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[4] 1 January 2016.

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CASES REPORTED WITHOUT PUBLISHED OPINIONS

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

JANE HEATON-SIDES, PLAINTIFF

v.

TORETTA SNIPES, INDIVIDUALLY, AND IN HER CAPACITY AS VICE PRESIDENT OF STATE EMPLOYEES' CREDIT UNION & STATE EMPLOYEES' CREDIT UNION & JAYME CURRIN, INDIVIDUALLY, AND IN HER CAPACITY AS PRESIDENT OF AMERICAN DREAM PROPERTIES, INC. & AMERICAN DREAM PROPERTIES, INC., DEFENDANTS

No. COA13-1083

Filed 18 March 2014

1. Mortgages and Deeds of Trust—foreclosure—remaining personal property—conversion claim

The trial court erred by concluding that plaintiff failed to prove her conversion claim in an action that arose from the disposal of personal property remaining after a foreclosure sale. The ten-day waiting period in N.C.G.S. § 42-25.9(g) cannot be avoided by contract because N.C.G.S. § 42-25.8 provides that a modified timeline violates public policy and is void. Nothing suggests that a tenant or former owner has only one opportunity to obtain possession of their personal property during the ten-day period.

2. Conversion—damages—fair market value

A conversion action arising from the disposal of personal property after a foreclosure was remanded to the trial court for entry of a judgment awarding plaintiff nominal damages. The fair market value of household items would be the value of the items at the time of their conversion, not the cost of buying replacement goods. The fair market value of papers which plaintiff claimed were children's books in progress would be the price a willing buyer would pay rather than a reasonable compensation for the amount of time

plaintiff worked on the books. Actual damages, however, are not an essential element of a conversion claim and nominal damages can still be recovered.

Appeal by plaintiff from an order entered 22 May 2013 by Judge Henry W. Hight, Jr. in Granville County Superior Court. Heard in the Court of Appeals 17 February 2014.

Michael A. Jones, for plaintiff-appellant.

Hopper, Hicks & Wrenn PLLC, by James C. Wrenn, Jr. and Gerald T. Koinis, for defendants-appellees.

MARTIN, Chief Judge.

Plaintiff Jane Heaton-Sides filed a complaint against defendants alleging claims for conversion, negligent and intentional infliction of emotional distress, punitive damages, and unfair and deceptive trade practices. The claims against defendants State Employees Credit Union ("SECU") and Toretta Snipes were dismissed by order dated 1 February 2013 as a result of plaintiff's failure to respond to discovery. Plaintiff subsequently voluntarily dismissed with prejudice all of her claims against defendants Jayme Currin and American Dream Properties except her claim for conversion.

After a bench trial, the trial court made the following relevant findings of fact, all of which are supported by the evidence presented at the trial. SECU foreclosed on plaintiff's personal residence located at 1500 Cash Road in Creedmoor, North Carolina and was later placed in lawful possession of the residence on 1 April 2011 at 9:00 a.m. On that date, plaintiff and her husband were in the process of moving out of the residence. Plaintiff, her husband, and SECU agreed that plaintiff and her husband could continue moving out until 3:00 p.m. that day. Around 3:00 p.m., Ms. Snipes, an employee of SECU, informed plaintiff and her husband that if they wanted to take any additional personal property from the residence they should inform her or Ms. Currin of American Dream, a property manager for SECU, by the close of business on 4 April 2011.[1] Furthermore, Ms. Currin testified that when she walked through the residence on 1 April 2011 it did not appear that anything of value was

1. We note that the trial court refers to both "Monday, April 3, 2011" and "Monday, April 4, 2011" in its order. The date is not disputed in this action, but we take judicial notice, by reference to a calendar, that the first Monday of April, 2011 was the 4th.

left behind. Plaintiff did not inform anyone that she wanted to retrieve additional personal property from the residence until 7 April 2011. By that time, any remaining property in the residence had been disposed of and plaintiff was not able to retrieve any additional personal property. Plaintiff testified that, as a result, she was missing some household items that would cost her $10,272 to replace as well as notes and outlines for several children's books ("the papers") that she thought had a value of $75,400 as reasonable compensation to her for the amount of time she spent working on them (20 hours per week x 52 weeks x 10 years x $7.25 per hour = $75,400). Plaintiff, however, did not offer any testimony about the fair market value of the household items or the papers.

Based on this evidence, the trial court concluded that plaintiff did not show a wrongful conversion by defendants because she had abandoned the personal property in the residence when she failed to contact anyone about removing additional personal property by 4 April 2011. Furthermore, the trial court concluded that even if plaintiff had proven her conversion claim, she had failed to prove actual damages. Plaintiff timely filed notice of appeal from the trial court's order dismissing her conversion claim with prejudice.

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[1] A conversion claim essentially requires two elements: "ownership in the plaintiff and wrongful possession or conversion by the defendant." *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 523, 723 S.E.2d 744, 747 (2012). On appeal, plaintiff argues that the trial court erred in dismissing her conversion claim for failure to show a wrongful conversion by defendants because defendants violated N.C.G.S. § 42-25.9(g) when they disposed of plaintiff's personal property before the expiration of the statutory ten-day waiting period. We agree.

When we review an order issued after a bench trial we determine "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 conclusion of law." *Holloway v. Holloway*, __ N.C. App. __, __, 726 S.E.2d 198, 204 (2012). However, we review the trial judge's conclusions of law *de novo*. *Id.*

In this case, plaintiff's residence was sold at a foreclosure sale and SECU was later placed in possession of the residence pursuant to N.C.G.S. § 45-21.29(l). This statute provides that the purchaser of the foreclosed property "shall have the same rights and remedies in connection with the execution of an order for possession and the disposition of

personal property following the execution as are provided to a landlord under North Carolina law, including Chapters 42 and 44A of the General Statutes." *Id.* Thus, section 45-21.29(l) directs us to Chapter 42.

N.C.G.S. § 42-25.9(g) states:

> Ten days after being placed in lawful possession by execution of a writ of possession, a landlord may throw away, dispose of, or sell all items of personal property remaining on the premises . . . . During the 10-day period after being placed in lawful possession by execution of a writ of possession, a landlord may move for storage purposes, but shall not throw away, dispose of, or sell any items of personal property remaining on the premises unless otherwise provided for in this Chapter. Upon the tenant's request prior to the expiration of the 10-day period, the landlord shall release possession of the property to the tenant during regular business hours or at a time agreed upon.

N.C. Gen. Stat. § 42-25.9(g) (2011) *amended by* 2012 N.C. Sess. Laws 73, 74, ch. 17, §§ 2(a), 2(b), *amended by* 2013 N.C. Sess. Laws 309, 311 ch. 334, § 4.

Based on the language of this statute, the landlord or buyer in a foreclosure sale who is placed in lawful possession of a residence may move personal property in the residence to storage but cannot dispose of the property for ten days after being placed in lawful possession. Furthermore, the landlord or buyer must make the personal property available to the tenant or former owner upon their request during the ten-day period.

Defendants assert that they met the statutory requirements of N.C.G.S. § 42-25.9 by: (1) allowing plaintiff to continue removing her personal property on 1 April 2011 when they were placed in lawful possession, and (2) agreeing with plaintiff and her husband that if they wanted additional personal property from the residence they should notify defendants by the end of business on Monday 4 April 2011. In essence, defendants appear to argue that plaintiff waived the ten-day waiting period when she agreed to contact defendants by the end of business on 4 April 2011, and that plaintiff was guaranteed only one opportunity to retrieve her personal property. These arguments fail.

In contract law there are generally two types of rules: default rules and immutable rules. Default rules are rules that "parties can contract around by prior agreement." Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99

Yale L.J. 87, 87 (1989). Immutable rules, by comparison, are those rules that "parties cannot change by contractual agreement." *Id.* While these terms usually refer to the Uniform Commercial Code, they demonstrate the principle that some rules may be avoided by contract while others may not. The ten-day waiting period in N.C.G.S. § 42-25.9(g) cannot be avoided by contract because N.C.G.S. § 42-25.8 provides: "Any lease or contract provision contrary to this Article shall be void as against public policy." Thus, plaintiff and defendants could not satisfy the statutory ten-day waiting period by agreeing to a modified timeline because such an agreement violates public policy and is void.

Furthermore, nothing suggests that a tenant or former owner has only one opportunity to obtain possession of their personal property during the ten-day period. While the statutory language "[u]pon the tenant's request" is singular, it seems counterintuitive to reason that a former owner of property has only one chance in the ten-day period to obtain physical possession of their personal property before it is disposed of. As a result, we believe that plaintiff could have obtained possession of her personal property on 7 April 2011 even though she had been allowed to remove personal property on 1 April 2011. Thus, we reverse the trial court's conclusion of law that plaintiff failed to prove her conversion claim.

[2] Once a party has stated a claim for conversion, the party must present evidence that will provide a basis for determining damages. *Marina Food Assocs., Inc. v. Marina Rest., Inc.*, 100 N.C. App. 82, 94, 394 S.E.2d 824, 831, *disc. rev. denied*, 327 N.C. 636, 399 S.E.2d 328 (1990). For a conversion claim, damages are determined by the "fair market value of the converted property at the time of the conversion, plus interest." *Bartlett Milling Co., v. Walnut Grove Auction & Realty Co.*, 192 N.C. App. 74, 81, 665 S.E.2d 478, 485, *disc. rev. denied*, 362 N.C. 679, 669 S.E.2d 741 (2008). Fair market value is the price that a willing buyer would pay a willing seller when neither party is compelled to take part in the transaction. *Esteel Co. v. Goodman*, 82 N.C. App. 692, 698, 348 S.E.2d 153, 157 (1986), *disc. rev. denied*, 318 N.C. 693, 351 S.E.2d 745 (1987).

As discussed earlier, a trial court's findings of fact are conclusive on appeal if they are supported by competent evidence. *Holloway*, __ N.C. App. at __, 726 S.E.2d at 204. In this case, the trial judge found that plaintiff did not attempt to determine the fair market value of the household goods and offered no testimony as to the fair market value of the papers. These findings are supported by the evidence. At trial, plaintiff testified that the *replacement cost* of the household items was $10,272. Replacement cost is not the fair market value. The fair market value of the household goods would be the value of the goods at the time of their

conversion, not the cost of buying replacement goods. Plaintiff did not testify as to the value of the goods at the time of their conversion, and as a result, failed to offer evidence of their fair market value.

Furthermore, plaintiff offered no evidence as to the fair market value of the papers. As stated earlier, fair market value is the price a willing buyer would pay a willing seller for goods. *See Esteel*, 82 N.C. App. at 698, 348 S.E.2d at 157. Plaintiff testified that she thought that the papers had a value of $75,400 because that would be reasonable compensation for the amount of time she worked on them. However, to prove the fair market value of the papers plaintiff would have to demonstrate how much a willing buyer would pay her for the papers.

During the bench trial, plaintiff's counsel relied on Pattern Jury Instruction 810.66 to argue that $75,400 represented the "intrinsic" value of the papers. This argument was not made on appeal; however, if plaintiff had made this argument on appeal it would have failed. The note to Pattern Jury Instruction 810.66 states: "Use this instruction where damages measured by market value would not adequately compensate the plaintiff." N.C.P.I.—Civ. 810.66 (gen. civ. vol. 2013). Thus, intrinsic value was not the appropriate value to determine plaintiff's damages because there was no evidence of the fair market value of the papers or that the fair market value of the papers would not adequately compensate plaintiff. The trial court correctly found that plaintiff had presented no evidence of the fair market value of the household goods or the papers, and correctly concluded that plaintiff had failed to prove actual damages.

Actual damages, however, are not an essential element of a conversion claim. *Hawkins v. Hawkins*, 101 N.C. App. 529, 533, 400 S.E.2d 472, 475 (1991), *aff'd*, 331 N.C. 743, 417 S.E.2d 447 (1992). Consequently, even if a plaintiff fails to prove actual damages, she can still recover nominal damages. *See Fagan v. Hazzard*, 34 N.C. App. 312, 313–14, 237 S.E.2d 916, 917 (1977) (affirming a trial court's award of one dollar as nominal damages when the plaintiff proved conversion but not actual damages). Accordingly, plaintiff is entitled to nominal damages because she proved her conversion claim but not actual damages.

