assignment of the debtor's membership interest" and after entry of a charging order "a debtor ceases to be a member in the limited liability company to which the charging order applies." To reach this conclusion, plaintiff argues that:

(1) a charging order assigns a debtor's economic interest in an LLC to a judgment creditor; (2) the only LLC membership rights that are freely transferable are economic rights, and thus, assignment of economic rights "effectuates a full and complete assignment of a limited liability company interest"; and (3) because "a member ceases to be a member upon assignment of all of his membership interest," N.C. Gen. Stat. § 57C-5-02, a charging order terminates the debtor-member's membership in the LLC.

We disagree with plaintiff's interpretation of these statutes. First, we do not read sections 57C-5-02 and 57C-5-03 as effectuating an assignment of the debtor's membership rights, either in whole or in part. Section 57C-5-03 clearly states that "the judgment creditor has *only the rights* of an assignee of the membership interest." An assignee has the right "to receive, to the extent assigned, only the distributions and allocations to which the assignor would be entitled but for the assignment." N.C. Gen. Stat. § 57C-5-02. Thus, under the plain language of these statutes, a charging order gives a judgment creditor the right to receive distributions and allocations to which the debtor-member would have been entitled until the judgment is satisfied. Nowhere in these provisions does the General Assembly mandate an assignment of membership interests from a debtor to a judgment creditor through a charging order. "Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990) (citation omitted). Section 57C-5-03 does exactly what it says; it "charge[s] the membership interest of the member with payment of the unsatisfied amount of the judgment with interest." Had the General Assembly intended a charging order to assign all membership interests and terminate a debtor's membership in an LLC, as plaintiff contends, it could have easily included language to that effect. Absent such language, we are bound by the words used by the General Assembly, and we hold that a charging order does not effectuate an assignment of a debtor-member's total interest in an LLC.

Recent amendments to the North Carolina Limited Liability Company Act support our conclusion that a charging order does not effectuate an assignment. Effective 1 January 2014, the General Assembly repealed Chapter 57C and enacted a new North Carolina Limited Liability Company Act in Chapter 57D. *See* 2013 Sess. Laws 157, §§ 1,2. N.C. Gen. Stat. § 57D-5-03 clarifies the rights of a judgment creditor seeking a charging order as follows:

> (a) On application to a court of competent jurisdiction by any judgment creditor of an interest owner, the court may charge the economic interest of an interest owner with the payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor has only the right to receive the distributions that otherwise would be paid to the interest owner with respect to the economic interest.
>
> (b) *A charging order is a lien on the judgment debtor's economic interest* to the extent provided in this section from the time that such charging order is served upon the LLC in accordance with Rule 4(j)(8) of the Rules of Civil Procedure. . . .
>
> (c) *This Chapter does not deprive any interest owner of a right*, including any benefit of any exemption law applicable to the interest owner's ownership interest.
>
> (d) The entry of a charging order is the exclusive remedy by which a judgment creditor of an interest owner may satisfy the judgment from or with the judgment debtor's ownership interest.

N.C. Gen. Stat. § 57D-5-03 (2013) (emphasis added). Although the newly revised North Carolina Limited Liability Company Act does not apply to this case, see N.C. Gen. Stat. § 57D-11-03, the clarified portions of section 57D-5-03 support our conclusion that the General Assembly did not intend for section 57C-5-03 to effectuate an assignment, enjoin a debtor-member from exercising managerial rights, or cause the debtor-member to cease to be a member in the LLC.

Although plaintiff contends that this conclusion leads to irreconcilable results, again we disagree.

First, plaintiff argues that to conclude that a charging order does not effectuate a total assignment, this Court would have to reconcile "why the interest received by a party receiving a charging order is identical to the interest received by a party who is otherwise assigned a membership interest in a limited liability company." We disagree with plaintiff's contention that these interests are identical. Section 57C-5-03 provides that a trial court "may charge the membership interest of the member with payment of the *unsatisfied* amount of the judgment with interest." N.C. Gen. Stat. § 57C-5-03 (emphasis added). Inherent in the concept of a charging order is that once the judgment is paid, the debtor-member's

interest in the LLC is no longer charged. An assignee of a member's LLC membership interest has no such limitation. Thus, contrary to plaintiff's argument, although a judgment creditor has the economic rights of an assignee until the judgment is satisfied, the interests that the two parties have are not identical.

Second, plaintiff argues that because the term "charging order" is not included in the last sentence of section 57C-5-02, which prescribes situations where a member loses some economic rights but retains membership in the LLC, the General Assembly could not have intended this provision to apply to charging orders. Although the term "charging order" is not specifically mentioned by name, we find that it fits within the "other encumbrance[s] in or against, all or any part of the membership interest" for which the provision applies. *See* N.C. Gen. Stat. § 57C-5-02 ("[T]he pledge of, or granting of a security interest, lien, or *other encumbrance* in or against, all or any part of the membership interest of a member shall not cause the member to cease to be a member or the secured party to have the power to exercise any rights or powers of a member.") (emphasis added). Plaintiff argues that because encumbrances do not include actual transfer of rights until they are enforced, and charging orders permit the judgment creditor to actually receive distributions and allocations, charging orders cannot be encumbrances. The flaw in this logic is the assumption that charging orders are never "enforced." The plain language of sections 57C-5-02 and 57C-5-03, specifically that the debtor's membership interest is "charge[d]" and the judgment creditor has the right to "receive . . . the distributions and allocations to which the assignor would be entitled," demonstrates a legislative intent for charging orders to act as encumbrances that are "enforced" whenever the debtor-member would have received distributions or allocations from the LLC. Furthermore, the General Assembly has clarified that charging orders are encumbrances, not assignments, and that the imposition of a charging order does not affect a member's managerial rights. Specifically, section 57D-5-03(b) states that "A charging order is a lien on the judgment debtor's economic interest[.]" The subsequent amendment of the charging order statute is strong evidence that the General Assembly intended charging orders under 57C-5-03 to be encumbrances that do not affect a debtor's managerial interest, contrary to plaintiff's contention and the trial court's order. *See Wells*, 354 N.C. at 318, 553 S.E.2d at 880.

Third, plaintiff argues that because section 57C-5-03 is included in the Article of the North Carolina Limited Liability Company Act entitled "Assignment of Membership Interests; Withdrawal," charging orders

must be interpreted to effectuate assignments. Although we agree that the title of an Article in which a statute is placed can be relevant when interpreting the statute, the placement of a statute within an Act is less probative of legislative intent than the plain language of the statute itself. "[I]n interpreting a statute, we *first* look to understand the legislative intent behind the statute by examining the plain language of the statute." *State v. Moore*, 167 N.C. App. 495, 503, 606 S.E.2d 127, 132 (2004) (emphasis added) (citing *Elec. Supply Co. v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991)). "[W]hen confronted with a clear and unambiguous statute, courts are without power to interpolate, or superimpose, provisions and limitations not contained therein." *In re Hamilton*, __ N.C. App. __, __, 725 S.E.2d 393, 396 (2012). Here, the plain language of section 57C-5-03 unambiguously states that a charging order gives the judgment creditor the *rights* of an assignee. N.C. Gen. Stat. § 57C-5-03. It does not provide for actual assignment of membership rights from debtor to judgment creditor. The fact that section 57C-5-03 was placed by the General Assembly in an Article entitled "Assignment of Membership Interests; Withdrawal" does not change this outcome.

Conclusion

After careful review, we hold that under the plain language of section 57C-5-03, a charging order does not effectuate an assignment of a debtor's membership interest in an LLC and does not cause a debtor to cease being a member in an LLC. Thus, we reverse the trial court's charging order enjoining defendant from exercising his membership rights in the LLC and ordering that his membership rights "lie fallow" and remand for entry of a charging order consistent with this opinion.

REVERSED AND REMANDED.

Judges McGEE and ELMORE concur.

MILLIE E. HERSHNER, PETITIONER
v.
N.C. DEPARTMENT OF ADMINISTRATION AND N.C. HUMAN RELATIONS COMMISSION, RESPONDENT

No. COA13-790

Filed 4 March 2014

1. Administrative Law—termination of state employment—adoption of findings and conclusions

In an action arising from the termination of a state employee, the trial court did not err in adopting the findings and conclusions of the administrative law judge and State Personnel Commission where unchallenged findings of fact supported the decisions.

2. Public Officers and Employees—termination of employment—no just cause

The trial court did not err by affirming the decisions of the administrative law judge and the State Personnel Commission that respondent state agency lacked just cause to terminate petitioner's employment. Respondent did not prove that allegedly confidential information disclosed by petitioner was confidential, did not prove that a rule allegedly violated by petitioner was in effect, or that petitioner in fact disobeyed an instruction as contended.

3. Administrative Law—initial quorum—recusals

The State Personnel Commission (SPC) had a quorum where seven members were present when business was commenced, exceeding the six required for a quorum. That quorum was not nullified by the subsequent recusal of two members.

Appeal by respondent from order entered 11 January 2013 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 11 December 2013.

John Walter Bryant and Amber J. Ivie for petitioner-appellee.

Roy Cooper, Attorney General, by Ann Stone, Assistant Attorney General, for respondent-appellant.

STEELMAN, Judge.

Where unchallenged findings of fact support the decisions of the administrative law judge and state personnel commission, the trial court did not err in adopting their findings of fact and conclusions of law. Where respondent failed at trial to present evidence to support the alleged bases for petitioner's termination, the trial court did not err in affirming the decisions of the administrative law judge and state personnel commission that petitioner's termination was wrongful. Where the state personnel commission had a quorum at the time it commenced business, it was authorized to issue a decision.

I. Factual and Procedural Background

Millie Hershner (petitioner) was employed by the North Carolina Department of Administration (DOA), Human Relations Committee (HRC) (collectively, respondent) as a staff attorney. Citizens who believe their rights under the Fair Housing Act have been violated can file complaints with the HRC. As part of her employment duties, petitioner assisted investigators in these cases and helped to determine whether HRC should hear them.

In 2005, petitioner was hired as an Attorney I for respondent. She was selected for this position over another applicant, Richard Boulden. In 2006, Boulden was selected for an Attorney II position, making him petitioner's supervisor. Prior to 2006, petitioner had only one disagreement with Boulden. At the time, Boulden, a case investigator, had determined that a case had cause, while petitioner determined that it did not. Subsequent to his promotion, Boulden did not train petitioner, or meet with her to establish any kind of work plan or standards, as required by respondent's "Performance Management System." However, on Boulden's first review of petitioner's work, he gave her a negative performance rating. Petitioner subsequently advised Boulden that he could not rate her performance negatively without stating the basis for the rating; Boulden then amended the performance ratings, so that they were positive, but in the lower range.

Following the low rating, petitioner contacted the complainants in cases on which she had previously worked. One such complainant, Virginia Radcliffe (Radcliffe), had threatened to sue HRC. On 3 January 2008, Boulden contacted Radcliffe, informed her that HRC was no longer working on her case, and told her that he would be the sole point of contact between Radcliffe and respondent. Boulden claimed at the hearing that he had overheard petitioner speaking with Radcliffe on the telephone later that day, although he did not raise the issue with petitioner at the time.

On 9 June 2008, Boulden informed petitioner of a disciplinary meeting concerning her conversation with Radcliffe on 3 January 2008. On 11 June 2008, petitioner received a Final Written Warning for unacceptable personal conduct, specifically insubordination, with regard to her continued contact with Radcliffe. This letter outlined five numbered rules that petitioner had been expected to follow. There was no evidence presented that petitioner had violated any of these rules, or that petitioner had any subsequent contact with Radcliffe.

On 24 August 2009, petitioner was dismissed for unacceptable personal conduct, including conduct unbecoming a State employee that was detrimental to State service, violation of a known work rule, and insubordination. Specifically, three acts were alleged as the basis for this dismissal: (1) petitioner sent two letters to Radcliffe, containing allegedly confidential information; (2) petitioner contacted Stephanie Williams (Williams), another complainant, and informed her that she believed Williams' case had "cause," before a final determination had been made by HRC; and (3) petitioner had been instructed to work on a single assignment, to the exclusion of others, and yet continued to work on other assignments. John Campbell, Executive Director of HRC (Campbell) admitted that petitioner was not fired due to a failure to meet expectations, a failure to do her job, or unsuccessful job performance due to lack of skill or effort. Further, an HRC Supervising Investigator, Maggie Faulcon, observed that she had "never heard of anyone ever even being disciplined for discussing the likelihood of the determination with a party, and for certain, never heard of anyone losing their job over such a thing."

On 4 December 2009, petitioner filed a petition for a contested case hearing in the Office of Administrative Hearings (OAH). On 3 February 2012, Administrative Law Judge Donald W. Overby (ALJ) issued his decision, and held that respondent's dismissal of petitioner was unwarranted and should be reversed. Respondent appealed the ALJs decision to the State Personnel Commission. On 23 May 2012, the SPC issued its decision and order, adopting the findings of fact and conclusions of law of the ALJ, and affirming the decision in favor of petitioner. Respondent appealed to the Superior Court of Wake County. On 11 January 2013, the trial court affirmed the decision of the SPC, and ordered that petitioner be reinstated with back pay and benefits.

Respondent appeals.

II. Standard of Review

"In cases appealed from administrative tribunals, we review questions of law *de novo* and questions of fact under the whole record test." *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 386, 628 S.E.2d 1, 2 (2006).

"[W]e consider *de novo* whether the Commission erred in reaching its conclusion that 'just cause' existed for petitioner's termination." *Amanini v. N.C. Dep't of Human Res.*, 114 N.C. App. 668, 678, 443 S.E.2d 114, 120 (1994).

III. Adoption of Findings and Conclusions by Trial Court

[1] In its first argument, respondent contends that the trial court erred in adopting the findings of fact and conclusions of law of the ALJ and SPC. We disagree.

The ALJ made one hundred and twenty five findings of fact, which were adopted by the SPC, and ultimately adopted by the trial court. Respondent challenges the evidentiary support for only ten of these findings. Those findings which respondent does not challenge are binding upon this court. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

Even assuming *arguendo* that respondent is correct, and that these ten findings were not supported by evidence in the record, there were one hundred and fifteen unchallenged findings. We hold that these remaining findings of fact support the ALJ's conclusions of law. These conclusions of law support the decisions of the SPC and trial court to affirm the ALJ's decision.

This argument is without merit.

IV. Affirming the ALJ and SPC

[2] In its second argument, respondent contends that the trial court erred in affirming the decisions of the ALJ and SPC. We disagree.

Respondent contends that petitioner was dismissed due to violations of guidelines, particularly those in the Final Written Warning dated 11 June 2008, relating to the disclosure of confidential information and contacting a complainant. Respondent contends that petitioner's violation of these guidelines constituted just cause for petitioner's dismissal.

At trial, respondent supported its claim that petitioner's conduct was unbecoming a State employee with two letters, written by petitioner to Radcliffe, which respondent contends contained confidential

information about cases and derogatory remarks about petitioner's supervisor and HRC. However, respondent failed to offer any evidence that the information in these letters was confidential. Respondent also failed to present evidence that these letters were detrimental to State service simply because they may have contained negative remarks concerning petitioner's supervisor. The ALJ concluded that "[t]he Respondent failed to meet its burden to establish that any information released by the Petitioner . . . was confidential to anyone other than the Petitioner, who is free to waive that confidentiality as she chooses." The ALJ also concluded that "[t]he Respondent failed to meet its burden to establish that the release of information by Ms. Hershner was detrimental to state service simply because it may have been negative regarding one Supervisor[.]" These conclusions were affirmed by the SPC and trial court.

Respondent also contended that petitioner was dismissed, in part, for the willful violation of a known work rule, specifically for her alleged disclosure to Williams of the status of her case. However, respondent presented no evidence that this rule applied to HRC attorneys such as petitioner. Evidence in the record instead supported a finding that this rule applied to the non-attorney investigators, and that investigators regularly disregarded this rule. Petitioner's supervisor testified that he had never told petitioner that this policy was grounds for dismissal. One investigator testified that such a policy did not apply to attorneys, and that she had not heard of investigators being disciplined for discussing preliminary determinations with complainants. The ALJ concluded, based upon this evidence, that the State had not met its burden of establishing that this policy existed, or that such a policy was enforced prior to being used as a basis to discipline petitioner.

Finally, respondent alleged as its third basis for petitioner's dismissal that petitioner was insubordinate, in that she willfully refused to carry out a reasonable order from her supervisor. Respondent contends that this directive was to work on nothing but an appellate brief for one specific case. However, the directive was for petitioner to make the brief her "top priority," not to cease all other work. The ALJ found that the case in question was ultimately dismissed as a result of her supervisor's conduct, not as a result of petitioner's work. The ALJ further concluded that:

> The Respondent failed to establish its burden that the Petitioner was insubordinate in her handling of the writing of the Appellate Brief, when she had been commended by the Executive Director of the Agency for postponing her vacation to finish a brief, putting her work ahead of

> her personal life, she had never missed a filing deadline in her work at the HRC, the Petitioner still had fifteen days remaining within which to finish the brief before its due date when she was placed on administrative leave by the Agency Counsel, the HRC Agency Counsel eventually decided to abandon the appeal without ever filing the brief, and the very day the Petitioner was placed on Administrative leave she was told by the Agency Counsel that the brief was only a "top priority" not her only priority.

We have previously held that, "according to the Commission's regulations, 'just cause' for dismissal has been divided into two basic categories—unsatisfactory job performance and personal conduct (misconduct) detrimental to State service." *Amanini*, 114 N.C. App. at 679, 443 S.E.2d at 120. In *Amanini*, we held that there was a distinction between the two categories:

> The JOB PERFORMANCE category is intended to be used in addressing performance-related inadequacies for which a reasonable person would expect to be notified of and allowed an opportunity to improve. PERSONAL CONDUCT discipline is intended to be imposed for those actions for which no reasonable person could, or should, expect to receive prior warnings.

Id. at 679, 443 S.E.2d at 120-21. In the instant case, the conduct at issue involved job performance, the first category. Alleged infractions under this category require prior notice and opportunity to improve. As the ALJ found, however, petitioner had never received such warning.

We hold that petitioner's termination, based upon disclosure of information which respondent failed to prove was confidential, violation of a rule which respondent failed to prove was in effect, and disobedience of an instruction which was not, in fact, disobeyed, was not supported by just cause. The trial court did not err in affirming the decisions of the ALJ and SPC that respondent lacked just cause to terminate petitioner's employment.

This argument is without merit.

C. Whether a Quorum Existed

[3] In its third argument, respondent contends that the SPC lacked the authority to make its decision because a quorum of its members was not present. We disagree.

Of the nine members of the SPC, seven were present when petitioner's case was heard. Once the session of the SPC had opened, those with conflicts were asked to recuse themselves; two did so, leaving five remaining SPC members. Respondent contends that five members did not constitute a quorum, and that the SPC lacked authority to rule on petitioner's case.

At the time of petitioner's case, the SPC required a quorum of six in order to hear cases. N.C. Gen. Stat. § 126-2(f) (2011).[1] The term "quorum" is not defined in Chapter 126 of the North Carolina General Statutes. Black's Law Dictionary defines a quorum as "[t]he minimum number of members . . . who must be present for a deliberative assembly to legally transact business[,]" but does not state at what time during the proceedings a quorum should be determined. *Black's Law Dictionary*, 1370 (9th ed. 2009). However, several other North Carolina statutes note that once a person is deemed present for quorum purposes, he is deemed present for the remainder of that meeting. *See* N.C. Gen. Stat. §§ 55-7-25(b), 55A-7-22(a) (2013). We hold that a quorum of the SPC is to be determined at the beginning of a meeting; once the meeting is opened, the SPC may conduct business regardless of subsequent recusals that may reduce the number of members voting on a particular issue below the number required for a quorum.

In the instant case, when the SPC commenced business, seven members were present, exceeding the six required for a quorum. At that time, a quorum was established. Respondent cites no authority to support the contention that this quorum was subsequently nullified by the recusal of two of its members. We hold that the SPC had a quorum, and therefore had the authority to hear petitioner's case.

This argument is without merit.

NO ERROR.

Judges GEER and ERVIN concur.

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1. In August of 2013, N.C. Gen. Stat. § 126-2(f) was amended to read "Five members of the Commission shall constitute a quorum." N.C. Gen. Stat. § 126-2(f) (2013). However, at the time of petitioner's hearing before the SPC, the statute required six members to constitute a quorum.

HORNER INT'L CO. v. McKOY

[232 N.C. App. 559 (2014)]

HORNER INTERNATIONAL COMPANY, Plaintiff
v.
BILL M. MCKOY, Defendant

No. COA13-964

Filed 4 March 2014

1. Appeal and Error—interlocutory orders and appeals—preliminary injunctions—trade secrets—substantial right

The merits of both plaintiff's appeal and defendant's cross-appeal from preliminary injunction rulings were addressed where the case involved trade secret agreements between an employer and employee.

2. Employer and Employee—non-compete agreement—too broad—unenforceable

The trial court did not err in a case involving the food processing and flavor industry by denying plaintiff's motion for a preliminary injunction as to a non-compete agreement where the agreement was overbroad and unenforceable. The agreement contained no geographical limitation, purported to bar defendant from doing wholly unrelated work for any firm that sold flavor materials, even if that firm's products did not compete with those of plaintiff, and purported to bar defendant from having even an indirect financial interest in such a business.

3. Trade Secrets—likelihood of success on the merits—specific trade secrets—threat of misappropriation

The trial court did not err by concluding that a plaintiff seeking a preliminary injunction showed a likelihood of success on the merits of its claim for violations of the Trade Secrets Protection Act where plaintiff pled the trade secrets at risk with sufficient particularity. Furthermore, defendant's knowledge of the trade secrets and the opportunity to use those in his work for his new employer created a sufficient threat of misappropriation rather than merely the opportunity for misappropriation.

4. Trade Secrets—injunction—not too nebulous

The trial court's injunction in a trade secrets action was not too broad and nebulous where the trade secrets were described with sufficient specificity that defendant would not be prevented from working with any standard processes with his new employer.

Judge STEELMAN concurring in a separate opinion.

Appeal by Plaintiff and cross-appeal by Defendant from preliminary injunction entered 14 June 2013 by Judge G. Bryan Collins in Wake County Superior Court. Heard in the Court of Appeals 8 January 2014.

Wallace & Nordan, L.L.P., by John R. Wallace and Joseph A. Newsome, for Plaintiff.

Robinson Bradshaw & Hinson, P.A., by J. Dickson Phillips and Brian L. Church, for Defendant.

STEPHENS, Judge.

Procedural History and Factual Background

This case concerns the grant in part and denial in part of a motion for a preliminary injunction in a dispute between a company and its former employee. Plaintiff Horner International Company manufactures flavor materials for use in tobacco and food products. Defendant Bill M. McKoy was employed by Plaintiff from May 2006 until October 2012. In 2006, Defendant, who had worked in the food processing and flavor industry since the early 1980s, assisted Plaintiff with setting up a new manufacturing plant in Durham and served as plant manager thereafter. In May 2006, Defendant signed a Non-Competition Agreement ("NCA") and Agreement Not to Disclose Trade Secrets ("ANDTS") as conditions of his employment with Plaintiff. Defendant resigned from Plaintiff on 8 October 2012 and, thereafter, began employment with Teawolf, LLC, a Delaware Limited Liability Company with its principal place of business in New Jersey. Defendant's work for Teawolf involves installing, maintaining, and optimizing equipment used in the production of new flavor products. Both Plaintiff and Teawolf sell flavor materials derived from cocoa, chocolate, coffee, tea, fenugreek, ginseng, and chamomile.

On 20 May 2013, Plaintiff filed (1) a complaint; (2) a motion for temporary restraining order ("TRO"), preliminary injunction, and permanent injunction; and (3) a motion for an order allowing expedited discovery of Defendant. The motions for TRO and expedited discovery were allowed on 22 May 2013, and Defendant was restrained from violating the NCA and ANDTS. Following a hearing on the motion for preliminary injunction in early June 2013, the trial court entered an order on 14 June 2013, *nunc pro tunc*, to 4 June 2013, which enjoined Defendant from disclosing Plaintiff's confidential information and trade secrets, but denied the motion as to

the NCA. On 27 June 2013, Plaintiff filed notice of appeal from the trial court's denial of the preliminary injunction as to the NCA. On 8 July 2013, Defendant filed notice of cross-appeal from the grant of the preliminary injunction as to Plaintiff's confidential information and trade secrets.

Grounds for Appellate Review

[1] Preliminary injunctions are "interlocutory and thus generally not immediately reviewable. An appeal may be proper, however, in cases, including those involving trade secrets and non-compete agreements, where the denial of the injunction deprives the appellant of a substantial right which he would lose absent review prior to final determination." *VisionAIR, Inc. v. James*, 167 N.C. App. 504, 507, 606 S.E.2d 359, 361 (2004) (citations and internal quotation marks omitted).

> The purpose of a preliminary injunction is ordinarily to preserve the status quo pending trial on the merits. Its issuance is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities. Its impact is temporary and lasts no longer than the pendency of the action. Its decree bears no precedent to guide the final determination of the rights of the parties. In form, purpose, and effect, it is purely interlocutory. Thus, the threshold question presented by a purported appeal from an order granting a preliminary injunction is whether the appellant has been deprived of any substantial right which might be lost should the order escape appellate review before final judgment.

A.E.P. Indus., Inc. v. McClure, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983) (citation and internal quotation marks omitted). Our Supreme Court went on to hold that

> where time is of the essence, the appellate process is not the procedural mechanism best suited for resolving the dispute. The parties would be better advised to seek a final determination on the merits at the earliest possible time. Nevertheless, [where a] case presents an important question affecting the respective rights of employers and employees who choose to execute agreements involving covenants not to compete, [appellate courts should] address the issues.

Id. at 401, 302 S.E.2d at 759. We believe the same reasoning applies to agreements between an employer and employee regarding protection of

the employer's alleged trade secrets. Accordingly, we address the merits of both Plaintiff's appeal and Defendant's cross-appeal.

Discussion

In its appeal, Plaintiff argues that the trial court erred in denying its motion for a preliminary injunction as to the NCA, contending that (1) a non-compete agreement can be properly enforced by means of a preliminary injunction and (2) the NCA is valid and enforceable. In his cross-appeal, Defendant argues that the court erred in enjoining him from disclosure of Plaintiff's confidential information and trade secrets, contending that (1) Plaintiff failed to sufficiently identify the trade secrets allegedly at risk of disclosure, (2) Defendant's mere "opportunity to misappropriate" cannot support the court's determination of Plaintiff's likelihood of success on the merits of its claims, and (3) the preliminary injunction entered was too "broad and nebulous." As discussed herein, we affirm.

I. Standard of Review

> As a general rule, a preliminary injunction is an extraordinary measure taken by a court to preserve the *status quo* of the parties during litigation. It will be issued only (1) if a plaintiff is able to show likelihood of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation.

Id. at 401, 302 S.E.2d at 759-60 (citations, internal quotation marks, and emphasis omitted).

"The standard of review from a preliminary injunction is essentially *de novo*." *VisionAIR, Inc.*, 167 N.C. App. at 507, 606 S.E.2d at 362 (citation and internal quotation marks omitted). Thus, "on appeal from an order of a superior court granting or denying a preliminary injunction, an appellate court is not bound by the findings, but may review and weigh the evidence and find facts for itself." *A.E.P. Indus., Inc.*, 308 N.C. at 402, 302 S.E.2d at 760 (citation omitted). "Nevertheless[,] a trial court's ruling on a motion for a preliminary injunction is presumed to be correct, and the party challenging the ruling bears the burden of showing it was erroneous." *VisionAIR, Inc.*, 167 N.C. App. at 507, 606 S.E.2d at 362 (citation and internal quotation marks omitted).

II. Plaintiff's Appeal

[2] Plaintiff argues that the trial court erred in denying its motion for a preliminary injunction as to the NCA, contending that (1) non-compete agreements *may* be properly enforced by means of a preliminary injunction and (2) the NCA is valid and enforceable. While Plaintiff's first contention is correct, we disagree with the second.

Plaintiff asserts that this Court should reverse the denial of its motion and remand for entry of a preliminary injunction as to the NCA, citing the following discussion from *A.E.P. Indus., Inc.*:

> [T]here are two important aspects of this case which distinguish it substantively and procedurally from the more usual case in which a preliminary injunction is sought. The first is that the ultimate relief [the] plaintiff seeks is *enforcement* of a covenant not to compete. The promised performance by the employee is forbearance to act and the remedy is one for specific performance of the contract in the nature of an injunction prohibiting any further violation of it.
>
> The second distinguishing feature of this case is that the decision made at the preliminary injunction stage of the proceedings becomes, in effect, a determination on the merits. This is so because the validity of the covenant depends, among other things, on the duration of the time limitation which, in order to be reasonable, must be brief. The case is clothed with immediacy. Frequently the time limitation will have expired prior to final determination. Moreover, because the primary relief sought by the plaintiff is a permanent injunction, many of the considerations involved in the decision to grant or deny the preliminary injunction parallel those involved in a final determination on the merits. Specifically, the court must decide whether the remedy sought by the plaintiff is the most appropriate for preserving and protecting its rights or whether there is an adequate remedy at law.

A.E.P. Indus., Inc., 308 N.C. at 405-06, 302 S.E.2d at 762 (citations omitted; emphasis in original). Thus, our Supreme Court held:

> Because of the need for immediacy of appropriate relief in cases dealing with covenants not to compete, as for example in the present case where [the] defendant contracted

> not to engage in a competitive business for only eighteen months, the law as stated above is particularly applicable. We hold that where the primary ultimate remedy sought is an injunction; where the denial of a preliminary injunction would serve effectively to foreclose adequate relief to [the] plaintiff; where no "legal" (as opposed to equitable) remedy will suffice; and where the decision to grant or deny a preliminary injunction in effect results in a determination on the merits, [the] plaintiff has made a showing that the issuance of a preliminary injunction is necessary for the protection of its rights during the course of litigation.

Id. at 410, 302 S.E.2d at 764. Thus, valid non-compete agreements *can be* enforced by a preliminary injunction, and Defendant freely concedes this point. What is not discussed in *A.E.P. Indus.*, *Inc.*, but forms the central question in this appeal, is the second prong of Plaintiff's appellate argument: whether the NCA is valid.

> Covenants not to compete between an employer and employee are not viewed favorably in modern law. To be valid, the restrictions on the employee's future employability by others must be no wider in scope than is necessary to protect the business of the employer. If a non-compete covenant is too broad to be a reasonable protection to the employer's business it will not be enforced. The courts will not rewrite a contract if it is too broad but will simply not enforce it.

VisionAIR, *Inc.*, 167 N.C. App. at 508, 606 S.E.2d at 362 (citations and internal quotation marks omitted). In that case, this Court observed that the non-compete clause in question provided that the defendant

> may not "*own*, *manage*, *be employed by or otherwise participate in*, *directly or indirectly*, *any business similar to Employer's . . . within the Southeast*" for two years after the termination of his employ with VisionAIR. Under this covenant [the defendant] would not merely be prevented from engaging in work similar to that which he did for VisionAIR at VisionAIR competitors; [the defendant] would be prevented from doing even wholly unrelated work at any firm similar to VisionAIR. Further, by preventing [the defendant] from even "indirectly" owning any similar firm, [the defendant] may, for example, even be prohibited from holding interest in a mutual fund invested in part in a firm engaged in business similar to

> VisionAIR. Such vast restrictions on [the defendant] cannot be enforced.

Id. at 508-09, 606 S.E.2d at 362-63 (footnote omitted; emphasis added).

The NCA here is quite similar to the non-compete covenant in *VisionAIR, Inc.* The NCA purports to bar Defendant from "directly or indirectly" being employed by or acting "as an advisor, consultant, or salesperson for, or *becom*[*ing*] *financially interested*, *directly or indirectly*, in any person, proprietorship, partnership, firm, or corporation engaged in, or about to become engaged in, the business of selling flavor materials" for a period of 18 months after his employment with Plaintiff ended. (Emphasis added).

We perceive no meaningful distinction between the NCA here and the non-compete covenant held to be overbroad in *VisionAIR, Inc.* The duration of time is slightly shorter (18 months here versus two years in *VisionAIR, Inc.*). However, the NCA contains no geographical limitation, unlike the restriction of the *VisionAIR, Inc.* covenant to similar businesses in "the Southeast." More importantly, just as, "[u]nder th[e] covenant [the defendant in VisionAIR] would not [have] merely be[en] prevented from engaging in work similar to that which he did for VisionAIR at VisionAIR competitors; [the defendant] would [have] be[en] prevented from doing even wholly unrelated work at any firm similar to VisionAIR[,]" the NCA purports to bar Defendant from doing wholly unrelated work for any firm that sells "flavor materials[,]" even if that firm's products do not compete with those of Plaintiff. Finally, the NCA purports to bar Defendant from having even an indirect financial interest in such a business, a condition specifically rejected by the Court in *VisionAIR, Inc. See id.* at 509, 606 S.E.2d at 362-63 ("Further, by preventing [the defendant] from even 'indirectly' owning any similar firm, [the defendant] may, for example, even be prohibited from holding interest in a mutual fund invested in part in a firm engaged in business similar to VisionAIR. Such vast restrictions on [the defendant] cannot be enforced.").

Plaintiff further cites *Precision Walls, Inc. v. Servie*, 152 N.C. App. 630, 568 S.E.2d 267 (2002) and *Okuma Am. Corp. v. Bowers*, 181 N.C. App. 85, 638 S.E.2d 617 (2007) in support of its position. These cases are distinguishable.

In *Okuma Am. Corp.*, this Court observed:

> *When considering the time and geographic limits outlined in a covenant not to compete*, we look to six overlapping factors:

> (1) the area, or scope, of the restriction; (2) the area assigned to the employee; (3) the area where the employee actually worked or was subject to work; (4) the area in which the employer operated; (5) the nature of the business involved; and (6) the nature of the employee's duty and his knowledge of the employer's business operation.