Therefore, we reverse the trial court's holding that plaintiff failed to prove conversion, affirm the determination that plaintiff failed to prove actual damages, and remand this case to the trial court for entry of a judgment awarding plaintiff nominal damages.

Affirmed in part, reversed in part and remanded.

Judges ELMORE and HUNTER, JR. concur.

IN THE MATTER OF APPEAL OF PACE/DOWD PROPERTIES LTD. FROM THE DECISIONS OF THE UNION COUNTY BOARD OF EQUALIZATION AND REVIEW REGARDING THE VALUATIONS OF CERTAIN PROPERTY FOR TAX YEAR 2010.

No. COA13-759

Filed 18 March 2014

1. Taxation—ad valorem tax—arbitrary method of valuation—findings of fact—conclusions of law—rational basis

The North Carolina Tax Commission did not err by holding that Union County used an arbitrary method of valuation in assessing two parcels of land owned by Pace/Dowd Properties, Ltd. The challenged findings and conclusions of the Commission had a rational basis in the evidence and it was not the duty of the Court of Appeals to substitute its judgment for that of the Commission.

2. Taxation—ad valorem tax—true value—general reappraisal

The North Carolina Tax Commission (Commission) did not err in a tax valuation case by finding the true value of Parcel 3 to be $3,987,600 and Parcel 3A to be $4,583,140 as of the 1 January 2008 general reappraisal. The record sufficiently supported the Commission's finding that Union County's arbitrary method of assessment resulted in an assessment of the parcels that substantially exceeded the market values of the parcels. Based on expert testimony, the Commission reduced Union County's values of the parcels by fifty percent.

3. Taxation—ad valorem tax—conclusions of law—improper discovery of parcel of land—increase or decrease in appraisal value not retroactive

The North Carolina Tax Commission did not err by holding in conclusion of law number three that Union County improperly discovered Parcel 3A for tax years 2008 and 2009. The General Assembly has stated that an increase or decrease in appraised value made under N.C.G.S. § 105-287(c) is effective as of January 1 of the year in which it is made and is not retroactive.

Appeal by Union County from final decision entered 24 January 2013 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 20 November 2013.

K&L Gates LLP, by Samuel T. Reaves, for Pace/Dowd Properties, Ltd.

Hamilton Stephens Steele & Martin, PLLC, by Rebecca K. Cheney, for Union County.

McCULLOUGH, Judge.

Union County appeals from a decision by the North Carolina Tax Commission, holding that Union County used an arbitrary method of valuation in assessing two parcels of land owned by Pace/Dowd Properties, Ltd. Based on the following reasons, we affirm the decision of the North Carolina Tax Commission.

I. Background

Union County appeals from a 24 January 2013 "Final Decision" of the North Carolina Property Tax Commission ("Commission") concerning the tax value of two parcels of land located within Union County. The two parcels of land at issue, purchased by appellee Pace/Dowd Properties Ltd. ("Pace/Dowd"), consist of Union County Tax Parcel Number 06-135-003 ("Parcel 3") and Parcel Number 06-135-003A ("Parcel 3A"). Parcel 3 is comprised of 216 acres of land. Pace/Dowd purchased it in 2005 for $11,212,500, with the intent to develop Parcel 3 as the second and third phases of a residential development called "Lawson" with 245 lots. Parcel 3A is comprised of 173.85 acres of land. It was purchased in 2003 for $7,375,298, with the intent to develop Parcel 3A as the fourth phase of the Lawson development with 404 lots.

During Union County's 2008 countywide general reappraisal, Parcel 3 was valued by Union County at a property tax value of $10,201,240 and Parcel 3A was valued at $1,135,420. In 2009, Pace/Dowd did not appeal the tax valuations. However, in 2010, Pace/Dowd contested the value of both parcels by filing an appeal with the Union County Board of Equalization and Review ("County Board").

Union County became aware it had wrongly classified Parcel 3A as a subdivision common area and notified Pace/Dowd that it was increasing the tax value of Parcel 3A to $9,166,280 effective 1 January 2008 for tax years 2008, 2009, and 2010. The County Board heard Pace/Dowd's challenges to Union County's assessments on 22 June 2010 and declined to consider Pace/Dowd's appeal on Parcel 3 for tax years 2008 and 2009. Furthermore, the County Board reduced the value of Parcel 3 from $10,201,240 to $7,975,200 effective 1 January 2010 and affirmed the valuation of Parcel 3A at $9,166,280.

Subsequently, Pace/Dowd appealed to the Commission, presenting several issues. First, Pace/Dowd argued that the subject parcels

were appraised in excess of the true value of the subject property as of 1 January 2008. Pace/Dowd asserted that the assigned values exceeded fair market value ("FMV") as defined in N.C. Gen. Stat. § 105-283 and that the FMV of Parcel 3 should be $2,400,000 and the FMV of Parcel 3A should be $1,837,500. Next, Pace/Dowd argued that Union County applied an arbitrary method of appraisal in reaching the following values: Parcel 3 valued at $10,201,240 and later reduced to $7,975,220; Parcel 3A valued at $1,135,420 and later increased to $9,166,280. Lastly, Pace argued that Union County improperly "discovered" Parcel 3A for tax years 2008, 2009, and 2010.

Following hearings held on 15 February 2012 and 18 April 2012, the Commission entered the "Final Decision" on 24 January 2013. The Commission made the following findings of fact, in pertinent part:

> 4. Under orders of the State of North Carolina (the "State"), Union County imposed a moratorium on new sewer taps in February 2007. Thereafter, the State denied Union County's request to expand its largest sewer treatment plant, and the moratorium continued.
>
> 5. On September 17, 2007, Union County adopted the "Policy for Allocating Wastewater Treatment Capacity ("SAP"), after which the State allowed Union County to lift the moratorium.
>
> 6. Pursuant to the SAP, 50 lots within Parcel [3] and 100 lots within Parcel [3A] were included within the first priority of properties to receive sewer and permits and 449 lots from Parcel [3] and [3A] were placed in the last priority of properties to receive sewer permits. Notwithstanding that [Pace/Dowd] purchased the subject parcels at purchase prices which included water and sewer capacity for residential development, the parcels were never developed.
>
> 7. As of the January 1, 2008 countywide general reappraisal of all real property in Union County, Parcel [3] was assessed at a value of $10,210,240, and, based upon [Pace/Dowd's] 2010 appeal, the County Board reduced the assessment to a value of $7,975,220; and, based upon [Pace/Dowd's] 2010 appeal, Union County increased the assessed value of parcel [3A] from $1,135,420 to $9,166,280 and assigned the increased value of $9,116,280 for tax years 2008, 2009 and 2010.

Further, Union County has collected taxes from [Pace/Dowd] based on the increased value of Parcel [3A] ($9,166,280) for tax years 2008, 2009 and 2010.

8. Union County is required to value all property for *ad valorem* tax purposes at its true value in money, which is "market value." N.C. Gen. Stat. § 105-283. . . .

9. An important factor in determining the property's market value is its highest and best use. The highest and best use of the subject property, as improved, would be residential development. . . .

10. However, under orders of [the State], Union County imposed a moratorium on new sewer taps in February 2007, which caused declines in the market values of the subject parcels. Accordingly, Union County shall, whenever any real property is appraised, consider the factors set forth in N.C. Gen. Stat. § 105-317. In particular, Union County shall consider how the county's sewer allocation policy affects the market value of the subject parcels, and the availability of water and sewer to Parcels [3 and 3A].

11. Consequently, [Pace/Dowd] did rebut the initial presumption of correctness as to Union County's assessments of the subject parcels by offering evidence tending to show that Union County used an arbitrary method of assessment and that Union County's assessments of the subject parcels substantially exceeded the market values of the parcels when the county assessed Parcel [3] at a value of $7,975,220; and by increasing the valuation of Parcel [3A] from $1,135,420 to $9,166,280, and when Union County did not consider the factors set forth in N.C. Gen. Stat. § 105-317 (i.e. the availability of water and sewer to Parcels [3 and 3A]).

12. Accordingly, the burden then shifts to Union County to go forward with the evidence and to demonstrate that its methods would in fact produce true value[.]

13. [T]he Commission . . . determines that Union County did not meet its burden regarding the valuations of the subject parcels when Union County did not consider

> certain relevant factors, as required by N.C. Gen. Stat. § 105-317[.]
>
> 14. Accordingly, the Commission, when considering the expert testimony of Mr. Willcox [sic], finds that the true value in money, which is "market value," as that term is defined in N.C. Gen. Stat. § 105-283, for Parcel [3] was $3,987,600, and the true value in money of Parcel [3A] was $4,583,140.

The Commission concluded that Pace/Dowd rebutted the presumption that Union County's *ad valorem* tax assessment was correct by showing that the county tax supervisor used an arbitrary method of valuation and that the assessments substantially exceeded the true value in money of the parcels. Furthermore, the Commission determined that the true value in money of Parcel 3 was $3,987,600 and the true value in money of Parcel 3A was $4,583,140 as of the 1 January 2008 appraisal.

Union County appeals.

II. Standard of Review

In reviewing a decision from the North Carolina Property Tax Commission:

> [this] 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. § 105-345.2(b) (2013).

"[A]n act is arbitrary when it is done without adequate determining principle." *In re Parkdale Mills*, __ N.C. App. __, __, 741 S.E.2d 416, 419 (2013) (citation omitted).

Our Court "shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error." N.C.G.S. § 105-345.2(c).

> The "whole record" test does not allow the reviewing court to replace the [Commission'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*. On the other hand, the "whole record" rule requires the court, in determining the substantiality of evidence supporting the [Commission's] decision, to take into account whatever in the record fairly detracts from the weight of the [Commission's] evidence. Under the whole evidence rule, the court may not consider the evidence which in and of itself justifies the [Commission's] result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.

In re Parkdale Mills, __ N.C. App. at __, 741 S.E.2d at 419 (citation omitted).

However, "the 'whole record' test is not a tool of judicial intrusion; 'instead, it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence.' " *In re Appeal of Owens*, 132 N.C. App. 281, 286, 511 S.E.2d 319, 323 (1999) (citation omitted). "[T]his Court cannot reweigh the evidence presented and substitute its evaluation for the Commission's." *In re Parkdale Mills*, __ N.C. App. at __, 741 S.E.2d at 419 (citation omitted). "If the Commission's decision, considered in the light of the foregoing rules, is supported by substantial evidence, it cannot be overturned." *In re Appeal of Philip Morris*, 130 N.C. App. 529, 533, 503 S.E.2d 679, 682 (1998) (citation omitted).

III. Discussion

On appeal, Union County argues that the Commission erred by: (A) concluding that Pace/Dowd had rebutted the presumption that Union County's *ad valorem* tax assessment was correct by finding

that Union County used an arbitrary method of valuation, resulting in a valuation of the parcels substantially exceeding the true values; (B) finding that as of 1 January 2008, the true values of the parcels were $3,987,600 for Parcel 3 and $4,583,140 for Parcel 3A; and (C) concluding, in conclusion of law number 3, that Pace/Dowd does not owe additional 2008 and 2009 taxes for Parcel 3A.

A. Union County's Method of Valuation

[1] First, Union County asserts that the Commission erred by concluding that Pace/Dowd had rebutted the presumption set out in *In re Appeal of Amp, Inc.*, 287 N.C. 547, 215 S.E.2d 752 (1975). Union County argues that the Commission erroneously found that Union County used an arbitrary method of valuation, resulting in a valuation of the parcels which substantially exceed the true value in money. We disagree.

In *In re Appeal of Amp, Inc.*, 287 N.C. 547, 215 S.E.2d 752 (1975), our Supreme Court stated that it is a "sound and [] fundamental principle of law in this State that ad valorem tax assessments are presumed to be correct." *Id.* at 562, 215 S.E.2d at 761 (citation omitted). "[T]he presumption is only one of fact and is therefore rebuttable." *Id.* at 563, 215 S.E.2d at 762 (hereinafter "the *Amp* presumption").

> [I]n order for the taxpayer to rebut the presumption he must produce competent, material and substantial evidence that tends to show that: (1) Either the county tax supervisor used an *arbitrary method* of valuation; or (2) the county tax supervisor used an *illegal method* of valuation; AND (3) the assessment *substantially* exceeded the true value in money of the property.