Id. at 89, 638 S.E.2d at 620 (citation and internal quotation marks omitted; emphasis added). In *Precision Walls*, this Court considered only "the reasonableness of time and territory restrictions" and a bar on employment with competitors. *Precision Walls, Inc.*, 152 N.C. App. at 637, 639, 568 S.E.2d at 272, 273. As noted *supra*, it is the broad sweep of the activities covered by the NCA which renders the agreement overbroad and thus unenforceable. Accordingly, these cases are largely inapposite. However, we do find it instructive that the Court in *Okuma Am. Corp.* noted that "a covenant not to compete is overly broad [when], rather than attempting to prevent [the former employee] from competing for []business, it requires [the former employee] to have no association whatsoever with any business that provides [similar] services . . . ." 181 N.C. App. at 91, 638 S.E.2d at 621 (citations and internal quotation marks omitted). We believe this is the situation presented by the NCA here.

In sum, because the NCA is overbroad and thus unenforceable, Plaintiff cannot demonstrate likely success on the merits. *See VisionAIR, Inc.*, 167 N.C. App. at 508, 606 S.E.2d at 362. We conclude that the trial court did not err in denying Plaintiff's motion for a preliminary injunction as to the NCA, and, accordingly, that portion of the order is affirmed.

III. Defendant's Cross-Appeal

In his cross-appeal, Defendant advances two bases for his argument that the trial court erred in granting the preliminary injunction as to confidential information and trade secrets obtained by Defendant during his employment with Plaintiff: that Plaintiff failed to show a likelihood of success on the merits of its claim for violations of the North Carolina Trade Secrets Protection Act ("TSPA") and that the trial court's injunction was too broad and nebulous. We disagree.

A. Specificity of allegations

[3] Defendant first contends that the trial court erred in concluding that Plaintiff showed a likelihood of success on the merits of its claim for violations of the TSPA because Plaintiff failed to plead the trade secrets at risk of disclosure with sufficient particularity and alleged only the

opportunity to misappropriate the trade secrets. We disagree with both contentions.

The TSPA

> provides that the owner of a trade secret shall have remedy by civil action for misappropriation of the secret.
>
> "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.
>
> "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. The TSPA also provides that actual or threatened misappropriation of a trade secret may be preliminarily enjoined during the pendency of the action and shall be permanently enjoined upon judgment finding misappropriation . . . .

Washburn v. Yadkin Valley Bank & Trust Co., 190 N.C. App. 315, 326, 660 S.E.2d 577, 585 (2008) (citations and internal quotation marks omitted), *disc. review denied*, 363 N.C. 139, 674 S.E.2d 422 (2009).

> To determine what information should be treated as a trade secret, a court should consider the following factors:
>
> (1) the extent to which information is known outside the business;
>
> (2) the extent to which it is known to employees and others involved in the business;
>
> (3) the extent of measures taken to guard secrecy of the information;

> (4) the value of information to the business and its competitors;
>
> (5) the amount of effort or money expended in developing the information; and
>
> (6) the ease or difficulty with which the information could properly be acquired or duplicated by others.

Area Landscaping, L.L.C. v. Glaxo-Wellcome, Inc., 160 N.C. App. 520, 525, 586 S.E.2d 507, 511 (2003) (citations and internal quotation marks omitted). "[A] complaint that makes general allegations in sweeping and conclusory statements, without specifically identifying the trade secrets allegedly misappropriated, is insufficient to state a claim for misappropriation of trade secrets." *Washburn*, 190 N.C. App. at 327, 660 S.E.2d at 585-86 (citation and internal quotation marks omitted). Rather, to successfully plead misappropriation of trade secrets, "a plaintiff must identify a trade secret with sufficient particularity so as to enable a defendant to delineate that which he is accused of misappropriating and a court to determine whether misappropriation has or is threatened to occur." *VisionAIR, Inc.*, 167 N.C. App. at 510-11, 606 S.E.2d at 364 (citation and internal quotation marks omitted). Regarding specificity of those trade secrets allegedly at risk, for example, allegations that an employee "acquired knowledge of [the employer's] business methods; clients, their specific requirements and needs; and other confidential information pertaining to [the employer's] business" are too "broad and vague" to allege a TSPA claim. *Washburn*, 190 N.C. App. at 327, 660 S.E.2d at 586.

Here, in contrast, the verified amendment to Plaintiff's complaint alleges with great detail and specificity the information Defendant has allegedly provided to his new employer, describing, *inter alia*, various raw materials and raw material treatments; extraction, filtration, separation, and distillation techniques; and methods for compounding of flavors, packaging, and plant utility. Further, the amendment alleged that these processes and methods were used in the production of flavor materials derived from seven specifically identified substances, such as cocoa, ginseng, and chamomile. Accordingly, we reject Defendant's assertions that Plaintiff failed to properly plead its claims under the TSPA.

Regarding allegations supporting the threat of misappropriation, Defendant contends that the trial court erred in granting the preliminary injunction because Plaintiff could only show "opportunity" for misappropriation. As noted *supra*, the TSPA provides that "*actual or threatened misappropriation of a trade secret may be preliminarily*

enjoined during the pendency of the action and shall be permanently enjoined upon judgment finding misappropriation . . . ." N.C. Gen. Stat. § 66-154(a) (2013) (emphasis added). Further,

> [m]isappropriation of a trade secret is *prima facie* established by the introduction of substantial evidence that the person against whom relief is sought both:
>
> (1) Knows or should have known of the trade secret; and
>
> (2) Has 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.
>
> This *prima facie* evidence is rebutted by the introduction of substantial evidence that the person against whom relief is sought acquired the information comprising the trade secret by independent development, reverse engineering, or it was obtained from another person with a right to disclose the trade secret. This section shall not be construed to deprive the person against whom relief is sought of any other defenses provided under the law.

N.C. Gen. Stat. § 66-155 (2013) (italics added). Courts have upheld grants of a preliminary injunction where plaintiffs have presented some evidence that former employees have or necessarily will use trade secrets. *Compare Barr-Mullin, Inc. v. Browning*, 108 N.C. App. 590, 597-98, 424 S.E.2d 226, 230-31 (1993) (finding a *prima facie* case for misappropriation existed which supported a preliminary injunction where the defendant helped develop software while working for the plaintiff and then began producing identical software after leaving the plaintiff's employment); *Analog Devices, Inc. v. Michalski*, 157 N.C. App. 462, 467, 579 S.E.2d 449, 453 (2003) (upholding denial of preliminary injunction where product design differences between the defendant's former and new employers "render[ed] the alleged trade secrets largely non-transferable").

Here, unlike in *Analog Devices, Inc.*, there are no product design differences which would render "non-transferable" the trade secrets of Plaintiff which Defendant possesses. Defendant's strenuous assertions on appeal that Plaintiff produced no direct or circumstantial evidence of his "acquisition, use, or disclosure of [Plaintiff's] information" is misplaced. The TSPA permits preliminary injunctions where a *prima*

facie case for "actual or *threatened* misappropriation of a trade secret" is established. N.C. Gen. Stat. § 66-154(a) (emphasis added). In turn, that *prima facie* case is established by showing 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 (emphasis added). Defendant's knowledge of trade secrets and opportunity to use those in his work for his new employer create a threat of misappropriation, and thus the trial court's grant of a preliminary injunction during the pendency of the action was proper.[1]

B. Specificity of the preliminary injunction

[4] Defendant also argues that the court's injunction was too broad and nebulous, citing *Travenol Labs., Inc. v. Turner*, 30 N.C. App. 686, 228 S.E.2d 478 (1976).

In *Travenol Labs., Inc.*, the plaintiff-employer

> sought and the trial court . . . granted an injunction to prevent [the employee] from revealing "all information regarded as confidential . . . including but not limited to information concerning the mechanical modification of the Westphalia centrifuge . . ." and to prevent [the new employer] from receiving the same. Again [the Court] weigh[ed] the factors relevant to the likelihood of disclosure in determining the appropriateness of injunctive relief. Ordinarily, mere employment by a competitor alone will not create a likelihood of disclosure sufficient to support an injunction. An employee may take from his employment general knowledge and skills. [The plaintiff-employer] has clearly shown that it is probable that at trial it will establish that the mechanical modification of the Westphalia centrifuge is a trade secret. This modification has been the subject of research and development and would be of current use to [the new employer] in its production process. [The employee] has worked in the production field for 22 years. Since this is precisely the field in which [the employee] will be employed by [the new employer], not merely as a

1. Defendant also identifies two e-mails, the contents of which Defendant asserts were improperly proved by testimony. However, the court did not rely on the e-mails to support its conclusions of law. Accordingly, we need not consider the admissibility of this evidence.

> worker but at a high level supervisory position, the possibility of disclosure is high even absent any underhanded dealing in the circumstances of his termination of employment with [the plaintiff-employer].
>
> [The plaintiff-employer] has also presented evidence showing that several competitors have tried without success to make a similar modification. The disclosure of this modification would cost [the plaintiff-employer] a competitive advantage worth many thousands of dollars. We f[ou]nd, therefore, that with respect to the modification of the Westphalia centrifuge, the trial court was correct in issuing a preliminary injunction in [the plaintiff-employer's] favor.
>
> We [did] not agree, however, that [the plaintiff-employer] made an adequate showing to support that part of the injunction broadly prohibiting disclosure of "all information regarded as confidential." This provision presents problems of scope and nebulosity.
>
> The showing made with respect to the centrifuge modification rested upon its use in production, [the employee's] high level position in production, and the failure of competitors to make a similar modification. These factors have no bearing to the more broadly phrased part of the injunction . . . . *Sub judice*, [the plaintiff-employer] apparently considers its entire production process as secret and confidential. Yet it appears that [the plaintiff-employer, the new employer,] and other competing enterprises use the standard . . . process in their plasma fractionation operations. Though there may be some variation in the production process among the competing enterprises, [the plaintiff-employer] has failed to show unique processing, other than the modified Westphalia centrifuge, the disclosure of which would result in irreparable damage.

Id. at 694-95, 228 S.E.2d at 485 (citations omitted). This Court went on to "emphasize that the facts and circumstances of each case dictate the propriety of injunctive relief[.]" *Id.* at 695, 228 S.E.2d at 485.

Here, looking at the individual facts and circumstances of the matter, the enjoining of Defendant from "[u]sing, disclosing, or transmitting for any purpose any confidential information obtained by [Defendant]

from [Plaintiff]" plainly applies to the methods, processes, and techniques described as trade secrets in the preliminary injunction's findings of fact and conclusions of law. As discussed *supra*, those trade secrets are described with sufficient specificity that Defendant will not be prevented from working with any "standard processes" with his new employer. Accordingly, we overrule this argument.

The trial court's order is

AFFIRMED.

Judge DAVIS concurs.

STEELMAN, Judge, concurring.

I fully concur with the legal reasoning and result set forth in the opinion, but write separately to again express concern over the state of our law of restrictive employment covenants in the context of our increasingly integrated global economy.

At the time that our law in the area of restrictive employment covenants was developed, much of our commerce was local, and restrictive covenants were imposed only to protect specific local interests. Any covenants that attempted to protect broader commercial interests were held to be invalid as an improper restraint of trade. Today's economy is global in nature. In the instant case, plaintiff conducts a very specialized niche type of business, but its scope is worldwide, rather than being focused upon a few counties in North Carolina. Our Supreme Court should re-evaluate the law of restrictive covenants in the context of changed economic conditions to allow restrictions upon competing business activities for a specific period of time, limited to a specific, narrow type of business, but with fewer geographic limitations.

IN RE APPLICATION OF DUKE ENERGY CORP.

[232 N.C. App. 573 (2014)]

IN THE MATTER OF APPLICATION OF DUKE ENERGY CORPORATION AND PROGRESS ENERGY, INC., TO ENGAGE IN A BUSINESS COMBINATION TRANSACTION AND TO ADDRESS REGULATORY CONDITIONS AND CODES OF CONDUCT

No. COA13-566

Filed 4 March 2014

1. Utilities—merger—costs—benefits and protections of retail ratepayers

The North Carolina Utilities Commission did not err by concluding that there was sufficient evidence of costs to allow the Commission to determine that the merger between Duke Energy Corporation and Progress Energy, Inc. met the statutory standard for approval considering the benefits and protections afforded to retail ratepayers.

2. Utilities—merger—benefits to public—fuel cost savings—funds contributed to community

The North Carolina Utilities Commission did not err by concluding that there was substantial evidence before the Commission that the merger between Duke Energy Corporation and Progress Energy, Inc. would result in benefits to the public considering the significant guaranteed fuel cost savings and potential non-fuel cost savings, as well as the commitments by the parties to contribute funds to support the community, workforce development, and low income energy assistance.

3. Utilities—merger—public convenience and necessity

The North Carolina Utilities Commission did not err by concluding that the merger between Duke Energy Corporation and Progress Energy, Inc. was justified by public convenience and necessity after considering concerns including whether the merger allowed the applicants to manipulate prices and harm local markets, would result in job losses, and harmed low income families.

4. Jurisdiction—standing—aggrieved party

Although Orangeburg contended the North Carolina Utilities Commission erred by concluding that the pertinent regulatory conditions did not restrict the sale of low cost wholesale power to certain Commission-favored wholesale customers in violation of the Commerce Clause and Supremacy Clause of the U.S. Constitution, Orangeburg lacked standing to appeal the merger order

since it was not an aggrieved party. Therefore, Orangeburg's appeal was dismissed.

Appeal by City of Orangeburg, South Carolina and N.C. Waste Awareness and Reduction Network from order entered 29 June 2012 by the N.C. Utilities Commission. Heard in the Court of Appeals 6 November 2013.

Allen Law Offices, PLLC, by Dwight W. Allen, Britton H. Allen, and Brady W. Allen; Duke Energy Corporation Deputy General Counsel Lawrence B. Somers; and Womble Carlyle Sandridge & Rice, LLP, by James P. Cooney, III, for Appellee Duke Energy Corporation.

Spiegel & McDiarmid, LLP, by James N. Horwood and Peter J. Hopkins, pro hac vice; and Schiller & Schiller, PLLC, by David G. Schiller, for Intervenor-Appellant City of Orangeburg, South Carolina.

The Law Offices of F. Bryan Brice, Jr., by Matthew D. Quinn; and John D. Runkle, for Intervenor-Appellant N.C. Waste Awareness Reduction Network.

Public Staff Chief Counsel Antoinette R. Wike and Staff Attorney Gisele L. Rankin, for Appellee Public Staff-North Carolina Utilities Commission.

McCULLOUGH, Judge.

Intervenors City of Orangeburg, South Carolina ("Orangeburg") and N.C. Waste Awareness and Reduction Network ("NC WARN") appeal from order of the N.C. Utilities Commission (the "Commission") entered 29 June 2012. For the following reasons, we affirm the Commission's order and dismiss Orangeburg's appeal.

I. Background

In accordance with N.C. Gen. Stat. § 62-111(a), on 4 April 2011, Duke Energy Corporation ("Duke") and Progress Energy, Inc. ("Progress") (collectively the "applicants") submitted an application to the Commission for authorization to: "engage in a business combination transaction; revise and apply Duke Energy Carolinas, LLC's ("DEC") Regulatory Conditions and Code of Conduct to Progress and Progress Energy Carolinas, Inc. ("PEC"); and nullify PEC's Regulatory Conditions and

Code of Conduct." DEC and PEC, wholly-owned subsidiaries of Duke and Progress, respectively, are electric utilities organized, existing, and operating under the laws of the State of North Carolina. Pursuant to the terms of the Agreement and Plan of Merger (the "merger agreement") entered into by the applicants and attached to the application as Exhibit 1, the business combination transaction (the "merger") would occur at the holding company level with Diamond Acquisition Corporation, a wholly-owned subsidiary of Duke, merging with and into Progress with the result that Progress survives the merger as a wholly-owned subsidiary of Duke.[1] Progress and PEC would remain separate legal entities following the merger, with the plan that PEC and DEC would merge into a single legal entity in the future.

On 27 April 2011, the Commission entered an Order Scheduling Hearing, Establishing Procedural Deadlines, and Requiring Public Notice. By the terms of the order, a Commission hearing on the application was scheduled to begin on 20 September 2011.

In the interim, the Commission allowed the intervention of thirty-seven (37) different parties, including the Commission's public staff and appellants NC WARN and Orangeburg. Regarding appellants, NC WARN filed a petition to intervene on 27 May 2011 that the Commission granted by order entered 7 June 2011; Orangeburg filed a petition to intervene on 5 August 2011 that the Commission granted by order entered 12 August 2011. Also in the interim, on 2 September 2011, the applicants and the public staff entered into an agreement and stipulation of settlement (the "Stipulation") for consideration by the Commission pursuant to N.C. Gen. Stat. § 62-69.

By Commission order entered following a pre-hearing conference on 19 September 2011, the application, certain exhibits, the revised Joint Dispatch Agreement, the Stipulation, and the corrected Regulatory Conditions and Code of Conduct were admitted into evidence as if introduced at the hearing on the application set to begin the following day.

The Commission hearings on the application then began as scheduled on 20 September 2011. The hearings lasted three days, concluding on 22 September 2011. A supplemental hearing was later held on 25 June 2012.

On 27 June 2012, NC WARN filed an offer of proof alleging that many facts relevant to the merger had changed significantly since the

1. Duke would acquire all issued and outstanding common stock of Progress in exchange for Duke common stock.

September 2011 hearings and, therefore, the Commission should reopen the hearing process. The Commission, however, determined the offer of proof was defective and on 29 June 2012 entered an Order Approving Merger Subject to Regulatory Conditions and Code of Conduct (the "merger order"). In the merger order, which includes 41 findings of fact and over 80 pages of analysis discussing the evidence and reasoning supporting the findings, the Commission stated its conclusions as follows:

> The Commission concludes that the Stipulation, Regulatory Conditions, Code of Conduct, Supplemental Stipulation, as amended, guaranteed fuel and fuel-related savings, Applicants' contributions to various work force development, low-income assistance, environmental and charitable programs, and the potential for future merger cost savings for ratepayers are sufficient to ensure that: (1) the merger will have no adverse impact on the rates and service of DEC's and PEC's North Carolina retail ratepayers; (2) DEC's and PEC's North Carolina retail ratepayers are protected as much as reasonably possible from potential costs and risks resulting from the merger; and (3) there are sufficient benefits from the merger to offset the potential costs and risks. Therefore, the Commission further concludes that the proposed business combination between Duke and Progress is justified by the public convenience and necessity.

In accordance with the terms of the merger order, the applicants filed a statement notifying the Commission they accepted and agreed with all terms, conditions, and provisions of the merger order on 2 July 2010, the same day the merger was finalized.

On 26 July 2012, NC WARN filed a motion for reconsideration of the merger order. The Commission denied NC WARN's motion by order entered 10 December 2012.

Orangeburg and NC WARN appealed from the merger order to this Court.[2]

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2. NC WARN also appealed from the Commission's denial of its motion for reconsideration. The issues related to the denial of NC WARN's motion for reconsideration, however, were dismissed by the Commission on 29 April 2013 following Duke's 7 March 2013 motion to dismiss.

II. Discussion

NC WARN and Orangeburg raise distinct issues on appeal. On the one hand, NC WARN challenges the merger as a whole, claiming there is not substantial evidence to support the Commission's decision to approve the merger. On the other hand, Orangeburg challenges the constitutionality of certain regulatory conditions imposed in connection with the Commission's approval of the merger. We address these issues separately.

A. Standard of Review

The scope of this Court's review of a Commission decision is governed by statute. As our Supreme Court has recognized, " '[t]he decision of the Commission will be upheld on appeal unless it is assailable on one of the statutory grounds enumerated in [N.C. Gen. Stat. §] 62–94(b).' " *State ex rel. Utilities Com'n v. Cooper*, 366 N.C. 484, 490, 739 S.E.2d 541, 545 (2013) (quoting *State ex rel. Utilities Com'n v. Carolina Utility Customers Ass'n* (*CUCA I*), 348 N.C. 452, 459, 500 S.E.2d 693, 699 (1998)). N.C. Gen. Stat. § 62-94(b) provides:

> So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional provisions, or
>
> (2) In excess of statutory authority or jurisdiction of the Commission, or
>
> (3) Made upon unlawful proceedings, or
>
> (4) Affected by other errors of law, or
>
> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or
>
> (6) Arbitrary or capricious.

N.C. Gen. Stat. § 62-94(b) (2013). As explained by our Supreme Court,

> "[t]his Court's role under section 62–94(b) is not to determine whether there is evidence to support a position the Commission did not adopt. Instead, the test upon appeal is whether the Commission's findings of fact are supported by competent, material and substantial evidence in view of the entire record. Substantial evidence [is] defined as more than a scintilla or a permissible inference. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The Commission's knowledge, however expert, cannot be considered by this Court unless the facts and findings thereof embraced within that knowledge are in the record. Failure to include all necessary findings of fact is an error of law and a basis for remand under section 62–94(b)(4) because it frustrates appellate review."

Cooper, 366 N.C. at 490-91, 739 S.E.2d at 545 (quoting *CUCA I*, 348 N.C. at 460, 500 S.E.2d at 699–700 (alteration in original) (citations and internal quotation marks omitted)); s*ee also State ex rel. Utilities Com'n v. Village of Pinehurst*, 99 N.C. App. 224, 226, 393 S.E.2d 111, 113 (1990) ("[T]he essential test to be applied is whether the Commission's order is affected by errors of law or is unsupported by competent, material, and substantial evidence in view of the entire record as submitted."). Yet, "[u]pon any appeal, . . . any . . . finding, determination, or order made by the Commission . . . shall be prima facie just and reasonable." N.C. Gen. Stat. § 62-94(e).

B. NC WARN's Appeal

NC WARN is a not-for-profit corporation with members across North Carolina that, according to its motion to intervene, seek "to reduce hazards to public health and the environment from nuclear power and other polluting electricity production through energy efficiency and renewable energy resources." In this case, NC WARN was allowed to intervene to advocate that the Commission investigate the public convenience and necessity of the merger and to address its members' concerns regarding the merger's potential impacts on the cost of electricity, renewable energy projects, and energy efficiency programs.

Now on appeal, NC WARN contends the Commission erred in approving the merger because there was insufficient evidence to support approval. Specifically, NC WARN argues: (1) the applicants failed to submit evidence of the risks posed by the merger; (2) there is no evidence

the merger will result in benefits to the public; and (3) the merger is not justified by the public convenience and necessity.

As provided in the Public Utilities Act, "[n]o . . . merger or combination affecting any public utility [shall] be made through acquisition or control by stock purchase or otherwise, except after application to and written approval by the Commission, which approval shall be given if justified by the public convenience and necessity." N.C. Gen. Stat. § 62-111(a) (2013). Since 2000, the Commission has required that applicants submit market-power and cost-benefit analyses as part of an application for an electric utility merger. *See Order Requiring Filing of Analyses*, Docket No. M-100, Sub 129, at 7 (2 November 2000) (the "Sub 129 Order").

1. Merger Risks

[1] NC WARN first argues that neither the application nor applicants addressed the risks posed by the merger, as required by the Sub 129 Order. We disagree. Although there was no specific document titled cost-benefit analysis, we find there was sufficient consideration of the risks of the merger.

In approving the merger, the Commission explicitly found "[t]he Applicants . . . are in compliance with the filing requirements established in the Sub 129 Order with respect to the market power and cost-benefit analyses submitted with the application." This finding reiterated a prior 27 April 2011 Commission order concluding the application satisfied the filing requirements of the Sub 129 order.

Upon review of the record, we hold there was substantial evidence to support the Commission's approval where, in addition to the application, the applicants submitted investment analyses from three different financial institutions, an analysis of the economic efficiencies under joint dispatch, a fuel synergies review, and a market power study, among other exhibits.

Despite recognition of the analyses submitted by the applicants, NC WARN argues the analyses only examined the potential benefits of the merger and did not constitute a comprehensive cost-benefit analysis. We hold that the Commission adequately addressed this argument in discussing its finding that the applicants met the filing requirements of the Sub 129 Order. In the merger order, the Commission noted, "[t]he purpose of such analyses is to assist the Commission in determining whether or not a merger meets the statutory standard for approval." The Commission then explained,

> [t]he Applicants stated in the application that the actual integration of Duke and Progress and their service companies is expected to produce cost savings in addition to those identified in the Compass Lexecon Study and the Fuel Synergies Review and that there will be upfront costs associated with achieving these savings. The fact that the application did not include a quantification of the costs and benefits associated with these non-fuel savings, along with the exhibits quantifying direct and immediate fuel savings, does not constitute a filing deficiency insofar as the Sub 129 Order is concerned. Moreover, as discussed . . . , the record contains ample evidence regarding the Applicants' estimates of both fuel and non-fuel savings to support a decision as to whether the merger meets the statutory standard for approval.

We find it evident from a review of the merger order that the Commission had sufficient evidence to determine whether the merger was justified by the public convenience and necessity.

Throughout the merger order, the Commission weighed and balanced the benefits of the merger with the known and potential costs and risks of the merger. Specifically, in Finding of Fact 22, the Commission documented the potential costs and risks to retail ratepayers that it considered.

> Known and potential costs and risks of the merger to North Carolina retail ratepayers include direct merger costs and other merger-related cost increases that could impact North Carolina retail rates; the potential for preemption of the Commission's regulatory authority under the FPA, particularly as it relates to the JDA and the Joint OATT, and under the Public Utility Holding Company Act of 2005 (PUHCA 2005); potential adverse effects on DEC and PEC of transactions within the holding company family and the resulting need for increased regulatory oversight of such transactions, including the treatment of joint dispatch costs and savings; the potential for DEC and PEC to unreasonably favor their unregulated affiliates over nonaffiliated suppliers of goods and services; potential adverse impacts on DEC's and PEC's cost of capital; the exposure of DEC, PEC, and their respective retail ratepayers to costs and risks associated with Duke, Progress, and their subsidiaries; and the potential for DEC's and PEC's

> quality of service to deteriorate because of increased management focus on cost savings and earnings growth.

In identifying these costs and risks, the Commission noted that "[t]he known and potential costs and risks to North Carolina retail ratepayers from a merger affecting one or more regulated electric utilities have been well documented in prior merger proceedings." The Commission further found, however, that despite these costs and risks, the retail ratepayers were adequately protected by the Regulatory Conditions and Stipulation approved by the Commission with the merger.

Although no single document entitled cost-benefit analysis was presented by the applicants quantifying the known and potential costs and risks of the merger, we hold there was sufficient evidence of the costs, considering the benefits and protections afforded to retail ratepayers, to allow the Commission to determine that the merger met the statutory standard for approval.

2. Public Benefit

[2] NC WARN also argues that there is no evidence that the merger will result in benefits to the public. NC WARN instead maintains that the benefits resulting from the merger accrue solely to the benefit of the emerging entity. We disagree.

Based on claims in the application and supporting evidence in the analysis of economic efficiencies under joint dispatch and fuel synergies review, the Commission found,

> [t]he primary quantifiable benefits of the merger to North Carolina retail ratepayers consist of an estimated $364.2 million in total system fuel and fuel-related cost savings over the five-year period 2012 through 2016 through joint dispatch of DEC's and PEC's generation assets and an additional estimated $330.7 million in total system fuel and fuel-related system cost savings through sharing and implementing best practices for fuel procurement and use over the same five-year period.

These savings in turn benefit the ratepayers. As further found by the Commission,

> [t]he Stipulation [agreed upon by the applicants and the public staff] guarantees that North Carolina retail ratepayers will receive their allocable share of $650 million of these cost savings, as well as a small amount of non-fuel

> operations and maintenance (O&M) cost savings, over five years through DEC's and PEC's annual fuel clause proceedings. . . . Further, if the fuel and fuel-related savings achieved by DEC and PEC exceed the guaranteed $650 million during the first five years after the merger, then North Carolina ratepayers will receive their allocable share of the additional savings.

NC WARN does not dispute the fuel cost savings on appeal, but contends the savings are temporary, are not a product of the merger, and are diminished by settlements to allocate fuel savings to wholesale customers. We are unpersuaded by NC WARN's contentions.

First, the fact that the savings are only guaranteed over the first five years does not diminish the benefit of the guaranteed savings to retail ratepayers. Second, the fuel savings are a product of the merger. As the Commission explained, the fuel cost savings "are the result of using the lower cost resources of each company to displace the higher cost resources of the other depending on the marginal cost of production of each utility's available resources in a given hour." Without the merger, these savings from joint dispatch would not be possible. Similarly, without the merger, it is unlikely the savings from the implementation of best practices for fuel procurement and use would be realized because companies do not usually share their proprietary skills and practices with unaffiliated entities. Third, we are unconvinced that the savings to retail ratepayers will be diminished by settlements with wholesale customers. As the Commission noted, there was testimony that "the settlement agreements between the Applicants and parties other than the Public Staff were considered by the Public Staff in its negotiations of its settlement with the Applicants." Furthermore, the Commission ultimately sets retail rates and the Commission is not bound by the terms of those settlement agreements.

In addition to the quantifiable fuel cost savings, the Commission also found that "substantial non-fuel O&M cost savings are expected to result from the integration of Duke and Progress over the long term." As explained by the Commission, this finding is supported by an internal study on merger integration savings and witness testimony that a major source of the O&M savings is lower payroll costs resulting from the elimination of duplicate positions.

Lastly, in addition to the fuel and non-fuel cost savings, the Stipulation provides that DEC and PEC will make annual community support and charitable contributions of at least $9.2 million and $7.28 million,

respectively, in their service areas over four years and contribute $15 million for workforce development and low income energy assistance during the first year following the merger. Additionally, the merger order requires DEC and PEC to contribute $2 million to NC GreenPower.

Considering the significant guaranteed fuel cost savings and potential non-fuel cost savings, as well as the commitments by DEC and PEC to contribute funds to support the community, workforce development, and low income energy assistance, we hold there was substantial evidence before the Commission that the merger will result in benefits to the public.

3. Public Convenience and Necessity

[3] In NC WARN's third argument, NC WARN contends the merger is not justified by public convenience and necessity for three reasons: (1) the merger allows the applicants to manipulate prices and harm local markets; (2) the merger will result in job losses; and (3) the merger harms low income families. It is evident from the merger order that the Commission considered each of these concerns; nevertheless, the Commission found the merger justified by public convenience and necessity. Upon review, we affirm the Commission.

Monopsony

NC WARN first argues the merger contradicts the public convenience and necessity because it is likely to create a monopsony, "a market situation in which one buyer controls the market." Black's Law Dictionary 1023 (7th ed. 1999). NC WARN contends this control could allow the buyer to manipulate prices, harming local markets, such as the market for renewable energy. NC WARN further contends that based on uncontroverted witness testimony concerning the potential for a monopsony following the merger, the Commission should have concluded "the merger will harm [local markets] within North Carolina – such as renewable energy markets – and therefore the merger cannot be in the public convenience and necessity."

While we acknowledge the potential of a monopsony was raised in testimony provided during the Commission hearing, we find the Commission adequately addressed the issue in the merger order. In explaining the potential costs and risks of the merger enumerated in Finding of Fact 22, the Commission specifically addressed the testimony of Richard S. Hahn, noting "Hahn testified that a result of the merger would be market dominance by the merged entities with regard to the procurement of renewable energy, leading to unaffiliated renewable

energy developers foregoing North Carolina development activities." Yet, after considering the rebuttal testimony of B. Mitchell Williams, the Commission was not persuaded that the merger would negatively impact the market for renewable energy. The Commission reasoned,

> PEC and DEC are required to meet their [Renewable Energy and Energy Efficiency Standards ("REPS")] renewable energy obligations in the least cost manner. In doing so, they minimize the rate impact to their customers of complying with this statutory mandate. In addition, to the extent the merger allows PEC and DEC to lower their REPS compliance costs through more efficient resource procurement procedures, this will be a direct benefit to their North Carolina customers.

The Commission further explained,

> following the close of the merger DEC and PEC will each continue to have the same obligations they had before the merger to refrain from favoring or subsidizing their affiliates, to pursue the most reliable, prudent and cost-effective resources and projects, and to demonstrate that they have done so in appropriate proceedings before the Commission[.]

Upon review, we hold the Commission's analysis is supported by Williams' testimony and the governing statutes, N.C. Gen. Stat. §§ 62-133.8(b) and 62-133.9(b).

Job Losses

NC WARN also argues the merger contradicts the public convenience and necessity because it results in job losses. NC WARN specifically points to the testimony of James Rogers, William D. Johnson, and Paula Sims to emphasize the applicants' plan to terminate 2,000 or more jobs (approximately 6.7% of the applicants' workforce) as a consequence of the merger. NC WARN argues that "[t]hese job losses, in a time of economic crisis, weigh strongly against the merger of Duke and Progress."

We agree the job losses weigh against the public convenience and necessity; yet, the number of jobs lost must not be considered in isolation.

Although 2,000 or more jobs were expected to be lost as a result of the merger, the evidence before the Commission tended to show that a majority of these job reductions would occur through retirement, normal

attrition, and voluntary severance. Furthermore, witness testimony reassured the Commission that these reductions would not affect the quality, safety, and reliability of DEC and PEC service because the majority of the reductions would occur in corporate functions, rather than operational functions. Testimony also provided that retained employees would benefit from the merger as a result of a larger, more diverse company with better career opportunities, compensation, and benefits.

It is evident from the merger order that the Commission considered the number of jobs lost, the manner in which the workforce was reduced, the benefits to the retained employees, and the potential benefits to retail ratepayers as a result of savings expected to be realized from lower payroll costs in its determination that the merger was justified by the public convenience and necessity. It is not this Court's role to second guess the determination of the Commission where its findings and conclusions are supported by the evidence.

Low-Income Families

In NC WARN's final argument, NC WARN argues the merger contradicts the public convenience and necessity because it harms low-income families. Specifically, NC WARN relies on the testimony of Roger D. Colton and contends the merger will eliminate the individualized customer service on which low-income families rely to manage the costs of electricity.

It is evident from the merger order that the Commission considered Colton's testimony but was unpersuaded. The Commission explained,

> [t]he Commission determines that the needs of low-income customers to manage their energy usage and be financially able to pay their bills are undeniably real and substantial, and the agencies and individuals who are committed to addressing those needs, particularly in times of economic hardship and high unemployment, have a considerable undertaking to manage. However, the Commission does not agree with witness Colton that the merger will adversely affect those customers or that conditions of the merger approval should be a major vehicle for addressing their energy needs.

The Commission was persuaded, however, "that the Applicants' commitments in the proposed Regulatory Conditions, along with the Commission's Rules and Regulations and monitoring by the Commission and the Public Staff, are sufficient to ensure that there is no diminution

of resources to assist low-income customers and other customers of DEC and PEC."

Upon review of Williams' rebuttal testimony, we hold the Commission's analysis is supported by the evidence. In rebuttal, Williams testified that Colton's concerns were speculative and "that this merger will do absolutely nothing to impair or modify [the] Commission's jurisdiction, consumer protection authority or regulatory control over the combined company." Specifically, Williams identified numerous Commission Rules and Regulatory Conditions that ensure quality customer service. Williams further testified the merger would not affect the discretion of customer service representatives and would not constrain the range of options available to customer service representatives assisting low income families manage payments.

NC WARN further contends that the payment of $15 million dollars by DEC and PEC within the first year following the merger is inadequate to remedy the harm to low income families resulting from the merger. NC WARN instead asserts that the Commission should have required the applicants to pay $270 million, $27 million per year for 10 years, as recommended by Colton. We disagree.

As stated above, the Commission was clear that it did not agree with Colton's analysis. Although there is no direct evidence to link the $15 million payment to the harm to low-income families, we hold the Commission did not err in approving the payment. As the Commission noted, the merger approval should not be the vehicle to address the energy needs of low income families. The statutory requirement for merger approval is that the merger is justified by the public convenience and necessity. Here, the $15 million dollar payment agreed to in the Stipulation is just a portion of the economic benefits to low income families, who also benefit from the $650 million in guaranteed savings to retail ratepayers.

Where it is evident that the Commission considered the potential costs and risks of the merger and weighed them against the anticipated benefits, and where there is substantial evidence supporting the Commission's findings and conclusions, we will not second guess the Commission's determination that the merger is justified by the public convenience and necessity. Thus, we affirm the Commission's approval of the merger in the merger order.

C. Orangeburg's Appeal

[4] Orangeburg, through its Department of Public Utilities, provides electric services to approximately 25,000 residential, industrial, and

commercial customers in the City of Orangeburg and Orangeburg County. With a generation capacity of only 23.5 megawatts and a growing total peak load of over 180 megawatts, Orangeburg is reliant on wholesale purchases of power to meet the needs of its customers.

When the Commission entered the merger order, the Commission approved the application "subject to the provisions of [the merger order] and the Regulatory Conditions and Code of Conduct[.]" Just as Orangeburg argued before the Commission, Orangeburg, as "a potential wholesale power customer of Duke or Progress and a competitor for industrial load with utilities in the Southeastern United States[,]" challenges Regulatory Conditions 3.6, 3.7, and 3.9 on appeal.

In short, these Regulatory Conditions provide the following: (1) DEC and PEC "shall continue to serve [their] Retail Native Load Customers with the lowest-cost power it can reasonably generate or obtain . . . before making power available for sales to customers that are not entitled to the same level of priority[;]" (2) DEC and PEC shall give written notice to the Commission prior to "execut[ing] any contract that grants Native Load Priority to a wholesale customer" other than the historically served wholesale customers recognized by the Commission; and (3) "[t]he Commission retains the right to assign, allocate, impute, and make pro-forma adjustments with respect to the revenues and costs associated with both DEC's or PEC's wholesale contracts for retail ratemaking and regulatory accounting and reporting purposes."

Orangeburg argues these Regulatory Conditions effectively restrict the sale of low cost wholesale power to certain Commission-favored wholesale customers in violation of the Commerce Clause and Supremacy Clause of the U.S. Constitution. As a result, Orangeburg, which is not one of the Commission-favored wholesale customers, contends it is competitively disadvantaged and will not receive competitive offers to purchase wholesale power in the future.

Below, the Commission considered these same arguments; nevertheless, the Commission approved the merger subject to the Regulatory Conditions finding,

> [t]he Commission-approved Regulatory Conditions effectively protect as much as reasonably possible the Commission's jurisdiction as a result of the merger, including risks related to agreements and transactions between and among DEC, PEC, and their affiliates, including the JDA; financing transactions involving Duke, DEC, or PEC, and any other affiliate; the ownership, use and

> disposition of assets by DEC or PEC; participation in the wholesale market by DEC or PEC; and filings with federal regulatory agencies. In addition they insulate DEC's and PEC's retail ratepayers as much as reasonably possible from any adverse consequences potentially resulting from the merger.

In fact, in discussing the evidence and conclusions supporting the above finding, the Commission specifically addressed Orangeburg's challenges to Regulatory Conditions 3.6, 3.7, and 3.9, noting that "[t]he Commission, the North Carolina appellate courts[,] and FERC have been confronted by Orangeburg's arguments or by similar arguments by others on previous occasions." Following a discussion of these prior occasions, the Commission then explicitly rejected Orangeburg's challenges. "The Commission [further] determine[d] that Orangeburg lacks standing at this time and in these dockets to raise these issues and alternatively that Orangeburg's arguments as they contemplate potential future harm are not ripe for consideration."

Upon review, we agree with the Commission's analysis; yet, we do not reach the merits of Orangeburg's challenges to the Regulatory Conditions on appeal because we hold Orangeburg lacks standing to appeal the merger order. Therefore, we dismiss Orangeburg's appeal.

N.C. Gen. Stat. § 62-90 provides that a "party aggrieved" by a final Commission order or decision has standing to appeal. N.C. Gen. Stat. § 62-90(a) (2013). "Generally, 'a "party aggrieved" is one whose rights have been directly and injuriously affected by the judgment entered[.]' " *State ex rel. Utilities Com'n v. Carolina Utility Customers Ass'n, Inc.* (*CUCA II*), 163 N.C. App. 1, 10, 592 S.E.2d 277, 282 (2004) (quoting *Hoisington v. ZT-Winston-Salem Assocs.*, 133 N.C. App. 485, 496, 516 S.E.2d 176, 184 (1999) (citations omitted)). In this case, we hold Orangeburg is not a party aggrieved at this time.

In January 2011, Orangeburg entered into a wholesale power supply agreement with S.C. Electric & Gas Co. ("SCE&G") to purchase its power requirements from SCE&G from 1 January 2012 through at least 31 December 2022.[3] As a result of this agreement, Orangeburg is not currently in the market to purchase wholesale power from DEC or PEC and will not be until it reenters the market in search of a new agreement several years before the current agreement expires. Thus, Orangeburg is

3. The wholesale power supply agreement between Orangeburg and SCE&G provided SCE&G an option to extend the agreement through 31 December 2023.

not aggrieved by the Regulatory Conditions it challenges. Furthermore, we find our holding is bolstered by Orangeburg's own declaration that it is merely "a potential wholesale power customer of Duke and Progress." As the Commission recognized, there are many variables subject to change prior to the time Orangeburg is back in the wholesale market.

Despite its contract to purchase wholesale power from SCE&G through at least 31 December 2022, Orangeburg argues it has standing to challenge the regulatory conditions because the Commission, by allowing it to intervene, necessarily determined that it had an interest in the merger and a right to be heard. We are unpersuaded by Orangeburg's argument.

The standards for intervention and standing are discrete and distinguishable. Intervention in a Commission proceeding is governed by Commission Rule 1-19, which provides that "[a]ny person having an interest in the subject matter of any hearing . . . before the Commission may become a party thereto . . . by filing a verified petition with the Commission" that includes, among other requirements, "[a] clear, concise statement of the nature of the petitioner's interest in the subject matter of the proceeding, and the way and manner in which such interest is affected by the issues involved in the proceeding." N.C. Admin. Code. tit. 4, c. 11, r. 1-19(a) (June 2012). Rule 1-19 further provides:

> [L]eave to intervene filed within the time herein provided, in compliance with this rule and showing a real interest in the subject matter of the proceeding, will be granted as a matter of course, *but granting such leave does not constitute a finding by the Commission that such party will or may be affected by any order or rule made in the proceeding.*

N.C. Admin. Code. tit. 4, c. 11, r. 1-19(d) (emphasis added). On the other hand, and as discussed above, standing is statutory and requires the party to be aggrieved. *See* N.C. Gen. Stat. § 62-90(a). As this Court has recognized, "[t]his Court's interpretation of 'party aggrieved' as it relates to an appeal of an order by the Commission . . . suggests that more than a generalized interest in the subject matter is required." *CUCA II*, 163 N.C. App. at 10, 592 S.E.2d at 282-83 (citing *State ex rel. Utilities Com'n v. Carolina Utility Customers Ass'n*, 104 N.C. App. 216, 408 S.E.2d 876 (1991) (holding CUCA was not an aggrieved party and dismissing its appeal of an order by the Commission for lack of standing because CUCA had failed to show that its interest in person, property, or employment has been substantially adversely affected, directly or indirectly);

State ex rel. Utilities Com'n v. Carolina Utility Customers Ass'n, 142 N.C. App. 127, 136, 542 S.E.2d 247, 253 (2001) (holding that CUCA was not a "party aggrieved" and thus, lacked standing to appeal "because the Commission's order did not impact rates and because any rate increases [would] be effectuated at subsequent rates cases")).

Although Orangeburg may have had an interest in the proceedings before the Commission, Orangeburg is not currently in the market to purchase wholesale power and, therefore, not directly and injuriously affected by the Regulatory Conditions approved by the Commission at this time. Thus, we hold Orangeburg is not an aggrieved party and dismiss its appeal for lack of standing. Additionally, although we dismiss Orangeburg's appeal for lack of standing, we take this opportunity to note, as did the Commission, that regulatory conditions similar to those challenged by Orangeburg have been upheld by the Commission, this Court, and FERC in prior cases. *See State ex. re. Utilities Com'n v. Carolina Power & Light Co.*, 359 N.C. 516, 614 S.E.2d 281 (2005).

III. Conclusion

For the reasons discussed above, we hold the Commission did not err in determining the merger was justified by the public convenience and necessity and, therefore, affirm the Commission's approval of the merger. Furthermore, having determined Orangeburg lacks standing to raise a challenge to the regulatory conditions on appeal, we dismiss Orangeburg's appeal.

Affirmed in part and appeal dismissed in part.

Judges ELMORE and STEPHENS concur.

JOYCE FARMS, LLC v. VAN VOOREN HOLDINGS, INC.

[232 N.C. App. 591 (2014)]

JOYCE FARMS, LLC f/k/a HICKORY MOUNTAIN FARMS, LLC, Plaintiff
v.
VAN VOOREN HOLDINGS, INC., STANNY H. VAN VOOREN, and WARRY VAN VOOREN and VAN VOOREN GAME RANCH, INC. An Ontario, Canada corporation, Defendants

No. COA13-773

Filed 4 March 2014

1. Corporations—dissolution—effect on defendants' contract claims—general successor liability rule

The trial court did not err by granting plaintiff's motion for partial summary judgment and dismissing defendants' counterclaims in a civil action arising after Van Vooren Game Ranch USA, LLC (VVGR USA)was dissolved and sold at auction even though defendants contended that there was a genuine issue of fact regarding the effect of the dissolution on defendants' contract claims. The trial court, consistent with the general successor liability rule, ordered a sale of VVGR USA's assets and did not order the transfer of VVGR USA's liabilities, including any contract claims defendants may have had against it.

2. Corporations—dissolution—ambiguity of order approving sale—impermissible collateral attack of receivership sale

The trial court did not err by granting plaintiff's motion for partial summary judgment and dismissing defendants' counterclaims in a civil action arising after Van Vooren Game Ranch USA, LLC (VVGR USA)was dissolved and sold at auction even though defendants contend there was ambiguity in the order approving the sale. Defendants' argument amounted to an impermissible collateral attack on the receivership sale of VVGR USA's assets.

3. Corporations—dissolution—exceptions to general successor liability rule

The trial court did not err by granting plaintiff's motion for partial summary judgment and dismissing defendants' counterclaims in a civil action arising after Van Vooren Game Ranch USA, LLC was dissolved and sold at auction even though defendant contended there was a genuine issue of material fact regarding application of the exceptions to the general successor liability rule. The exceptions to the general successor liability rule put in place to prevent fraudulent transfers in private sales of company assets were inapplicable.

Appeal by defendants from order entered 18 April 2013 by Judge William Z. Wood, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 10 December 2013.

Hendrick Bryant Nerhood & Otis, LLP, by Matthew H. Bryant, for plaintiff-appellee.

Craige Brawley Liipfert & Walker, LLP, by William W. Walker, for defendants-appellants.

HUNTER, Robert C., Judge.

Defendants appeal from an order entered 18 April 2013 in Forsyth County Superior Court by Judge William Z. Wood, Jr. granting plaintiff's motion for partial summary judgment and dismissing defendants' counterclaims. Defendants contend on appeal that the trial court erred by granting plaintiff's motion for partial summary judgment because defendants' counterclaims were not barred, and there was ambiguity in the receivership sale documents as to whether liabilities were transferred, thus creating a genuine issue of material fact. Alternatively, defendants argue that summary judgment was improper because they fall under an exception to the general successor liability rule as set out in *Budd Tire Corp. v. Pierce Tire Co.*, 90 N.C. App. 684, 687, 370 S.E.2d 267, 269 (1988).

After careful review, we affirm the trial court's order.

I. Background

This action arises from the second of two related proceedings between the parties. The first proceeding involved a civil action and arbitration leading to the judicial dissolution of Van Vooren Game Ranch USA, LLC ("VVGR USA"). The second proceeding, which gives rise to this appeal, involved a civil action after VVGR USA was dissolved and sold at auction.

Stan Van Vooren ("Stan") formed Van Vooren Game Ranch, Inc. ("VVGR Canada") in Ontario, Canada in 1987 to grow and sell pheasants for commercial consumption. VVGR Canada created a breed of white pheasants especially suited for meat production and developed a market in North America and overseas. Ron Joyce ("Joyce") joined the family poultry distribution business, Joyce Foods, Inc. ("JFI") in Forsyth County, North Carolina in 1971, became sole shareholder and manager in 1981, and formed Hickory Mountain Farms, LLC ("HMF") in 2003 to manage JFI's farming operation.

In 2006, VVGR Canada sought a processor for its pheasants. After negotiation, HMF and Joyce entered into an agreement with Stan and Van Vooren Holdings Ltd. ("VVH") to form VVGR USA. VVGR USA was owned equally; HMF and Joyce owned 50% and Stan and VVH owned 50%. Joyce and Stan served as co-managers of the new company. VVGR USA was to purchase the assets of VVGR Canada for $2,200,000.00. In late 2006 VVGR Canada moved its assets to North Carolina. JFI provided office space and other services for VVGR USA, and JFI's chief financial officer administered VVGR USA's books and bank accounts.

In March 2007, VVGR USA established a $300,000.00 line of credit with SunTrust Bank ("the SunTrust loan") which was converted to a promissory note in 2008. The note gave SunTrust a security interest in all of VVGR USA's assets and was personally guaranteed by Joyce and Stan. The SunTrust loan went into default in 2009. VVGR USA negotiated a forbearance agreement with SunTrust to keep SunTrust from seizing VVGR USA's assets while VVGR USA looked for other sources of income as it paid interest on the note. Out of the three parties liable on the note – Joyce, Stan, and VVGR USA – Joyce was the only party with sufficient assets to pay the debt.

Joyce and Stan were unable to work together as co-owners/managers of VVGR USA due to myriad disputes related to VVGR USA's relationship with JFI. In July 2011, JFI sent VVGR USA a demand letter for $100,548.62 owed for product sold and delivered. VVGR USA contended that, because of improper charges, JFI actually owed VVGR USA funds in excess of the amount demanded by JFI. Joyce, JFI, Stan, and VVGR USA agreed in August 2011 to submit their disputes to arbitration.

A. Arbitration and Judicial Dissolution

In the arbitration, Stan and VVGR USA filed, among other claims, a request for judicial dissolution of VVGR USA pursuant to N.C. Gen. Stat. § 57-6-02. Because judicial dissolution of VVGR USA would trigger default of the SunTrust note and Joyce's guaranty would be called upon, Joyce began a plan to protect his personal obligation in the note. Joyce determined that he would be paying off the note "one way or the other" and decided he would rather have control of the VVGR USA assets than lose them in a bank auction, which he believed would not realize the assets' value. 2011 Asset Acquisition, LLC ("2011 AA") was formed by Todd Tucker, a JFI shareholder and officer, to purchase the SunTrust note from the bank. Art Pope, another JFI shareholder and creditor, loaned the funds to 2011 AA to buy the SunTrust note for $299,589.42. Joyce agreed, through HMF, to underwrite and fund

2011 AA's costs of purchasing the SunTrust note and take control of the VVGR USA collateral.

On 3 October 2011, Joyce and HMF commenced the dissolution action in Forsyth County Superior Court seeking (1) judicial dissolution of VVGR USA; (2) an order allowing the other VVGR USA owners to buy Stan and VVGR Canada's interest in VVGR USA; (3) a declaratory judgment determining the scope of the arbitration agreement; and (4) an order staying the arbitration proceeding. HMF specifically alleged management deadlock, that HMF was not a party to the arbitration agreement, and that VVGR USA should be "dissolved, its assets liquidated and creditors paid." On 5 October 2011, the attorney for Joyce and JFI informed Stan and VVGR USA that 2011 AA had purchased the SunTrust note. 2011 AA demanded immediate payment of the $299,589.42 balance on the SunTrust note and took possession of all of VVGR USA's assets pursuant to the original security agreement.

On 10 October 2011, Stan and VVGR USA filed a counterclaim, a third-party complaint, and a motion for injunctive relief in the dissolution action. They argued that there was no factual or legal difference between Joyce, JFI, HMF, Tucker, and 2011 AA and that the acts of any one of them was the act of the others, meaning that all were subject to the arbitration agreement entered into by Joyce and JFI as part of their dispute with Stan and VVGR USA. Alternatively, they asked the court to enjoin Joyce, JFI, HMF, Tucker, and 2011 AA from pursuing claims outside the arbitration proceeding, and for the court to appoint a receiver to manage VVGR USA.

On 4 November 2011, the trial court: (1) denied the preliminary injunction motion; (2) found that HMF and 2011 AA were not parties to the arbitration agreement; (3) found that VVGR USA was deadlocked; and (4) ordered that a receiver be appointed to dissolve VVGR USA. The receiver operated VVGR USA until he made a motion to sell VVGR USA's assets, which was granted on 15 December 2011. Neither the order appointing the receiver nor the order approving the receiver's sale specifically mention any contract-based claims that Stan, his father Warry Van Vooren ("Warry"), VVH or VVGR Canada held against VVGR USA. The bill of sale and motion to sell were silent with regard to the transfer of liabilities; however, an attached asset protection agreement explicitly stated that the sale would not transfer liabilities.

The receiver conducted an auction of VVGR USA's assets, where HMF submitted the highest bid of $510,000.00. The court approved the sale in an order dated 16 December 2011, with the details of the sale attached.

The order approving sale provided that "[t]he Purchased Assets shall be sold free and clear of all liens, interests and encumbrances whatsoever[.]" With the sale complete, the receiver asked Tucker to specify all amounts VVGR USA owed to 2011 AA on the SunTrust note and security agreement purchased by 2011 AA. Tucker claimed 2011 AA was due $485,630.00 from VVGR USA, and the receiver paid the requested amount to 2011 AA. Tucker subsequently transferred his sole ownership of 2011 AA to Joyce for no consideration. Joyce therefore controlled all of VVGR USA's assets through the auction sale to HMF, and had the SunTrust note paid off to 2011 AA, which Joyce now solely owned. The arbitrator later conducted a hearing in March 2013 and entered a ruling on 2 April 2013 denying Stan's and VVH's claims against Joyce for money owed from unpaid capital contributions at VVGR USA's creation.

B. The Present Action

HMF commenced this action against Stan, Warry, VVH, and VVGR Canada (collectively "defendants") claiming they were liable to HMF as assignee for legal claims previously held by VVGR USA related to unapproved distributions and unpaid invoices, among other things. Defendants counterclaimed that HMF, as the owner of VVGR USA's contracts and goodwill, was liable to defendants for, inter alia, money owed from VVGR USA's initial purchase of assets from VVGR Canada in 2006 and subsequent loans defendants made to VVGR USA throughout the course of the business. After discovery, HMF filed a partial summary judgment motion claiming that the liabilities of VVGR USA were not transferred in the dissolution sale, and therefore all of defendants' counterclaims should be dismissed.

The trial court denied HMF's motion for summary judgment as to its own claims but granted the motion as to defendants' counterclaims, concluding that the receivership sale did not transfer VVGR USA's liabilities to the buyer, HMF. The parties settled all remaining claims shortly after jury selection. The settlement specified that it was a "final determination of the rights of the parties" and that "[d]efendants' right to appeal the dismissal of [d]efendants' counterclaims [was] not waived or abridged by [the] settlement."

Defendants filed timely notice of appeal from the trial court's order.

II. Discussion

Defendants contend that summary judgment was improper for three reasons: (1) their counterclaims were not barred by the dissolution because a genuine issue of material fact existed as to whether the trial

court ordered a sale free and clear of defendants' contract claims against VVGR USA; (2) the order approving the sale of VVGR USA's assets to HMF was ambiguous, and thus its effect could not be determined as a matter of law; and (3) the evidence raises genuine issues of material fact as to whether any exceptions to the general successor liability rule apply. After careful review, we affirm the trial court's order dismissing defendants' counterclaims.

"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)). "An issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 182 S.E.2d 897, 901 (1972). On summary judgment, facts must be viewed in the light most favorable to the non-moving party. *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975).

A. Effect of Dissolution on Defendants' Contract Claims

[1] Defendants first argue that a genuine issue of material fact exists as to whether the trial court actually ordered that VVGR USA's assets were to be sold free and clear of defendants' contract claims against VVGR USA. We disagree.

Under the general successor liability rule, "a corporation which purchases all or substantially all of the assets of another corporation is not liable" for the transferor's liabilities. *Budd Tire*, 90 N.C. App. at 687, 370 S.E.2d at 269. Defendants' counterclaims all stem from alleged breach of contractual agreements defendants held with VVGR USA. Contract claims are liabilities that generally do not transfer to successor corporations. *See Becker v. Graber Builders, Inc.*, 149 N.C. App. 787, 791, 561 S.E.2d 905, 909 (2002). Thus, under the general rule, when plaintiff purchased all of VVGR USA's assets at the receivership sale, it did not acquire VVGR USA's liabilities, which included defendants' contract claims against it.

Despite the general successor liability rule, defendants argue that there is a genuine issue of material fact as to whether the judicial dissolution court specifically ordered VVGR USA's assets to be sold free and clear of defendants' contract claims. Because neither the order appointing the receiver nor the order approving the receiver's sale specifically

mention defendants' contract claims against VVGR USA, defendants argue that there is a genuine issue of material fact as to whether these liabilities were transferred. We disagree. Though the trial court's orders do not expressly indicate that defendants' contract claims against VVGR USA were excluded in the receiver's sale of VVGR USA's assets, they do indicate that VVGR USA's assets were to be sold "free and clear of all liens, claims and encumbrances[.]" Furthermore, as is discussed in more detail below, all relevant documents related to the receivership sale indicate that it was intended to be a sale of assets only, with no liabilities included.

Absent any indication to the contrary, we hold that the trial court, consistent with the general successor liability rule, ordered a sale of VVGR USA's assets and did not order the transfer of VVGR USA's liabilities, including any contract claims defendants may have had against it.

B. Ambiguity of Order Approving Sale

[2] Defendants next argue that the order approving the sale of VVGR USA's assets was ambiguous and therefore could not be determined as a matter of law. We disagree.

At the outset, we note that defendants' argument as to this issue amounts to an impermissible collateral attack on the receivership sale of VVGR USA's assets. "Attacks on the validity of receiverships by collateral actions are not permissible under North Carolina law." *Hudson v. All Star Mills, Inc.*, 68 N.C. App. 447, 451, 315 S.E.2d 514, 517 (1984). The method of attacking a public sale of assets must be direct, either by motion in the cause or appeal, not through a separate action. *See Brown v. Miller*, 63 N.C. App. 694, 697, 306 S.E.2d 502, 504 (1983). "[T]he court being one of competent jurisdiction in receivership proceedings, and having acquired jurisdiction of the parties and the subject matter in controversy, it may not be interfered with by any other court of coordinate authority[.]" *Hall v. Shippers Exp.*, 234 N.C. 38, 40, 65 S.E.2d 333, 335 (1951).

Here, defendants attempted to challenge the order approving the receivership sale in a new action brought in a trial court of coordinate authority as that which conducted the dissolution. The trial court in the dissolution action concluded, and defendants do not contest, that it had proper subject matter jurisdiction to oversee the receivership sale. Defendants failed to file any claims, motions, objections, or appeals in the dissolution action or otherwise challenge the receivership proceedings or the order authorizing the sale in any way. Therefore, because the trial court in the judicial dissolution case had proper subject matter

jurisdiction over the parties with regard to the receivership sale, and defendants now contest the receivership sale before a new judge with co-ordinate authority, we hold that this argument is an impermissible collateral attack.

However, even if this were not an impermissible collateral attack, we would hold that defendants' argument fails. Whether ambiguity exists in a court order is a question of law. *Emory v. Pendergraph*, 154 N.C. App. 181, 186, 571 S.E.2d 845, 848 (2002). "[W]here a judicial ruling is susceptible of two interpretations, the court will adopt the one which makes it harmonize with the law properly applicable to the case." *Kniep v. Templeton*, 185 N.C. App. 622, 631, 649 S.E.2d 425, 431-32 (2007) (citations and quotation marks omitted).

Defendants' contention that the order approving the sale was ambiguous arises from the order's provision that VVGR USA's "contracts" would be sold with its assets but that "[t]he [p]urchased [a]ssets shall be sold free and clear of all liens, interests and encumbrances whatsoever." Defendants argue that because their contract claims against VVGR USA were not "liens, interests or encumbrances," and that VVGR USA's "contracts" were transferred to plaintiff, ambiguity existed as to whether liability on defendants' contract claims were sold to plaintiff and this issue should have been decided by a trier of fact. We disagree.

The receiver's report and motion to sell assets both indicate that the receiver intended to conduct an asset sale exclusive of liabilities. An "Asset Purchase Agreement" form, which the receiver attached to the motion as a template for the sale, specifically excluded transfer of VVGR USA's liabilities to the buyer:

> NOTWITHSTANDING ANYTHING CONTAINED HEREIN TO THE CONTRARY, THE PURCHASER SHALL NOT ASSUME ANY LIABILITIES OR OBLIGATIONS (FIXED OR CONTINGENT, KNOWN OR UNKNOWN, MATURED OR UNMATURED), INCLUDING ANY AND ALL ENVIRONMENTAL LIABILITIES, OF THE COMPANY OR ITS MEMBERS OR SHAREHOLDERS WHETHER OR NOT ARISING OUT OF OR RELATING TO THE PURCHASED ASSETS OR THE BUSINESS OR ANY OTHER BUSINESS OF THE COMPANY OR ITS MEMBERS OR SHAREHOLDERS, ALL OF WHICH LIABILITIES AND OBLIGATIONS SHALL, AT AND AFTER THE CLOSING, REMAIN THE EXCLUSIVE RESPONSIBILITY OF THE COMPANY OR ITS MEMBERS OR SHAREHOLDERS (AS APPLICABLE).

Furthermore, the bill of sale refers only to the sale of assets and is silent with regard to liabilities. The receiver filed an affidavit in which he stated that the auction sale was for assets only, not liabilities. Finally, the order itself states that "[t]he Purchased Assets shall be sold free and clear of all liens, interests and encumbrances whatsoever." In short, all of the evidence related to the receivership sale clearly indicates that it was a sale of assets, not liabilities. Defendants produced no evidence indicating that the parties, the receiver, or the trial court intended to contravene the long-standing general successor liability rule by selling defendants' unspecified contract claims together with VVGR USA's assets.

Based on these facts, we agree with plaintiff that the order unambiguously transferred VVGR USA's assets and excluded all liabilities, including defendants' contract claims, in the receivership sale. Therefore, defendants' argument is overruled.

C. Exceptions to the General Successor Liability Rule

[3] Defendants' final argument is that a genuine issue of material fact existed as to whether any exceptions to the general successor liability rule apply. We disagree.

Defendants rely on the four exceptions enunciated in *Budd Tire* to support their argument. In *Budd Tire*, the Court dealt with a private sale of company assets for inadequate consideration where the purchaser would be protected by the general successor liability rule. *Budd Tire*, 90 N.C. App. at 684, 370 S.E.2d at 267. The Court was forced to carve out exceptions to the general successor liability rule to provide an equitable remedy to a creditor in the face of a fraudulent transaction. *Id.* at 689, 370 S.E.2d at 270. Thus, the Court held that the general successor liability rule does not apply where:

> (1) there is an express or implied agreement by the purchasing corporation to assume the debt or liability; (2) the transfer amounts to a de facto merger of the two corporations; (3) the transfer of assets was done for the purpose of defrauding the corporation's creditors, or; (4) the purchasing corporation is a "mere continuation" of the selling corporation in that the purchasing corporation has some of the same shareholders, directors, and officers.

Id. at 687, 370 S.E.2d at 269.

However, the structured court-ordered sale of assets in the present case is distinguishable from the type of fraudulent private transaction in *Budd Tire* that involved inadequate consideration and shielding

the insolvent company from creditors without the creditors having legal remedies prior to the sale. *See id.* Defendants cite to no caselaw, and we find none, supporting the contention that these exceptions are applicable to a court-ordered and supervised public sale. In this context, statutory safeguards are already in place to ensure that the trial court and the receiver conduct dissolution fairly and without fraud. *See* N.C. Gen. Stat. § 1-505 (2013) ("Sales of property [by receivers] shall be upon such terms as appear to be to the best interests of the creditors affected by the receivership."). Furthermore, unlike the private sale in *Budd Tire*, defendants here could have protected their interests by bidding on VVGR USA's assets. The *Budd Tire* exceptions were put in place to prevent fraudulent transfers in private sales. *Id.* at 689, 370 S.E.2d at 270. The need to protect creditors from fraud through application of these exceptions is minimized where, as here, statutory safeguards were already in place to ensure dissolution without fraud and the creditors could have protected their own interests by participating in the public sale.

For these reasons, we decline to extend the exceptions to the general successor liability rule to the new context of court-ordered and supervised public sales of company assets. Defendants' contention that there existed a genuine issue of material fact as to whether the exceptions apply is overruled.

III. Conclusion

Because the trial court unambiguously ordered VVGR USA's assets to be sold at the receivership sale free of all liabilities, and the general successor liability rule applies, there is no genuine issue of material fact and defendants' counterclaims against plaintiff based on alleged contracts with VVGR USA are barred as a matter of law. Furthermore, we hold that the *Budd Tire* exceptions to the general successor liability rule put in place to prevent fraudulent transfers in private sales of company assets are inapplicable here. As such, we affirm the trial court's order.

AFFIRMED.

Judges McGEE and ELMORE concur.

PREMIER, INC. v. PETERSON

[232 N.C. App. 601 (2014)]

PREMIER, INC., PLAINTIFF
v.
DAN PETERSON; OPTUM COMPUTING SOLUTIONS, INC.; HITSCHLER-CERA, LLC; DONALD BAUMAN; MICHAEL HELD; THE HELD FAMILY LIMITED PARTNERSHIP; ROBERT WAGNER; ALEK BEYNENSON; I-GRANT INVESTMENTS, LLC; JAMES MUNTER; GAIL SHENK; STEVEN E. DAVIS; CHARLES W. LEONARD, III AND JOHN DOES 1-10, DEFENDANTS

No. COA13-344

Filed 4 March 2014

Contracts—breach of contract—declaratory judgment—summary judgment—plain terms of the contract—further factual development

The trial court erred by granting summary judgment in favor of plaintiff on its claim for a declaratory judgment that it did not breach its contract with defendants. Although the trial court correctly concluded that the contract at issue required some affirmative act by a facility to subscribe to or license the SafetySurveillor product in order for Product Implementation to have occurred, further factual development was necessary to explore what affirmative acts—if any—were taken by the facilities identified by defendants to obtain the SafetySurveillor product.

Appeal by defendants from order entered 11 December 2012 by Judge Calvin E. Murphy in Mecklenburg County Superior Court. Heard in the Court of Appeals 29 August 2013.

Moore & Van Allen, PLLC, by J. Mark Wilson, Kathryn G. Cole, and Benjamin R. Huber, for plaintiff-appellee.

Williams Mullen, by Christopher G. Browning, Jr. and Garrick A. Sevilla, for defendants-appellants.

DAVIS, Judge.

Dr. Dan Peterson ("Dr. Peterson"); Optum Computing Solutions, Inc.; Hitschler-Cera, LLC; Donald Bauman; Michael Held; the Held Family Limited Partnership; Robert Wagner; Alek Beynenson; I-Grant Investments, LLC; James Munter; Gail Shenk; Steven E. Davis; Charles W. Leonard, III; and John Does 1-10 (collectively "Defendants") appeal from the trial court's 11 December 2012 order granting summary judgment in favor of Plaintiff Premier, Inc. ("Premier") on (1) its claim for a declaratory judgment that

it did not breach its contract with Defendants; and (2) Defendants' counterclaims for breach of contract, attorneys' fees, and recovery of audit expenses. After careful review, we vacate the trial court's order granting summary judgment and remand for further proceedings.

Factual Background

On 29 September 2006, Premier acquired Cereplex, Inc. ("Cereplex") by entering into a Stock Purchase Agreement (the "Agreement") with Defendants, the former shareholders and stakeholders of Cereplex. Cereplex developed and designed web-based surveillance and analytic services to healthcare providers through its software products, Setnet and PharmWatch. Setnet was designed to assist healthcare providers in detecting, responding to, and preventing healthcare-associated infections ("HAIs"). HAIs are infections that patients acquire during their course of treatment in a healthcare facility or setting. The Setnet program provided various alerts, reports, and other monitoring and surveillance functions regarding the possible presence of HAIs in healthcare providers' patient population.

PharmWatch was a program designed to optimize treatment, curb resistance to antibiotics, and prevent unnecessary use or overuse of antibiotics. The PharmWatch product provided automated surveillance and monitoring by generating alerts to notify a healthcare provider of a potential problem in the provision and dosage of antibiotics to a particular patient.