Id. (citations and quotation marks omitted) (emphasis in original). "[I]t is not enough for the taxpayer to show that the means adopted by the tax supervisor were wrong, he must also show that the result arrived at is *substantially* greater than the true value in money of the property assessed, i.e., that the valuation was *unreasonably high*." *Id.* (citation omitted) (emphasis in original).

N.C. Gen. Stat. § 105-286(a) (2013) provides:

> (a) Octennial Cycle. - Each county must reappraise all real property in accordance with the provisions of G.S. 105-283 and G.S. 105-317 as of January 1 of the year set out in the following schedule and every eighth year thereafter[.]

N.C. Gen. Stat. § 105-283 (2013), entitled "Uniform appraisal standards," states that:

> [a]ll property, real and personal, shall as far as practicable be appraised or valued at its true value in money. When used in this Subchapter, the words "true value" shall be interpreted as meaning market value, that is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used.

When real property is being appraised, our General Assembly has mandated that

> it shall be the duty of the persons making appraisals:
>
> (1) In determining the true value of land, to consider as to each tract, parcel, or lot separately listed at least its advantages and disadvantages as to location; zoning; quality of soil; waterpower; *water privileges*; . . . adaptability for agricultural, timber-producing, commercial, industrial, or other uses;. . . . and any other factors that may affect its value except growing crops of a seasonal or annual nature.

N.C. Gen. Stat. § 105-317(a)(1) (2013) (emphasis added).

At the hearing before the Commission, Pace/Dowd called four witnesses: Steven Pace, principal and president of Pace/Dowd who was tendered as an expert in real property acquisition and residential development; Robert Palmer Wilcox, Jr., an expert in soil science; Alfred Tucker, an appraiser; and Phillip Every, serving as an adverse witness.

Steven Pace testified that Pace/Dowd purchased the parcels with the intention to develop Parcel 3 as phases 2 and 3 of the Lawson development, with 245 lots, and to develop Parcel 3A as phase 4 of the Lawson development, with 404 lots. When Pace/Dowd purchased the parcels, Pace/Dowd did not have sewer and water permits, but Steven Pace testified that he made the purchases after he "confirmed [verbally] with Union County that there would be absolutely no restrictions at all on me having sewer and water to develop this site[.]" Steven Pace admitted that although he did not have written confirmation from Union County,

he did receive reasonable assurances from the Director of Public Works that he would "be able to get sewer and water without any restrictions for capacity or moratoriums." At no point during his testimony did Steven Pace testify as to Union County's method of valuing the parcels.

Robert Palmer Wilcox, Jr., a soil science expert with Soil and Material Engineers, testified regarding his evaluation of the septic system needs and sewer capacity of both parcels. Wilcox testified that in September 2007, he performed a preliminary soil evaluation of Parcel 3. Wilcox determined that greater than fifty (50) to sixty (60) percent of Parcel 3 was "in that category of not being able to be utilized for septic suitability." In January 2012, Wilcox separately evaluated Parcel 3 and testified that there was no chance that the soil conditions could have changed from 1 January 2008. Wilcox's findings in regards to Parcel 3A were "very identical" to the findings of Parcel 3 "as there is very limited capacity to use on-site septic systems[.]"

Phillip Every, appraisal manager of Union County and mass appraiser certified by the State of North Carolina, testified that he reviewed the final numbers for the 1 January 2008 revaluation. Every testified, that as a mass appraiser valuing 93,000 parcels, he uses "models to capture valuation – to reflect valuation in the marketplace and apply that to large masses of the properties to come up with a, hopefully, rational, reasonable reflection of the value of the property." As part of mass appraisal, a schedule of values ("SOV") is developed. Every testified that a SOV is "our means, our methods, our numbers we're going to use to determine valuation, and it has to be approved by our commissioners." "The objective of the schedules is to develop standards by which all property is valued at market value." Every agreed that "for a property to be developed residentially, you would have to have some sewer and water available" and also agreed that all other things being equal, "the value of property with access to sewer and water . . . is greater than the value of the same property without the access."

In regards to the 1 January 2008 valuation, Every testified that Union County was required by statute to appraise the parcels at its true and actual value in money, which meant that Union County "is required to consider each parcel separately listed as to its particular advantages and disadvantages and its adaptability to particular uses." Nonetheless, Every testified to the following:

> [Pace/Dowd:] Do you make a determination in carrying out that analysis of what the highest and best use of the property is?

[Every:] Yes.

[Pace/Dowd:] And did you make a determination – did the County make a determination with respect to the Pace parcels as to what the highest and best use of those parcels were as of the date of revaluation?

[Every:] We valued it as raw land. Large acreage, raw land.

[Pace/Dowd:] Did you value it as raw land for residential construction or not for residential construction?

[Every:] Just say large acreage of raw land. We didn't go any further than that.

. . . .

[Every:] We did not parse it down that fine, no. We valued the land all of the parts. We made no premium – put no premium on it to be a subdivision.

. . . .

[Pace/Dowd:] Okay. Now, did you – did the County, in conducting the reappraisal of these lots in connection with the countywide revaluation in January of 2008, take the SAP into account?

[Every:] Directly, no.

[Pace/Dowd:] When you say, "Directly, no," what do you mean?

[Every:] In that this problem had been well-known for a great period of time, I believe back to 2003, that the County was our [SIC] sewer and water. I believe that the sales we used, the majority of the sales in this list were sold and bought knowing that sewer and water was an issue. So I believe that this problem was already accounted for in these land sales. So I believe in that way, yes, we did. Did we then go out and do something in addition after the sale? No, we didn't.

Furthermore, Every testified that in selecting comparable parcels to assist in valuing the parcels at issue, Union County did not take sewer and water availability into account.

[Every:] [W]e weren't going and looking at these large-acreage tracts and go, which ones have sewer and water,

> which ones don't. We just were looking at, we have sales, and there are large-acreage tracts, and we'll use them for the valuation of other large-acreage tracts.

The comparables Every used concerned sales of property made from 2004 through 2006. None of the comparables used were from dates on or after Union County adopted the SAP in 2007. Also, in selecting comparables, Every testified that Union County selected comparables that were within the same school district. When questioned regarding this method of selecting a comparable, the following exchange occurred:

> [Pace/Dowd:] And, Mr. Every, do you have any evidence that you're prepared to present that would say that the market value, the school zones of raw, undeveloped land would affect market value so significantly that you're only going to consider comparables in the same school zone?
>
> [Every:] I believe that location is a very well-established appraisal principle. You can get fairly close [geographically], and we did that. . . . And I believe, again, that in our – in our situation, schools are a prime driver. . . .
>
> [Pace/Dowd:] But – but beyond just that general statement, you don't have anything specifically that would correlate property value to the school zone?
>
> [Every:] Do I have anything prepared for you today? No.

Every explained that he did not rely on any data that supported the idea that a specific school zone had a greater increase in value over a property located in another school zone but rather limited comparables to school zones because it was "the simplest solution."

Alfred Louis Tucker, Jr., also testified at the hearing. Tucker, an expert witness for Pace/Dowd, testified that he owned his own appraisal company, A.O. Tucker and Associates. Tucker completed two appraisals of the properties; one on 29 June 2007 valued as of 12 June 2007, and one on 10 May 2011 valued as of 1 January 2008. The purpose of the June 2007 appraisal was for mortgage loan financing. As of 12 June 2007, Tucker appraised Parcel 3 at $14,565,000 and Parcel 3A at $15,321,750, with both of these values reflecting his assumption that sewer and water would be available.

Tucker also performed an appraisal of the parcels in May of 2011 valued as of 1 January 2008, the date of the last Union County tax revaluation. Parcel 3 was valued at $2,400,000 and Parcel 3A was valued at

$1,837,500. Tucker's 2008 appraisal took into consideration the SAP, providing that "[a]ccording to local developers and officials in the Union County Public Works Department, no water or sewer taps are expected to be available to the [parcels] for some 6 to 8 years from January 1, 2008, the date of the last Union County tax revaluation." Union County argues, and Pace/Dowd concedes, that the Commission extensively questioned Tucker's 2007 appraisal and ultimately did not adopt his valuation or cite his opinion in the 24 January 2013 Final Decision.

Union County argues that even if Pace/Dowd was able to rebut the *Amp* presumption, Union County was able to establish that its method of valuing the parcels produced true values. Union County relies on Every's testimony to support its contention that there was no evidence to support the conclusion that Union County used an arbitrary appraisal method. However, we find this argument to be without merit. The evidence discussed above sufficiently supports the Commission's finding that Pace/Dowd rebutted the Amp presumption "by offering evidence tending to show that Union County used an arbitrary method of assessment . . . when Union County did not consider the factors set forth in N.C. Gen. Stat. § 105-317 (i.e. the availability of water and sewer to Parcels [3] and [3A])." Applying the whole record test, we conclude that the Commission's finding is rationally based on testimony provided by Every, which established that Union County failed to consider water and sewer availability in its valuation of the parcels.

Because the challenged findings and conclusions of the Commission have a rational basis in the evidence and it is not our duty to substitute our judgment for that of the Commission, we overrule Union County's arguments.

B. True Value of Parcel 3 and Parcel 3A as of 1 January 2008

[2] Next, Union County argues that the Commission erred by finding the true value of Parcel 3 to be $3,987,600 and Parcel 3A to be $4,583,140 as of the 1 January 2008 general reappraisal where there was no competent evidence in the record to support this valuation. We disagree.

In the 24 January 2013 "Final Decision," the Commission found the following:

> 14. Accordingly, the Commission, when considering the expert testimony of Mr. Willcox [sic], finds that the true value in money, which is "market value," as that term is defined in N.C. Gen. Stat. § 105-283, for Parcel [3] was $3,987,600, and the true value in money of Parcel [3A] was $4,583,140.

In a footnote to finding of fact 14, the Commission stated that:

> Based upon the expert testimony of Mr. Robert P. Willcox [sic], Jr., L.S.S., an expert in soil sites, Union County should reduce the county's values of Parcels [3] and [3A] by fifty percent (50%). (See Stipulation 3(w) stating that the county contends the value of Parcel [3] to be $7,975,200. ($7,975,200 divided by 50% = $3,987,600 for Parcel [3] and $9,166,280 divided by 50% = $4,583,140 for Parcel [3A]).

After thorough review, we conclude that the record sufficiently supports the Commission's finding that Union County's arbitrary method of assessment resulted in an assessment of the parcels that substantially exceeded the market values of the parcels. The Commission relied on Wilcox's testimony, which provided that greater than fifty (50) to sixty (60) percent of the parcels was "in that category of not being able to be utilized for septic suitability." Based on Wilcox's expert testimony, the Commission reduced Union County's values of the parcels by fifty percent (50%) resulting in values of $3,987,600 ($7,975,200 divided by 50%) for Parcel 3 and $4,583,140 ($9,166,280 divided by 50%) for Parcel 3A. Accordingly, we overrule Union County's arguments.

C. Conclusion of Law Number 3

[3] In its last argument, Union County contends that the Commission erred by concluding the following:

> 3. . . . Union County improperly "discovered" Parcel [3A] for tax years 2008 and 2009 when N.C. Gen. Stat. § 105-287 is the applicable statute regarding [Pace's] appeal.

Originally, after Pace/Dowd challenged Union County's property tax values of Parcel 3A in 2010, Union County sent notice to Pace/Dowd that it had "discovered" Parcel 3A by increasing the value to $9,166,280 for tax years 2008 and 2009. This "discovery" implicates N.C. Gen. Stat. § 105-312 (2013), titled "Discovered property; appraisal; penalty." Union County now argues that N.C.G.S. § 105-287 is not applicable to the case *sub judice* and that N.C. Gen. Stat. § 105-394 is the correct statute regarding Pace/Dowd's appeal, allowing Union County to recover taxes on the corrected value of Parcel 3A for years 2008 and 2009. We disagree.

N.C. Gen. Stat. § 105-287, titled "Changing appraised value of real property in years in which general reappraisal is not made," provides the following:

> (a) In a year in which a general reappraisal of real property in the county is not made under G.S. 105-286, the

> property shall be listed at the value assigned when last appraised unless the value is changed in accordance with this section. The assessor shall increase or decrease the appraised value of real property, as determined under G.S. 105-286, to recognize a change in the property's value resulting from one or more of the following reasons . . . .