After acquiring Cereplex, Premier developed SafetySurveillor, a successor product that combined the functionalities of Setnet and PharmWatch into one software program. SafetySurveillor, like its predecessors, generates automated alerts to notify the user of potential problems that require attention. SafetySurveillor's key features relate to its ability to (1) facilitate infection prevention by firing alerts to infection control professionals regarding the potential existence of clusters or outbreaks of HAIs; and (2) provide configurable pharmacological-related alerts based on set variables, including high-cost medication, drug combinations, length of therapy, lab results, and other factors.

Pursuant to the Agreement, Defendants were entitled to receive an annual earnout payment (the "Earnout Amount") from Premier for five years following the date of the Agreement. The Earnout Amount provision of the Agreement states, in pertinent part, as follows:

> (iii) Earnout. On each of the dates that are the first five (5) anniversaries of the Closing Date, the Earnout Amount

> earned during the preceding twelve (12) months shall be determined by the Buyer in good faith (the "Yearly Earnout"). . . . "Earnout Amount" shall mean an amount equal to $12,500 for each Hospital Site where a Product Implementation occurs during the applicable 12-month period; excluding the first fifty (50) Hospital Sites where a Product Implementation occurs . . . . For the avoidance of doubt the first fifty (50) Hospital Site threshold is a one-time threshold, not an annual threshold. "Hospital Site" shall mean an individual hospital, nursing home, care center or similar facility (and for the avoidance of doubt a single health care company or hospital group may consist of multiple Hospital Sites). "Product Implementation" means a Hospital Site that has (A) subscribed to or licensed the Company's Setnet or PharmWatch product (or any derivative thereof, successor product, or new product that substantially replaces the functionality of either product), whether such product is provided, sold or licensed (for a charge or at no charge, or provided on a stand-alone basis or bundled with other products and/or services) to the applicable Hospital Site by Company (or its successor in interest), any affiliate of the Company or any reseller authorized by the Company, and (B) completed any applicable implementation, configuration and testing of the product so that the product is ready for production use by the Hospital Site. Together with the delivery of each Yearly Earnout, the Buyer shall provide the Sellers' Representative with a written report listing the names and addresses of the Hospital Sites covered by the applicable Yearly Earnout payment.

The Agreement provided that Defendants were authorized to conduct an annual audit to verify that Premier was paying out the correct Earnout Amount to Defendants. Defendants were responsible for paying the expenses associated with the audit unless the audit revealed that Premier had underpaid the Earnout Amount by more than 5%. If the applicable Earnout Amount was in dispute, Premier would not have any obligation to pay the costs and expenses of the audit "unless a final, non-appealable order of a court or an arbitrator that is binding on [Premier] finds that the Audit findings are correct."

From May 2010 to September 2010, Dr. Peterson, the co-founder and former Chief Executive Officer of Cereplex, conducted a pilot audit on

Defendants' behalf regarding Premier's compliance with the Agreement. Dr. Peterson testified by affidavit that in determining the appropriate Earnout Amount that Defendants were due, his audit "reported on the occurrence of single-event alerts as a simple and sure way to identify Product Implementations of SafetySurveillor[1] for the Audit." A single-event alert refers to the notification the SafetySurveillor program dispatches to infection control professionals or other designated medical personnel to identify either (1) the potential presence of an HAI in a patient who was discharged from a hospital and later sought medical attention from another healthcare facility; or (2) a possible problem with the antibiotic therapy prescribed to a patient.

Dr. Peterson examined Premier's databases and discovered over 1,000 healthcare facilities from which an alert had been fired. His affidavit states that "[e]ach alert relates to an individual patient and is specific to the facility at which that patient was seen, and each alert was sent to at least one clinician who had chosen to be alerted about the event." He also explained that in order for an alert to be fired from a facility, the SafetySurveillor program must have acquired access to the facility's patient data.

The conclusion reached by Dr. Peterson from his audit was that Premier had provided SafetySurveillor to over 1,000 facilities yet had only recognized 263 Hospital Sites for purposes of the Product Implementation provision of the Agreement. Based on Dr. Peterson's audit, Defendants informed Premier that they intended to initiate litigation against Premier for miscalculating the Earnout Amount and violating the terms of the Agreement.

On 19 January 2011, Premier filed an action in Mecklenburg County Superior Court seeking a declaratory judgment that it had not breached the Agreement. On 27 April 2011, Defendants filed an answer and counterclaims. Defendants alleged that Premier had, in fact, breached its contract with Defendants and sought damages as well as the recovery of audit expenses and attorneys' fees. The matter was designated a complex business case and assigned to the Honorable Calvin E. Murphy.

On 29 July 2011, the trial court entered a case management order giving the parties until 30 April 2012 to complete fact discovery and until 31 July 2012 to complete all discovery. On 30 August 2011, approximately

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1. SafetySurveillor, the successor product of Setnet and PharmWatch, replaced those two software programs and was the only relevant product for purposes of Product Implementation in 2010.

40 days after the entry of the case management order, Premier filed a motion for judgment on the pleadings pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure or, in the alternative, a motion for summary judgment pursuant to Rule 56.

The trial court conducted a hearing on 14 December 2011 and entered its order and opinion on 11 December 2012 granting summary judgment in Premier's favor on its declaratory judgment claim as well as on Defendants' counterclaims for breach of contract, attorneys' fees, and recovery of audit expenses.[2] Defendants appealed to this Court.

Analysis

On an appeal from an order granting summary judgment, this Court reviews the trial court's decision *de novo*. *Shroyer v. Cty. of Mecklenburg*, 154 N.C. App. 163, 167, 571 S.E.2d 849, 851 (2002). 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." *Dockery v. Quality Plastic Custom Molding, Inc.*, 144 N.C. App. 419, 421, 547 S.E.2d 850, 852 (2001).

In a contract dispute between two parties, the trial court may interpret a plain and unambiguous contract as a matter of law if there are no genuine issues of material fact. *See McKinnon v. CV Indus., Inc.*, 213 N.C. App. 328, 333, 713 S.E.2d 495, 500 ("Courts may enter summary judgment in contract disputes because they have the power to interpret the terms of contracts."), *disc. review denied*, 365 N.C. 353, 718 S.E.2d 376 (2011); *Metcalf v. Black Dog Realty, LLC*, 200 N.C. App. 619, 633, 684 S.E.2d 709, 719 (2009) ("[W]hen the language of a contract is not ambiguous, no factual issue appears and only a question of law which is appropriate for summary judgment is presented to the court.").

"Whenever a court is called upon to interpret a contract its primary purpose is to ascertain the intention of the parties at the moment of its execution." *Lane v. Scarborough*, 284 N.C. 407, 409-10, 200 S.E.2d 622, 624 (1973). In determining the parties' intent, the court must construe the contract "in a manner that gives effect to all of its provisions, if the court is reasonably able to do so." *Johnston Cty. v. R.N. Rouse & Co.*, 331 N.C. 88, 94, 414 S.E.2d 30, 34 (1992).

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2. The trial court granted summary judgment in favor of Defendants on Premier's claim for attorneys' fees after concluding that there was no statutory basis for an award of attorneys' fees in Premier's favor.

The key language in the Agreement that lies at the heart of this dispute states as follows:

> "Product Implementation" means a Hospital Site that has (A) *subscribed to or licensed* the Company's Setnet or PharmWatch product (or any derivative thereof, successor product, or new product that substantially replaces the functionality of either product), *whether such product is provided, sold or licensed* (for a charge or at no charge, or provided on a stand-alone basis or bundled with other products and/or services) to the applicable Hospital Site by Company (or its successor in interest), any affiliate of the Company or any reseller authorized by the Company . . . .

(Emphasis added.)

The parties offer different views on how the italicized language quoted above should be interpreted. Relying on the "subscribed to or licensed" phrase, Premier contends that in order for Product Implementation to occur, a Hospital Site must affirmatively take steps to subscribe to or license the SafetySurveillor product. Based on this interpretation, Premier claims that it fully satisfied its obligations under the Agreement by making Earnout payments for 213 of the 263 Hospital Sites that had formal written subscription agreements with Premier.[3]

Defendants, conversely, assert that Premier's interpretation of Product Implementation is too narrow. They argue that the "whether such product is provided, sold or licensed" phrase broadens the circumstances under which an annual Earnout payment can accrue. As such, Defendants contend that the "subscribed to or licensed" component of Product Implementation is satisfied simply by virtue of Premier's provision of the SafetySurveillor product to a facility. Based on this reasoning, Defendants contend that Premier was not entitled to summary judgment because the results of Dr. Peterson's audit — specifically the data showing the numerous facilities from which single-event alerts were fired — indicated that Premier had "provided" the SafetySurveillor program to over 1,000 facilities, thereby causing Product Implementation to occur *regardless* of whether those facilities had actually taken steps to subscribe to or license the product.

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3. Pursuant to the Agreement, the first 50 Hospital Sites where Product Implementation occurs are excluded when calculating the appropriate Earnout Amount total. Thus, payment was made for only 213 of these 263 Hospital Sites.

Premier responds by arguing that Defendants' interpretation of Product Implementation reads the "subscribed to or licensed" language out of the Agreement. Defendants' interpretation, according to Premier, treats the "subscribed to or licensed" phrase as having been effectively superseded by the "whether such product is provided, sold or licensed" phrase.

In its order and opinion, the trial court agreed with Premier's interpretation of the Agreement, ruling that a Hospital Site was required to subscribe to or license the product in order for Product Implementation to occur. The trial court harmonized the "subscribed to or licensed" phrase with the "whether such product is provided, sold or licensed" phrase by determining that "while it does not matter who provides the product to the Hospital Site or whether the Hospital Site is charged, the Hospital Site *still must subscribe to or license the product* in order for 'Product Implementation' to occur." (Emphasis added.)

The trial court, therefore, rejected Defendants' contention that they would be entitled to an Earnout payment any time SafetySurveillor was "merely provided" to a Hospital Site because that interpretation "unreasonably construes the otherwise unambiguous language of the contract that requires a license or subscription." Based on its interpretation of the Product Implementation definition in the Agreement, the trial court concluded that summary judgment in favor of Premier was appropriate.

We agree with the trial court that Defendants' interpretation would impermissibly read the phrase "subscribed to or licensed" out of the Agreement. *See Singleton v. Haywood Elec. Membership Corp.*, 357 N.C. 623, 629, 588 S.E.2d 871, 875 (2003) (explaining that when interpreting a contract "[t]he various terms of the contract are to be harmoniously construed, and if possible, every word and every provision is to be given effect" (citation and brackets omitted)). Defendants' argument hinges on the notion that Product Implementation can occur simply by virtue of a facility's receipt of the SafetySurveillor product. However, the unmistakable meaning of the language the parties agreed upon in drafting the Agreement is that some affirmative act on the part of the Hospital Site is required. Defendants simply cannot escape the fact that the definition of Product Implementation makes clear that it is the *Hospital Site* that must "subscribe[] to or license[]" the product. Thus, contrary to Defendants' proffered interpretation, the mere receipt of SafetySurveillor by a facility is, standing alone, insufficient to trigger an Earnout payment under the Agreement.

However, our adoption of this interpretation of the Product Implementation definition does not resolve the case. To hold, as we do, that a Hospital Site must subscribe to or license the product in order for Product Implementation to occur is to raise the question of whether the additional facilities that Defendants contend qualify as Hospital Sites at which Product Implementation has occurred have, in fact, affirmatively undertaken steps to subscribe to or license the SafetySurveillor product.

It is well established that in construing contract provisions, "[w]here a contract defines a term, that definition is to be used. If no definition is given, non-technical words are to be given their meaning in ordinary speech, unless the context clearly indicates another meaning was intended." *Reaves v. Hayes*, 174 N.C. App. 341, 345, 620 S.E.2d 726, 729 (2005) (citation and quotation marks omitted). As neither "subscribed" nor "licensed" is defined in the Agreement, it is appropriate to examine the ordinary and plain meaning of these terms.

"Subscribe" means "to agree to receive and pay for a periodical, service, etc." Webster's New World Dictionary 588 (1995). The most applicable dictionary definition of the word "license" is "official or legal permission to do or own a specified thing." American Heritage College Dictionary 782 (3d ed. 1993). Both definitions connote an affirmative act by the recipient prior to receipt of the product or service — be it the act of agreeing to receive the product or service or the act of obtaining permission to use the product or service. Applying these definitions here, we believe that the Agreement contemplates a mutual arrangement between Premier and the Hospital Site whereby Premier agrees to provide the SafetySurveillor product and the Hospital Site agrees to accept it and utilize its services.[4]

While the trial court correctly interpreted the Agreement as requiring the Hospital Site to take some action to subscribe to or license SafetySurveillor, we cannot agree with the trial court's conclusion that summary judgment was appropriate at this stage in the litigation. Defendants submitted evidence, consisting primarily of the affidavit of Dr. Peterson, suggesting that Premier provided SafetySurveillor to numerous additional facilities (beyond the 263 Hospital Sites acknowledged by Premier in its calculation of the Earnout Amount) for which no payment was made. Premier does not dispute Defendants' contention

4. However, because the Agreement expressly states that an Earnout payment can be triggered — assuming the other requirements are met — regardless of whether the product is provided "for a charge or at no charge," payment by the Hospital Site is not required. Similarly, an Earnout payment can be triggered whether SafetySurveillor is offered on a stand-alone basis or as part of a bundle of other products and services.

that alerts were fired from these facilities but claims that (1) there is no evidence that any of the facilities identified have subscribed to or licensed SafetySurveillor; and (2) evidence of the firing of alerts is not relevant to the issue of whether a facility has subscribed to or licensed SafetySurveillor.

While we have rejected Defendants' contention that evidence of Premier's mere provision of the SafetySurveillor product to facilities, without more, automatically triggers Product Implementation, we believe that such evidence (as shown by the firing of alerts) and the circumstances under which the product came to be received by these facilities is probative of the issue of whether the facilities did, in fact, meet the criteria for Product Implementation. However, as presently constituted, the record is devoid of specific evidence on this issue. It may or may not ultimately be determined that additional facilities beyond the 263 acknowledged by Premier qualify as Hospital Sites as to which Product Implementation has occurred; however, on the present record, we have no way of knowing the answer to this question.

In its complaint, Premier summarized the relief it was seeking as follows:

> 30. Plaintiff is entitled to a judgment declaring that it has not violated any purported rights of Defendants pursuant to the Stock Purchase Agreement or otherwise under federal, state or common law, and is not liable to Defendants for any claims, including any claims concerning the parties' respective rights or obligations pursuant to the Stock Purchase Agreement. . . .

As the party seeking summary judgment, Premier bore "the initial burden of demonstrating the absence of a genuine issue of material fact" as to whether it had fully satisfied its payment obligations under the Agreement. *Austin Maint. & Constr., Inc. v. Crowder Constr. Co.*, ___ N.C. App. ___, ___, 742 S.E.2d 535, 540 (2012) (citation and quotation marks omitted).

The trial court appears to have reasoned that Premier met this burden because (1) Product Implementation could only occur when a Hospital Site entered into a formal written agreement with Premier; and (2) neither party produced evidence "that refutes the fact that [Premier] paid Defendant[s] for each Hospital Site that subscribed to or licensed the product" through a formal, written subscription or licensing agreement. However, as explained above, while the Agreement requires some affirmative act by a Hospital Site to subscribe to or license the

SafetySurveillor product in order for Product Implementation to occur, the Agreement does not specifically require a formal, written agreement between Premier and the Hospital Site. The fact that Product Implementation can occur even when the SafetySurveillor product is provided to the Hospital Site at no cost suggests that a more informal process may, in fact, have existed.

The trial court also concluded that Dr. Peterson's affidavit constituted parol evidence that attempted to impermissibly add to or revise the unambiguous language of the Agreement. We agree that Dr. Peterson's affidavit about the parties' intent when negotiating the Agreement should not be allowed to alter the contractual terms that the parties agreed upon as contained in the four corners of the Agreement; however, as explained above, we believe that Dr. Peterson's affidavit contained evidence probative on the issue of whether the additional facilities referenced in his audit may have subscribed to or licensed SafetySurveillor. Accordingly, further factual development is necessary to explore what affirmative acts — if any — were taken by the facilities identified by Defendants to obtain the SafetySurveillor product so that any such acts can be evaluated in accordance with our interpretation of the "subscribed to or licensed" language in the Agreement.

For these reasons, we conclude that this matter must be remanded to the trial court for a fuller development of the factual record. While we do not foreclose the possibility that summary judgment may ultimately be appropriate in this matter, we believe that such a determination cannot properly be made at the present time in light of the incomplete factual record that currently exists. *See Ussery v. Taylor*, 156 N.C. App. 684, 686, 577 S.E.2d 159, 161 (2003) (reversing premature entry of summary judgment and remanding to give parties "the opportunity to further develop the facts"). Because we are vacating the entry of summary judgment and remanding for further proceedings, we also vacate the trial court's rulings on both parties' claims for attorneys' fees. We express no opinion as to whether either party may be entitled to attorneys' fees once the trial court has rendered a final judgment in this action on remand.

Conclusion

For the reasons stated above, we vacate the trial court's order and opinion and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Judges CALABRIA and STROUD concur.

ALANA WILLIAMS RESPESS, PLAINTIFF
v.
MURPHY TODD RESPESS, DEFENDANT AND
BOYD AND SUSAN RESPESS, INTERVENORS

No. 13-760

Filed 4 March 2014

1. Child Visitation—best interests of children—findings

The trial court did not commit reversible error by denying defendant visitation with his minor children. Although defendant argued, based on the holding of *Moore v. Moore*, 160 N.C. App. 569, that the trial court did not comply with the provisions of N.C.G.S. § 50-13.5(i), the holding of *Moore* diverged sharply from the controlling precedent and did not control this case. In this case, the trial court found that it would not be in the children's best interests to have any visitation with defendant and this ultimate finding of fact was supported by numerous evidentiary findings of fact.

2. Child Custody and Support—retroactive child support—remanded—actual expenditures

A trial court's award of retroactive child support was reversed and remanded for further findings. *Carson v. Carson*, 199 N.C. App. 101, and *Robinson v. Robinson*, 210 N.C. App. 319, construed together, require that an award of retroactive child support be supported by evidence of plaintiff's actual expenditures for the children during the period for which she seeks retroactive support.

3. Child Custody and Support—support—imputed income

The trial court erred in a child support action in its determination of the amount of income it imputed to defendant where that amount was not supported by the findings or the evidence. Defendant did not challenge the trial court's findings as to the effect of his intentional "course of sexually abusing" his daughter and the resultant loss of his career as a stockbroker and insurance agent and the court's determination that it was appropriate to impute income to defendant should be upheld. However, the order must be remanded for findings detailing how the trial court arrived at the amount of income to be imputed to defendant.

4. Child Custody and Support—child support—automobile—value

The trial court did not err by awarding plaintiff a 1997 Ford Expedition as an "additional form of child support" without

determining the vehicle's value and deducting it from the child support award. N.C.G.S. § 50-13.4(e) does not require the trial court to determine the value of personal property applied toward a child support arrearage; defendant did not offer any support for his contention that such a transfer is analogous to a transfer of real property; and defendant did not offer any authority for the Court of Appeals to supplement the statute with an additional requirement not found therein.

5. Child Custody and Support—support—willful refusal to pay

The trial court did not err by finding that defendant had willfully failed to pay any child support without excuse where defendant presented evidence of his inability to find employment. The trial court was not required to believe defendant's testimony and the trial court's finding was supported by evidence in the record.

6. Child Custody and Support—attorney fees findings—plaintiffs expenses

A child support and custody case awarding attorney fees to plaintiff was remanded for additional findings where the trial court made no findings as to plaintiff's expenses or her assets and estate. Defendant cited no authority for the proposition that the trial court had to make findings about his ability to pay before it could award attorney's fees to plaintiff, and the North Carolina Supreme Court has held that a determination of whether a party has sufficient means to defray the necessary expenses of the action does not require a comparison of the relative estates of the parties.

Appeal by defendant from order entered 16 October 2012 by Judge Christopher B. McLendon in Beaufort County District Court. Heard in the Court of Appeals 11 December 2013.

Pritchett & Burch, PLLC, by Lloyd C. Smith, Jr., Lloyd C. Smith, III, and R. Gray Jernigan for plaintiff-appellee.

Ward and Smith, P.A., by John M. Martin, for defendant-appellant.

STEELMAN, Judge.

The trial court did not err by denying visitation with the minor children to defendant. The trial court did not err by ordering that plaintiff was entitled to child support or by imputing income to defendant. The order of the trial court is remanded for additional findings on the

amount of income to be imputed to defendant and the amount of retroactive child support. The trial court did not err by transferring a vehicle to plaintiff as part of defendant's child support arrearage without calculating the value of the vehicle. The trial court's award of attorney's fees to plaintiff included the findings of fact required by N.C. Gen. Stat. § 50-13.6, and the trial court did not err in calculating a reasonable amount of attorney's fees. However, we remand this issue to the trial court for findings as to plaintiff's reasonable expenses as they pertain to her ability to pay for counsel.

I. Factual and Procedural Background

Plaintiff Alana Respess and defendant Todd Respess were married on 22 August 1986, separated in 2006, and were divorced on 15 June 2009. They have four children: Jessica, born in 1987; Amanda, born 1993; Allysa, born 1998; and Noah, born in 2002. In 2005 defendant admitted to plaintiff that he had engaged in inappropriate sexual activity with Jessica, and on 3 May 2007 defendant pled guilty to five felony counts of indecent liberties with a child. In Case No. 05 CRS 54090, he was sentenced to 16 to 24 months imprisonment, suspended for 36 months of supervised probation on condition that he register as a sex offender, submit to electronic monitoring, have only supervised visitation with his children, and serve a four month active sentence. This sentence was completed in December 2009. In Case No. 07 CRS 1209, defendant pled guilty to four additional counts of indecent liberties, and was sentenced to consecutive terms of 16 to 24 months imprisonment, with the first to begin at the expiration of the active sentence in 05 CRS 54090. The four sentences were suspended on the same terms as in 05 CRS 54090, with the sentences to expire on 28 August 2011, 27 April 2013, 27 December 2015, and 26 April 2017.

On 7 May 2007 plaintiff filed a complaint seeking temporary and permanent custody of the three minor children (Jessica reached majority in 2005). Plaintiff alleged that defendant had violated the conditions established by the Beaufort County DSS for visitation and that he was not "a fit and proper person" to have custody of the children. In his answer, defendant counterclaimed, seeking custody, child support,[1] and attorney's fees. In her reply, plaintiff requested that defendant be denied all contact with the minor children. On 21 May 2008 plaintiff

1. On 12 June 2007 the minor children's paternal grandparents (intervenors) moved to intervene and sought visitation with the minor children. Their motion was granted on 6 August 2007. The trial court granted the intervenors visitation. The intervenors are not a party to this appeal.

filed a complaint for divorce, child support, equitable distribution, and attorney's fees. In his answer, defendant denied the material allegations of plaintiff's complaint and counterclaimed for child support, equitable distribution, and attorney's fees. Plaintiff filed a reply on 25 August 2008. The parties were granted a divorce on 15 June 2009.

On 16 October 2012 the trial court entered an order on the issues of child custody, child support, visitation, and the attorney's fees associated with litigation of these issues. At that time only Alyssa and Noah were minors. The provisions of the court's order concerning custody, visitation, and prospective child support apply only to those two children. The court made findings concerning defendant's sexual abuse of Jessica and his subsequent behavior towards her and his other children, and concluded that it would be "totally inappropriate" and detrimental to the best interests of the children for defendant to have "visitation or custodial relationships of any type" with the minor children. The trial court also made findings concerning the effect of defendant's sexual abuse upon his employment situation, and found that it was appropriate for the court to impute an income of approximately $50,000 a year to defendant, an amount that was about half of his previous annual earnings. The trial court concluded that plaintiff was entitled to retroactive and prospective child support, and to attorney's fees.

Defendant appeals.

II. Denial of Visitation to Defendant

[1] In his first argument, defendant contends that the trial court committed reversible error by denying him visitation with the minor children. We disagree.

A. Standard of Review

"Under our standard of review in custody proceedings, 'the trial court's findings of fact are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary.' Whether those findings of fact support the trial court's conclusions of law is reviewable *de novo*." *Mason v. Dwinnell*, 190 N.C. App. 209, 221, 660 S.E.2d 58, 66 (2008) (quoting *Owenby v. Young*, 357 N.C. 142, 147, 579 S.E.2d 264, 268 (2003) (other citation omitted). "A trial court's unchallenged findings of fact are 'presumed to be supported by competent evidence and [are] binding on appeal.' If the trial court's uncontested findings of fact support its conclusions of law, we must affirm the trial court's order." *Mussa v. Palmer-Mussa*, 366 N.C. 185,

191, 731 S.E.2d 404, 409 (2012) (quoting *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (other citation omitted).

B. Analysis

Defendant argues, based on the holding of *Moore v. Moore*, 160 N.C. App. 569, 587 S.E.2d 74 (2003), that the trial court did not comply with the provisions of N.C. Gen. Stat. § 50-13.5(i), and contends the trial court's finding that it was not in the children's best interests to have visitation with him was not supported by its other findings.

Under N.C. Gen. Stat. § 50-13.1(a) "the word 'custody' shall be deemed to include custody or visitation or both." It is long-established that a trial court's determination of child custody, including visitation, must be guided by the best interests of the child:

> [W]e apprehend the true rule to be that the court's primary concern is the furtherance of the welfare and best interests of the child and its placement in the home environment that will be most conducive to the full development of its physical, mental, and moral faculties. All other factors, including visitorial rights of the other applicant, will be deferred or subordinated to these considerations[.]

Griffith v. Griffith, 240 N.C. 271, 275, 81 S.E.2d 918, 921 (1954). This standard is incorporated in N.C. Gen. Stat. § 50-13.2(a), which directs the trial court to "award the custody of [a] child to such person . . . as will best promote the interest and welfare of the child."

It is also well-established that "the applicable standard of proof in child custody cases is by a preponderance, or greater weight, of the evidence." *Speagle v. Seitz*, 354 N.C. 525, 533, 557 S.E.2d 83, 88 (2001) (citing *Jones v. All American Life Ins. Co.*, 312 N.C. 725, 733, 325 S.E.2d 237, 241 (1985)).

Although courts seldom deny visitation rights to a non-custodial parent, a trial court may do so if it is in the best interests of the child:

> [T]he welfare of a child is always to be treated as the paramount consideration[.] . . . Courts are generally reluctant to deny all visitation rights to the divorced parent of a child of tender age, but it is generally agreed that visitation rights should not be permitted to jeopardize a child's welfare.

Swicegood v. Swicegood, 270 N.C. 278, 282, 154 S.E.2d 324, 327 (1967) (citing *Griffin v. Griffin*, 237 N.C. 404, 75 S.E. 133 (1953)). *See also*, *In re*

Custody of Stancil, 10 N.C. App. 545, 551, 179 S.E.2d 844, 848-49 (1971) (" 'The rule is well established in all jurisdictions that the right of access to one's child should not be denied unless the court is convinced such visitations are detrimental to the best interests of the child.' ") (quoting *Willey v. Willey*, 253 Iowa 1294, 1302, 115 N.W. 2d 833, 838 (1962)). This principle is codified in N.C. Gen. Stat. § 50-13.5(i), which provides that:

> In any case in which an award of child custody is made in a district court, the trial judge, prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child. (emphasis added).

The statutory language is straightforward and unambiguous and requires that if a trial court does not grant reasonable visitation to a parent, its order must include a finding either that the parent is "an unfit person to visit the child" or that visitation with the parent is "not in the best interest of the child." Although our Supreme Court has not issued an opinion discussing this statute, during the past 30 years this Court has issued numerous opinions applying N.C. Gen. Stat. § 50-13.5(i). For example, in *King v. Demo*, 40 N.C. App. 661, 666-667, 253 S.E.2d 616, 620 (1979), we stated that:

> Unless the child's welfare would be jeopardized, courts should be generally reluctant to deny all visitation rights to the divorced parent of a child of tender age. Moreover, G.S. 50-13.5(i) provides [that] . . . "prior to denying a parent the right of reasonable visitation, [the trial court] shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child."

(citing *Swicegood*, and *Stancil*). And, in *Johnson v. Johnson*, 45 N.C. App. 644, 647, 263 S.E.2d 822, 824 (1980), we held that:

> In awarding visitation privileges the court should be controlled by the same principle which governs the award of primary custody, that is, that the best interest and welfare of the child is the paramount consideration. . . . G.S. 50-13.5(i) provides that "[i]n any case in which an award of child custody is made in a district court, the trial judge, prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being

> denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child."

(citing *Swicegood*). During the 33 years since *Johnson* was decided, we have consistently followed both its application of the best interests standard to disputes between parents regarding child custody and visitation, and its acceptance of the plain language of N.C. Gen. Stat. § 50-13.5(i). *See*, *e.g.*, *Correll v. Allen*, 94 N.C. App. 464, 471, 380 S.E.2d 580, 584 (1989) ("Visitations may be denied if visitation is not in the child's best interest.") (citation omitted); *Raynor v. Odom*, 124 N.C. App. 724, 733, 478 S.E.2d 655, 660 (1996) ("G.S. 50-13.5(i) requires that 'the trial judge prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interests of the child.' "); and *Maxwell v. Maxwell*, 212 N.C. App. 614, 622, 713 S.E.2d 489, 495 (2011) ("Our General Assembly has provided that: '. . . prior to denying a parent the right of reasonable visitation, [the trial court] shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child.' N.C. Gen. Stat. § 50-13.5(i) (2009)"). Thus, "it is generally agreed that visitation rights should not be permitted to jeopardize a child's welfare." *Swicegood*, 270 N.C. at 282, 154 S.E. 2d at 327.

In the present case, the trial court found, as required by N.C. Gen. Stat. § 50-13.5(i), that it would not be in the children's best interests to have any visitation with defendant. This ultimate finding of fact was supported by numerous evidentiary findings of fact, including the following:

. . .

> 12. The Court had the opportunity to observe the demeanor of each of the witnesses called by the parties and to hear their testimony.
>
> 13. The Court formed opinions as to the veracity of each witness having had the occasion to observe said witnesses and to hear their testimony.
>
> 14. On August 4, 2005 . . . the Defendant . . . confessed to [plaintiff] that he had engaged in inappropriate sexual behavior with Jessica Respess. . . .

. . .

17. In 2007, the Plaintiff . . . move[ed] to Kansas[.].

. . .

30. After the revelations of August 4, 2005 to the Plaintiff by the Defendant, [law enforcement authorities] . . . began a criminal investigation of the Defendant[.]

31. On August 18, 2005, the Defendant made a voluntary statement to Investigators . . . regarding his voluntary sexual acts with his minor daughter, Jessica.

32. Said voluntary statement, which was . . . acknowledged to be true and accurate during his testimony by the Defendant is incorporated herein[.]

. . .

34. In March of 2002 . . . Defendant slept in the same bed with Jessica who . . . [was] 14 years of age. . . . Between February 2003 and August 2004, the Defendant touched Jessica on her bare breasts many times, kissed Jessica's breasts on occasion, and rubbed Jessica's vaginal area numerous times. The Defendant estimates that he put his finger inside of Jessica's vagina and kissed her breasts on at least ten occasions.

35. Between August 2004 and August 18, 2005, the Defendant touched Jessica's breast more than ten times, rubbed her vaginal area ten to twelve times, inserted his finger inside of Jessica's vaginal area ten or twelve times, and kissed her bare breasts three or more times.

36. The Defendant allowed or caused Jessica to have an orgasm while riding straddled on top of him a number of times.

37. The Defendant was charged with multiple sex offenses and indecedent liberties with a minor child in October of 2005 in Beaufort County.

. . .

43. The Defendant was ordered by the Department of Social Services as conditions of being able to visit with his children not to be alone with the children out of the presence of the Plaintiff, not to kiss the children on the lips, not to allow them to sit on his lap . . . [and] not to

otherwise engage any type of physical touching or activity that could be determined to be sexual grooming. During the year of 2006, the Defendant . . . engaged in these prohibited activities.

. . .

45. Amanda Respess, who is now 18 years of age but is still in high school, testified as did her younger sister, Allysa. Both of these individuals gave forthright testimony which is highly creditable.

. . .

47. Based upon the testimony of Amanda Respess and Allysa Respess, which the Court finds to be creditable, the Court determines that the Defendant engaged in the following behaviors:

A. Would rub their chest to awaken them in the morning, although, they were of an age to have developed breasts.

B. Would rub lotion on their backs and their naked buttocks under the pretense of making sure their skin was soft.

C. Would spend[] hours combing their hair just as he had previously done with Jessica.

D. After the Defendant was separated from the home in August of 2005, he suggested to Amanda that, since she was a minor and an excellent shot, that an accidental shooting of the Plaintiff, her mother, would be appropriate. . . .

E. Saw both children at inappropriate times and places in violation of the restrictions placed on his visitation[.] . . .

F. Would take the minor child, Allysa, by himself to a barn behind [her] residence . . . and would threaten Allysa with physical punishment . . . if she revealed that he had taken her away from the family unit.

48. Amanda and Allysa Respess both testified that they wanted no contact with the Defendant, their father, of any type. . . .

. . .

52. After the Defendant was indicted on the multiple sexual charges . . . three men who belonged to the same church as [the Intervenors] and the Defendant, went to see the Defendant at his trailer[.] . . .

53. In this meeting . . . the Defendant stated that he "never molested anyone who hadn't reached puberty" and further stated that if "he wished to live with his daughter, it was no one else's business."

54. Between November 2005 and . . . July 2007, Judy Kilpatrick, a Department of Social Services case worker, had . . . conversations with the Defendant[, who] . . . told [her] many disturbing things which included but were not necessarily limited to the following:

A. He had a love affair with Jessica and he fell in love with her.

B. Jessica came to him and pursued him.

C. Jessica was a better wife than the Plaintiff and that he would like to have a wife like her.

D. The Plaintiff didn't satisfy his sexual needs and this was the reason he was involved with Jessica.

E. The Defendant stated "[Alana] was the problem" and the reason he engaged in sexual behavior with his minor child, Jessica.

F. The Defendant referred to his daughter, Jessica Respess, when she was a minor with the nickname "Luscious Lips" and admitted kissing her and his other children directly on the lips and nibbling with his teeth on Jessica's lower lip.

55. The Defendant also . . . told the Plaintiff . . . that the problems arising out of his destructive behavior with his daughter were the fault of the Plaintiff.

56. The Defendant, after he was charged with criminal indecent liberties . . . left notes with his daughter, Jessica, suggesting how she might testify so that his behavior did not look so bad.

. . .

58. The Defendant also, during the period of time when he was not supposed to write to or communicate with his minor children, sent messages to the minor children[.] . . .

59. The Plaintiff introduced numerous hand-written letters and notes from the Defendant to his minor children indicating that he still did not see anything wrong with what he had done, which . . . were written and delivered in violation of the restrictions imposed upon communication between the [defendant] and his children[, and] . . . contained [inappropriate] language[.] . . .

60. On May 3, 2007, the Defendant entered pleas of guilty to five counts of indecent liberties with the minor child, Jessica Respess.

61. . . . [In] File Number 05 CRS 54090, he [pled] guilty to a Class F, Level 1 Felony and was sentenced to . . . [16 to 24] months of an active sentence suspended for thirty six months of supervised probation upon the condition that he register as a sex offender, submit to electronic monitoring, have supervised visitation only with his children, and serve a four month active sentence in jail. This sentence expired December 29, 2009.

62. . . . [In] File Number 07 CRS 1209 in Count 1, he [pled] guilty to the charge of indecent liberties . . . [and received the same sentence as in File No. 54090,] to run at the expiration of the 05 CRS 54090 and which sentence was suspended on the same terms and conditions as the sentence handed down in O5 CRS 54090. . . . [T]his sentence would expire on August 28, 2011.

63. In this same criminal case, the Defendant [pled] guilty to a second count of indecent liberties . . . and [received] an identical sentence . . . [that] would run at the expiration of the active sentence in Count 1 and . . . expire on April 27, 2013.

64. In this same criminal case, the Defendant [pled] guilty to a third count of indecent liberties . . . and was sentenced to an identical sentence as in the first count . . . [to] run at the expiration of the active sentence in Count 2 and . . . expire on December 27, 2015.

65. In this same criminal case, the Defendant [pled] guilty to a fourth count of indecent liberties . . . and was sentenced to an identical sentence as in the first count . . . [to] run at the expiration of the active sentence in Count 3 and . . . expire on April 26, 2017.

66. If the Defendant were to have unsupervised visitation or custody as he sought in his counterclaim, he would be in violation of the terms of the Superior Court Order suspending his active sentences.

67. As a condition of the sentence imposed in . . . file number 05 CRS 54090, the Defendant served an active prison sentence . . . from May 2007 through December 2007.

. . .

71. Amanda Respess, having a date of birth of May 25, 1993 . . . [has] health problems as she has developed Neurofibromatosis, which is a disease which affects the nerve endings in the brain[.] . . .

. . .

75. Allysa Respess . . . is a very mature 13 year old girl who testified creditably in Court. . . .

. . .

77. The minor child, Noah, is in the fourth (4th) grade. He is very energetic and enjoys . . . scholastic and community activities[.]

. . .

80. The three minor children, Amanda, Allysa, and Noah, are doing extraordinarily well in Smith Center, Kansas, and their environment should not be disturbed.

81. The Plaintiff took the children to family counseling . . . with Cyndee Fintel who spoke to the Court's expert, Dr. Harold May, and recommended that there be no visitation between the minor children and the Defendant.

. . .

85. Dr. Harold May, Ph.D., of the Carolina Center . . . testified as the Court's appointed expert.

. . .

89. Dr. May has not seen the minor children in over three years and six months as of the date of this hearing.

. . .

91. The present therapist . . . for the Defendant is Michael Doughtie, who . . . testified that the Defendant . . . viewed Jessica more as a wife than as a daughter[, and that] . . . the sexual abuse of Jessica had begun at least in 1998.

92. Mr. Doughtie also testified creditably that as recently as June of 2010, the Defendant expressed concerns about "Jessica getting married" and that the Defendant was "losing her." These remarks were further evidence that the Defendant had made Jessica Respess, in his mind, both a mother and a wife figure.

93. These comments made to Mr. Doughtie combined with the Defendant's other actions such as grooming the minor children, Amanda and Allysa, are creditable and strong evidence indicating that the Defendant should never have any contact with his three younger children.

94. The Court rejects the suggestions of Dr. May that the children should have any contact with the Defendant as it is not in the children's best interest so to do.

. . .

125. The Defendant engaged in a prolonged, deliberate, and willful course of sexually abusing Jessica Respess.

. . .

146. As a further mixed finding of fact and conclusion of law, the Court concludes that the Defendant's . . . sexual molestation of his oldest daughter over a period of not less than five (5) years, his refusal to accept responsibility for it, his continued obsession with his minor daughter[,] . . . his grooming behaviors to his two youngest daughters, the threats he made to his youngest daughter[], and his refusal to accept ultimate responsibility make him a totally inappropriate person to have visitation or custodial relationships of any type with his minor children, and the Court finds as a mixed finding of fact and conclusion of law

> that it would be actually adverse to any good interest of the minor children for the Defendant to have any contact whatsoever, and the Court must be vigilant in preventing the same.

We hold that the trial court made the finding required by N.C. Gen. Stat. § 50-13.5(i) that it was not in the best interests of the minor children that defendant have visitation. This finding was supported by other, unchallenged, findings, and the trial court did not err by denying visitation to defendant.

In seeking to persuade us to reach a contrary conclusion, defendant relies primarily on the case of *Moore v. Moore*, 160 N.C. App. 569, 587 S.E.2d 74 (2003), which he contends is "controlling" and requires us to reverse the trial court. After careful review, we conclude that *Moore* is not dispositive of this issue.

Moore arose from a custody dispute between the divorced parents of a minor child. The plaintiff-father's visitation rights were suspended after the child disclosed sexual contact between the plaintiff and the child. The trial court denied the plaintiff's motion to reinstate visitation and found that it would not be in the child's best interests for plaintiff's visitation to be reinstated. *Moore*, 160 N.C. App. at 571, 587 S.E.2d at 75. On appeal, this Court reversed the trial court, based on application of a new standard for a trial court's denial of visitation rights, and held for the first time that (1) a trial court's denial of visitation is tantamount to termination of parental rights, and therefore requires the trial court to apply the "clear, cogent, and convincing" evidence standard applicable to termination cases; (2) to comply with N.C. Gen. Stat. § 50-13.5(i), a trial court must apply the standard applicable to a custody dispute between a parent and a non-parent, and may not apply the best interests of the child standard absent a written finding that the parent was unfit or had engaged in conduct inconsistent with his protected status as a parent; and (3) the trial court must state that these findings were based on clear, cogent, and convincing evidence. *Id.* at 573-74, 584 S.E.2d at 76.

In this case, the trial court found that visitation between defendant and the minor children was not in the children's best interest, but did not find that defendant was unfit or that his conduct was inconsistent with his protected parental status, and did not state that its decision to deny visitation was based on clear, cogent, and convincing evidence. Defendant argues that the trial court's ruling did not comply with the dictates of *Moore*. However, we conclude that the standard articulated

in *Moore* directly conflicts with prior holdings of this Court and our Supreme Court and therefore does not control our decision in the instant case.

"According to well-established law, '[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.' " *State v. Perry*, __ N.C. App. __, __, 750 S.E.2d 521, 534 (quoting *In re Appeal of Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989)), *disc. review denied*, __ N.C. __, 749 S.E.2d 852 (2013). Thus, as a general rule, we are bound by prior opinions of this Court.

However, this Court has no authority to reverse existing Supreme Court precedent. *See Rogerson v. Fitzpatrick*, 121 N.C. App. 728, 732, 468 S.E.2d 447, 450 (1996) ("It is elementary that this Court is bound by holdings of the Supreme Court [of North Carolina]") (citation omitted), and *Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888 (1985) (the Court of Appeals lacks authority to overrule decisions of the Supreme Court of North Carolina and has a "responsibility to follow those decisions, until otherwise ordered by the Supreme Court"). "Further, our Supreme Court has clarified that, where there is a conflicting line of cases, a panel of this Court should follow the older of those two lines." *State v. Gardner*, __ N.C. App. __, __, 736 S.E.2d 826, 832 (2013) (citing *In re R.T.W.*, 359 N.C. 539, 542 n.3, 614 S.E.2d 489, 491 n.3 (2005), *superseded by statute on other grounds as recognized in In re M.I.W.*, 365 N.C. 374, 376, 722 S.E.2d 469, 472, *rehearing denied*, 365 N.C. 568, 724 S.E.2d 512 (2012)).

As discussed above, numerous cases from both this Court and our Supreme Court have long held that issues of child custody and visitation are determined by the best interest of the child, based upon the preponderance of the evidence. In addition, this Court has consistently interpreted N.C. Gen. Stat. § 50-13.5(i) as written, without adding additional requirements to the statute's text or deviating from the general rules governing child custody. The holding of *Moore* diverged sharply from this controlling precedent in significant respects.

First, *Moore* directed trial courts to apply to a custody dispute between a child's parents the standard applicable to a dispute between a parent and a non-parent. In *Petersen v. Rogers*, 337 N.C. 397, 403-04, 445 S.E.2d 901, 905 (1994), our Supreme Court held that, in a custody dispute between a child's natural parent and a non-parent, "absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children,

the constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail." However, in *Owenby*, 357 N.C. at 145, 579 S.E.2d at 266-67, which was decided before *Moore*, our Supreme Court explicitly ruled that *Petersen* was inapplicable to a custody dispute between parents:

> We acknowledged the importance of this liberty interest [of parents] nearly a decade ago when this Court held: "absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally protected paramount right of parents to custody, care, and control of their children must prevail." . . . Therefore, unless a natural parent's conduct has been inconsistent with his or her constitutionally protected status, application of the "best interest of the child" standard in a custody dispute with a nonparent offends the Due Process Clause of the United States Constitution. Furthermore, the protected right is irrelevant in a custody proceeding between two natural parents, whether biological or adoptive, or between two parties who are not natural parents. In such instances, the trial court must determine custody using the "best interest of the child" test.

(emphasis added) (quoting *Petersen*, 337 N.C. at 403-04, 445 S.E.2d at 905, and citing *Price v. Howard*, 346 N.C. 68, 78-79, 484 S.E.2d 528, 534 (1997) (internal citation omitted), *Quilloin v. Walcott*, 434 U.S. 246, 255, 54 L. Ed. 2d 511, 520, 98 S. Ct. 549 (1978), and *Adams v. Tessener*, 354 N.C. 57, 61, 550 S.E.2d 499, 502 (2001)). *Moore*'s holding that the *Petersen* presumption applies to a trial court's decision to deny visitation rights to a non-custodial parent contradicts our Supreme Court's holding that *Petersen* is "irrelevant" to a dispute between parents and that "[i]n such instances, the trial court must determine custody using the 'best interest of the child' test." *Id.*

Moore also failed to state a substantive or precedential basis for its holding that an order denying visitation was the functional equivalent of the termination of parental rights, and therefore required a trial court to apply the standards for termination proceedings. Our jurisprudence has long recognized significant differences between a child custody order, which is subject to modification upon a showing of changed circumstances, and orders for adoption or for termination of parental rights, which are permanent. *See, e.g.*, *Stanback v. Stanback*, 287 N.C. 448, 456, 215 S.E.2d 30, 36 (1975) ("A judicial decree in a child custody and support matter is subject to alteration upon a change of circumstances

affecting the welfare of the child and, therefore, is not final in nature.") (citations omitted), and *Owenby*, 357 N.C. at 145, 579 S.E.2d at 267 ("[A] termination of parental rights order completely and permanently severs all rights and obligations of the parent to the child and the child to the parent[.]") (citation omitted).

We also note that in *In re T.K.*, *D.K.*, *T.K.*, *& J.K.*, 171 N.C. App. 35, 613 S.E.2d 739, *aff'd* 360 N.C. 163, 622 S.E.2d 494 (2005), we affirmed a trial court's permanency planning order, holding that the trial court properly made findings as to the best interest of the children. Judge Tyson dissented in part, and argued that the trial court had failed to follow the standards set out in *Moore*, that denial of visitation rights "effectively terminated respondent's parental rights," *T.K.*, 171 N.C. App. at 42, 613 S.E.2d at 743, and that the "trial court erred by denying respondent all visitation rights . . . without finding her to be unfit or engaging in conduct inconsistent with her parental rights. Absent proper findings supported by clear, cogent, and convincing evidence, the trial court's conclusions of law are erroneous[.]" *Id.* at 44, 613 S.E.2d at 744-45 (citing *Moore*). Our Supreme Court rejected this opportunity to ratify or adopt the holding of *Moore*, and affirmed the majority opinion.

Prior to the decision in *Moore*, binding precedent consistently held that (1) the standard in a custody dispute between a child's parents is the best interest of the child; (2) the applicable burden of proof is the preponderance of the evidence; (3) the principles that govern a custody dispute between a parent and a non-parent are irrelevant to a custody action between parents; and (4) a trial court complies with N.C. Gen. Stat. § 50-13.5(i) if it makes the finding set out in the statute. *Moore* does not acknowledge these cases or articulate a basis on which to distinguish it from earlier cases. We conclude that *Moore* does not control the outcome of this case, and that defendant is not entitled to relief based on *Moore*.

Defendant also argues that the trial court's finding that visitation between defendant and the minors would not be in the children's best interest is not supported by its other findings. We reject this argument and note the trial court's extensive findings, quoted above. We conclude that the trial court did not commit reversible error by denying defendant visitation and that the trial court's ruling in this regard should be affirmed.

III. Child Support

In his next argument, defendant contends that the trial court erred by (1) calculating retroactive child support based upon the child support guidelines, rather than evidence of plaintiff's actual expenditures;

(2) applying the 2011 guidelines to his retroactive child support obligation, rather than the 2006 guidelines; (3) imputing an amount of income to him that was not supported by proper findings; (4) awarding plaintiff a vehicle without determining its value; and (5) finding that defendant had willfully refused to pay any child support without excuse or explanation. We agree in part.

A. Calculation of Retroactive Child Support

[2] " 'Child support awarded prior to the time a party files a complaint is properly classified as retroactive child support. . . . Child support awarded, however, from the time a party files a complaint for child support to the date of trial is . . . [termed] prospective child support[.]' " *Carson v. Carson*, 199 N.C. App. 101, 105, 680 S.E.2d 885, 888 (2009) (quoting *Taylor v. Taylor*, 118 N.C. App. 356, 361, 455 S.E.2d 442, 446 (1995), *rev'd on other grounds*, 343 N.C. 50, 468 S.E.2d 33 (1996) (internal citations omitted)).

N.C. Gen. Stat. § 50-13.4(c) states that the trial "court shall determine the amount of child support payments by applying the presumptive guidelines established pursuant to subsection (c1) of this section." The guidelines in effect at the time of this hearing state that

> [i]n cases involving a parent's obligation to support his or her child for a period before a child support action was filed (*i.e.*, cases involving claims for "retroactive child support" or "prior maintenance"), a court may determine the amount of the parent's obligation (a) by determining the amount of support that would have been required had the guidelines been applied at the beginning of the time period for which support is being sought, or (b) based on the parent's fair share of actual expenditures for the child's care. . . .

Standing alone, this provision would allow a trial court to calculate retroactive child support by reference to the guidelines. However, in *Robinson v. Robinson*, 210 N.C. App. 319, 333, 707 S.E.2d 785, 795 (2011), we held that " '[r]etroactive child support payments are only recoverable for amounts actually expended on the child's behalf during the relevant period.' Therefore, a party seeking retroactive child support must present sufficient evidence of past expenditures made on behalf of the child, and evidence that such expenditures were reasonably necessary." (quoting *Rawls v. Rawls*, 94 N.C. App. 670, 675, 381 S.E.2d 179, 182 (1989), and citing *Savani v. Savani*, 102 N.C. App. 496, 501, 403 S.E.2d 900, 903 (1991)).

The rule stated in the Guidelines conflicts with the holding of *Robinson*. We have held that:

> Nowhere in the statute does the legislature authorize the Conference to override existing case law in formulating the Guidelines. Although the Guidelines are formulated by the Conference of Chief District Judges pursuant to authority granted them by the legislature in N.C. Gen. Stat. § 50-13.4(c1), the Conference is not a legislative body, and the Guidelines are not codified in the North Carolina General Statutes. . . . Therefore, we find that if the trial court follows the Guidelines in awarding retroactive child support in cases involving unincorporated separation agreements, instead of controlling case law, the court is in error.

Carson, 199 N.C. App. at 107, 680 S.E.2d at 889. *Carson* and *Robinson*, construed together, require that an award of retroactive child support be supported by evidence of plaintiff's actual expenditures for the children during the period for which she seeks retroactive child support.

Plaintiff acknowledges the cases cited above, but argues that "the Court of Appeals was mistaken in its decision in *Robinson*." However, we "are bound by opinions of prior panels of this Court deciding the same issue." *Easton v. J.D. Denson Mowing*, 173 N.C. App. 439, 441, 620 S.E.2d 201, 202 (2005) (citing *Civil Penalty*). We conclude that this issue is controlled by *Robinson* and *Carson*, and that the trial court's award of retroactive child support must be reversed and remanded for findings on plaintiff's actual expenditures for the children during the relevant time period.

B. Application of 2011 Guidelines

Next, defendant argues that the trial court erred by calculating his retroactive child support obligation using the 2011, as opposed to the 2006, guidelines. However, as we have held that the trial court erred by using the guidelines to calculate retroactive child support, we do not reach this argument.

C. Imputation of Income

[3] Defendant argues next that the trial court erred in determining the amount of income it imputed to defendant. The trial court imputed to defendant an annual income of approximately $50,000. Defendant argues that this amount was not supported by the trial court's other findings or

the evidence. We agree and remand for the trial court to make additional findings as to defendant's earning ability.

"Generally, a party's ability to pay child support is determined by that party's actual income at the time the award is made. A party's capacity to earn may, however, be the basis for an award where the party 'deliberately acted in disregard of his obligation to provide support.' Before earning capacity may be used as the basis of an award, there must be a showing that the actions reducing the party's income were taken in bad faith to avoid family responsibilities. . . . [T]his showing may be met by a sufficient degree of indifference to the needs of a parent's children." *McKyer v. McKyer*, 179 N.C. App. 132, 146, 632 S.E.2d 828, 836 (2006) (citing *Atwell v. Atwell*, 74 N.C. App. 231, 235, 328 S.E.2d 47, 50 (1985), quoting *Sharpe v. Nobles*, 127 N.C. App. 705, 708, 493 S.E.2d 288, 290 (1997) (internal citation omitted), and citing *Bowers v. Bowers*, 141 N.C. App. 729, 732, 541 S.E.2d 508, 510 (2001)). In this case, defendant does not challenge the trial court's findings as to the effect of his intentional "course of sexually abusing" his daughter and the resultant loss of the licenses he needed to continue his previous career as a stockbroker and insurance agent, or the trial court's decision to impute income to him. What defendant does argue is that the trial court's ruling on the amount of income imputed to him was not supported by its findings. The court's findings on the issue of defendant's earning capacity include the following:

. . .

> 109. The Defendant earned a gross sum of One . . . ($100,000.00) in the year 2005 and if he had continued to [sell] insurance and be licensed as a . . . Stock Broker, he could have earned not less than . . . ($50,000.00) per year each year since that time.
>
> . . .
>
> 115. The Defendant has no living expenses as his wife, a banker with BB&T, apparently provides for him. . . .
>
> 116. The Defendant testified that he could not secure employment in his former employment as an insurance salesman or stock broker because of his felony convictions.
>
> 117. The Defendant reported Zero income tax in 2009 despite apparently working as a farrier and earning a gross income of . . . ($8,000.00). He also used business expenses

deductions in 2009 for a portion of his home which he admitted that he did not own or pay for.

118. In 2010, he indicated that he had lost . . . ($10,086,00) in income from his employment as a farrier, but this included . . . ($15,628.00) in car and truck expenses and . . . ($7,480.00) in supplies.

119. The Defendant's tax returns for 2009 and 2010 were not creditable evidence of his earning capacity.

. . .

124. In the present case, before his arrest and conviction, the Defendant father was employed as an insurance salesman and stock broker, and capable of earning a gross salary of at least . . . ($100,000.00) per year, a net salary of . . . ($50,000.00), or a monthly salary of . . . ($4,167.00) per month at a minimum.

. . .

132. . . . Defendant's income from all sources is imputed to be . . . ($4,167.00) per month.

The court found that defendant had previously earned $100,000 and imputed a current income of approximately $50,000, or half of his previous salary. However, the findings do not establish any basis for the court's imputation in 2011 of half of what he earned in 2005, as opposed to some other fraction or amount. "[T]he findings of fact on this issue are insufficient to support the trial court's determination of *the amount of income* that should be imputed to [defendant]. A trial court must 'make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law.' " *McKyer*, 179 N.C. App. at 147-48, 632 S.E.2d at 837 (quoting *Spicer v. Spicer*, 168 N.C. App. 283, 287, 607 S.E.2d 678, 682 (2005)) (emphasis in original). We conclude that the court's determination that it was appropriate to impute income to defendant should be upheld, but that the order must be remanded for findings detailing how the trial court arrives at the amount of income to be imputed to defendant.

D. Transfer of Vehicle to Plaintiff

[4] Defendant argues next that the trial court erred by awarding plaintiff a 1997 Ford Expedition as an "additional form of child support" without

determining the vehicle's value and deducting it from the child support award. We disagree.

Defendant cites N.C. Gen. Stat. § 50-13.4(e):

> (e) Payment for the support of a minor child shall be paid by lump sum payment, periodic payments, or by transfer of title or possession of personal property of any interest therein, or a security interest in or possession of real property, as the court may order. The court may order the transfer of title to real property solely owned by the obligor in payment of arrearages of child support so long as the net value of the interest in the property being transferred does not exceed the amount of the arrearage being satisfied. . . .

Defendant notes that if the trial court orders the transfer of real property in payment of child support arrearages it must determine the property's value. He argues that an "analogous situation exists here," that the trial court "should have determined the Vehicle's value and deducted that amount from the total child support award" and that the court's "failure to do so constitutes error." However, N.C. Gen. Stat. § 50-13.4(e) does not require the trial court to determine the value of personal property applied towards child support arrearage and defendant does not offer any support for his contention that such a transfer is "analogous" to a transfer of real property or any authority for us to supplement the statute with an additional requirement not found therein.

And, defendant does not dispute the trial court's finding of fact that:

> 144. The only vehicle the Plaintiff [had] available to her is a 1997 Ford Expedition until May 2010 which has 285,000 miles on it as of the date of this hearing which she has had since the parties' separation although this vehicle has been titled to the Defendant. She is seeking this vehicle as an additional form of child support from the Defendant. The Defendant has agreed for said in kind child support to be also paid since the Plaintiff has maintained all expenses of this vehicle. The Defendant will sign over title of said vehicle to the Plaintiff on or before June 15, 2012. . . .

Thus, defendant concedes that (1) the vehicle was fifteen years old and had 285,000 miles on it at the time of the hearing; (2) although it had been titled in his name, plaintiff had assumed responsibility for "all expenses" of the vehicle; and (3) he consented to transfer of the vehicle as an additional form of child support.

"[T]o obtain relief on appeal, an appellant must not only show error, but that appellant must also show that the error was material and prejudicial, amounting to denial of a substantial right that will likely affect the outcome of an action." *Starco, Inc. v. AMG Bonding & Ins. Servs.*, 124 N.C. App. 332, 335, 477 S.E.2d 211, 214 (1996) (citation omitted). Defendant does not assert any prejudice from the court's alleged error. In addition, defendant does not dispute that he consented to transfer the vehicle to plaintiff, a finding supported by his testimony. Given the defendant's failure to articulate a legal basis for interpreting N.C. Gen. Stat. § 50-13.4(e) in a manner not supported by the statute's text, any prejudice arising from the court's alleged error, or any reason to grant relief on the basis of a transfer to which he consented, we decline to hold that the court erred by transferring the 1997 vehicle to plaintiff without making a specific finding as to its value.

E. Failure to Pay Any Child Support After August 2006

[5] In defendant's next argument, he argues that the trial court erred by finding "that, although [he] has resources to pay some child support, he [had] 'willfully failed to pay any child support without excuse.' " Defendant does not dispute that he failed to pay any child support after August 2006, but argues that he presented evidence of his inability to find employment. However, the court was not required to believe defendant's testimony. We hold that this finding was supported by evidence in the record.

III. Attorney's Fees

[6] In his final argument, defendant contends that the trial court erred by awarding attorney's fees to plaintiff. Defendant argues that the trial court erred in finding that defendant had the ability to pay attorney's fees, basing its award of attorney's fees in part on its finding that defendant had acted in bad faith, and finding that plaintiff had insufficient means to pay attorney's fees. We agree in part.

1. Standard of Review

N.C. Gen. Stat. § 50-13.6 (2013) states that in any proceeding for child custody or support:

> [T]he court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is

> adequate under the circumstances existing at the time of the institution of the action or proceeding[.] . . .

"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.

Hennessey v. Duckworth,__ N.C. App. __, __, 752 S.E.2d 194, __ (2013) (quoting *Cameron v. Cameron*, 94 N.C. App. 168, 172, 380 S.E.2d 121, 124 (1989) (citations omitted). Pursuant to N.C. Gen. Stat. § 50-13.6, in a custody action, a trial court "has the discretion to award attorney's fees to an interested party when that party is (1) acting in good faith and (2) has insufficient means to defray the expense of the suit. The facts required by the statute must be alleged and proved[.] . . . Whether these statutory requirements have been met is a question of law, reviewable on appeal." *Hudson v. Hudson*, 299 N.C. 465, 472, 263 S.E.2d 719, 723 (1980).

2. Analysis

The trial court made the following findings:

> 1. This action for child custody was brought by the Plaintiff in good faith and she is without sufficient funds to defray the expenses of this custody lawsuit including all of her attorneys' fees.
>
> 2. As this is a proceeding for child support of the parties' three minor children, the Plaintiff may be entitled to the entry of an Order requiring the [defendant] to pay some or all of her reasonable attorneys' fees pursuant to N.C.G.S. Section 50-13.6.
>
> 3. The Defendant, who is the party who is going to be ordered to furnish support, has refused to provide support of any type, and has refused to provide support which is adequate under the circumstances existing at the time of the institution of this action or proceeding.

Defendant does not dispute that these findings meet the statutory requirements discussed above. He does not challenge the trial court's

determination of a reasonable amount of attorney's fees, which we affirm. However, defendant raises other arguments about the court's award of attorney's fees to plaintiff.

Defendant argues first that the trial court erred by finding that he "has resources" available to pay attorney's fees. Defendant directs our attention to evidence he presented tending to show that he faces economic challenges. However, the trial court was not required to find his evidence credible. He also argues that the trial court should not have considered the fact that his living expenses are being paid by his wife, because she has no legal obligation to support his children. However, "where a party's new spouse shares responsibility for the party's expenses and needs, it is proper for the court to consider income received by the new spouse[.]" *Harris v. Harris*, 188 N.C. App. 477, 487, 656 S.E.2d 316, 321-22 (2008) (citing *Wyatt v. Wyatt*, 35 N.C. App. 650, 651-52, 242 S.E.2d 180, 181 (1978).

The underlying premise of this argument is that before it could award attorney's fees to plaintiff, the trial court had to make findings about his ability to pay these fees. Defendant cites no authority for this proposition and our Supreme Court has held that " 'we do not believe that the determination of whether a party has sufficient means to defray the necessary expenses of the action requires a comparison of the relative estates of the parties' " and "that N.C.G.S. § 50-13.6 does not require the trial court to compare the relative estates of the parties[.]" *Van Every v. McGuire*, 348 N.C. 58, 59-60, 497 S.E.2d 689, 690 (1998) (quoting *Taylor*, 343 N.C. at 57, 468 S.E.2d at 37. We conclude that the trial court was not required to find that defendant "had resources" available in order to award attorney's fees to plaintiff, making it unnecessary for us to analyze the evidentiary support for this finding of fact.

Defendant also argues that the trial court erred by basing its award of attorney's fees on his "bad faith in requesting custody or visitation." This argument lacks merit. In Finding No. 145, the trial court stated that:

> 145. Moreover, the Court, as a mixed finding of fact and conclusion of law, determines that the Defendant's insistence upon a trial seeking custody or visitation of his children and defending against the claims of his former wife, the Plaintiff, for the same and for her claims of child support are in bad faith, not well taken, and he has adequate resources available to him to reimburse her for some or all of her attorney's fees.

Defendant concedes that "this Finding/Conclusion was not included in the findings related to the attorney's fees award[.]" There is no evidence that the trial court's award of attorney's fees to plaintiff was "based on" its passing reference to bad faith in this finding. Defendant is not entitled to relief based upon this argument.

Defendant also challenges the evidentiary support for the trial court's finding that plaintiff "is without sufficient funds to defray the expenses of this custody lawsuit including all of her attorneys' fees[.]" The trial court made the following findings regarding plaintiff's income, expenses, and estate:

. . .

> 102. The Plaintiff has been a nurse registered by the State of North Carolina from 1987 through 2007, and has been a Registered Nurse in Kansas from 1999 until [the] present.
>
> 103. The Plaintiff is presently employed with the Smith Center School District as the School Nurse. She also runs the concession stand to earn extra money. The Plaintiff's gross monthly earnings from all sources is . . . ($3,033.42). The Plaintiff has earned approximately . . . ($3,033.00) per month from all sources since August 2006.
>
> 104. The Plaintiff paid a total of . . . ($7,740.70) in premiums for the three minor children's, Amanda, Allysa, and Noah, health insurance coverage[.] . . .
>
> 105. The children were approved for Health Wave coverage on October 26, 2009, so the Plaintiff could secure health insurance on her three minor children at no additional cost.
>
> 106. The Plaintiff has sought to recover a portion of the out of pocket expenses paid by her . . . as a portion of the retroactive and prospective child support in the percentage of the Plaintiff's income to the Defendant's income as hereinafter determined and imputed by the Court.
>
> . . .
>
> 132. The Plaintiff's income from all sources is . . . ($3,033.00) per month[.]

The court's findings are sufficient with regards to plaintiff's income. However, the trial court made no findings as to her expenses or her

assets and estate. We remand for additional findings to support the trial court's finding that plaintiff had insufficient means to defray the cost of counsel.

Conclusion

We affirm the trial court's ruling denying defendant visitation with the minor children, its determination that plaintiff was entitled to child support, its ruling that it was proper to impute income to defendant, and its transfer of the 1997 vehicle to plaintiff. We reverse and remand the order with regard to the amount of retroactive child support to which plaintiff may be entitled, the amount of income that may be imputed to defendant, and for additional findings regarding plaintiff's expenses as it pertains to her claim for attorney's fees. In its discretion, the trial court may take such additional evidence as it deems necessary.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Judges STEPHENS and DAVIS concur.

STATE OF NORTH CAROLINA
v.
LAMAR MONQUEE CARPENTER, DEFENDANT

No. COA13-898

Filed 4 March 2014

1. Evidence—photographs—properly authenticated—relevant—not unduly prejudicial

The trial court did not commit plain error in a robbery case by admitting three photographs of defendant and his tattoos taken at the jail after his arrest. The photographs were properly authenticated and were relevant to the issue of the identity of defendant as the perpetrator. Furthermore, the trial court did not abuse its discretion by denying defendant's motion to exclude them under Rule 403. The photographs were probative of defendant's identity and were not unduly prejudicial as the trial court specifically found that it was unable to determine from the pictures that they were taken in a jail.

2. Robbery—with a dangerous weapon—sufficient evidence

The trial court did not err by denying defendant's motion to dismiss the charge of armed robbery. Taken in the light most favorable

to the State, the evidence was sufficient to convince a reasonable juror that defendant was one of the perpetrators of the armed robbery.

3. Constitutional Law—effective assistance of counsel—dismissed without prejudice—motion for appropriate relief

Defendant's argument that he received ineffective assistance of counsel, in violation of his Sixth Amendment rights, when his trial counsel failed to cross-examine the two eyewitnesses with prior inconsistent statements they had made to police and the prosecutor was dismissed without prejudice to his ability to raise it through a motion for appropriate relief.

Appeal by defendant from Judgments entered on or about 21 March 2013 by Judge V. Bradford Long in Superior Court, Forsyth County. Heard in the Court of Appeals 9 January 2014.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Aimee Margolis, for the State.

Unti & Lumsden LLP, by Sharon L. Smith, for defendant-appellant.

STROUD, Judge.

Lamar Carpenter ("defendant") appeals from judgments entered on or about 21 March 2013 after a Forsyth County jury found him guilty on two counts of robbery with a dangerous weapon and one count of possession of a firearm by a convicted felon. We conclude that defendant has failed to show error at his trial, but dismiss his ineffective assistance of counsel claim without prejudice to his ability to raise it by motion for appropriate relief.

I. Background

On 7 February 2011, defendant was indicted in Forsyth County for robbery with a dangerous weapon. This indictment was superseded on 23 January 2012 by one charging two counts of robbery with a dangerous weapon and again on 13 August 2012 by indictments charging two counts of robbery with a dangerous weapon and one count of possession of a firearm by a felon. Defendant pled not guilty and the case proceeded to jury trial.

At trial, the State's evidence tended to show that on 23 April 2010, Ahmed Khabiry and Shafic Andraos were working at a gas station and convenience store in Winston-Salem. Mr. Khabiry was working as

a manager and clerk, while Mr. Andraos, the owner of the store, was working in the back office. At around 9:00 or 9:30 that morning, a young man walked into the convenience store and attempted to use the ATM. Neither Mr. Khabiry nor Mr. Andraos recognized the man. That same man returned a few minutes later with a second man. Both men were wearing bandanas covering the lower half of their faces. Mr. Khabiry was outside sweeping the parking lot when he saw the men arrive. He started heading back inside to assist them when he noticed the first man was carrying a silver gun in his hand. Mr. Khabiry grabbed for the gun, but the second robber came up, pointed another silver gun at him, and pushed him inside. The first robber took Mr. Khabiry back behind the counter to the cash register, while the second robber went back to the office where Mr. Andraos was working.