N.C.G.S. § 105-287(a) (2013). The statute proceeds to list reasons such as: to correct a clerical or mathematical error; to correct an appraisal error resulting from a misapplication of schedules, standards, and rules used in the county's most recent general appraisal; to recognize an increase or decrease in the value of the property resulting from a conservation or preservation agreement, a physical change in the land or improvements on the land, and a change in the legally permitted use of the property, etc. *Id.*

N.C. Gen. Stat. § 105-394, titled "Immaterial irregularities," provides the following:

> Immaterial irregularities in the listing, appraisal, or assessment of property for taxation or in the levy or collection of the property tax or in any other proceeding or requirement of this Subchapter shall not invalidate the tax imposed upon any property or any process of listing, appraisal, assessment, levy, collection, or any other proceeding under this Subchapter.

N.C.G.S. § 105-394 (2013). Examples of immaterial irregularities are listed. Union County argues that "[t]he failure to list, appraise, or assess any property for taxation or to levy any tax within the time prescribed by law" is the applicable subsection to the facts before us. N.C.G.S. § 105-394(3).

Union County relies on two cases for their arguments: *In re Appeal of Morgan*, 186 N.C. App. 567, 652 S.E.2d 655, (2007), *rev'd*, 362 N.C. 339, 661 S.E.2d 733 (2008), and *In re Appeal of Dickey*, 110 N.C. App. 823, 431 S.E.2d 203 (1993). However, we find both of the cases to be distinguishable from our present case and hold neither of these cases to be controlling.

In *Morgan*, although the taxpayers had listed their residence on the county tax listing form in 1993 and an appraiser with Henderson County's Tax Assessor's Office visited the taxpayers' property during countywide reappraisals in 1999 and 2003, the tax assessor *failed to assess any taxes* on the residence from the years 1995 through 2003.

Morgan, 186 N.C. App. at 568, 652 S.E.2d at 656. In 2004, Henderson County's Tax Assessor's Office finally assessed taxes on the residence and asserted that the taxpayers owed back taxes and interest in the amount of $8,533.61 for tax years 1995 through 2003. *Id.* The Commission concluded, and our Court affirmed, that the failure of the tax assessor to assess taxes on the residence was not an "immaterial irregularity" pursuant to N.C.G.S. § 105-394 and barred Henderson County from attempting to collect back taxes. *Id.* Our Court held that N.C.G.S. § 105-394 was "intended to cover cases where there is no dispute that but for the *clerical error*, the tax would have been valid." *Id.* at 571, 652 S.E.2d at 658 (citation omitted) (emphasis in original). Henderson County's failure to assess the residence was not an "immaterial irregularity" because it was neither a clerical nor administrative error. *Id.* at 570, 652 S.E.2d at 657. In a dissenting opinion, Judge Geer stated that the plain language of N.C.G.S. § 105-394 did not require that the failure to assess any property for taxation be due to a clerical or administrative error. Rather, Judge Geer opined that Henderson County's failure to assess the taxpayers' residence within the time prescribed by law constituted an immaterial irregularity pursuant to N.C.G.S. § 105-394 and that it did not invalidate the tax levied on the property. *Id.* For the reasons stated in Judge Geer's dissent, our Supreme Court reversed the Court of Appeal's opinion in *In re Appeal of Morgan*, 362 N.C. 339, 661 S.E.2d 733 (2008).

In *Dickey*, the taxpayers purchased a lot and a newly constructed house in 1988 for $272,500.00. The taxpayers submitted their "1989 Property Tax Listing" and the 1989 tax bill from Forsyth County assessed the taxpayers' real property valued at $37,500.00. *Dickey*, 110 N.C. App. at 824, 431 S.E.2d at 204. In 1990, the tax assessor notified the taxpayers that their property "ha[d] been taxed improperly" for the year 1989. The tax assessor, "pursuant to N.C.G.S. § 105-312 (discovered property), added to the previously assigned value the sum of $185,500.00, and assessed the [taxpayers] an additional $2,094.30 in taxes." *Id.* at 825, 431 S.E.2d at 204. The taxpayers appealed to Forsyth County, which dismissed their appeal. *Id.* The taxpayers then appealed to the Commission, and the Commission found that the taxpayers properly listed their house on the property tax listing dated 17 January 1989 "on a portion of the listing form which was designed to be torn off if it was not completed." The Commission stated that "[a]fter receipt by the County, this portion of the form was removed and destroyed even though it had been completed by the [taxpayers.]" *Id.* at 825, 431 S.E.2d at 204. Because the taxpayers submitted a timely and accurate property tax listing, the improvements on the taxpayers lot were not considered "discovered" property under

N.C.G.S. § 105-312. Furthermore, the Commission found that because the tax assessor appraised the house at a value of $0.00 for the tax year 1989, pursuant to N.C.G.S. § 105-287, the assessor was authorized to reappraise the house in 1990. Such reappraisal was effective as of 1 January of the year in which it is made and was not retroactive. *Id.* at 825, 431 S.E.2d at 205. Forsyth County appealed. Our Court held that because the tax assessor never "appraised" the taxpayer's house for tax purposes in 1989 as defined in N.C.G.S. § 105-273[1], N.C.G.S. § 105-287 had no application. "There is no evidence that the Assessor prior to 1990 attempted to ascertain the true value of the [taxpayers'] house, and it is undisputed that the true value of the house in 1989 was not *zero* dollars." *Id.* at 828, 431 S.E.2d at 206. Forsyth County argued that the tax assessor's failure to levy any tax on the house was an "immaterial irregularity" and our Court agreed that N.C.G.S. § 105-394 applied since it had been previously established that "a clerical error by a tax supervisor's office is an immaterial irregularity under G.S. 105-394 so as not to invalidate the tax levied on the property." *Id.* at 829, 431 S.E.2d at 207 (citing *In re Notice of Attachment*, 59 N.C. App. 332, 333-34, 296 S.E.2d 499, 500 (1982)).

In both *Morgan* and *Dickey*, the properties at issue had never been "appraised" as defined in N.C. Gen. Stat. § 105-273 or assessed for taxation purposes. The facts in both *Morgan* and *Dickey* support the conclusion that the tax assessors' actions constituted an "immaterial irregularity" pursuant to N.C.G.S. § 105-394, in that the assessors failed "to list, appraise, or assess any property for taxation or to levy any tax within the time prescribed by law." N.C.G.S. § 105-394(3) (2013). In the case *sub judice*, Union County did not fail to appraise the parcels for the years 2008 and 2009. To the contrary, Union County appraised the parcels, but did so using an arbitrary method of valuation that resulted in an assessment that substantially exceeded the true value of the parcels.

Based on the foregoing, the Commission did not err by concluding that N.C.G.S. § 105-287 applied to Pace/Dowd's appeal, as Union County attempted to change the value of the parcels in a year in which a general reappraisal was not made. Furthermore, the Commission did not err by holding that Union County "improperly 'discovered' Parcel [3A] for tax years 2008 and 2009" as the General Assembly has stated that "[a]n increase or decrease in appraised value made under this section is

1. N.C. Gen. Stat. § 105-273 (2013) defines "appraisal" as "[t]he true value of property or the process by which true value is ascertained."

effective as of January 1 of the year in which it is made and is not retroactive." N.C.G.S. § 105-287(c).

Affirmed.

Judges ELMORE and DAVIS concur.

MORNINGSTAR MARINAS/EATON FERRY, LLC, PETITIONER
v.
WARREN COUNTY, NORTH CAROLINA AND KEN KRULIK, WARREN COUNTY PLANNING AND ZONING ADMINISTRATOR, IN HIS OFFICIAL CAPACITY, RESPONDENTS

No. COA13-458

Filed 18 March 2014

1. Mandamus—writ of mandamus—zoning dispute—zoning administrator—transmission of appeal to Board of Adjustment

The trial court did not err by issuing a writ of mandamus in favor of petitioner in connection with a zoning dispute. The zoning administrator had a statutory duty to transmit petitioner's appeal to the Board of Adjustment (BOA) and the petitioner's standing was a legal determination to be made by the BOA, not the zoning administrator; the act of placing petitioner's appeal on the BOA agenda was ministerial in nature and did not involve any discretion on the part of the zoning administrator; petitioner had a legal right to have its appeal transmitted to the BOA and placed on the agenda; and mandamus was petitioner's only available remedy.

2. Mandamus—writ of mandamus—motion to dismiss—failure to join necessary party—attempt to circumvent untimely appeal

The trial court did not err in a case involving a zoning dispute by denying respondents' motion to dismiss petitioner's petition for writ of mandamus. Petitioner did not fail to join a necessary party and N.C.G.S. § 160A-393 was not applicable to this action for mandamus. Furthermore, petitioner was not seeking mandamus in an attempt to take an untimely appeal of the substance of the 21 April Determination but was instead appealing from the 16 November Determination.

Judge ELMORE dissenting.

Appeal by respondents from order entered 13 September 2012 by Judge Robert H. Hobgood in Warren County Superior Court. Heard in the Court of Appeals 6 November 2013.

Robinson, Bradshaw & Hinson, P.A., by John H. Carmichael, for petitioner-appellee.

Turrentine Law Firm, PLLC, by Karlene S. Turrentine, for respondents-appellants.

DAVIS, Judge.

Warren County and Ken Krulik ("Mr. Krulik"), in his official capacity as the Warren County Planning and Zoning Administrator (collectively "Respondents"), appeal from the trial court's order issuing a writ of mandamus in favor of Morningstar Marinas/Eaton Ferry, LLC ("Morningstar") in connection with a zoning dispute. After careful review, we affirm the trial court's order.

Factual Background

The facts relevant to this appeal are as follows: Morningstar operates a full-service marina on a 5.03 acre parcel of land ("the Morningstar Property") located at 1835 Eaton Ferry Road in Littleton, North Carolina. The Morningstar Property is zoned commercial in the Lakeside Business District under the Warren County Zoning Ordinance ("the Ordinance"). Its commercial marina offers wet slips and dry storage for boats and a fuel dock. The Morningstar Property is located off of a small cove of Lake Gaston and is approximately 145 feet across the cove from land owned by East Oaks, LLC ("East Oaks"). Approximately 8.5 acres of the East Oaks property is zoned residential ("the Residential Property") under the Ordinance. Adjacent to the Residential Property is a 1.91 acre parcel of land owned by East Oaks and zoned commercial ("the Commercial Property"). The Commercial Property is improved with a boat storage building from which East Oaks operates a dry storage facility.

East Oaks filed a petition for a conditional use permit seeking to build 36 townhouses on the Residential Property. In its petition, East Oaks included a site plan for the proposed use showing the townhouses, roads, and a drive ("the Drive") that connects the Commercial Property and the Residential Property. The record indicates that the Drive was to be used for the purpose of transporting boats from the dry storage facility located on the Commercial Property to the boat launch area located on the Residential Property.

Before the Warren County Board of Adjustment ("BOA") ruled on East Oaks' petition for a conditional use permit, Mr. Krulik reviewed the Ordinance and issued a formal determination on 21 April 2011 ("the 21 April Determination"), finding that townhouses were a permitted use in a residential district as a single-family dwelling. As such, East Oaks withdrew its application for the conditional use permit and secured a standard zoning permit to begin construction.

Morningstar appealed the 21 April Determination to the BOA, asserting that neither the townhouses nor the Drive portions of East Oaks' site plan were permitted under the Ordinance. Because the 21 April Determination did not expressly address the Drive portion of East Oaks' site plan, on 12 May 2011, Morningstar requested that Mr. Krulik issue a formal determination as to whether East Oaks' proposed use of the Drive would constitute a commercial use of the Residential Property in violation of the Ordinance. In an email dated 10 June 2011, Mr. Krulik responded, "I am not going to make a determination on this . . . . [because] it is not a relevant issue to my determination on townhouses as a permitted use or issuing the zoning permit."

On 15 August 2011, the BOA heard Morningstar's appeal and voted unanimously to reverse the 21 April Determination and to revoke East Oaks' zoning permit. On 12 September 2011, East Oaks filed a petition for writ of certiorari in Warren County Superior Court seeking judicial review of the BOA's decision reversing the 21 April Determination. On 14 October 2011, the Honorable Robert H. Hobgood entered a consent order whereby East Oaks and Warren County agreed to reinstate East Oaks' zoning permit and adopt Mr. Krulik's interpretation of the Ordinance so as to allow East Oaks to develop the property pursuant to its site plan. Morningstar was not a party to the consent order, and the trial court concluded as a matter of law that "Morningstar is not a 'person aggrieved' pursuant to N.C. Gen. Stat. § 153A-345(b)" and that the "Warren County Board of Adjustment had no jurisdiction or authority to hear the appeal of Morningstar."