Mr. Khabiry recognized the second robber as one of his regular customers, who he had nicknamed "Big Money," but did not recognize the first robber. He recognized "Big Money" from his build and voice, and also from his tattoo. In court, Mr. Khabiry identified defendant as the second robber and the man he knew as "Big Money."

The first robber told Mr. Khabiry to open the cash register, which he did, and then demanded Mr. Khabiry hand over his wallet. When Mr. Khabiry informed the first robber that he did not have a wallet on him, the robber told him to hand over whatever money he had in his pocket, which amounted to five dollars. The second robber took about $6,700 from the back office, where Mr. Andraos had been preparing the store's cash for deposit. Both robbers then left the store and Mr. Khabiry called the police.

Around 5 May 2010, the police asked Mr. Khabiry to look at two photo arrays, one of which contained defendant's photograph. The arrays were administered by an officer with no connection to the investigation and no knowledge of which photograph in the array was the suspect. Mr. Khabiry identified defendant as the regular customer who had robbed the store, stating he was "100 percent sure." He did not identify the man whom police suspected was the first robber.

Sometime in July 2010, defendant returned to the convenience store. Mr. Khabiry recognized him as the second robber and informed Mr. Andraos. Mr. Andraos went out to look at the car defendant was driving, wrote down the license plate number, and called the police. At trial, Mr. Andraos identified defendant as the man he saw in July whom Mr. Khabiry pointed out. Mr. Andraos testified that he noticed the same tattoo on defendant's arm in July as the one he saw on the second robber's arm, but that he did not really know defendant.

The State also introduced pictures taken of defendant while he was in jail that showed the tattoo on his right arm and still photographs taken by the store's surveillance cameras during the robbery. The surveillance camera photographs showed that the second robber had a tattoo on his forearm, but the photographs were not of sufficient quality to show the details of the tattoo.

At the close of the State's evidence, defendant moved to dismiss all of the charges against him and the trial court denied the motion. He then elected not to present evidence and renewed his motion to dismiss. Again, the trial court denied the motion. The jury found defendant guilty on two counts of robbery with a dangerous weapon and one count of possession of a firearm by a felon. The trial court sentenced defendant to two consecutive terms of 97-126 months imprisonment and one term of 19-23 months imprisonment. Defendant gave notice of appeal in open court.

II. Admission of Photographs

[1] Defendant first argues that the trial court erred in admitting three photographs of him and his tattoos taken at the jail after his arrest. He contends that the photographs were not properly authenticated, not relevant, and that the trial court erred in denying his motion to exclude them under Rule 403. We hold that the trial court did not err in admitting the photographs.

A. Standard of Review

At trial, defendant only objected to admission of the photographs under N.C. Gen. Stat. § 8C-1, Rule 403 (2011). Defendant did not raise either authentication or relevance below, but asks us to review the trial court's denial of his motion to exclude the photographs on those grounds for plain error.

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

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

Defendant did object on the basis that the evidence was inadmissible under Rule 403. We review the trial court's determination under Rule 403 for an abuse of discretion. *State v. Cunningham*, 188 N.C. App. 832, 836-37, 656 S.E.2d 697, 700 (2008). "An abuse of discretion results only where a decision is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision." *State v. Black*, 197 N.C. App. 731, 737, 678 S.E.2d 689, 693 (citation and quotation marks omitted), *app. dismissed*, 363 N.C. 657, 685 S.E.2d 108 (2009), *cert. dismissed*, 365 N.C. 208, 710 S.E.2d 38 (2011).

B. Authentication

"Photographs may be used as substantive evidence upon the laying of a proper foundation, N.C.G.S. § 8-97, and may be admitted when they are a fair and accurate portrayal of the place in question and are sufficiently authenticated." *Sellers v. CSX Transp., Inc.*, 102 N.C. App. 563, 565, 402 S.E.2d 872, 873 (1991). A photograph is authentic if there is "evidence sufficient to support a finding that the matter in question is what its proponent claims." N.C. Gen. Stat. § 8C-1, Rule 901(a) (2011).

Here, the photographs that defendant challenges are photographs taken of him, including his tattoo, while he was in custody in October 2010. Defendant argues that because the State introduced no evidence that defendant had that tattoo on 23 April 2010, the date of the robbery, the photographs were not what they purported to be. We disagree.

The custodial photographs did not purport to show defendant's arm at the time of the robbery. The photographs clearly show—and the State introduced them to show—that defendant had a tattoo on a particular place on his forearm at the time the photograph was taken. The officer who took the photographs testified about the procedure used to take them and testified that they fairly and accurately depicted defendant's tattoo as it appeared in October 2010. Indeed, defendant does not contest that the photographs fairly and accurately depict defendant's arm while he was in custody. Therefore, there is no authentication issue with the photographs under either N.C. Gen. Stat. § 8C-1, Rule 901(a) or N.C. Gen. Stat. § 8-97.

C. Relevance

Similarly, defendant argues that the custodial photographs were irrelevant because the State has failed to show that he had the tattoo on 23 April 2010. Defendant contends that the fact that he had a tattoo on his forearm in October 2010 is not probative at all as to identity. Again, we disagree.

" '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). "Evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue in the case." *State v. Whiteside*, 325 N.C. 389, 397, 383 S.E.2d 911, 915 (1989). A piece of evidence does not have to positively identify the perpetrator to be relevant to the issue of identity. *See State v. Collins*, 35 N.C. App. 250, 252, 241 S.E.2d 98, 99 (1978) ("Under the facts in this case it was not necessary that the victim give testimony positively identifying the clothing as that worn by the robber, only that it was similar."); *State v. Bass*, 280 N.C. 435, 449, 186 S.E.2d 384, 394 (1972) (holding that testimony identifying the jacket the defendant was wearing at his arrest as similar to that of the perpetrator was relevant and admissible).

Here, the photographs of defendant's tattoo taken after his arrest were relevant to proving his identity as the perpetrator. Detective Clark did testify that he could not make out what the tattoo said, in the surveillance camera still photographs but noted that he could tell it was a tattoo. Additionally, the surveillance camera photographs clearly show the location and general dimensions of the tattoo of the second robber. It would be reasonable for a juror to conclude that the photographs taken after defendant's arrest show a tattoo in approximately the same location and approximately the same size as that of the second robber. That defendant had a tattoo on his forearm in October 2010 similar to that of the second robber is at least some evidence that he was the second robber. Such evidence makes it "more probable" that defendant was the perpetrator "than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401. Therefore, the evidence is relevant to the issue of identity. *See Whiteside*, 325 N.C. at 397-98, 383 S.E.2d at 915-16 (holding that evidence that a pair of shoes owned by defendant matched the shoe prints found at the crime scene is relevant to identity, even if the witnesses were unsure if he was wearing those shoes on the night of the crime). "Once properly admitted, the weight to be given the evidence was a decision for the jury." *Id.* at 398, 383 S.E.2d at 916.

D. Rule 403

We have held that the photographs of defendant's tattoos were properly authenticated and relevant to identify the second robber. Now, we must address defendant's argument—the only one raised below—that the photographs are inadmissible under Rule 403 because "[a]ny probative value from the custodial photographs was outweighed by the danger of unfair prejudice and confusion of the issues."

Defendant first contends that the photographs had no probative value and tended to confuse the jury, largely repeating the same arguments made as to authentication and relevance. For the reasons discussed in the sections addressing those arguments, this argument is similarly unconvincing. Next, defendant argues that the photographs were unfairly prejudicial because they showed him in a jail setting. Defendant fails to highlight anything in the photographs that clearly identify where they were taken other than "some type of institutional setting" and the reflections of two officers.

> While all evidence offered against a party involves some prejudicial effect, the fact that evidence is prejudicial does not mean that it is necessarily unfairly prejudicial. The meaning of unfair prejudice in the context of Rule 403 is an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one.

State v. Capers, 208 N.C. App. 605, 617, 704 S.E.2d 39, 46 (2010) (citation and quotation marks omitted), *disc. rev. denied and app. dismissed*, 365 N.C. 187, 707 S.E.2d 236 (2011).

Here, the trial court admitted the photographs that it determined showed the least amount of information regarding the location, but excluded as cumulative one of the photographs that showed more of defendant's jail jumpsuit. The photographs admitted by the trial court did not clearly show defendant in jail garb or in handcuffs. The pictures only showed defendant in a white t-shirt in a cinderblock room with large windows. The trial court specifically found that it was unable to determine from the pictures that they were taken in a jail. Therefore, we fail to see how the admission of these pictures was unfairly prejudicial.

Even to the extent that a juror could have deduced that the pictures were taken in a jail, the trial court did not abuse its discretion in determining that the unfair prejudice did not substantially outweigh the probative value. It is common knowledge that defendants charged with armed robbery are often arrested and that when people are arrested they are taken to jail. *See id.* at 614, 704 S.E.2d at 44-45 (noting that it is common knowledge that arrestees are handcuffed and citing *State v. Smith*, 278 Kan. 45, 49, 92 P.3d 1096, 1099–1100 (2004), which held that the "trial court did not err in admitting photographs of defendant in jail clothing because most jurors would hardly be shocked to learn that a murder suspect was taken into custody for some period of time, the only information communicated by jail clothing."). These photographs,

at most, conveyed only the limited information that defendant had been arrested, taken to jail, and photographed. Therefore, we hold that the trial court did not abuse its discretion in overruling defendant's objection based on Rule 403 and did not err in admitting the photographs of defendant.

III. Motion to Dismiss

[2] Defendant argues that the trial court erred in denying his motion to dismiss because the State presented insufficient evidence identifying him as the second robber. We conclude that the trial court did not err in denying defendant's motion to dismiss.

A. Standard of Review

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

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

B. Analysis

Defendant contends that there was insufficient evidence identifying him as the second robber. He cites a number of articles and cases from other states discussing the weaknesses of eyewitness identification, especially when the identification is cross-racial and when a firearm is pointed at the eyewitness. Such arguments have no bearing on the sufficiency of the evidence when considering a motion to dismiss. If relevant at all, these arguments would go only to the credibility of an eyewitness identification. *See generally State v. Knox*, 78 N.C. App. 493, 496-97, 337 S.E.2d 154, 157 (1985) (holding that the exclusion of expert testimony on the reliability of eyewitnesses was within the trial court's discretion where the expert on voir dire only testified generally); *State v. Cotton*, 99 N.C. App. 615, 621-22, 394 S.E.2d 456, 459-60 (1990) (finding no abuse of

discretion where the trial court concluded that general expert testimony on the reliability of eyewitnesses was unduly prejudicial to the State), *aff'd*, 329 N.C. 764, 407 S.E.2d 514 (1991).

The State called two eyewitnesses who were present at the time of the robbery—the store clerk, Mr. Khabiry, and the owner, Mr. Andraos. Mr. Khabiry testified that he recognized the second robber by his eyes and his voice as one of his regular customers both from working at the convenience store and from his previous business operating an ice cream truck in the area.[1] Although he did not know the customer's name, Mr. Khabiry had been calling him "Big Money." He also testified that he recognized defendant as the second robber from his tattoo.[2] Further, as previously mentioned, although the surveillance video was not clear enough to positively identify what the second robber's tattoo said, it was clear enough for a reasonable juror to conclude that the robber's tattoo was in approximately the same location, and approximately the same size and shape, as defendant's tattoo.

Mr. Khabiry was later asked to do two photo lineups, one of which contained defendant's photograph, and one of which contained a photograph of the suspected first robber. He identified defendant's photograph as one of the robbers and as the man he knew as "Big Money." He indicated that he was 100% certain. In court, he again identified defendant as the second robber. The police officers who investigated the robbery confirmed that Mr. Khabiry had told them that he knew the second robber as "Big Money" and that he told them he recognized that robber as a regular customer, but testified that he had not mentioned anything about a tattoo. Mr. Khabiry was unable to identify anyone as the first robber.

In July 2010, defendant drove up to the gas station and walked into the convenience store. Mr. Khabiry testified that he recognized defendant and told Mr. Andraos that he was the one who had robbed them. Mr. Andraos then went outside, took down the car's license plate number and called the police. Mr. Andraos did not recognize either of the robbers, but confirmed that Mr. Khabiry had identified defendant as the second robber when he returned to the store in July.

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1. Defendant, in his interview with a detective, confirmed that he lived in that area and had been to the convenience store on a number of occasions.

2. Mr. Khabiry testified that the tattoo was on the robber's hand, but when he was examining the photograph of the robber, marked as State's Exhibit 2, which clearly shows a tattoo on the robber's arm, he again described the tattoo as being on the robber's hand. Taken in the light most favorable to the State, this inconsistency could mean that Mr. Khabiry simply misspoke when he said the tattoo was on the second robber's "hand."

Defendant argues that this evidence is insufficient to identify him as the second robber because the eyewitnesses had not mentioned a tattoo when interviewed by the police and because there was no corroborating physical evidence. First, the argument about the witness' failure to mention the tattoo simply goes to the credibility of eyewitness' testimony. "The credibility of the witnesses and the weight to be given their testimony is exclusively a matter for the jury." *State v. Scott*, 323 N.C. 350, 353, 372 S.E.2d 572, 575 (1988) (citation omitted). Defendant's second argument is simply unconvincing. He was positively identified by Mr. Khabiry as the second robber. Mr. Khabiry testified how he recognized defendant and identified him both in court and through an out-of-court photographic array. Additionally, it would be reasonable for a juror to conclude that the photographs from the day of the robbery show that the second perpetrator had a tattoo consistent with defendant's. Taken in the light most favorable to the State, the above evidence is sufficient to convince a reasonable juror that defendant was one of the perpetrators of the armed robbery. *See State v. Mobley*, 86 N.C. App. 528, 532, 358 S.E.2d 689, 691 (1987) (holding that eyewitness identification of defendant as the perpetrator is sufficient to defeat a motion to dismiss on the basis of identity). Therefore, the trial court did not err in denying defendant's motion to dismiss. *See Teague*, ___ N.C. App. at ___, 715 S.E.2d at 923.

IV. Ineffective Assistance of Counsel

Defendant next argues that he received ineffective assistance of counsel, in violation of his Sixth Amendment rights, when his trial counsel failed to cross-examine the two eyewitnesses with prior inconsistent statements they had made to police and the prosecutor.

> As a general proposition, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal. It is well established that ineffective assistance of counsel claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing. Thus, when this Court reviews ineffective assistance of counsel claims on direct appeal and determines that they have been brought prematurely, we dismiss those claims without prejudice, allowing defendants to bring them pursuant to a subsequent motion for appropriate relief in the trial court.

State v. Hernandez, ___ N.C. App. ___, ___, 742 S.E.2d 825, 830 (2013) (citations, quotation marks, and brackets omitted).

Defendant asserts that there was no possible strategic reason that his trial counsel would fail to cross-examine the eyewitnesses on any prior inconsistent statements they made. The State counters that there were a number of possible strategic reasons that defendant's trial counsel would elect not to cross-examine the witnesses using those prior statements. As we cannot resolve this dispute on the cold record before us, we dismiss defendant's ineffective assistance claim as premature without prejudice to his ability to raise it through a motion for appropriate relief.

V. Conclusion

For the foregoing reasons, we conclude that the trial court did not err in admitting the photographs of defendant and his tattoos taken at the jail and that the trial court did not err in denying defendant's motion to dismiss. We dismiss defendant's ineffective assistance of counsel claim without prejudice to his ability to raise it by motion for appropriate relief.

NO ERROR; DISMISSED in part.

Judges HUNTER, JR., Robert N. and DILLON concur.

STATE OF NORTH CAROLINA
v.
MATTHEW PELHAM FLEIG

No. COA13-1001

Filed 4 March 2014

1. Appeal and Error—untimely notice of appeal—writ of certiorari

The Court of Appeals granted defendant's petition for writ of certiorari where defendant's attorney failed to timely file notice of appeal.

2. Sentencing—consolidated judgment—selling marijuana—delivering marijuana—single transaction

The trial court erred by sentencing defendant to a consolidated judgment of 6-8 months for the two separate offenses of selling

marijuana and delivering marijuana per N.C.G.S. § 90-95(a)(1). Since defendant's acts of sale and delivery arose from a single transaction, defendant was improperly sentenced on the separate offenses of sale and delivery of marijuana.

Appeal by defendant from judgment entered 20 March 2013 by Judge W. Allen Cobb, Jr. in Onslow County Superior Court. Heard in the Court of Appeals 3 February 2014.

Attorney General Roy Cooper, by Assistant Attorney General Ann W. Matthews, for the State.

James W. Carter, for defendant.

ELMORE, Judge.

On 20 March 2013, a jury found Matthew Pelham Fleig (defendant) guilty of multiple drug offenses. The subject of this appeal concerns judgment entered on those offenses in 11 CRS 055170 that stemmed from 10 August 2010: 1.) felony sale of marijuana; 2.) felony delivery of marijuana; and 3.) misdemeanor possession of marijuana. Judge W. Allen Cobb, Jr. consolidated these convictions and imposed a term of imprisonment for six-months minimum, eight-months maximum. That sentence was suspended, and defendant was placed on probation for thirty months and required to served a thirty-day active sentence. Defendant now appeals and contends that the trial court erred by sentencing him for both sale and delivery of marijuana. After careful consideration, we remand for a new sentencing hearing with instructions to vacate either the 1.) sale of marijuana conviction or 2.) delivery of marijuana conviction.

I. Facts

On 5 August 2010, the Jacksonville Police Department conducted a traffic stop of Sarah Lyon's vehicle, and it was discovered that the passenger in her car possessed marijuana, a marijuana grinder, and digital scales. After further investigation, Lyon was never charged with any criminal offenses. Thereafter, she was asked by the Jacksonville Police Department if she knew any individuals who were involved in the sale of narcotics in the local area. She provided the police with defendant's name and agreed to assist them in conducting a controlled buy of marijuana from defendant. On 10 August 2010, officers recorded a phone conversation between Lyon and defendant in which she asked to purchase marijuana from him. Defendant agreed, and the police department gave

Lyon a twenty-dollar bill to buy the marijuana. Equipped with a recording device, Lyon drove to defendant's house, picked him up, and they drove to another location in the neighborhood to conduct the drug deal. Lyon provided defendant with twenty dollars, and he gave her a "dime bag" of marijuana (bag) in return. Knowing that one bag was not a sufficient amount of marijuana for the price of twenty dollars, Lyon immediately requested an additional bag. Defendant did not have any additional marijuana on his person because he thought Lyon only wanted one bag, but he agreed to give Lyon the additional quantity she requested. They drove back to his house to retrieve more marijuana, defendant obtained another bag, and he gave it to Lyon. Lyon did not pay defendant, nor did defendant request, additional money for the second bag. After Lyon received the second bag, she left defendant's house and relinquished the recording device and marijuana to the Jacksonville Police Department.

II. Analysis

a.) Writ of Certiorari

[1] Defendant seeks appellate review by petition for writ of certiorari because of his trial counsel's failure to give proper notice of appeal pursuant to North Carolina Appellate Procedure Rule 4. For the reasons that follow, we allow defendant's writ of certiorari.

Rule 4 mandates that appeal from a judgment rendered in a criminal case must be given either orally at trial or by "filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment[.]" N.C. R. App. P. 4. Should a defendant fail to timely appeal, a writ of certiorari "may be issued in appropriate circumstances by either appellate court to permit review of the judgments[.]" N.C.R. App. P. 21. This Court has held that an appropriate circumstance to issue writ of certiorari occurs when "a defendant's right to appeal has been lost because of a failure of his or her trial counsel to give proper notice of appeal." *State v. Gordon*, ___ N.C. App. ___, ___, 745 S.E.2d 361, 363 (2013) *review denied*, 749 S.E.2d 859 (2013).

Here, defendant's counsel did not give oral notice of appeal at trial because he needed to speak with defendant to ascertain whether defendant sought to appeal the judgment. After conferring with defendant, defendant's attorney gave oral notice of appeal five days later in Onslow County Superior Court. However, defendant's counsel failed to file a written notice of appeal with the Onslow County Clerk of Superior Court and serve copies upon the State within fourteen days after entry of judgment. As a result, defendant's right to appeal was lost. However,

the lost appeal was no fault of defendant's but an error by his trial attorney. Accordingly, we grant defendant's petition for writ of certiorari and address the merits of his appeal.

b.) Sentencing Error

[2] Defendant argues that the trial court erred in sentencing him to a consolidated judgment of 6-8 months for the two separate offenses of selling marijuana and delivering marijuana per N.C. Gen. Stat. § 90-95(a)(1). Specifically, defendant argues that that he was sentenced twice for conduct that constituted a single offense. We agree.

"[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)). Under N.C. Stat. § 90-94 (2013), marijuana is classified as a schedule VI controlled substance. Pursuant to N.C. Gen. Stat. § 90-95(a)(1) (2013), it is unlawful for an individual to "manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance[.]" The statute establishes three distinct offenses: "(1) *manufacture* of a controlled substance, (2) *transfer* of a controlled substance by sale or delivery, and (3) *possession with intent to manufacture, sell or deliver* a controlled substance." *State v. Moore*, 327 N.C. 378, 381, 395 S.E.2d 124, 126 (1990) (emphasis in original). A sale is defined as "a *transfer* of property for a specified price payable in money" while a delivery is "the actual [sic] constructive, or attempted transfer from one person to another of a controlled substance[.]" *Id.* at 382, 395 S.E.2d at 127 (citations and quotations omitted) (emphasis in original). In addressing offense (2) above, our Supreme Court has ruled that "each single transaction involving transfer of a controlled substance" creates a single offense, "which is committed by either or both of two acts—sale or delivery." *Id.* Thus, a defendant "may not . . . be convicted under N.C.G.S. § 90-95(a)(1) of both the sale *and* the delivery of a controlled substance arising from a single transfer." *Id.* (emphasis in original).

Here, the transaction began when Lyon gave defendant twenty dollars, and defendant gave her a bag in return. The transaction continued because neither sale nor delivery of the marijuana was complete. A negotiation ensued as Lyon requested an additional bag because of the amount of money she had provided to defendant. Defendant acquiesced, retrieved more marijuana from his house, and completed the sale by delivering the bag to Lyon. Thus, the transaction concluded when defendant gave the second bag to Lyon. The transfer

of the second bag from defendant to Lyon simultaneously completed sale and delivery of the drug transaction because Lyon received the total quantity of marijuana she requested for the specified price of twenty dollars. Since defendant's acts of sale and delivery arose from a single transaction, defendant was improperly sentenced on the separate offenses of sale and delivery of marijuana. Thus, we remand this matter for resentencing notwithstanding the consolidated judgment. *See id.* at 383, 395 S.E.2d at 127-28 (holding that when separate convictions for sale and delivery were in error and consolidated into one judgment, this Court must remand because we are "unable to determine what weight, if any, the trial court gave each of the separate convictions for sale and for delivery" in calculating the imposed sentences); *See also State v. Rogers*, 186 N.C. App. 676, 678, 652 S.E.2d 276, 277 (2007) (remanding for resentencing where the trial court erred by sentencing defendant for both sale and delivery of a controlled substance). On remand, either the conviction for 1.) sale of marijuana or 2.) delivery of marijuana in 11 CRS 055170 should be vacated to reflect that defendant was convicted of a single count of "sale or delivery" of marijuana.

III. Conclusion

In sum, the trial court erred by sentencing defendant for the sale and delivery of marijuana when his conduct constituted a single offense. Therefore, we remand for a new sentencing hearing with instructions to vacate either the 1.) sale of marijuana conviction or 2.) delivery of marijuana conviction in 11 CRS 055170.

Remanded.

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

STATE OF NORTH CAROLINA
v.
LOCREAIG DONNELL RUFFIN

No. COA13-744

Filed 4 March 2014

1. Rape—second-degree—rejection of plea offer—failure to state increased maximum sentence

The trial court did not commit reversible error by failing to state the maximum sentence for second-degree rape. Defense counsel informed the trial court that defendant had decided to reject a plea offer and proceed to trial on a charge of first-degree rape, and thus, the trial court's failure to inform defendant of the increased maximum sentence for second-degree rape under N.C.G.S. § 15A-1340.17(f) was not error.

2. Evidence—prior crimes or bad acts—cross-examination

The trial court did not err by allowing the district attorney to cross-examine defendant about alleged prior convictions after defendant initially indicated that he did not recall any, nor did the court err by allowing the prosecutor over objection, to read from a list of charges on an unverified DCI printout. Even assuming, *arguendo*, that the trial court erred by allowing the cross-examination, defendant failed to show prejudice.

3. Rape—second-degree—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of second-degree rape based on insufficiency of the evidence even though the parties consumed alcohol and the victim acknowledged engaging in several prior instances of consensual sex with defendant. Contradictions and discrepancies did not warrant dismissal of the case, but were for the jury to resolve.

Appeal by defendant from judgment entered 29 January 2013 by Judge Benjamin G. Alford in Washington County Superior Court. Heard in the Court of Appeals 8 January 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Jennie Wilhelm Hauser, for the State.

McCotter Ashton, P.A., by Rudolph A. Ashton, III, and Kirby H. Smith, III, for defendant-appellant.

STEELMAN, Judge.

Where defense counsel informed the trial court that defendant had decided to reject a plea offer and proceed to trial on a charge of first-degree rape, the trial court's failure to inform defendant of the increased maximum sentence for second-degree rape under N.C. Gen. Stat. § 15A-1340.17(f) was not error. The trial court did not err in allowing the prosecutor to cross-examine defendant about prior out of state criminal convictions or in denying defendant's motion to dismiss the charge of second-degree rape for insufficient evidence.

I. Factual and Procedural Background

In January of 2012, J.B., who lived in Plymouth, North Carolina, met defendant through a telephone dating service. After talking to defendant on the phone for several weeks, she invited him to visit in person on the weekend of 8 January 2012. On 6 January 2012, a friend of J.B.'s picked up defendant in Greenville and brought him to Plymouth. When J.B. finished work, she and defendant purchased beer and food and went to a motel, where they talked, ate, drank beer, and had consensual sex. That night, defendant talked about his father, who he felt had mistreated him. The next day, J.B. went to work in the morning and afterwards she and defendant went to her trailer with more beer. J.B. slept about two hours, cooked food for defendant, and they had consensual sex.

Defendant continued drinking during the day and during the evening he became increasingly agitated about issues that he had with his father, and threatened to harm J.B. or himself. Defendant retrieved a machete from J.B.'s closet, pushed her onto the bed, punched J.B., choked her, held the machete to her neck, and forced her to have sex with him. After the forcible intercourse, defendant made her take a shower with him, after which they dressed and both took some sedative-laced pain pills. J.B. and defendant dozed briefly, but when defendant awoke he was still very agitated and "proceeded to scream and holler." J.B. ran into a bathroom and called 911, at which point defendant ran out of the trailer.

When Deputies Ricks and Spencer of the Washington County Sheriff's Department arrived at J.B.'s trailer, Deputy Ricks noted that J.B. was "crying hysterically and shaking." The deputies took a statement from J.B., obtained a photo of defendant, photographed J.B.'s bruises, and took her to the hospital.

Defendant was arrested a few hours later, and at around 10:00 a.m. on 8 January 2012, Deputy Spencer met with defendant at the Washington County jail. Defendant waived his *Miranda* rights, and gave Spencer a statement about the events of the previous 36 hours. His account of the time he had spent with J.B. was similar to J.B.'s statement; specifically, he admitted to Spencer that he had forced J.B. to have sex on Saturday. He told Spencer that J.B. had threatened him with the machete, and that in response "he got angry and went and got the machete and put it up to her neck and threatened to cut her head off and then forced her to have sex with him[.]" J.B. had stated that defendant had raped her once; however, defendant told Spencer that he forced himself on her twice. After Spencer reduced defendant's statement to writing, defendant read and initialed it.

Defendant was indicted on 23 July 2012 in an indictment whose language described second-degree rape, but whose caption and cited statute identified the charged offense as first-degree rape. Prior to trial, the trial court ruled that the indictment charged defendant with second-degree rape.

Defendant was tried before a jury on 28 and 29 January 2013. Defendant's mother testified that defendant, who grew up in Connecticut, suffered a head injury at age two, after which "his brain didn't develop like normal" and that he read at a third or fourth grade level and had difficulty with long term memory. Defendant's mother also testified that after defendant moved to North Carolina about three years earlier, he lived in Greenville for two years, and had spent "one year in jail."

Defendant testified that he was 36 years old, lived in Greenville, North Carolina, and was unemployed but received disability payments for "mental retardation." He recalled speaking with Spencer, but contended that he was "drunk" at the time and did not remember his answers to her questions, or remember telling Spencer that he had forced J.B. to have sex. He testified that he could not read the statement that he had initialed. On cross-examination, defendant testified that he could not recall what happened during the weekend of 8 January 2012, and that he did not "know of" or recall any criminal convictions from Connecticut. Over objection, the prosecutor asked defendant about 5 prior criminal convictions in Connecticut. Defendant denied any recollection of those convictions. When asked on redirect examination, defendant testified that he remembered being arrested, but not what he was charged with.

On 29 January 2013 the jury found defendant guilty of second-degree rape. The trial court sentenced defendant to an active sentence

of 73 to 100 months. Subsequently, the Department of Public Safety informed the trial court that the maximum sentence of 100 months did not correspond to the minimum sentence of 73 months, since defendant was convicted of a reportable sex offense as defined in N.C. Gen. Stat. § 14-208.6(4), and therefore was required to be sentenced under N.C. Gen. Stat. § 15A-1340.17(f). On 11 March 2013, the trial court amended its judgment and entered a maximum sentence of 148 months.

Defendant appeals.

II. Analysis

A. Defense Counsel Places the Plea Arrangement Offered by the State into the Record

[1] In his first argument, defendant contends that the trial court committed reversible error by misstating the maximum sentence for second-degree rape. Defendant asserts that the trial court's failure to inform defendant of the maximum sentence for a conviction of a reportable sex offense "deprived the defendant of a full understanding of the ramifications of turning down the State's plea offer." We disagree.

N.C. Gen. Stat. § 15A-1340.17(f) states that:

> . . . [F]or offenders sentenced for a Class B1 through E felony that is a reportable conviction subject to the registration requirement of Article 27A of Chapter 14 of the General Statutes, the maximum term of imprisonment shall be equal to the sum of the minimum term of imprisonment and twenty percent (20%) of the minimum term of imprisonment, rounded to the next highest month, plus 60 additional months.

N.C. Gen. Stat. § 14-208.6(4) defines "reportable offense" to include a conviction for "a sexually violent offense, or an attempt to commit any of those offenses[,]" and N.C. Gen. Stat. § 14-208.6(5) defines a "sexually violent offense" to include second-degree rape. Thus, upon defendant's conviction for second-degree rape, his maximum sentence is subject to the provisions of N.C. Gen. Stat. § 15A-1340.17(f).

In this case, after the jury was impaneled, but before the first witness was called to testify, defendant's attorney asked to "place on the record" that defendant was charged with first-degree rape, a Class B1 felony, and that the State had offered to allow him to plead guilty to a Class D felony. Defendant had decided not to accept the plea offer and to proceed to trial. Defense counsel did not identify the Class D felony

to which defendant could plead guilty[1] or state the specific terms of the plea offer. After defense counsel put defendant's decision to proceed to a jury trial on the record, the trial court ruled that the indictment actually charged the offense of second-degree rape, a Class C felony. The trial court then addressed defendant:

> THE COURT: The Court has reviewed the indictment and finds that it does properly allege second-degree rape which is a Class C felony, and you're reading from the second level, and, Mr. Ruffin, if you got convicted of this, then the Court could sentence you to a minimum sentence of anywhere between 50 months in the mitigated range to a maximum minimum sentence of 83 months. If you got 50 months, that would correspond to a maximum of 72 months. If you got 83 months, then that would correspond to a maximum of 112 months. Do you understand that?
>
> DEFENDANT: Yes.
>
> THE COURT: Okay. Anything the State wants to say about that?
>
> PROSECUTOR: No, Your Honor.
>
> THE COURT: Okay. [defense counsel], anything further?
>
> DEFENSE COUNSEL: No, Your Honor.
>
> THE COURT: Okay. And, Mr. Ruffin, at this time is it your desire to proceed on with the trial of this case knowing that the indictment charges second-degree rape, a Class C felony?
>
> DEFENDANT: Yes.

On appeal, defendant argues that "the trial court's improper statement of the maximum punishment deprived the defendant of an informed decision as to whether or not he should accept the State's plea offer[.]" As set out above, after the trial court ruled that defendant was charged with a Class C offense, and not a Class B1 felony, the court informed defendant that if convicted he might receive a minimum sentence of 50 to 83 months, corresponding to a maximum sentence of 72 to 112 months. The trial court did not inform defendant that, if he

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1. The only potential Class D felony that is apparent on the record before us would be attempted second degree rape.

were convicted of second-degree rape, his maximum sentence would be determined under N.C. Gen. Stat. § 15A-1340.17(f), which would result in a longer maximum sentence than under the felony sentencing grid set out in N.C. Gen. Stat. § 15A-1340.17(c). However, based upon the facts of this case, we hold that this omission did not deprive defendant of an informed decision or entitle him to appellate relief.

Assuming that (1) defendant were convicted of either first-degree rape, second-degree rape, or attempted second-degree rape; (2) defendant was a prior record level II offender, which was the record level used by defense counsel and the trial court in their colloquy with defendant, and; (3) rounding the length of each sentence to the nearest month, the range of sentences to which defendant was exposed was:

Offense Class	Minimum Sentence Range (Months)	Corresponding Maximum Sentence from Sentencing Grid	Increased Maximum Sentence
B1	221 276	278 344	325 391
C	67 83	93 112	140 160
D	59 73	83 100	131 148

Defense counsel represented to the trial court that defendant had elected to be tried for a Class B1 offense, for which he faced a minimum sentence of 221 months, or 18 years, and that he had rejected an opportunity to plead guilty to a Class D offense, for which the minimum sentence was 59 months, or approximately 5 years. Given that defendant had decided to risk a sentence of <u>at least</u> 18 years rather than plead guilty, there is no basis to infer that he might have changed his mind based on the difference between the maximum presumptive sentence for a Class C offense as derived from the sentencing grid – 112 months, or about 9 years – and the increased maximum sentence for a Class C offense, which is 159 months, or about 13 years. We conclude that on the facts of this case, the trial court's omission of the increased maximum sentence under N.C. Gen. Stat. § 15A-1340.17(f) does not entitle defendant to relief.

In arguing for a different result, defendant urges us to apply N.C. Gen. Stat. § 15A-1022(a) to the facts of this case. This statute provides that a superior court judge may not accept a defendant's guilty plea

"without first addressing him personally" and informing him of his right to remain silent, ascertaining that he understands the charge against him, his right to plead not guilty, and the range of possible sentences he might receive, and "[i]nforming him that by his plea he waives his right to trial by jury and his right to be confronted by the witnesses against him[.]" N.C. Gen. Stat. § 15A-1022(a)(4).

"Because a guilty plea waives certain fundamental constitutional rights such as the right to a trial by jury, our legislature has enacted laws to ensure guilty pleas are informed and voluntary." *State v. Agnew*, 361 N.C. 333, 335, 643 S.E.2d 581, 583 (2007) (citing *State v. Sinclair*, 301 N.C. 193, 197, 270 S.E.2d 418, 421 (1980)). However, a defendant who elects to proceed to trial is exercising, rather than waiving, his constitutional rights. A trial court is not required to make an inquiry into a defendant's decision not to plead guilty. Further, in this case defense counsel represented to the trial court that defendant had already made the decision to proceed to trial on a charge of first-degree rape. Counsel did not request the trial court's assistance in persuading defendant to change his mind, or indicate doubts as to defendant's competence to make this decision, but simply stated that he wanted to put defendant's decision "on the record." We conclude that N.C. Gen. Stat. § 15A-1022 is not applicable to this case and that defendant is not entitled to relief on this basis.[2]

B. Cross-examination of Defendant

[2] In his next argument, defendant contends that the trial court erred by "allowing the district attorney to cross-examine the defendant about alleged prior convictions after the defendant initially indicated that he did not recall any" and that the court erred in allowing the prosecutor "over objection, [to] read from a list of charges on an unverified DCI printout." We disagree.

As a general rule, the "scope of cross-examination lies within the discretion of the trial judge, and the questions must be asked in good faith." *State v. Forte*, 360 N.C. 427, 442-443, 629 S.E.2d 137, 147 (2006)

2. Defendant also argues that the trial court erred by not advising defendant of "the highest level in the aggravated range[.]" However, N.C. Gen. Stat. § 15A-1340.16(a6) provides that the "State must 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 . . . at least 30 days before trial[.]" The record is devoid of any indication that the State provided defendant with the requisite pretrial notice of intent to prove the existence of any aggravating factors, or that the State expressed such an intention during the trial. We hold, based on the record before us, that the issue of aggravating factors was not pertinent to this trial.

(citing *State v. Williams*, 279 N.C. 663, 675, 185 S.E.2d 174, 181 (1971)). N.C. Gen. Stat. § 8C-1, Rule 609(a) provides that "[f]or the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a felony, or of a Class A1, Class 1, or Class 2 misdemeanor, shall be admitted if elicited from the witness . . . during cross-examination[.]" In addition, "evidence which would otherwise be inadmissible may be permissible on cross-examination 'to correct inaccuracies or misleading omissions in the defendant's testimony or to dispel favorable inferences arising therefrom.' " *State v. Braxton*, 352 N.C. 158, 193, 531 S.E.2d 428, 448 (2000) (quoting *State v. Lynch*, 334 N.C. 402, 412, 432 S.E.2d 349, 354 (1993)). However, "a cross-examiner can elicit only 'the name of the crime and the time, place, and punishment for impeachment purposes under Rule 609(a)[.]' " *Id.* (quoting *Lynch*, 334 N.C. at 410, 432 S.E.2d at 353).

In this case, defendant was asked on cross-examination if he had been convicted of criminal offenses while he lived in Connecticut. He responded: "Not that I know of, that's a long time." The prosecutor then questioned defendant about specific criminal convictions, based on a document described at trial as "a DCI printout showing the convictions."[3] The prosecutor did not attempt to elicit details about the facts of the offenses, or pursue the matter further when defendant denied remembering his alleged prior convictions. On appeal, defendant does not dispute that the document relied upon by the prosecutor provided a good faith basis for his questions, and does not argue that the trial court abused its discretion in allowing this cross-examination or that the prosecutor exceeded the permissible scope of cross-examination. We conclude that there was no error in allowing the prosecutor to cross-examine defendant about prior convictions.

Defendant appears to argue on appeal that the district attorney was barred from questioning him about his criminal record unless (1) his questions would also have been admissible under N.C. Gen. Stat. § 8C-1, Rule 404(b), and (2) the prosecutor was in possession of a verified copy of the Connecticut judgments meeting the requirements for determining a defendant's prior record level for purposes of Structured Sentencing under N.C. Gen. Stat. § 15A-1340.14. Defendant cites no authority for either proposition, and we reject these arguments.

Moreover, even assuming, *arguendo*, that the trial court erred by allowing the cross-examination, defendant has failed to show prejudice.

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3. This document has not been included in the record of this case.

Under N.C. Gen. Stat. § 15A-1443(a), a "defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant." Defendant does not argue that the trial would have had a different result had the cross-examination not been permitted, and our own review does not suggest that the cross-examination had an effect on the jury's verdict. Moreover, we note that defendant's mother testified that defendant had spent "a year in jail" and that on redirect examination defendant testified that he remembered his arrests, just not the names of the charged offenses. Given that defendant elicited additional evidence of his criminal history, and given the substantial evidence presented by the State, we cannot hold that defendant was prejudiced by this cross-examination.

C. Sufficiency of the Evidence

[3] In his last argument, defendant contends that the trial court erred by denying his motion to dismiss for insufficiency of the evidence. We disagree.

1. Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). " 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (internal 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) (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). "Contradictions and discrepancies do not warrant dismissal of the case; rather, they are for the jury to resolve. Defendant's evidence, unless favorable to the State, is not to be taken into consideration." *State v. Franklin*, 327 N.C. 162, 172, 393 S.E.2d 781,

787 (1990) (citations omitted). In this case, since defendant presented evidence, we only review the sufficiency of the evidence as of the close of all of the evidence. *See State v. Britt*, 87 N.C. App. 152, 154, 360 S.E.2d 291, 292 (1987).

2. Analysis

N.C. Gen. Stat. § 14-27.3(a) states that "[a] person is guilty of rape in the second-degree if the person engages in vaginal intercourse with another person: (1) By force and against the will of the other person[.]" Therefore, the "elements of second-degree rape are that the defendant (1) engage in vaginal intercourse with the victim; (2) by force; and (3) against the victim's will. N.C. Gen. Stat. § 14-27.3." *State v. Scercy*, 159 N.C. App. 344, 352, 583 S.E.2d 339, 344, *disc. review denied*, 357 N.C. 581, 589 S.E.2d 363 (2003).

At trial, J.B. testified that defendant brandished a machete and beat her in order to force her to have vaginal intercourse against her will. Her testimony was corroborated by photos of her bruises and by her statements to the investigating officers. Moreover, Deputy Spencer testified that defendant made a statement in which he admitted threatening J.B. with a machete in order to force her to have sex. This evidence was sufficient to merit the submission of the charge of second-degree rape to the jury.

On appeal, defendant does not dispute the existence of the evidence discussed above. Rather, he directs our attention to other evidence, such as the parties' consumption of alcohol, and the fact that J.B. acknowledged engaging in several prior instances of consensual sex with defendant, that tended to weaken the State's case. However, "[c]ontradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve." *State v. Johnson*, 203 N.C. App. 718, 724, 693 S.E.2d 145, 148 (2010) (citing *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). The trial court did not err in denying defendant's motion for dismissal.

For the reasons discussed above, we conclude that defendant had a fair trial, free of reversible error.

NO ERROR.

Judges STEPHENS and DAVIS concur.

STATE OF NORTH CAROLINA
v.
PAUL EDWARD SALE

No. COA13-863

Filed 4 March 2014

1. Sentencing—misdemeanor—probation—longer than statutory mandate

A case was remanded where the State conceded that the trial court erred by failing to enter specific findings as to why a probationary period longer than that mandated by statute for a misdemeanor offense was necessary.

2. Appeal and Error—appeal from probation—special condition—no appellate authority

The Court of Appeals was without authority to review the trial court's imposition of a special condition of probation that defendant, a law enforcement officer, may not be "employed in any type of law enforcement" while on probation. Defendant entered an *Alford* plea, so that defendant did not have a right to appeal pursuant to N.C.G.S. § 7A-27 and he did not contest the judgment on any ground in N.C.G.S. § 15A-1444(a2), which delineates the grounds for appeal from a guilty or no contest plea. The Court of Appeals is restricted in its authority to issue a writ of *certiorari* by Rule 21 of the North Carolina Rules of Appellate Procedure, and none of the provisions of that Rule were triggered.

Appeal by defendant from judgment entered 18 March 2013 by Judge L. Todd Burke in Montgomery County Superior Court. Heard in the Court of Appeals 10 December 2013.

Attorney General Roy Cooper, by Assistant Attorney General Christina S. Hayes, for the State.

Richard Croutharmel for defendant-appellant.

HUNTER, Robert C., Judge.

Paul Edward Sale ("defendant") appeals from judgment imposing 36 months of supervised probation after defendant entered an *Alford* plea to one count of obstructing justice. On appeal, defendant argues:

(1) the trial court erred by failing to make findings of fact as to why a probationary period longer than 18 months was necessary; and (2) the trial court abused its discretion by imposing a probation condition limiting defendant's employment opportunities that was overly broad and unduly burdensome.

After careful review, we remand for resentencing and dismiss defendant's argument regarding the special condition of probation.

Background

In January 2012, defendant was charged with one count of willful failure to discharge duties based on receiving a bribe and one count of obstructing justice. In exchange for the State's dismissal of the failure to discharge duties offense, defendant entered an *Alford* plea to one count of misdemeanor obstructing justice. The prosecutor introduced the following as the factual basis for the plea.

In September 2010, defendant was working as a police officer in the town of Candor, North Carolina. During this time, defendant conducted a traffic stop of Stephanie Gibson ("Gibson") resulting in criminal charges for possession of cocaine. After that date, Gibson agreed to have intercourse with defendant in exchange for his assurance that he would have the charges dismissed. Defendant and Gibson consummated this agreement on 6 December 2010. Thereafter, defendant failed to appear for any of Gibson's court dates, but the charge against her was continued rather than dismissed. Gibson then contacted the State Bureau of Investigation, which launched an investigation and brought the underlying charges against defendant. Defendant was employed as a correctional officer at the Morrison Correctional Facility in Richmond County by the time this matter came before the trial court.

Based on defendant's *Alford* plea to one count of obstructing justice, the trial court sentenced defendant to thirty days imprisonment, but suspended this sentence for 36 months of supervised probation. The trial court further ordered that defendant: (1) pay court costs; (2) pay a fine of $1,000.00; (3) comply with the regular terms and conditions of probation; and (4) refrain from working in any law enforcement capacity during the probationary period. Defendant filed timely notice of appeal.

Discussion

I. Findings as to Length of Probation

[1] Defendant's first argument is that the trial court erred by failing to enter specific findings as to why a probationary period longer than that

mandated by statute for his misdemeanor offense was necessary. The State concedes that the trial court erred and agrees with defendant that the case should be remanded. Accordingly, we remand for resentencing.

N.C. Gen. Stat. § 15A-1343.2(d)(1) (2013) provides that a defendant who is sentenced to community punishment for a misdemeanor shall be placed on probation for no less than 6 months and no more than 18 months, unless the trial court enters specific findings that longer or shorter periods of probation are necessary. This Court has remanded for resentencing where the trial court violated section 15A–1343.2(d)(1) by entering a period of probation longer than 18 months without making the necessary findings that the extension was necessary. *See State v. Love*, 156 N.C. App. 309, 317–18, 576 S.E.2d 709, 714 (2003) (remanding for either reduction of the defendant's probation to the statutory length or entry of specific findings as to why a longer period of probation was necessary); *see also State v. Branch*, 194 N.C. App. 173, 179, 669 S.E.2d 18, 22 (2008). Thus, pursuant to *Love* and *Branch*, we remand for entry of specific findings by the trial court indicating why a longer probationary period is necessary or reduction of defendant's probation to a length of time authorized by section 15A-1343.2(d)(1).

II. Special Condition of Probation

[2] Defendant next argues that the trial court abused its discretion by entering a special condition of probation that defendant may not be "employed in any type of law enforcement" while on probation. After careful review, we dismiss this argument because we are without authority to review it.

"The jurisdiction of the Court of Appeals is limited to that which 'the General Assembly may prescribe.' " *State v. Jones*, 161 N.C. App. 60, 61, 588 S.E.2d 5, 7 (2003) (quoting N.C. Const. art. IV, § 12(2)), *rev'd on other grounds*, 358 N.C. 473, 598 S.E.2d 125 (2004). "In North Carolina, a defendant's right to appeal in a criminal proceeding is purely a creation of state statute." *State v. Pimental*, 153 N.C. App. 69, 72, 568 S.E.2d 867, 869 (2002). "Furthermore, there is no federal constitutional right obligating courts to hear appeals in criminal proceedings." *Id.* (citing *Abney v. United States*, 431 U.S. 651, 656, 52 L. Ed. 2d 651, 657 (1977)).

Defendant purports to have a right to appeal the trial court's imposition of a special condition of probation pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a2) (2013). However, neither statute confers a right to appeal here.

First, section 7A-27(b) explicitly excludes from its right of appeal those cases where a final judgment is entered based on a guilty plea. *See*

N.C. Gen. Stat. § 7A-27(b)(1) (2013); *State v. Mungo*, 213 N.C. App. 400, 401, 713 S.E.2d 542, 543 (2013) ("N.C. Gen. Stat. § 7A–27(b) does not provide a route for appeals from guilty pleas.") Because defendant entered an *Alford* plea, and "[a]n *Alford* plea is to be treated as a guilty plea and a sentence may be imposed accordingly," *State v. Alston*, 139 N.C. App. 787, 792, 534 S.E.2d 666, 669 (2000) (citation and quotation marks omitted), he does not have a right of appeal pursuant to section 7A-27.

Second, defendant's reliance on section 15A-1444(a2) is misplaced. This statute provides that:

> (a2) 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:
>
> > (1) Results 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;
> >
> > (2) Contains a type of sentence disposition that is 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; or
> >
> > (3) Contains 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) (2013). Defendant's challenge to the trial court's imposition of a special condition of probation does not fall under the provisions of this subsection. Rather than contesting the judgment on any ground enunciated in section 15A-1444(a2), defendant asserts that the trial court abused its discretion by entering a special condition of probation which unduly burdens his livelihood. Because this challenge to the court's judgment is not enunciated in section 15A-1444(a2), this statute does not confer a right to appeal.

Furthermore, we have no authority to issue a writ of certiorari to reach these issues in lieu of a statutory right to appeal. Although section 15A-1444(e) states that a defendant who pleads guilty to a criminal charge "may petition the appellate division for review by writ of certiorari" where he otherwise does not have a statutory right of appeal, this Court is restricted in its authority to issue a writ of certiorari by

Rule 21 of the North Carolina Rules of Appellate Procedure. Under Rule 21(a)(1),

> The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to N.C.G.S. § 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief.

N.C. R. App. P. 21(a)(1) (2013). The relationship between section 15A-1444(e) and Rule 21 was specifically addressed by this Court in *Jones*.

> Where a defendant has no appeal of right, our statute provides for defendant to seek appellate review by a petition for writ of certiorari. N.C. Gen. Stat. § 15A–1444(e). However, our appellate rules limit our ability to grant petitions for writ of certiorari to cases where: (1) defendant lost his right to appeal by failing to take timely action; (2) the appeal is interlocutory; or (3) the trial court denied defendant's motion for appropriate relief. N.C. R. App. P. 21(a)(1) (2003). In considering appellate Rule 21 and N.C. Gen. Stat. § 15A–1444, this Court reasoned that since the appellate rules prevail over conflicting statutes, we are without authority to issue a writ of certiorari except as provided in Rule 21.

Jones, 161 N.C. App. at 63, 588 S.E.2d at 8 (citing *State v. Nance*, 155 N.C. App. 773, 775, 574 S.E.2d 692, 693-94 (2003); *State v. Dickson*, 151 N.C. App. 136, 564 S.E.2d 640 (2002)).

Here, none of the provisions of Rule 21(a)(1) have been triggered to confer authority on this Court to issue a writ of certiorari. First, defendant did not lose a right of appeal by failing to take timely action because: (1) as discussed above, he has no right to appeal the special condition of probation, and (2) he otherwise filed and perfected his appeal of the statutory violation addressed in issue I above in a timely manner. Second, this appeal is from a final judgment made by the trial court and is therefore not interlocutory. Third, the appeal does not stem from a denial of a motion for appropriate relief.

Therefore, we are without authority to review, either by right or by certiorari, the trial court's imposition of a special condition of probation.[1]

Conclusion

Because the trial court violated section 15A-1343.2(d)(1) by failing to enter specific findings of fact as to why a longer probationary period than that prescribed by statute was necessary, we remand for resentencing. Defendant's argument as to the imposition of a special condition of probation is dismissed.

REMANDED; DISMISSED IN PART.

Judges McGEE and ELMORE concur.

STATE OF NORTH CAROLINA
v.
THOMAS KEITH SUTTON, DEFENDANT

No. COA13-841

Filed 4 March 2014

1. Appeal and Error—notice of appeal—petition for writ of certiorari

The Court of Appeals granted defendant's petition for writ of *certiorari* and heard defendant's appeal from the denial of his motion to suppress where defendant failed to appeal from the judgment of conviction.

2. Search and Seizure—motion to suppress—challenged findings of fact—supported by competent evidence

The challenged findings of fact in an order denying defendant's motion to dismiss were supported by competent evidence.

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1. We note that defendant filed this appeal before exhausting all of his potential remedies at the trial level. Had he filed a motion for appropriate relief pursuant to N.C. Gen. Stat. § 15A-1415 (2013), the trial court may have altered the challenged condition of probation.

3. Search and Seizure—motion to suppress—findings of fact—supported conclusion of reasonable suspicion

The trial court did not err by denying defendant's motion to suppress. The findings of fact supported a conclusion of reasonable suspicion on the part of the police officer to stop and frisk defendant based on the high crime area, the officer's experience and knowledge of the area, and defendant's behavior.

On writ of certiorari to review judgment entered on or about 22 January 2013 by Judge Paul L. Jones in Superior Court, Lenoir County. Heard in the Court of Appeals 12 December 2013.

Attorney General Roy A. Cooper, III, by Assistant Attorney General John P. Barkley, for the State.

Public Defender Jennifer Harjo, by Assistant Public Defender Brendan O'Donnell, for defendant-appellant.

STROUD, Judge.

Defendant appeals an order denying his motion to suppress and a judgment convicting him of felony carrying a concealed gun contending that his right "to be free from unreasonable search and seizure" was violated when a law enforcement officer frisked him without reasonable suspicion. (Original in all caps.) For the following reasons, we affirm.

I. Background

In October of 2012, defendant was indicted for two counts of "FELONY CARRYING A CONCEALED WEAPON[.]" On 11 January 2013, defendant filed a motion to suppress moving

> for an Order suppressing all evidence, alleged contraband, defendant's identity, and all statements and testimony concerning the alleged contraband, and as grounds therefore alleges that said material[] evidence, and testimony were seized in or obtained as a result of an illegal stop that occurred on March 27, 2012, absent reasonable and articulable suspicion in violation of his Fourth and Fourteenth Amendment rights under the United States Constitution and similar provisions in the North Carolina Constitution, Article 1, Section 19.

On 31 January 2013, the trial court denied defendant's motion to suppress finding as fact:

> 1) That the arresting officer, B. Wells, was employed by the Kinston Department of Public Safety as a police officer. Officer B. Wells has more than 10 years experience in that position. That he was assigned to the Special Response Unit and also served as a K-9 Officer. That as a member of the Special Response Unit he was assigned to patrol public housing units located within the city of Kinston, North Carolina.
>
> 2) That prior to March 27th, 2012, the Special Response Unit patrolled public housing, along with a task force made up of US Marshals and Drug Enforcement Agency, concentrating on viol[ent] crimes, gun crimes, etc. That in the past officers have been assaulted by individuals in public housing. That officer B. Wells is trained in the detection of drugs, weapons and other general policing tactics.
>
> 3) At 14:34 hours (2:34pm) in the afternoon of March 27, 2012, officer B. Wells was patrolling near Simon Bright Apartments, which is one of the public housing apartments located in Kinston. Officer Wells had prior experience hearing shots fired on the East Bright Street area near Simon Bright Apartments. That the Kinston Department of Public Safety enforces a ban list of over 9 pages of individuals who are banned from public housing.
>
> 4) That on the day in question officer B. Wells was driving a Ford Crown Victoria vehicle with the windows down where he was listening and looking for criminal activity. While in the 800 block of East Bright Street Wells observed the defendant on McDaniel Street, who was walking normally while swinging his arms. That the defendant was carrying a Styrofoam food container in his left hand.
>
> 5) The Court finds as soon as the defendant starting turning east on Shine Street, he used his right hand to grab his waistband to clinch an item. The Court finds that

this was an overt act which gave reasonable suspicion to the Public Safety Officer.

6) That officer B. Wells thought the defendant was trying to hide something and his posturing made it apparent that he was concealing something on his person. That the defendant then began to look specifically at the officer in question, that the reaction of the defendant created some urgency to stop to determine who the defendant was and that he needed to be identified. The Officer then turned around his vehicle without lights and siren and stopped the defendant for questioning.

7) That prior to being frisked, the officer did not draw a weapon or use any type of force on the defendant. That he asked the defendant if he was carrying a weapon and he doesn't remember the response of the defendant. That the officer performed a Terry Frisk upon the defendant. A gun was found on the defendant tucked in his waistband.

8) That the defendant never stated to the Officer that he was carrying a weapon. That the defendant was not handcuffed and the Officer did not have a weapon drawn. That the entire process took probably less than a minute or two. That the weapon in question was a Ruger P89 .9mm handgun with a magazine and 7 rounds of ammo, but there was no round which was chambered inside the weapon in question.

The trial court concluded:

1) That the stop of the defendant was legal and did not violate Federal and State Constitutional Standards. That the detaining Officer gave reasonable and articulable grounds for stopping the defendant that resulted in his being frisked.

2) That the rights of the defendant . . . were not violated and therefore evidence seized may be presented before the Jury at trial. That the behavior and actions of the defendant as well as the totality of the circumstances form a further basis for Denying the Motion to Suppress.

3) The Court has examined the Ruger handgun in court for size, weight and concealability to determine if it was consistent with suppression testimony. The Court finds that both federal and state courts have given patrol officers wide latitude to stop and frisk defendants based upon an articulable suspicion.

4) The Court finds that the entire process of frisking the defendant took less than 2 minutes for an investigatory stop. The Court finds the Motion to Suppress is Denied.

On or about 22 January 2013, the trial court entered a judgment against defendant for carrying a concealed gun based upon defendant's guilty plea; defendant received a suspended sentence and was placed on 24 months of supervised probation. Defendant appeals.

II. Petition for Writ of Certiorari

[1] In his plea transcript defendant reserved his right to appeal "the interlocutory order entered in the above-captioned case on January 22, 2012, denying his motion to suppress the March 27, 2012 stop." In open court, defendant's attorney stated "that he would like to appeal the interlocutory order entered in this matter today[.]" Defendant never appealed from his judgment, but he subsequently filed a petition for a writ of certiorari with this Court because he had failed to properly appeal from his judgment within the time period allotted. This Court stated in *State v. Franklin*,

> All of defendant's issues on appeal are concerning his motion to suppress, but since defendant did not file a notice of appeal from the judgment or after entry of the written order denying his motion to suppress, we must first address whether we have jurisdiction to consider defendant's appeal. In *Miller*, this Court stated,
>
> > N.C. Gen. Stat. § 15A–979(b) (2009) states that: An order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty. Defendant has failed to appeal from the judgment of conviction and our Court does not have jurisdiction to consider Defendant's appeal. In North Carolina, a defendant's right to pursue an appeal from a

> criminal conviction is a creation of state statute. Notice of intent to appeal prior to plea bargain finalization is a rule designed to promote a fair posture for appeal from a guilty plea. Notice of Appeal is a procedural appellate rule, required in order to give this Court jurisdiction to hear and decide a case. Although Defendant preserved his right to appeal by filing his written notice of intent to appeal from the denial of his motion to suppress, he failed to appeal from his final judgment, as required by N.C.G.S. § 15A–979(b).

Accordingly, the Court dismissed defendant's appeal. Here, however, while defendant has not properly provided notice of appeal, he has petitioned this Court for a writ of certiorari to consider his appeal.

North Carolina Rule of Appellate Procedure 21(a) provides,

> The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to N.C.G.S. § 15A–1422(c)(3) of an order of the trial court denying a motion for appropriate relief.

Pursuant to Rule 21(a), we grant defendant's petition for a writ of certiorari and will consider the issues presented in his brief as he lost his right to appeal by failure to take timely action.

___ N.C. App. ___, ___, 736 S.E.2d 218, 220 (2012) (citations, quotation marks, and brackets omitted). Accordingly, we grant defendant's petition for certiorari.

III. Standard of Review

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

> in turn support the judge's ultimate conclusions of law. The trial court's conclusions of law are fully reviewable on appeal.

State v. McKinney, ___ N.C. App. ___, ___, 752 S.E.2d 726, 727-28 (2014) (citations, quotation marks, and ellipses omitted).

IV. Findings of Fact

[2] Defendant challenges portions of findings of facts 5 and 6 as not supported by the competent evidence and also contends that portions of these findings of fact are actually conclusions of law.

A. Findings of Fact Supported by Competent Evidence

As to all of defendant's challenges regarding competent evidence to support the findings of fact, much of his argument is devoted to the credibility of the evidence and not necessarily to its absence. But the credibility of the evidence is a determination made by the trial court; "the trial court as finder of the facts *may believe or disbelieve all or any part of the testimony of a witness*," *Bowles Distributing Co. v. Pabst Brewing Co.*, 80 N.C. App. 588, 592, 343 S.E.2d 543, 545 (1986) (emphasis added). This Court reviews findings of fact only to determine if there was competent evidence to support them, not whether *all* of the evidence supported them. *See McKinney*, ___ N.C. App. at ___, 752 S.E.2d at 727, *Bowles Distributing Co.*, 80 N.C. App. at 592, 343 S.E.2d at 545.

It is said that a picture is worth a thousand words. In this case, a picture would be worth several thousand words, since the testimony in this case, the trial court's order, and other cases all necessarily use words to the very brief movements, glances, and body language that tend to form the basis for many a *Terry* stop. Lacking a picture of that moment when Officer Wells observed defendant grabbing at his waistband or side on 27 March 2012, we will address defendant's arguments as to each of these facts.

Defendant challenges the portion of finding of fact 5 that stated defendant "used his right hand to grab his waistband to clinch an item" because "Officer Wells' repeated testimony is that the defendant clinched his side . . . but he did not ever testify that the defendant grabbed his waistband." Defendant also argues that Officer Wells did not "testify that the defendant clinched 'an item.'" Defendant's arguments are hyper-technical. Clutching, clinching, and grabbing are all words which describe the same sort of movement and a person's waistband crosses his "side." Officer Wells testified that defendant "clutch[ed] his right side at this time. And it was very distinct, a clinched fist as well as almost like

trying to hold something on his body" and that the way defendant "was clinching his side" is the reason he "believe[d] the waistband would be of interest[.]" Accordingly, Officer Wells' testimony supports the challenged portions of finding of fact 5.

Defendant also challenges the portion of finding of fact 6 stating, "That the defendant then began to look specifically at the officer in question[.]" Defendant directs our attention to portions of Officer Wells' testimony which he asserts show that defendant did not "specifically" look at him. It is true that it is nearly impossible to know for certain if another person is actually looking at a particular thing — the observer can tell only if it *looks* like they are looking at it. Here the evidence shows that that is how defendant looked to Officer Wells. Officer Wells testified that as defendant "rounded . . . his turn . . . it was almost like he was surprised to see me and kind of, you know, postured up[;]" "he saw me kind of slow patrol[;]" and "[i]f he did make eye contact with me it was so quick. But it was more like he panned around me in my direction and then kind of — I know he saw me for a fact that he saw me. He had to have seen me[.]" Officer Wells' testimony supports a finding of fact that defendant "look[ed] specifically at the officer in question[.]" The challenged portion of finding of fact six does not state that defendant and Officer Wells made eye contact but only that defendant specifically saw Officer Wells, and Officer Wells' testimony supports this finding of fact.

Defendant further challenges the portion of finding of fact six that provides, "The Officer then turned around his vehicle without lights and siren and stopped the defendant for questioning." Defendant specifically states in his brief that he "agrees that the evidence supports a finding that the officer stopped him and that the officer did so without the patrol car's lights or siren. It is inaccurate, however, to say or suggest that the officer stopped the defendant only for questioning." Thus, defendant only challenges that there was competent evidence to support Officer Wells' mental intent for stopping defendant. Defendant contends that Officer Wells' true intent was not just to question but also to search defendant. Officer Wells testified that he "was going to stop [defendant] and identify who he was and see what he was trying to hide on [that] right side." Officer Wells' testimony supports a finding of fact that his intent was to question defendant, since he would presumably ask defendant his identity. "Questioning" defendant to identify him and frisking him to find out what he was trying to hide does not mean that Officer Wells planned to do a more extensive search than would be appropriate

based upon reasonable suspicion. Though the finding of fact could have been more artfully written or could have contained more details about the specific types of questions Officer Wells intended to ask, the general statement that defendant was stopped "for questioning" is supported by competent evidence. Accordingly, Officer Wells' testimony supports the challenged portions of finding of fact 5. These arguments are overruled.

B. Findings of Fact as Conclusions of Law

Defendant also contends that portions of findings of fact 5 and 6 are actually conclusions of law. To the extent that defendant is correct, we will review them as such. *See State v. Jackson*, ___ N.C. App. ___, ___, 727 S.E.2d 322, 329 (2012) ("We will review conclusions of law *de novo* regardless of the label applied by the trial court." (citation and quotation marks omitted)).

V. Reasonable Suspicion

[3] Defendant contends that the trial court did not "have reasonable suspicion, based on specific and articulable facts, that the individual is involved in criminal activity" to justify stopping and frisking defendant. Defendant's argument is difficult to summarize in a logical manner because he essentially takes each separate finding of fact or even portions thereof and argues that each finding in isolation does not create reasonable suspicion. It would be extremely difficult to find reasonable suspicion in any case if it had to be supported by each individual fact taken in isolation. But "[t]he concept of reasonable suspicion is not readily, or even usefully, reduced to a neat set of legal rules. Rather, in determining if reasonable suspicion existed, *the Court must account for the totality of the circumstances—the whole picture*." *State v. Knudsen*, ___ N.C. App. ___, 747 S.E.2d 641, 650-51 (emphasis added) (citations, quotation marks, and ellipses omitted), *disc. review denied*, ___ N.C. ___, 749 S.E.2d 865 (2013). As such, we will set forth all of the findings of fact and address them as a whole. *See id.* at ___, 747 S.E.2d at 651. Furthermore, defendant also suggests that this Court can essentially make its own findings of fact based upon the uncontested evidence before the trial court and supplement the trial court's findings of facts for a "whole picture[.]" This is incorrect, as

> [o]ur 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.* The trial court's conclusions of law are fully reviewable on appeal.

McKinney, ___ N.C. App. at ___, 752 S.E.2d at 727-28 (emphasis added).

Defendant first contends that he was "seized;" this is true, but merely the start of the analysis. *See State v. Fleming*, 106 N.C. App. 165, 169, 415 S.E.2d 782, 784 (1992) ("When defendant approached Officer Williams, the officer immediately began to pat him down while simultaneously asking him questions. Thus, Officer Williams applied actual physical force to defendant's person and this action constituted a seizure. *Id. See also Terry v. Ohio*, 392 U.S. 1, 20 L.Ed. 2d 889 (1968). (When a law enforcement officer takes hold of an individual and pats down the outer surface of his clothing, he has seized that individual within the meaning of the Fourth Amendment.) Accordingly, the Fourth Amendment is applicable to the facts and circumstances in this case." (quotation marks omitted)).

The fact that defendant was "seized" then leads to consideration of the reasonableness of this seizure, considering all of the circumstances as

> [t]he Constitution does not prohibit all searches and seizures; it only protects against unreasonable searches and seizures. Since Officer Williams' conduct did not rise to the level of a traditional arrest requiring probable cause, his conduct must be measured in light of the reasonableness standard established in *Terry v. Ohio*. A brief investigative stop of an individual must be based on specific and articulable facts as well as inferences from those facts, viewing the circumstances surrounding the seizure through the eyes of a reasonable cautious police officer on the scene, guided by his experience and training. Law enforcement officers are required to have reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.

Id. at 169-70, 415 S.E.2d at 785 (citations and quotation marks omitted).

> In order to conduct a warrantless, investigatory stop, an officer must have reasonable and articulable suspicion of criminal activity.
>
> > The stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and

> training. The only requirement is a minimal level of objective justification, something more than an unparticularized suspicion or hunch.
>
> The officer's reasonable suspicion must arise from his knowledge prior to the time of the stop.

State v. Blankenship, ___ N.C. App. ___, ___, 748 S.E.2d 616, 618 (2013) (citations, quotation marks, and brackets omitted).