One week earlier, on 7 October 2011, Morningstar filed its initial petition for writ of mandamus to compel Mr. Krulik to issue the requested formal determination regarding the Drive. In Respondents' answer, they denied Morningstar's right to petition for writ of mandamus but also attached a formal determination from Mr. Krulik dated 16 November 2011 ("the 16 November Determination"), which stated, in pertinent part, that

> [w]hile I did not make a specific determination as to whether the use of the concrete drive/easement

> constitutes a commercial use of the East Oaks property in violation of the Ordinance, my issuance of the East Oaks zoning permit . . . necessarily required that I determine the submitted use of the entire property covered by the permit is not restricted by the Warren County Zoning Ordinance.
>
> The drive is shown as a "20' wide private access easement" on East Oaks' development plans. Warren County's Ordinance does not specifically regulate easements — whether or not they cross varying zoning jurisdictions. . . . [T]o my knowledge, there has been no attempt by Warren County to regulate such easements through its zoning regulations.

After Mr. Krulik issued the 16 November Determination, Morningstar dismissed its petition for writ of mandamus without prejudice.

Thereafter, Morningstar noticed its appeal of the 16 November Determination ("the Drive Appeal"). By letter dated 17 January 2012, Warren County's attorney advised Morningstar that the Drive Appeal would not be placed on the BOA's agenda. On 14 May 2012, Morningstar filed another petition for writ of mandamus in Warren County Superior Court, seeking — this time — to compel Respondents to place the Drive Appeal on the BOA's agenda for a hearing on the merits. On 13 September 2012, Judge Hobgood granted Morningstar's petition and issued a writ of mandamus ordering Respondents to place the appeal on the BOA's agenda. Respondents filed a timely notice of appeal to this Court.

Analysis

As an initial matter, Respondents argue that the 16 November Determination was not a "new" determination from which Morningstar could appeal to the BOA because it merely echoed Mr. Krulik's 21 April Determination. We disagree. The 21 April Determination did not explicitly address the use of the Drive. Moreover, in its first petition for writ of mandamus, Morningstar alleged: "As of the date of this Petition, Mr. Krulik has not issued the requested formal determination [regarding the Drive]." Respondents admitted this allegation in their answer and then — referencing the 16 November Determination — provided that "such formal determination is hereto attached." Thus, we consider Mr. Krulik's 16 November letter to be a formal determination from which Morningstar may appeal.

[1] We now turn our attention to whether the criteria for the issuance of a writ of mandamus were satisfied. "A writ of mandamus is an

extraordinary court order to a board, corporation, inferior court, officer or person commanding the performance of a specified official duty imposed by law." *Graham Cty. Bd. of Elections v. Graham Cty. Bd. of Comm'rs*, 212 N.C. App. 313, 322, 712 S.E.2d 372, 379 (2011) (citation and quotation marks omitted). A writ of mandamus is the proper remedy when (1) the party seeking relief has "a clear legal right to the act requested;" (2) the respondent has "a legal duty to perform the act requested;" (3) the act at issue is "ministerial in nature and [does] not involve the exercise of discretion;" (4) the respondent has failed to perform the act requested and the time for performance has expired; and (5) there is no legally adequate alternative remedy. *In re T.H.T.*, 362 N.C. 446, 453-54, 665 S.E.2d 54, 59 (2008). "A court cannot refuse a petition for writ of mandamus when it is sought to enforce a clearly-established legal right." *Id.* at 453, 665 S.E.2d at 59.

Here, Respondents' primary contention is that mandamus was not appropriate because Morningstar lacked standing to appeal Mr. Krulik's 16 November Determination and, as such, did not have a "clear legal right" to have its appeal placed on the BOA's agenda. However, because we believe that Mr. Krulik had a statutory duty to transmit Morningstar's appeal to the BOA and that the existence — or nonexistence — of standing is a legal determination that must be made by the BOA, we affirm the trial court's order issuing a writ of mandamus compelling Respondents to place the appeal on the BOA's agenda.

At all times relevant to this action, N.C. Gen. Stat. § 153A-345[1] provided, in relevant part, as follows:

> (b) A zoning ordinance . . . adopted pursuant to the authority granted in this Part shall provide that the board of adjustment shall hear and decide appeals from and review any order, requirement, decision, or determination made by an administrative official charged with the enforcement of that ordinance. Any person aggrieved or any officer, department, board, or bureau of the county may take an appeal. Appeals shall be taken within times prescribed by the board of adjustment by general rule, by filing with the officer from whom the appeal is taken and with the board of adjustment a notice of appeal, specifying the grounds thereof. The officer from whom the appeal is taken *shall*

1. N.C. Gen. Stat. § 153A-345 was in effect during the time period relevant to the present action but has since been repealed. N.C. Gen. Stat. § 160A-388 now governs appeals to county boards of adjustment.

> forthwith transmit to the board all the papers constituting the record upon which action appealed from was taken.

N.C. Gen. Stat. § 153A-345(b) (emphasis added). The purpose of N.C. Gen. Stat. § 153A-345 is "to provide a right of review, and statutes providing for review of administrative decisions should be liberally construed to preserve and effectuate that right." *Mize v. Cty. of Mecklenburg*, 80 N.C. App. 279, 283, 341 S.E.2d 767, 769 (1986).

Neither N.C. Gen. Stat. § 153A-345 nor any other provision of North Carolina law confers upon a zoning administrator the power to make a legal decision as to whether a party seeking to appeal to the BOA from a zoning decision is a "person aggrieved" for standing purposes. North Carolina law does, however, mandate that the zoning administrator transmit the record of an appeal to the BOA if the appeal is taken within the prescribed time period. Pursuant to N.C. Gen. Stat. § 153A-345(b), a zoning administrator has no discretion regarding whether to perform his duty of transmitting the record to the BOA once the appeal has been noticed. Instead, as quoted above, the statute expressly states that the zoning administrator from whom the appeal is being taken "*shall* forthwith transmit to the board all the papers constituting the record upon which action appealed from was taken." N.C. Gen. Stat. § 153A-345(b) (emphasis added). The Warren County Zoning Ordinance — in accordance with § 153A-345(b) — also specifically provides that "[a]ppeals from the enforcement and interpretation of this ordinance . . . shall be filed with the Zoning Administrator, who *shall* transmit all such records to the Board of Adjustment." Warren County, N.C., Zoning Ordinance § IX-4 (emphasis added).

Our appellate courts have consistently held that the use of the word "shall" in a statute indicates what actions are required or mandatory. *See Multiple Claimants v. N.C. Dep't of Health & Human Servs.*, 361 N.C. 372, 378, 646 S.E.2d 356, 360 (2007) ("It is well established that the word 'shall' is generally imperative or mandatory." (citations and quotation marks omitted)); *Internet E., Inc. v. Duro Communications, Inc.*, 146 N.C. App. 401, 405-06, 553 S.E.2d 84, 87 (2001) ("The word 'shall' is defined as 'must' or 'used in laws, regulations, or directives to express what is mandatory.' " (citation omitted)). As such, we conclude that the act of placing Morningstar's appeal on the BOA agenda is ministerial in nature and does not involve any discretion on the part of the zoning administrator.

We also hold that Morningstar has a legal right to have its appeal transmitted to the BOA and placed on the agenda. Morningstar appealed the 16 November Determination on 14 December 2011. In accordance

with the provisions of the Warren County Zoning Ordinance, Morningstar filed its appeal with Mr. Krulik, the officer from whom the appeal was taken, and included a $150.00 filing fee for the appeal. *See* Warren County, N.C., Zoning Ordinance § IX-4 ("Appeals from the enforcement and interpretation of this ordinance . . . shall be filed with the Zoning Administrator . . . ."); *id.* at § IX-2 (listing $150.00 as fee for appeals to the BOA). Because Morningstar complied with the requirements for taking an appeal, it had a right to have its appeal placed on the BOA's agenda. *See id.* at § IX-3 ("The Board of Adjustment shall have the following powers and duties . . . [t]o hear and decide any appeal from and review any order, requirement, decision, or determination made by the Zoning Administrator."); *id.* at § IX-4 ("The Board of Adjustment shall fix a reasonable time, not to exceed 30 days, for the hearing of the appeal . . . .").

Mr. Krulik, as the zoning officer from whom the appeal was taken, therefore had a statutory duty to transmit the appeal to the BOA. This duty was mandatory, as indicated by the use of the word "shall," and did not involve the exercise of discretion. Because Mr. Krulik failed to comply with the statutory mandate and instead made clear his unwillingness to do so, mandamus was Morningstar's only available remedy. Morningstar's ability to appeal to the BOA was foreclosed by Mr. Krulik's refusal to place the appeal on the BOA's agenda. Moreover, Morningstar could not appeal the substance of the zoning administrator's decision directly to the superior court because only BOA decisions are subject to judicial review. *See* N.C. Gen. Stat. § 153A-345(e2) ("Each decision *of the board* is subject to review by the superior court by proceedings in the nature of certiorari." (emphasis added)).

The trial court's order compelling Respondents to place Morningstar's appeal on the BOA agenda does not allow Morningstar to circumvent the requirement of standing. To the contrary, its order fully recognizes that in accordance with § 153A-345, Morningstar must establish that it is an aggrieved party in order to have the merits of its appeal heard by the BOA. We believe the order correctly provides that the determination of whether Morningstar has standing to appeal must be made by the BOA rather than by Mr. Krulik. We express no opinion as to whether Morningstar does or does not possess standing to appeal because that issue is not before us.

Smith v. Forsyth Cty. Bd. of Adjust., 186 N.C. App. 651, 652 S.E.2d 355 (2007), the case the dissent relies upon in concluding that mandamus was not appropriate, did not involve a petition for a writ of mandamus or in any way address the authority of a zoning administrator to make a determination as to standing. Rather, the issue in *Smith*

was whether the superior court correctly dismissed the petitioner's appeal from a BOA decision for lack of standing. *Id.* at 652, 652 S.E.2d at 357. This Court concluded that the petitioner's application to the BOA appealing the zoning officer's decision had not alleged special damages as required in order for the petitioner to qualify as a "person aggrieved." *Id.* at 654-55, 652 S.E.2d at 358.

We do not read *Smith* as suggesting that a zoning officer would have the authority to refuse to transmit an appeal to the BOA based simply on his own belief that the appellant lacked standing. We cannot agree with the dissent that our holding in *Smith* somehow confers a gatekeeper role onto zoning officers given that such a role is nowhere conferred by statute or, for that matter, identified in our decision in that case. Rather, we believe that *Smith* is consistent with the notion that it is the *BOA* that has the duty of determining whether a party has made the requisite showing of standing such that the merits of the appeal may be reached.

Standing is a question of law. *Cook v. Union Cty. Zoning Bd. of Adjust.*, 185 N.C. App. 582, 588, 649 S.E.2d 458, 464 (2007). A determination of standing involves a determination of "whether a particular litigant is a proper party to assert a legal position." *Id.* As such, we are unable to conclude that a zoning officer is vested with the authority to make such legal determinations regarding standing, particularly where the result, as here, would be to insulate that very same officer's decision from review.

[2] Respondents also contend that their motion to dismiss the petition for writ of mandamus was improperly denied because (1) Morningstar failed to join a necessary party (East Oaks); and (2) Morningstar's petition for mandamus was merely an attempt to bypass the fact that the time period for appealing the 21 April Determination or the consent order reinstating that determination had already passed. We are not persuaded by either of these arguments.

"A necessary party is one whose presence is required for a complete determination of the claim, and is one whose interest is such that no decree can be rendered without affecting the party." *McCraw v. Aux*, 205 N.C. App. 717, 719, 696 S.E.2d 739, 740, *disc. review denied*, 364 N.C. 617, 705 S.E.2d 362 (2010). As we have explained above, the present action commenced when Morningstar attempted to appeal the 16 November Determination and Mr. Krulik refused to place the appeal on the BOA's agenda. Morningstar then sought a writ of mandamus directing Respondents to perform the ministerial, nondiscretionary task of placing the appeal on the BOA's agenda for a hearing. The order issuing

mandamus in no way addressed the merits of any substantive issues concerning (1) whether Morningstar was an aggrieved party with standing to appeal; or (2) whether East Oaks' use of the Drive is permitted under the Warren County Zoning Ordinance.[2] Rather, as Morningstar notes, the present action is "a purely procedural issue between Morningstar and the Respondents."