Defendant argues, based on several different cases which he contends are on point with this case, that Officer Wells did not have reasonable suspicion to frisk him. But since the determination in each case may differ on the subtlest of facts, and lacking a picture of the moment each defendant was stopped in these cases as well, we have analyzed the cases identified by defendant with consideration of both the facts and law, which we have set out in verbatim fashion in order to emphasis these differences without unnecessary further commentary. Given the wealth of binding authority in North Carolina regarding defendant's appeal we need not consider the persuasive authority presented by defendant. Defendant first compares this case to *Fleming* wherein

> several Greensboro police officers were in the vicinity of the Ray Warren Homes housing project. The officers were members of a tactical division and were operating a drug suppression program in the project on this date. Officer J. Williams, a veteran officer of seventeen years and a member of the tactical division, described the Ray Warren Homes project as an area where numerous arrests for drug violations had been made and where crack cocaine and other contraband was sold on a daily basis. At approximately 12:10 a.m., Officer Williams observed defendant and another black male standing in an open area between two apartment buildings located on Best and Rugby Streets. When first observed, defendant and his companion were standing in the open area looking at the officers located on Best Street. Officer Williams was out of his vehicle at the time talking to the other officers. Officer Williams further testified that the gentlemen stood there and they watched us for a few minutes, and then the defendant and the other young man turned and started walking towards Rugby Street out of the area.
>
> When the two young men started walking the other way, Officer Williams got into his vehicle and drove

around to Rugby Street where the gentlemen were walking out from between two buildings. He then observed the defendant and the other male walking on the sidewalk along Rugby Street towards him. Officer Williams told the court he had never seen either of the two young men in the area of the housing project. On cross examination, he admitted he decided to stop them because he had never seen them. Officer Williams got out of his vehicle and asked them to hold it a minute. At this time, defendant and the other male were approximately 35 to 40 feet from the officer. Defendant turned right towards Best Street, and Officer Williams said, Come here. Defendant hesitated for approximately one minute, then both young men complied and approached the officer.

Officer Williams testified that when defendant approached he acted real nervous. Officer Williams asked them to identify themselves and they both complied; neither were residents of the Ray Warren Homes project. When questioned about why he was in the area, defendant stated a friend had dropped him off and he was walking through. When asked if the conversation with defendant was before he patted him down, Officer Williams responded, I was talking to him as I was patting him down. Officer Williams felt an object in defendant's underwear while he was patting him down. Officer Williams testified that when he asked defendant what the object was, defendant replied crack cocaine. Pursuant to Officer Williams' instructions, defendant subsequently removed the object and placed it on Officer Williams' car hood.

Fleming, 106 N.C. App. at 166-67, 415 S.E.2d at 783 (quotation marks omitted). The defendant made a motion to suppress which the trial court subsequently denied. *Id.* at 168, 415 S.E.2d at 784. Defendant appealed. *Id.* This Court stated in its analysis,

> at the time Officer Williams first observed defendant and his companion, they were merely standing in an open area between two apartment buildings. At this point, they were just watching the group of officers standing on the street and talking. *The officer observed no overt act by defendant at this time* nor any contact between defendant and his companion. Next, the officer observed the two men walk between two buildings, out of the open area, toward

> Rugby Street and then begin walking down the public sidewalk in front of the apartments. These actions were not sufficient to create a reasonable suspicion that defendant was involved in criminal conduct, it being neither unusual nor suspicious that they chose to walk in a direction which led away from the group of officers. At this time, Officer Williams stopped defendant and his companion and immediately proceeded to ask them questions while he simultaneously patted them down.
>
> We find that the facts in this case are analogous to those found in *Brown*. Officer Williams had only a generalized suspicion that the defendant was engaged in criminal activity, based upon the time, place, and the officer's knowledge that defendant was unfamiliar to the area. Should these factors be found sufficient to justify the seizure of this defendant, such factors could obviously justify the seizure of innocent citizens unfamiliar to the observing officer, who, late at night, happen to be seen standing in an open area of a housing project or walking down a public sidewalk in a high drug area. This would not be reasonable.
>
> Considering the facts relied upon by the officer, together with the rational inferences which the officer was entitled to draw therefrom, we conclude they were inadequate to support the trial court's conclusion that Officer Williams had a reasonable articulable suspicion that defendant was engaged in criminal activity.

Id. at 170-71, 415 S.E.2d at 785-86 (emphasis added) (quotation marks omitted). While many of the facts in *Fleming* are the same or similar to this case, in *Fleming*, the defendant did not make any overt actions, *id.* at 170, 415 S.E.2d at 785, and here defendant did when he "used his right hand to grab his waistband to clinch an item."

Defendant also directs this Court's attention to *In Re J.L.B.M.*, wherein

> on patrol at approximately 6:00 p.m. on 6 July 2004, Officer D.H. Henderson (Officer Henderson) responded to a police dispatch of a suspicious person at an Exxon gas station in Burlington, North Carolina. The only description given of the person was Hispanic male. Officer Henderson saw a person in the gas station parking lot, later identified as the

> juvenile, who fit the description of the person. When the juvenile saw Officer Henderson, he walked over to a vehicle in the parking lot, spoke to someone, and then began walking away from Officer Henderson's patrol car. Officer Henderson pulled up beside the juvenile in an adjoining restaurant parking lot and stopped the juvenile. Upon getting out of the patrol car and speaking with the juvenile, Officer Henderson noticed a bulge in the juvenile's pocket. Officer Henderson patted down the juvenile for weapons. Officer Henderson found and seized a dark blue, half-empty spray can of paint and a box cutter with an open blade.

176 N.C. App. 613, 615-16, 627 S.E.2d 239, 241 (2006) (quotation marks omitted). This Court held

> that in the present case, like in *Fleming*, the stop was unjustified. Officer Henderson relied solely on the dispatch that there was a suspicious person at the Exxon gas station, that the juvenile matched the Hispanic male description of the suspicious person, that the juvenile was wearing baggy clothes, and that the juvenile chose to walk away from the patrol car. Officer Henderson was not aware of any graffiti or property damage before he stopped the juvenile, and he testified that he noticed the bulge in the juvenile's pocket after he stopped the juvenile.

Id. at 622, 627 S.E.2d at 245 (quotation marks omitted). However, unlike in the present case, in *In re J.L.B.M.*, the defendant was not in an area known for "viol[ent] crimes [and] gun crimes[;]" the defendant did not change his actions upon seeing a law enforcement officer, and the defendant took no actions which made law enforcement believe "defendant was trying to hide something and . . . made it apparent that he was concealing something on his person." *Id.* at 616, 627 S.E.2d at 241. In In re J.L.B.M., the law enforcement officer did not even notice the defendant was concealing something until "after he stopped" him. *Id.* at 622, 627 S.E.2d at 245. (emphasis added) Accordingly, *In re J.L.B.M.*, is distinguishable from the present case.

Defendant also directs our attention to cases where "this Court has found some physical mannerisms to be a factor supporting reasonable suspicion, but only in combination with facts that point to actual criminal activity." Here, we have both a high crime area and movements by defendant which Officer Wells found suspicious. The very location of

where defendant was walking was an area so ridden with crime that it was patrolled by a Special Response Unit in which Officer Wells served, which was a part of "a task force made up of US Marshals and [the] Drug Enforcement Agency" in order to "concentrate[e] on viol[ent] crimes [and] gun crimes[.]" Furthermore, "[o]fficers have been assaulted in the area, Officer Wells has personally heard shots fired in the area, and "the Kinston Department of Public Safety enforces a ban list of over 9 pages of individuals who are banned from public housing." Accordingly, these circumstances coupled with defendant's own actions are factors in a reasonable suspicion analysis. *See State v. Watson*, 119 N.C. App. 395, 398, 458 S.E.2d 519, 522 (1995) ("[A]n officer's experience and training can create reasonable suspicion. Defendant's actions must be viewed through the officer's eyes. Our Supreme Court has also noted that the presence of an individual on a corner specifically known for drug activity and the scene of multiple recent arrests for drugs, coupled with evasive actions by defendant are sufficient to form reasonable suspicion to stop an individual." (citations omitted); *see generally State v. Butler*, 331 N.C. 227, 233-34, 415 S.E.2d 719, 722 (1992) (noting cases where a high crime area has been a factor in determining reasonable suspicion).

Defendant further contends that "because carrying a concealed weapon with a valid permit is not illegal in North Carolina" reasonable suspicion is "undermined" in this case. Defendant essentially argues that since a person carrying a concealed weapon may also have a permit to carry it legally, a law enforcement officer cannot assume that a person who appears to have a weapon concealed is doing so illegally. Yet defendant's argument is undermined by North Carolina General Statute § 14-415.11, which addresses exactly what an individual is required to do if he is legally carrying a concealed weapon and he is approached by a law enforcement officer:

> Any person who has a concealed handgun permit may carry a concealed handgun unless otherwise specifically prohibited by law. *The person shall carry the permit together with valid identification whenever the person is carrying a concealed handgun, shall disclose to any law enforcement officer that the person holds a valid permit and is carrying a concealed handgun when approached or addressed by the officer*, and shall display both the permit and the proper identification upon the request of a law enforcement officer.

N.C. Gen. Stat. § 14-415.11 (2011). (emphasis added) Thus, a person who is carrying a concealed weapon legally has an affirmative obligation to

disclose this fact and that he has a permit to an officer "when approached or addressed by the officer." *Id.*

Here, Officer Wells approached defendant and addressed him, but there is no indication that defendant informed him at any time that he had any legal right to carry a concealed weapon, nor is there any evidence that defendant had a valid concealed carry permit. The trial court made a finding of fact, which is not challenged by defendant, "[t]hat the defendant never stated to the Officer that he was carrying a weapon." Since North Carolina General Statute § 14-415.11 requires any person who is carrying a concealed weapon legally to disclose this fact when he is "approached" by a law enforcement officer, and defendant did not make this disclosure, Officer Wells had no reason to assume that any gun defendant may have tucked into his waistband was legally carried. *See id.* In fact, just the opposite would be true: if defendant was legally carrying a gun, Officer Wells would expect that he would immediately disclose this information when he approached defendant and his failure to do so would raise *more* suspicion that he was carrying the weapon illegally.

The binding unchallenged findings of fact and those we have already determined are supported by competent evidence, *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."), support the conclusion that Officer Wells had reasonable suspicion of criminal activity. Defendant was in a public housing area that was patrolled by a Special Response Unit and "a task force made up of US Marshals and [the] Drug Enforcement Agency" in order to "concentrat[e] on viol[ent] crimes [and] gun crimes[.]" Officer Wells was a police officer with ten years of experience and was assigned to the Special Response Unit where his responsibilities included patrolling the public housing area. "[O]fficers have been assaulted" in this area. Many individuals -- a list of at least nine pages -- are banned from the public housing area. On a prior occasion Officer Wells had heard shots fired near the area where he was patrolling on 27 March 2012. On 27 March 2012, Officer Wells saw defendant "walking normally while swinging his arms." Defendant turned and "used his right hand to grab his waistband to clinch an item" which "was an overt act[ion.]" Officer Wells believed "defendant was trying to hide something and his posturing made it apparent that he was concealing something on his person." Defendant "look[ed] specifically at" Officer Wells, and defendant's reaction created an "urgency to stop" defendant in Officer Wells in order to identify defendant. Officer Wells turned his vehicle around, without lights or siren, to stop defendant in order to ask

him questions. Officer Wells did not draw a weapon or use any type of force with defendant nor did he handcuff defendant, though he did frisk defendant and found a gun in defendant's waistband.

The State's arguments were based on several other cases, but we will not address these as we find *Fleming* to be more similar than those presented by the State. In *Fleming*, as in this case, the law enforcement officers were experienced officers involved with a specific law enforcement team assembled to address a specific crime problem in a specific area. *Fleming*, 106 N.C. App. at 166, 415 S.E.2d at 783. In *Fleming*, Officer Williams was a seventeen year veteran officer and a "member[] of a tactical division . . . operating a drug suppression program" in the vicinity of a housing project where the defendant was seized; *id.* at 166-67, 415 S.E.2d at 783, here, Officer Wells was a ten year veteran officer and "was assigned to the Special Response Unit . . . assigned to patrol public housing units . . . along with a task force made up of US Marshals and [the] Drug Enforcement Agency" in order to "concentrat[e] on viol[ent] crimes [and] gun crimes[.]" In *Fleming*, this Court concluded that Officer Williams did not have reasonable suspicion to seize the defendant because "at the time Officer Williams first observed [the] defendant and his companion, they were merely standing in an open area between two apartment buildings. At this point, they were just watching the group of officers standing on the street and talking. The officer observed no overt act by defendant[.]" *Id.* at 170, 415 S.E.2d at 785. This case is different, as Officer Wells saw defendant "walking normally while swinging his arms[,]" but then he turned and "used his right hand to grab his waistband to clinch an item" which "was an overt act[ion.]" Officer Wells believed "defendant was trying to hide something and his posturing made it apparent that he was concealing something on his person." Defendant "look[ed] specifically at" Officer Wells, and defendant's reaction "created some urgency to stop" defendant in Officer Wells in order to identify defendant. Here, the trial court specifically found that defendant engaged in a specific action, "grab[bing] his waistband to clinch an item[,]" which made Officer Wells believe "defendant was trying to hide something and his posturing made it apparent that he was concealing something on his person." Furthermore, defendant looked at Officer Wells in such a way that his reaction "created some urgency" in Officer Wells that defendant needed to be identified in a high crime area where a list of at least nine pages of individuals were banned. Accordingly, we conclude that the findings of fact do support a conclusion of reasonable suspicion on the part of Officer Wells to stop and frisk defendant as due to the high crime area,

Officer Wells' experience and knowledge of the area, and defendant's behavior, Officer Wells had a reasonable suspicion both to stop defendant and frisk him for weapons. *See generally State v. Rinck*, 303 N.C. 551, 559, 280 S.E.2d 912, 919 (1981) ("If from the totality of circumstances, a law enforcement officer has reasonable grounds to believe that criminal activity may be afoot, he may temporarily detain an individual. If upon detaining the individual, the officer's personal observations confirm that criminal activity may be afoot and suggest that the person detained may be armed, the officer may frisk him as a matter of self-protection." (citations omitted)). As such, the trial court properly denied defendant's motion to suppress, and defendant's argument is overruled.

VI. Conclusion

For the foregoing reasons, we affirm.

AFFIRMED.

Judges HUNTER, JR., Robert N. and DILLON concur.

VIKING UTILITIES CORPORATION, INC., GARLAND W. TUTON, AND SUE C. TUTON, PLAINTIFFS
v.
ONSLOW WATER AND SEWER AUTHORITY, DEFENDANT

No. COA13-597

Filed 4 March 2014

1. Appeal and Error—interlocutory orders and appeals—governmental immunity—substantial right

Defendant's appeal of the denial of its motion to dismiss was interlocutory. However, appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review. To the extent defendant's appeal was based upon the affirmative defense of immunity, the appeal was properly before the Court.

2. Immunity—governmental—further record development necessary—motion to dismiss properly denied

The trial court did not err by denying defendant's motion to dismiss in a breach of contract action where further development of

the record was necessary for determination of whether the defendant was entitled to assert the defense of governmental immunity.

Appeal by defendant from order filed 18 February 2013 by Judge W. Allen Cobb, Jr., in Onslow County Superior Court. Heard in the Court of Appeals 9 October 2013.

Ward and Smith, P.A., by Ryal W. Tayloe and Jeremy M. Wilson, for plaintiff-appellees.

Turrentine Law Firm, PLLC, by S.C. Kitchen, for defendant-appellant.

STEELMAN, Judge.

Where further development of the record is necessary for determination of whether the defendant is entitled to assert the defense of governmental immunity, the trial court did not err by denying defendant's motion to dismiss under N.C. Gen. Stat. § 1A-1, Rule 12(b)(1), (2), and (6).

I. Factual and Procedural Background

On 16 November 2007, Viking Utilities Corporation, Inc., Garland W. Tuton, and Sue C. Tuton (collectively plaintiffs), entered into an "Asset Purchase Agreement for the Acquisition of the Wastewater System Assets of Viking Utilities Corporation, Inc., by Onslow Water and Sewer Authority." The parties amended the agreement on 17 April 2008. The agreement provided that Onslow Water and Sewer Authority (defendant) would purchase Viking's wastewater system, including real property owned by plaintiffs, for $5,550,000. Defendant paid plaintiffs $500,000 at closing, and the parties agreed that most of the balance of the purchase price, $4,800,000, would be donated to defendant by plaintiffs. The agreement also contained a specific provision that defendant would receive a credit of $250,000 towards the purchase price in return for allowing plaintiffs to connect over the next five years to the wastewater system at any location served by defendant without payment of a "Tap Fee." The credit would be used at the rate of $2,500 per connection. The agreement also contained a specific representation by defendant that the transaction did not require "the approval or consent of any federal, state, local or other governmental body or agency that has not been obtained[.]"

On 27 September 2012, plaintiffs filed a complaint alleging that defendant had breached its agreement by refusing to allow plaintiffs to connect with defendant's sewer system without payment of a tap fee. The complaint sought specific performance of the agreement, a declaratory judgment that plaintiffs were entitled to 100 residential tap fees, and in the alternative asked for rescission or reformation of the agreement. On 18 October 2012, defendant filed a motion to dismiss pursuant to Rules 12(b)(1), (2), and (6) of the North Carolina Rules for Civil Procedure, for lack of jurisdiction and for failure to state a claim upon which relief may be granted. On 5 December 2012, plaintiffs filed their First Amended Complaint, which added three additional claims: (1) restitution, *quantum meruit*, and unjust enrichment; (2) estoppel; and (3) negligent misrepresentation. On 28 December 2012, defendant filed its second motion to dismiss for lack of jurisdiction and failure to state a claim upon which relief may be granted. On 18 February 2013, Judge Cobb denied defendant's motions to dismiss pursuant to Rules 12(b)(1), (2), and (6) of the North Carolina Rules for Civil Procedure

Defendant appeals.

II. Interlocutory Appeal

[1] Defendant's appeal of the denial of its motion to dismiss is interlocutory. However, "this Court has repeatedly held that appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review." *Price v. Davis*, 132 N.C. App. 556, 558-59, 512 S.E.2d 783, 785 (1999) (citations omitted). To the extent defendant's appeal is based upon the affirmative defense of immunity, this appeal is properly before this Court. *See id.*

III. Motion to Dismiss

[2] In defendant's only argument on appeal, defendant contends that the trial court erred in denying its motion to dismiss. We disagree.

A. Standard of Review

We review "a trial court's denial of a motion to dismiss that raises sovereign immunity as grounds for dismissal" *de novo*. *White v. Trew*, 366 N.C. 360, 362-63, 736 S.E.2d 166, 168 (2013).

B. Governmental Immunity

"Under the doctrine of governmental immunity, a county or municipal corporation 'is immune from suit for the negligence of its employees in the exercise of governmental functions absent waiver of immunity.' " *Estate of Williams v. Pasquotank County*, 366 N.C. 195, 198, 732 S.E.2d

137, 140 (2012) (quoting *Evans ex rel. Horton v. Hous. Auth.*, 359 N.C. 50, 53, 602 S.E.2d 668, 670 (2004) (internal quotation omitted). "Nevertheless, governmental immunity is not without limit. '[G]overnmental immunity covers only the acts of a municipality or a municipal corporation committed pursuant to its governmental functions.' Governmental immunity does not, however, apply when the municipality engages in a proprietary function." *Williams*, 366 N.C. at 199, 732 S.E.2d at 141 (quoting *Evans*, 359 N.C. at 53, 602 S.E.2d at 670 (citations omitted), and citing *Town of Grimesland v. City of Washington*, 234 N.C. 117, 123, 66 S.E.2d 794, 798 (1951).

In *Williams* the Court took the "opportunity to restate our jurisprudence of governmental immunity," *Williams* at 196, 732 S.E.2d at 139, and in so doing focused on the need for courts to engage in a fact-based analysis, considering various relevant factors, rather than applying bright-line rules:

> In determining whether an entity is entitled to governmental immunity, the result therefore turns on whether the alleged tortious conduct of the county or municipality arose from an activity that was governmental or proprietary in nature. . . . [T]he threshold inquiry in determining whether a function is proprietary or governmental is whether, and to what degree, the legislature has addressed the issue.

Williams at 199-200, 732 S.E.2d at 141-42. *Williams* arose from a drowning at a public park and, although noting the existence of statutory provisions affirming the public benefit of parks and recreation, it declined to hold that these provisions were dispositive. Instead, the Court held that, even if the general operation of a parks program had been statutorily designated as a governmental function, "the question remains whether the specific operation of the [swimming area where the drowning occurred] in this case and under these circumstances, is a governmental function." *Williams* at 201, 732 S.E.2d at 142. The *Williams* Court also offered certain guiding principles for future courts to apply:

> [W]hen the particular service can be performed both privately and publicly, the inquiry involves consideration of a number of additional factors, of which no single factor is dispositive. Relevant to this inquiry is whether the service is traditionally a service provided by a governmental entity, whether a substantial fee is charged for the service provided, and whether that fee does more than simply cover the operating costs of the service provider.

> We conclude that consideration of these factors provides the guidance needed to identify the distinction between a governmental and proprietary activity. Nevertheless, we note that the distinctions between proprietary and governmental functions are fluid and courts must be advertent to changes in practice. We therefore caution against overreliance on these four factors.

Williams at 202-03, 732 at 143. Finally, *Williams* held:

> Analysis of the factors listed above when considering whether the action of a county or municipality is governmental or proprietary in nature is particularly important in light of two points we have previously emphasized. . . . "First, although an activity may be classified in general as a governmental function, liability in tort may exist as to certain of its phases; and conversely, although classified in general as proprietary, certain phases may be considered exempt from liability. Second, it does not follow that a particular activity will be denoted a governmental function even though previous cases have held the identical activity to be of such a public necessity that the expenditure of funds in connection with it was for a public purpose." Consequently, the proper designation of a particular action of a county or municipality is a fact intensive inquiry, turning on the facts alleged in the complaint, and may differ from case to case.

Williams at 203, 732 S.E.2d at 143 (quoting *Sides v. Cabarrus Mem'l Hosp., Inc.*, 287 N.C. 14, 21-22, 213 S.E.2d 297, 302 (1975) (internal citations and emphases omitted).

In *Town of Sandy Creek v. E. Coast Contr., Inc.*, __ N.C. App. __, 741 S.E.2d 673 (2013) this Court applied *Williams* to the plaintiff's allegations that the defendant, the City of Northwest, had failed to properly manage its contract with an engineering firm for construction of a sewer system. We held that, although the operation of a sewer system might be a governmental function, the specific allegations of the plaintiff's complaint did not assert acts undertaken in a governmental capacity:

> These allegations of breaches of the duty of reasonable care do not concern decisions of government discretion such as whether to construct a sewer system or where to locate the sewer system. Instead, the alleged breaches concern Northwest's handling of the contract and

> Northwest's business relationship with the contractor, acts that are not inherently governmental but are commonplace among private entities. . . . [W]we find that Northwest was involved in a proprietary function while handling its business relationship with ECC and the trial court did not err in denying Northwest's motion to dismiss based on governmental immunity.

Sandy Creek, __ N.C. App. at __, 741 S.E.2d at 676-77. In this case, as in *Sandy Creek*, the plaintiffs' allegations involve its "business relationship" with defendant.

Based on *Williams* and *Sandy Creek*, we hold that determination of whether defendant is entitled to assert the defense of governmental immunity will require the trial court to consider the pertinent statutory provisions as well as factual evidence regarding plaintiffs' allegations, fees charged by defendant, whether the fees cover more than the operating costs of the water authority, and any other evidence relevant to the issue of whether, in executing and interpreting its contract with plaintiffs, defendant was acting in a governmental or proprietary capacity. Because such evidence was not before the court in ruling on a motion to dismiss under N.C. Gen. Stat. § 1A-1, Rule 12(b)(1), (2), or (6), the trial court did not err by denying defendant's motion to dismiss at this stage of the proceedings. Our decision to affirm the trial court does not prevent the parties from seeking summary judgment, at which time they may offer documentary or testimonial evidence in support of their positions. As we are holding that the trial court did not err by denying the motion to dismiss, we do not reach the parties' arguments concerning whether, in the event that the court determines that defendant is entitled to assert the defense of governmental immunity, the defense has been waived by execution of a valid contract with plaintiffs.

Conclusion

We hold that the trial court did not err in its denial of defendant's motion to dismiss and that its order should be affirmed.

AFFIRMED.

Judges HUNTER, ROBERT C., and BRYANT concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 4 MARCH 2014)

CINOMAN v. THE UNIV. OF N.C. No. 13-902	Wake (09CVS3164)	Reversed
FOSTER v. WELLS FARGO, N.A. No. 13-974	Durham (12CVS6015)	Affirmed
HANCOX v. WINGATE UNIV. No. 13-1018	Union (13CVS158)	Dismissed
HARRIS v. A-1 BUILDERS OF N.C., INC. No. 13-1048	Randolph (12CVS2353)	Affirmed
PATTERSON v. UNIV. FORD, INC. No. 13-585	Durham (11CVS2376)	No Error
REEGER BUILDERS, INC. v. J.C. DEMO INS. GRP., INC. No. 13-622	Gaston (08CVS5609)	Reversed
STATE v. BARNHILL No. 13-678	Randolph (09CRS56732)	Affirmed
STATE v. FENNELL No. 13-1056	Pender (08CRS3155) (08CRS52362)	Remanded
STATE v. HAQQ No. 13-813	Catawba (12CRS3753)	No prejudicial error.
STATE v. JEFFERSON No. 13-668	Rockingham (10CRS231)	No Prejudicial Error; Remanded for Resentencing
STATE v. KILLETTE No. 13-836	Johnston (09CRS55879) (09CRS56059)	Affirmed
STATE v. LIPFORD No. 13-708	Caldwell (10CRS53142) (10CRS53149) (10CRS53337) (10CRS53340)	NO ERROR in part; DISMISSED in part.
STATE v. LONG No. 13-922	Mecklenburg (07CRS238137-38) (07CRS238140)	No Error

STATE v. NIETO No. 13-430	Montgomery (08CRS50760-61)	No Error
STATE v. SPIVEY No. 13-656	Robeson (09CRS57970) (09CRS706839) (09CRS8828) (09IFS707165) (11CRS5000)	No Error
STATE v. VAZQUEZ No. 13-556	Mecklenburg (11CRS12462) (11CRS3173-74)	Affirmed
STATE v. WATLINGTON No. 13-480	Rockingham (11CRS51074-75)	No Prejudicial Error
THOMPSON v. CONTI No. 13-1091	Halifax (12CVS231)	Reversed and Remanded
VENABLE v. LOWES HOME CTRS., INC. No. 13-883	N.C. Industrial Commission (X13603)	Affirmed
WURTZ v. WURTZ No. 13-993	Iredell (10CVD2708)	Dismissed

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APPEAL AND ERROR—Continued

Interlocutory orders and appeals—denial of motion to dismiss—immunity—substantial right—non-immunity related arguments—Although appeals from interlocutory orders raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review, defendants were not entitled to immediate appellate review of the trial court's denial of their motions to dismiss on the basis of any non-immunity related arguments. Further, defendant's petitions for writ of certiorari were denied. **Hinson v. City of Greensboro, 204.**

Interlocutory orders and appeals—denial of motion to intervene—substantial right—Although intervenor SeaScape Property Owners' Association, Inc. appealed from an interlocutory order that denied its motion to intervene, it affected a substantial right and was immediately appealable. **Anderson v. SeaScape at Holden Plantation, LLC, 1.**

Interlocutory orders and appeals—governmental immunity—substantial right—Defendant's appeal of the denial of its motion to dismiss was interlocutory. However, appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review. To the extent defendant's appeal was based upon the affirmative defense of immunity, the appeal was properly before the Court. **Viking Utils. Corp., Inc. v. Onslow Water and Sewer Co., 684.**

Interlocutory orders and appeals—preliminary injunctions—trade secrets—substantial right—The merits of both plaintiff's appeal and defendant's cross-appeal from preliminary injunction rulings were addressed where the case involved trade secret agreements between an employer and employee. **Horner Int'l Co. v. McKoy, 559.**

Interlocutory orders and appeals—preliminary injunction—livelihood—substantial right—Where the entry of an order granting a request for the issuance of a preliminary injunction effectively destroyed defendant's livelihood by prohibiting him from working for his current employer for a period of three years, it affected a substantial right and was subject to immediate appellate review. **CopyPro Inc. v. Musgrove, 194.**

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Motion to dismiss appeal—subject matter jurisdiction—stipulation—Plaintiffs' motion to dismiss the appeal for lack of subject matter jurisdiction on the basis that intervenor SeaScape Property Owners' Association, Inc. lacked authority, and therefore standing, to pursue the appeal was denied. The parties stipulated that the trial court had subject matter jurisdiction over the present action. **Anderson v. SeaScape at Holden Plantation, LLC, 1.**

Notice of appeal—petition for writ of certiorari—The Court of Appeals granted defendant's petition for writ of *certiorari* and heard defendant's appeal from the denial of his motion to suppress where defendant failed to appeal from the judgment of conviction. **State v. Sutton, 667.**

CONTRACTS—Continued

statute from performing. Thus, the installation agreement was neither illegal nor impossible to perform. **Botts v. Tibbens, 537.**

CORPORATIONS

Derivative action—lack of reasonable cause—negligence—no reasonable belief—The trial court did not err in a derivative action by concluding that the action was brought without reasonable cause. Plaintiffs did not have a reasonable belief that there was a sound chance that the derivative action alleging negligence could be sustained. **McMillan v. Ryan Jackson Props., LLC, 35.**

Dissolution—ambiguity of order approving sale—impermissible collateral attack of receivership sale—The trial court did not err by granting plaintiff's motion for partial summary judgment and dismissing defendants' counterclaims in a civil action arising after Van Vooren Game Ranch USA, LLC (VVGR USA) was dissolved and sold at auction even though defendants contend there was ambiguity in the order approving the sale. Defendants' argument amounted to an impermissible collateral attack on the receivership sale of VVGR USA's assets. **Joyce Farms, LLC v. Van Vooren Holdings, Inc., 591.**

Dissolution—effect on defendants' contract claims—general successor liability rule—The trial court did not err by granting plaintiff's motion for partial summary judgment and dismissing defendants' counterclaims in a civil action arising after Van Vooren Game Ranch USA, LLC (VVGR USA) was dissolved and sold at auction even though defendants contended that there was a genuine issue of fact regarding the effect of the dissolution on defendants' contract claims. The trial court, consistent with the general successor liability rule, ordered a sale of VVGR USA's assets and did not order the transfer of VVGR USA's liabilities, including any contract claims defendants may have had against it. **Joyce Farms, LLC v. Van Vooren Holdings, Inc., 591.**

Dissolution—exceptions to general successor liability rule—The trial court did not err by granting plaintiff's motion for partial summary judgment and dismissing defendants' counterclaims in a civil action arising after Van Vooren Game Ranch USA, LLC was dissolved and sold at auction even though defendant contended there was a genuine issue of material fact regarding application of the exceptions to the general successor liability rule. The exceptions to the general successor liability rule put in place to prevent fraudulent transfers in private sales of company assets were inapplicable. **Joyce Farms, LLC v. Van Vooren Holdings, Inc., 591.**

COSTS

Expert witnesses—denial of motion for funds—failure to meet burden of proof—The trial court did not abuse its discretion in a voluntary admission of a minor to a twenty-four hour psychiatric treatment facility case by denying respondent minor's motion for funds to hire an expert witness. Respondent failed to meet his burden to convince the trial court that there existed some valid concern or reason to provide funds for an "independent" expert. **In re A.N.B., 406.**

CRIMINAL LAW

Charging document—misdemeanor—amendment—changed nature of offense—impermissible—The superior court lacked jurisdiction to try defendant

SENTENCING—Continued

domestic assault was substantially similar to the North Carolina offense of assault on a female. The required comparison is of the elements of the two offenses. **State v. Sanders, 262.**

Prior record points—Tennessee offense—substantially similar to North Carolina offense—The trial court did not err by concluding that the Tennessee offense of theft and the North Carolina offense of larceny are substantially similar. The only difference between the elements of the offenses in the two states that defendant pointed out was that the Tennessee offense allegedly required no showing of permanent deprivation. However, courts in Tennessee have held that Tennessee's theft statute requires an intention to permanently deprive the owner of property. **State v. Sanders, 262.**

Satellite-based monitoring—civil regulatory scheme—no ex post facto or double jeopardy implications—The North Carolina Supreme Court has held that the satellite-based monitoring program is a civil regulatory scheme that does not implicate constitutional protections against either *ex post facto* laws or double jeopardy. *State v. Bowditch*, 364 N.C. 335. **State v. Mills, 460.**

TERMINATION OF PARENTAL RIGHTS

Best interests of child—age of children—The trial court did not abuse its discretion by determining that termination of respondent mother's parental rights was in the best interests of the minor children even though the trial court failed to make written findings concerning the age of the children. Respondent failed to cite any evidence in the record indicating that age was raised as a relevant factor in this case. **In re D.H., 217.**

Findings—absence of adoptive placement—Although respondent mother in a termination of parental rights case contended that the trial court abused its discretion by making no findings with respect to the quality of the relationship between the juveniles and the proposed adoptive parent, guardian, custodian, or other permanent placement, pursuant to N.C.G.S. § 7B-1110(5), the absence of an adoptive placement for a juvenile at the time of the termination hearing was not a bar to terminating parental rights. **In re D.H., 217.**

Findings—adoptability of children—The trial court did not abuse its discretion by terminating respondent mother's parental rights even though she contended that it was unlikely that two of the children would be adopted. The trial court found as fact that with continued therapeutic support, these children were likely to be adoptable. **In re D.H., 217.**

Findings—likelihood children would be adopted—Although respondent mother in a termination of parental rights case contended that the trial court abused its discretion by making no findings with respect to the likelihood that the children would be adopted pursuant to N.C.G.S. § 7B-1110(a)(2), the trial court made the requisite findings concerning this factor. **In re D.H., 217.**

Findings—whether termination would aid in accomplishment of permanent plan—Although respondent mother in a termination of parental rights case contended that the trial court abused its discretion by making no findings with respect to N.C.G.S. § 7B-1110(3), concerning whether termination would aid in the accomplishment of the permanent plan for the juveniles, which in this case was adoption, the trial court made sufficient findings concerning this factor. **In re D.H., 217.**