Respondents nevertheless assert that under N.C. Gen. Stat. § 160A-393, Morningstar was required to name East Oaks as a respondent. *See* N.C. Gen. Stat. § 160A-393(e) (2013) ("If the petitioner is not the applicant before the decision-making board whose decision is being appealed, the petitioner shall also name that applicant as a respondent."). However, the scope of N.C. Gen. Stat. § 160A-393 is specifically limited to appeals in the nature of certiorari from decision-making boards to superior courts and, thus, does not apply to the present action for mandamus. N.C. Gen. Stat. § 160A-393(a) ("This section applies to appeals of quasi-judicial decision-making boards when that appeal is to superior court and in the nature of certiorari . . . ."). As such, we agree with the trial court's conclusion that "the Warren County Zoning Board of Adjustment and East Oaks, LLC are not necessary parties to this mandamus action. The parties sought to be compelled to take action in this mandamus action are the Respondents."

Finally, Respondents argue that the trial court improperly denied their motion to dismiss because Morningstar only sought mandamus in an attempt to take an untimely appeal of the substance of the 21 April Determination. Respondents correctly state that "[a]n action for mandamus may not be used as a substitute for an appeal. This extraordinary remedy is not a proper instrument to review or reverse an administrative board which has taken final action on a matter within its jurisdiction." *Snow v. N.C. Bd. of Architecture*, 273 N.C. 559, 570, 160 S.E.2d 719, 727 (1968) (citations, quotation marks, and italics omitted).

However, as previously discussed, the 16 November Determination — unlike the 21 April Determination — specifically addresses the Drive, and was, in fact, a formal determination concerning the Drive. Once the 16 November Determination was made, Morningstar attempted to bring a timely appeal to the BOA but was prevented by Mr. Krulik from doing so. We therefore cannot agree with Respondents' argument that

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2. The trial court's order issuing mandamus specifically explains that "[t]his Order only directs that a hearing be conducted by the Warren County Board of Adjustment but does not direct that Board concerning the merits of the case."

Morningstar's petition for mandamus was filed "for the sole purpose of getting around the appeal deadline [for the 21 April Determination] which had passed." Accordingly, this argument is overruled.

Conclusion

For the reasons stated above, we affirm the trial court's order issuing a writ of mandamus compelling Respondents to place Morningstar's appeal on the BOA's agenda. Because we hold that the trial court properly issued the writ of mandamus, we also affirm the trial court's denial of Respondents' motion for attorneys' fees.

AFFIRMED.

Judge McCULLOUGH concurs.

ELMORE, Judge, dissenting.

I respectfully disagree with the majority's conclusion that Mr. Krulik had a statutory duty to transmit the appeal to the Board of Adjustment (BOA) pursuant to N.C. Gen. Stat. § 153A-345. As a result, I would reverse the trial court's order granting petitioner's writ of mandamus. I concur in all other aspects of the majority opinion.

The majority is correct in that N.C. Gen. Stat. § 153A-345 mandates that any person *aggrieved* by a zoning decision shall be afforded a statutory right of review before the BOA. This Court has defined a "person aggrieved" as "one adversely affected in respect of legal rights, or suffering from an infringement or denial of legal rights." *Cnty. of Johnston v. City of Wilson*, 136 N.C. App. 775, 779, 525 S.E.2d 826, 829 (2000) (citations and quotations omitted). "It is well settled that an appeal may only be taken by an aggrieved real party in interest." *Id.*

While the majority argues that *Smith v. Forsyth County Bd. of Adjustment* is inapposite to the outcome of the instant case, I disagree. 186 N.C. App. 651, 652 S.E.2d 355 (2007). In *Smith*, we specifically looked to whether the petitioner had standing to appeal a zoning determination from the Zoning Officer to the BOA. To establish standing to appeal, this Court required that an aggrieved party "show either some interest in the property affected," or, if plaintiffs are adjoining property owners, "they must present evidence of a reduction in their property values. Mere proximity to the site of the zoning action at issue is insufficient to establish 'special damages.' " *Id.* at 654, 652 S.E.2d at 358. We concluded that because the petitioner's application to the BOA for appeal of the Zoning

Officer's decision failed to allege that the zoning decision had decreased the value of the petitioner's property or would do so in the future, the petitioner "failed to allege, or show, special damages; therefore, she did not have standing to appeal from the Zoning Officer to the [BOA]." *Id.* at 654-55, 652 S.E.2d at 358.

I read *Smith* as suggesting that the Zoning Officer is vested with authority to refuse to transmit an appeal to the BOA if the appealing party's application is devoid of any allegations of special damages, namely a decrease in property value. Without alleging special damages in an application for appeal, the appealing party cannot demonstrate that it is aggrieved, and therefore the Zoning Officer may unilaterally dismiss the appeal for want of standing. Simply put, to fall under the purview of N.C. Gen. Stat. § 153A-345, Morningstar must have shown that it was aggrieved, which it could have done by alleging special damages in its appeal of the 16 November determination. However, Morningstar neglected to do so. Without alleging special damages, Morningstar is not "aggrieved" under N.C. Gen. Stat. § 153A-354, and it had no standing to appeal. Thus, Mr. Krulik was not compelled to place Morningstar's appeal on the BOA's agenda.

Further, without standing, Morningstar could not demonstrate a "clear legal right" to petition for writ of mandamus. Because Morningstar failed to satisfy the first element of mandamus, the trial court erred in granting its petition. Accordingly, the trial court's order should be reversed.

MARCUS ROBINSON, JAMES EDWARD THOMAS, ARCHIE LEE BILLINGS, AND JAMES A. CAMPBELL, PLAINTIFFS

v.

KIERAN A. SHANAHAN, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, KENNETH E. LASSITER, WARDEN OF CENTRAL PRISON, DEFENDANTS

No. COA13-504

Filed 18 March 2014

Appeal and Error—issues not litigated before trial court—remand

Plaintiffs' argument that the "Execution Procedure Manual for Single Drug Protocol (Pentobarbital)" must be promulgated through rule-making under the Administrative Procedure Act was remanded for proper determination by the trial court. Plaintiffs' arguments before the Court of Appeals were not considered by the trial court when the court entered the order from which plaintiffs' appealed because these issues stemmed entirely from subsequent changes to N.C.G.S. § 15-188 and the execution protocol made during pendency of this appeal.

Appeal by plaintiffs from order entered 12 March 2012 by Senior Resident Superior Court Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 21 January 2014.

Poyner Spruill LLP, by Robert F. Orr, and Copeley Johnson & Groninger PLLC, by David Weiss, for plaintiffs-appellants.

Attorney General Roy Cooper, by Special Deputy Attorney General Joseph Finarelli and Assistant Attorney General Jodi Harrison, for defendants-appellees.

HUNTER, Robert C., Judge.

Marcus Robinson, James Edward Thomas, Archie Lee Billings, and James A. Campbell (collectively "plaintiffs") appeal from an order granting summary judgment in favor of defendants on plaintiffs' challenge to North Carolina's previously used three-drug protocol for the administration of lethal injections ("the 2007 Protocol"). During the pendency of this appeal, the 2007 Protocol was replaced by the "Execution Procedure Manual for Single Drug Protocol (Pentobarbital)" ("the new Manual") after a statutory amendment vested the Secretary of the North Carolina Department of Public Safety ("DPS") with the authority to determine

execution procedures in North Carolina. As a result, plaintiffs' only remaining contention on appeal is that the new Manual must be promulgated through rule-making under the Administrative Procedure Act ("the APA").

After careful review, we remand so that the trial court may properly determine this issue in the first instance.

Background

Plaintiffs are death-sentenced inmates who filed individual complaints in 2007, later consolidated, seeking declaratory judgments, temporary restraining orders, and injunctive relief on the grounds that, *inter alia*, (1) the 2007 Protocol violated the Eighth Amendment of the United States Constitution and Article 1, section 27 of the North Carolina Constitution proscribing cruel and/or unusual punishment; and (2) the 2007 Protocol violated the APA because it was not promulgated through the administrative rule-making process. After effectively staying the proceedings pending resolution of other litigation involving the 2007 Protocol, the trial court recommenced the case in May 2009. Following discovery, the parties filed cross motions for summary judgment, which were heard by the trial court on 12 December 2011. By order entered 12 March 2012, the trial court granted summary judgment for defendants. With regard to plaintiffs' claim that the 2007 Protocol was implemented in violation of the APA, the trial court concluded:

> 12. Plaintiffs' claim that the execution protocol is invalid until Defendants issue it in accordance with the rule-making provisions of Chapter 150B of the North Carolina General Statutes is also without foundation. N.C.G.S. § 150B-1(d)(6) provides that the Division of Adult Correction of the Department of Public Safety - the Department into which the previously-existing North Carolina Department of Correction was recently consolidated - is exempt from rule making "with respect to matters relating solely to persons in its custody or under its supervision, including prisoners, probationers, and parolees." Because it provides the method for and procedures by which condemned prisoners such as Plaintiffs are to be executed pursuant to Chapter 15 of the General Statutes, the Protocol relates solely to prisoners and, so, is exempt from the rule making provisions of Chapter 150B.

Plaintiffs filed timely notice of appeal from this order.

During the pendency of the appeal, the General Assembly amended the law relevant to plaintiffs' APA rule-making claim. Effective 19 June 2013, N.C. Gen. Stat. § 15-188 confers authority on the Secretary of DPS to determine North Carolina's lethal injection procedure. *See* 2013 Sess. Laws 154, § 3.(a). Pursuant to this grant of authority, Secretary of DPS Frank L. Perry issued the new Manual on 24 October 2013, eliminating the three-drug method of lethal injection challenged by plaintiffs at the trial level and instituting a new, single-drug procedure.

As a result, this Court allowed a Joint Motion for Removal from the 6 November 2013 Argument Calendar and permitted the parties to file supplemental briefs outlining the effect of these changes on plaintiffs' appeal. Subsequently, this Court dismissed as moot plaintiffs' arguments that the 2007 Protocol constituted cruel and/or unusual punishment and allowed oral argument on one issue – whether the new Manual must be promulgated through APA rule-making.

Discussion

I. APA Rule-making

The sole issue remaining on appeal is whether the new Manual must be issued in accordance with APA rule-making procedures. Because this matter has not been presented to the trial court for a determination, we remand.

Rule 10 of the North Carolina Rules of Appellate Procedure provides that:

> In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C. R. App. P. 10(a)(1) (2013). Our appellate courts have consistently declined to consider issues that were not presented at the trial level. "It is a well-established rule in our appellate courts that a contention not raised and argued in the trial court may not be raised and argued for the first time on appeal." *In re Hutchinson*, __ N.C. App. __, __, 723 S.E.2d 131, 133 (2012); *see also Henderson v. LeBauer*, 101 N.C. App. 255, 264, 399 S.E.2d 142, 147 (1991) (refusing to pass on theories of liability for the first time on appeal).

Here, plaintiffs argue two theories as to why the new Manual must be promulgated through APA rule-making: (1) section 15-188 as revised confers authority to issue the new Manual on the Secretary of DPS, and because the General Assembly declined to give DPS an APA exception, the new Manual must undergo rule-making in its entirety; and (2) even if the rule-making exception for the Department of Adult Correction ("DAC") within DPS set out in N.C. Gen. Stat. § 150B-1(d)(6) relating solely to "persons in its custody or under its supervision" is applicable, parts of the new Manual go beyond its parameters and must be promulgated through rule-making.

Although they initially requested that this Court invalidate the new Manual until it undergoes rule-making, plaintiffs acknowledged at oral argument that the new Manual has not been evaluated at the trial level, and thus conceded that remand is proper. We agree. The order from which plaintiffs appealed contains no findings of fact or conclusions of law relating to the sole issue before us. Nor could it. These arguments could not have been considered by the trial court when it entered the 12 March 2012 order because they stem entirely from subsequent changes to section 15-188 and the execution protocol made during pendency of this appeal. Thus, in effect, we have nothing to review. Absent a ruling from the trial court on these matters, we are without authority to consider them in the first instance on appeal. *See Henderson*, 101 N.C. App. at 264, 399 S.E.2d at 147. Accordingly, we believe it is appropriate to remand this matter to the trial court for further proceedings.

In their supplemental brief, defendants first requested that this Court affirm the trial court's conclusion that the 2007 Protocol need not undergo rule-making, or in the alternative, remand so that the trial court may consider arguments on the new Manual. Because the 2007 Protocol was replaced by the new Manual and is no longer the applicable process by which lethal injections are carried out, we decline to address the trial court's conclusion that it need not undergo APA rule-making.

At oral argument, counsel for defendants further asked this Court to enter an affirmative ruling that the APA exception in section 150B-1(d)(6) "with respect to matters relating solely to persons in [DAC] custody or under its supervision" will always apply to execution procedures, including the single-drug method set out in the new Manual, based on the North Carolina Supreme Court's holding in *Connor v. N.C. Council of State*, 365 N.C. 242, 716 S.E.2d 836 (2011). In *Connor*, the Supreme Court addressed whether the APA applied to the Council of State's approval of the 2007 Protocol. *Id.* at 250, 716 S.E.2d at 841. According to the Court, neither party disputed that the APA exception in section 150B-1(d)(6)

applied to the 2007 Protocol. *Id.* at 253, 716 S.E.2d at 843. Ultimately it held that "the process by which the Council approves or disapproves the DOC's lethal injection protocol is not subject to the APA[.]" *Id.* at 257, 716 S.E.2d at 846. Regardless of whether the Supreme Court's analysis of the 2007 Protocol is dicta, a conclusion as to which plaintiffs and defendants are in disagreement, we are without authority to determine the effect that the *Connor* holding may have on the new Manual before the trial court has had the opportunity to do so. *See In re Hutchinson*, __ N.C. App. at __, 723 S.E.2d at 133.

Conclusion

Because this Court may not pass on legal issues for the first time on appeal, we remand to the trial court so that it may properly determine this matter and develop an adequate record for any subsequent appellate review.

REMANDED.

Judges McGEE and ELMORE concur.

THOMAS BRANDON SPOON, PLAINTIFF
v.
ABBY MELVIN SPOON, DEFENDANT

No. COA13-340

Filed 18 March 2014

1. Civil Procedure—Rule 52(b)—court's authority to amend conclusions of law

The trial court did not err in a child custody case by amending its order in response to plaintiff's N.C.G.S. § 1A-1, Rule 52(b) motion. The trial court possessed authority under Rule 52(b) to amend its conclusions of law.

2. Child Custody and Support—custody—substantial change in circumstances—moving—stipulation

The trial court did not err in a child custody case by concluding that a substantial change in circumstances had occurred based on its alleged reliance on the 3 August 2011 stipulation which stated that a move to Orange County, North Carolina constituted a substantial change in circumstances affecting the minor children. There

was no indication that the trial court sought to avoid its obligation to determine whether a substantial change in circumstances had occurred.

3. Child Custody and Support—custody modification—substantial change in circumstances—moving—nexus—children's welfare

The trial court did not err by modifying child custody. The order demonstrated that there had been a substantial change in circumstances related to defendant's moves to Mebane and Chapel Hill. It also established a sufficient nexus between the change in circumstances and the children's welfare.

Appeal by defendant from order entered 20 September 2012 by Judge Kathryn Whitaker Overby in Alamance County District Court. Heard in the Court of Appeals 12 September 2013.

Wishart, Norris, Henninger & Pittman, PA, by Hillary D. Whitaker and Kathleen F. Treadwell, for plaintiff-appellee.

Alexander, Miller, and Schupp, LLP, by Sydenham B. Alexander, Jr. and Jonathan J. Loch, for defendant-appellant.

DAVIS, Judge.

Abby Melvin Spoon, now Abby Melvin Brown ("Defendant"), appeals from the trial court's amended order modifying the custody arrangements for the parties' three children. Defendant's primary arguments on appeal are that the trial court erred by (1) supplementing its conclusions of law in response to a Rule 52(b) motion filed by Thomas Brandon Spoon ("Plaintiff"); and (2) concluding that there had been a substantial change in circumstances warranting the modification of custody. After careful review, we affirm the trial court's amended order.

Factual Background

Plaintiff and Defendant were married on 8 July 2000, separated on 19 October 2007, and divorced on 15 July 2009. The parties have three minor children: Allison, age 12; Rebecca, age 11; and Trevor, age 7.[1]

On 25 September 2007, Plaintiff filed an action seeking child custody, equitable distribution, and divorce from bed and board. On

1. Pseudonyms are used in this opinion to protect the identities of the minor children.

26 September 2007, the trial court granted Plaintiff temporary custody of the minor children. Defendant filed an answer and counterclaims on 19 October 2007 seeking child custody, child support, divorce from bed and board, post-separation support, alimony, and equitable distribution. Both parties voluntarily dismissed their claims, and a consent order was entered on 14 November 2007 granting the parties joint custody of the children. The consent order also required the minor children to attend school in the Alamance Burlington School System ("ABSS").

Between December 2007 and December 2009, the parties filed various motions for contempt and to modify custody. On 15 June 2011, Plaintiff filed a motion requesting primary placement. A hearing was held on 1 August 2011. Before this hearing, the parties filed a written set of stipulations, stating the following:

> 1. Defendant, Abby Melvin Spoon, is moving to Orange County, North Carolina. A move to Orange County, North Carolina constitutes a substantial change in circumstances affecting the minor children of the parties.
>
> 2. If this Court determines that it is in the best interest of the minor children to remain in Alamance County, North Carolina, then Abby Melvin will not move from Alamance County, North Carolina, and placement will remain the same.

The trial court proceeded to enter an order determining that "[i]t is in the best interests of the minor children to remain in Alamance County, North Carolina."

In August of 2011, Defendant moved from Burlington to Mebane. On 28 October 2011, the trial court entered a consent order concerning custody and the children's school placement after Defendant withdrew the children from their previous school in Burlington and enrolled them in E.M. Yoder Elementary School in Mebane. In May of 2012, Defendant moved from Mebane to Chapel Hill. On 3 May 2012, Defendant filed motions seeking to modify the children's school placement to the Chapel Hill-Carrboro School District and to hold Plaintiff in contempt. On 22 May 2012, Plaintiff filed motions seeking to modify custody and hold Defendant in contempt. Plaintiff filed a second motion to hold Defendant in contempt on 31 July 2012.

On 14 August 2012, the trial court held a hearing on Plaintiff's motion to modify custody, Defendant's motion to modify school placement, and the parties' cross motions for contempt. The trial court entered an order

on 24 August 2012 modifying the 28 October 2011 consent order. The trial court granted Plaintiff primary physical custody, giving him custody of the minor children for nine days out of every fourteen days, and Defendant secondary physical custody, giving her custody for the remaining five days. The trial court also held Defendant in contempt for moving the minor children without giving Plaintiff 90 days written notice as required by a previous court order; however, the trial court declined to sanction her.

On 4 September 2012, Plaintiff filed a motion under Rule 52(b) of the North Carolina Rules of Civil Procedure requesting that the trial court make additional findings of fact and conclusions of law. In response to Plaintiff's motion, the trial court entered an amended order on 20 September 2012. Defendant appealed to this Court.

Analysis

A trial court may order the modification of an existing child custody order if the court determines that there has been a substantial change of circumstances affecting the child's welfare and that modification is in the child's best interests. *Shipman v. Shipman*, 357 N.C. 471, 473, 586 S.E.2d 250, 253 (2003). Our review of a trial court's decision to modify an existing child custody order is limited to determining (1) whether the trial court's findings of fact are supported by substantial evidence; and (2) whether those findings of fact support its conclusions of law. *Id.* at 474-75, 586 S.E.2d at 253-54. Evidence is substantial if "a reasonable mind might accept [it] as adequate to support a conclusion." *Id.* at 474, 586 S.E.2d at 253. Because our trial courts "are vested with broad discretion in child custody matters" and have the opportunity to observe the witnesses and the parties, the trial court's findings of fact are conclusive on appeal if supported by evidence in the record, even if the evidence might also support a contrary finding. *Balawejder v. Balawejder*, ___ N.C. App. ___, ___, 721 S.E.2d 679, 689 (2011) (citation and quotation marks omitted).

Defendant asserts a number of arguments on appeal. We address each in turn.

I. Rule 52(b) Motion

[1] Defendant first argues that the trial court erred in amending its 24 August 2012 order in response to Plaintiff's Rule 52(b) motion. Rule 52(b) provides, in pertinent part, that "[u]pon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly." N.C. R. Civ. P.52(b).

Based on Plaintiff's Rule 52(b) motion, the trial court amended its prior order by adding the following italicized language to its second conclusion of law:

> 2. There has been a substantial change in circumstances that affects the welfare of the minor children *related to the defendant's moves to Mebane, North Carolina and Chapel Hill, North Carolina.*

The trial court also added a conclusion of law number 6 stating that "[t]he plaintiff is not in contempt." Defendant asserts that the plain language of Rule 52(b) does not allow such amendments to a trial court's original conclusions of law.

However, this Court has stated that "Rule 52(b) concerns amendments to the findings *and conclusions* relating to a final judgment . . . ." *O'Neill v. S. Nat'l Bank*, 40 N.C. App. 227, 231, 252 S.E.2d 231, 234 (1979) (emphasis added). We also look to federal cases for guidance on this issue as our Court has held that "federal court decisions are pertinent" to our analysis of Rule 52(b) because "North Carolina's Rule 52(b) mirrors Rule 52(b) of the Federal Rules of Civil Procedure." *Parrish v. Cole*, 38 N.C. App. 691, 693, 248 S.E.2d 878, 879 (1978). Federal case law supports the proposition that Rule 52(b) gives a trial court "the power to amend its findings of fact and conclusions of law." *Nat'l Metal Finishing Co. v. BarclaysAmerican/Commercial, Inc.*, 899 F.2d 119, 124 (1st Cir. 1990) (emphasis added); *see Shivers v. Grubbs*, 747 F.Supp. 434, 436 (S.D. Ohio 1990) ("The primary purpose of a Rule 52(b) motion is to enable the party to obtain a correct understanding of the Court's findings, typically for appeal purposes. In doing so the movant raises questions of substance by seeking reconsideration of material findings of fact or conclusions of law." (emphasis added)). Thus, we conclude that the trial court possessed authority under Rule 52(b) to amend its conclusions of law.

II. 3 August 2011 Stipulation

[2] Defendant next contends that the trial court erred by relying on the 3 August 2011 stipulation — which stated that "[a] move to Orange County, North Carolina constitutes a substantial change in circumstances affecting the minor children of the parties" — in concluding that a substantial change in circumstances had occurred. Specifically, she argues that "[t]he fact that Judge Overby drafted her own order, the presence of certain Findings of Fact in that order which suggest she may have worked off a previous electronic file, the addition of conclusions of law pursuant to a Rule 52 motion, and the absence of required findings of fact strongly

indicate that the trial court had again accepted the Stipulation as a conclusion of law."

Defendant correctly notes that "whether there has been a substantial change of circumstances is a legal conclusion, which must be supported by adequate findings of fact" and that the requirement that a trial court find a substantial change in circumstances before modifying custody cannot be waived by the parties. *Hibshman v. Hibshman*, 212 N.C. App. 113, 121, 710 S.E.2d 438, 444 (2011) (citation and quotation marks omitted). Our Court has also explained that "stipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate." *In re A.K.D.*, ___ N.C. App. ___, ___, 745 S.E.2d 7, 9 (2013) (citation, quotation marks, and brackets omitted).

However, it is well established that "[a]n appellate court is not required to, and should not, assume error by the trial judge when none appears on the record before the appellate court." *State v. Williams*, 274 N.C. 328, 333, 163 S.E.2d 353, 357 (1968). Here, the only reference the trial court made to the parties' 3 August 2011 stipulation is in finding of fact 5 in which the trial court provides the entire procedural history of the case. There is no indication that the trial court sought to avoid its obligation to determine whether a substantial change in circumstances had occurred — in stark contrast to the trial court's actions in *Hibshman*.

In *Hibshman*, the trial court initially granted custody of the minor children to the mother during the school year. *Hibshman*, 212 N.C. App. at 122, 710 S.E.2d at 444. The order conditioned this custody arrangement on the mother "maintaining a home in the Granite Quarry Elementary School district" and provided that if she moved out of the school district, "this order may be modified without a showing of a substantial change in circumstances." *Id.* When the trial court later modified the custody order, it "explicitly stated that it was not considering whether a substantial change in circumstances warranting a change in custody had occurred" and instead expressly relied upon the above-quoted provision of the original custody order. *Id.*

Unlike in *Hibshman*, the trial court here did not disregard its duty to determine whether a substantial change in circumstances had occurred. The trial court's order does not suggest that it relied upon the parties' prior stipulation in any way when it concluded that there had been a substantial change in circumstances. Therefore, we decline to assume error.

III. Substantial Change in Circumstances

[3] Defendant's next several arguments on appeal relate to the trial court's conclusion that "[t]here has been a substantial change in circumstances that affects the welfare of the minor children related to the defendant's moves to Mebane, North Carolina and Chapel Hill, North Carolina." Defendant asserts that the trial court erred in making this conclusion because (1) the change in circumstances must "substantially affect" the children's welfare; (2) the trial court relied on a change that occurred prior to the entry of the previous custody order; and (3) relocating to another county is not a substantial change in circumstances where the evidence fails to establish a sufficient nexus between the relocation and the children's welfare.

A. "Substantially affects" the children's welfare

Citing *Spence v. Durham*, 283 N.C. 671, 198 S.E.2d 537 (1973), Defendant claims that modification was improper here because the trial court was required to find that the moves to Mebane and Chapel Hill constituted a *substantial* change in circumstances that *substantially* affected the children's welfare.

In *Spence*, our Supreme Court stated that modification of a child custody order is appropriate upon a showing of "any change of circumstances substantially affecting the welfare of the children." *Id.* at 684, 198 S.E.2d at 545. Since *Spence*, however, our appellate courts have repeatedly articulated the standard for modification of a child custody order as a substantial change of circumstances affecting the welfare of the children. *See Shipman*, 357 N.C. at 473, 586 S.E.2d at 253 ("It is well established in this jurisdiction that a trial court may order a modification of an existing child custody order between two natural parents if the party moving for modification shows that a substantial change of circumstances affecting the welfare of the child warrants a change in custody" (citation and internal quotation marks omitted)); *Stephens v. Stephens*, 213 N.C. App. 495, 498, 715 S.E.2d 168, 171 (2011) ("In granting the Motion to Modify Custody, the trial court must have first appropriately concluded that there was a substantial change in circumstances and that the change affected the welfare of the minor child or children.").

Thus, the trial court applied the appropriate standard in concluding that "[t]here has been a substantial change in circumstances that affects the welfare of the minor children related to the defendant's moves to Mebane, North Carolina and Chapel Hill, North Carolina." Defendant's argument, therefore, is overruled.

B. Significance of Fact that Defendant's Move to Mebane Occurred Prior to Entry of 28 October 2011 Custody Order

Defendant next argues that the trial court erred in considering her move to Mebane, North Carolina when making its determination that a substantial change of circumstances had occurred, claiming that she had moved to Mebane in August of 2011, which was prior to the entry of the 28 October 2011 custody order. As such, Defendant, citing *Tucker v. Tucker*, 288 N.C. 81, 216 S.E.2d 1 (1975), asserts that her relocation to Mebane was not relevant because only changes that have occurred *since* 28 October 2011 should be considered when ruling on the motion to modify custody.

Defendant is mistaken, however, because the trial court's actual conclusion was that a substantial change of circumstances "*related* to the defendant's moves to Mebane, North Carolina and Chapel Hill, North Carolina" had occurred. (Emphasis added.) While the move to Mebane did, in fact, take place two months before the previous custody order was entered, the trial court's findings and the record evidence show that the effects of the relocation on the minor children did not manifest themselves until *after* the entry of that order. Our review of the trial court's findings reveals that the trial court was concerned about Defendant's history of uprooting, or attempting to uproot, the minor children without first consulting Plaintiff and the ramifications that these actions had on the children.

Indeed, the trial court's findings pertaining to Defendant's move to Mebane primarily refer to (1) the children's emotional well-being and school performance; and (2) Defendant's actions in attempting to diminish the amount of time the children spent with Plaintiff, once they had moved.[2] As such, the effects of the move to Mebane, which became apparent following the entry of the 28 October 2011 consent order, were relevant and properly considered by the trial court in determining whether a substantial change in circumstances had occurred.

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2. Defendant claims that findings of fact 14, 16, 18, 32, 33, 37, 47, 49, 62, and 66 address events that occurred before the entry of the consent order and must be disregarded. We first note that Defendant merely lists these findings by number and provides no specific argument regarding any of the findings as required by Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure. Moreover, we believe these findings, which address the numerous times Defendant has attempted to relocate and unilaterally change the children's school placements, shed light on events occurring *after* the 28 October 2011 consent order was entered.

C. Sufficiency of Defendant's Relocations to Show a Substantial Change in Circumstances

Defendant also argues that the trial court erred in concluding that there had been a substantial change in circumstances because "a change in the custodial parent's residence is not itself a substantial change in circumstances affecting the welfare of the child which justifies a modification of a custody decree." *Evans v. Evans*, 138 N.C. App. 135, 140, 530 S.E.2d 576, 579 (2000); *see Harrington v. Harrington*, 16 N.C. App. 628, 630, 192 S.E.2d 638, 639 (1972) (holding that trial court erred in modifying custody of minor child when "[t]he only finding of change in circumstances as to [the minor child] was that defendant is now residing in Mecklenburg County, North Carolina" (internal quotation marks omitted)).

In *Evans*, our Court explained that the relocation and remarriage of one of the parties could not have been deemed a substantial change in circumstances warranting modification of custody because the trial court "made no findings of fact indicating the effect of the remarriage and relocation on the child himself . . . [and did] not discuss the impact of the proposed move on the child." *Evans*, 138 N.C. App. at 141, 530 S.E.2d at 580.

In *Shipman*, our Supreme Court further elaborated on the need to show the relationship between the change in circumstances and the welfare of the child, holding that

> [i]n situations where the substantial change involves a discrete set of circumstances such as a move on the part of a parent, a parent's cohabitation, or a change in a parent's sexual orientation, the effects of the change on the welfare of the child are not self-evident and therefore necessitate a showing of evidence directly linking the change to the welfare of the child. . . . Evidence linking these and other circumstances to the child's welfare might consist of assessments of the minor child's mental well-being by a qualified mental health professional, school records, or testimony from the child or the parent.

Shipman, 357 N.C. at 478, 586 S.E.2d at 256 (internal citations and emphasis omitted).

Here, unlike in *Evans*, the trial court made multiple findings concerning how the two relocations (and resultant change in school placement) within a ten month period affected the minor children. The trial

court found that the move to Mebane — abruptly followed by another move to Chapel Hill — "added stress to the minor children" because they were distanced from their friends and extracurricular activities when they moved to Mebane and because the situation was repeated when they moved to Chapel Hill. The trial court also determined that both the children's teachers and Plaintiff had noticed a change in the children — observing that they were more clingy, tearful, and upset since the moves. The court found that Allison, the oldest child, had especially struggled with moving and going to a new school and that her dance instructor had observed "a change in [her] demeanor" such that she would frequently cry and be "visibly upset."

Additionally, the trial court made findings that since the two moves and her remarriage, Defendant has withdrawn the children from activities that Plaintiff helps with or coaches and has prioritized the development of relationships between the children and their step-family over their ability to spend time with Plaintiff. *See Stephens*, 213 N.C. App. at 499, 715 S.E.2d at 172 (explaining that interference with and attempts to frustrate relationship between children and other parent can be considered in determining whether modification of custody is appropriate). These findings are uncontested by Defendant and thus are binding on appeal. *See Crenshaw v. Williams*, 211 N.C. App. 136, 142, 710 S.E.2d 227, 232 (2011) ("Unchallenged findings are presumed to be supported by competent evidence and are binding on appeal." (citation, quotation marks, and brackets omitted)).

The trial court also made findings regarding Allison's and Rebecca's declining academic performance since they changed schools. Defendant only challenges the finding concerning Rebecca's academic performance. As such, the trial court's finding regarding Allison's school performance is presumed to be supported by competent evidence and is binding on appeal. *See id.* With respect to Rebecca's school performance, the trial court found

> 43. The middle child [Rebecca] is a rising 4th grader. She attended Highland for kindergarten, first and second grade. She attended Yoder for third grade. From kindergarten through second grade her grades progressively increased from eleven "needs improvement"s (and 205 "satisfactory" marks) in kindergarten to one "needs improvement" (and 215 "satisfactory" marks) in first grade to all "satisfactory" (209 "satisfactory") marks in second grade, with no "needs improvement" marks. In third grade children receive their first "letter" grades, but they also continue

> to receive "needs improvement," "satisfactory" or "unsatisfactory" marks. In third grade, the middle child received twenty-one "needs improvement" marks and 170 "satisfactory" marks. The middle child took the end of grade (EOG) tests for the first time while at Yoder. She passed math on the first try. She failed the English EOG and had to retake it. The middle child passed the English EOG on the second try. The middle child's grades (or marks) have diminished while she attended Yoder.

We cannot agree with Defendant's assertion that the trial court's findings on this issue were unsupported by competent evidence. Rebecca's report cards from her new school in Mebane — introduced into evidence by Defendant — show that Rebecca received more "needs improvement" marks and less "satisfactory" marks than in her previous years of schooling. As such, the trial court's finding that Rebecca's grades diminished is supported by competent evidence in the record.

Thus, the trial court determined that the children's emotional and academic well-being were adversely impacted by the moves to Mebane and Chapel Hill. As such, we hold that the trial court's order modifying custody (1) demonstrates that there has been a substantial change in circumstances; and (2) establishes a sufficient nexus between the change in circumstances and the children's welfare.

IV. Best Interests of the Children

Defendant also contends that the trial court erred in concluding that it was in the best interests of the minor children to modify the previous custody order because the trial court "failed to specify in its findings of fact which evidence presented convinced it that modification of the 28 October 2011 Order was in the best interest of the children." We disagree.

> Once the trial court makes the threshold determination that a substantial change has occurred, the court then must consider whether a change in custody would be in the best interests of the child. As long as there is competent evidence to support the trial court's findings, its determination as to the child's best interests cannot be upset absent a manifest abuse of discretion.

Metz v. Metz, 138 N.C. App. 538, 540-41, 530 S.E.2d 79, 81 (2000) (internal citation omitted). In determining whether modification of custody is in the best interests of the minor children, "any evidence which is

competent and relevant to a showing of the best interest . . . must be heard and considered by the trial court." *In re P.O.*, 207 N.C. App. 35, 39, 698 S.E.2d 525, 529 (2010) (citation and emphasis omitted).

"When determining whether the findings in an order modifying child custody are adequate to support its conclusions, this Court examines the entire order. The trial court is not constrained to using certain and specific buzz words or phrases in its order." *Lang v. Lang*, 197 N.C. App. 746, 748, 678 S.E.2d 395, 397 (2009) (citation, quotation marks, and brackets omitted). In this case, the trial court's findings, taken together, support its conclusion that modification of custody was in the best interests of the minor children. As discussed above, the trial court found that the two relocations have had a negative impact on the children's emotional and academic well-being and that since the moves, Defendant has withdrawn the children from extracurricular activities with which Plaintiff assists in order to limit their time with him.

The trial court also found that Plaintiff's living situation has been more stable over the past several years than Defendant's. Specifically, the trial court noted that Plaintiff has lived in the same house since his separation from Defendant and has not been engaged or married during this time. The trial court found that, conversely, Defendant has been engaged twice, has moved twice, has transferred the children to a different school district, and is now attempting to change the children's school placement once again. The trial court also determined that at Plaintiff's house, the children had their own bedrooms, were closer to their core group of friends and to their extracurricular activities, and that the flexibility of Plaintiff's work schedule allows him to pick up the children from school and transport them to their afterschool activities. Based on our examination of the entire order and its extensive findings of fact, we are satisfied that the trial court did not abuse its discretion in concluding that modification of custody was in the best interests of the minor children.

V. Motion to Modify School Placement

Finally, Defendant argues that the trial court erred by failing to explicitly rule on her motion to modify school placement. We note that the decretal portion of the 20 September 2012 order states that "[t]he plaintiff is responsible for and shall enroll the minor children in school in the ABSS," indicating that the trial court considered and denied Defendant's motion to modify the children's school placement to the Chapel Hill-Carrboro School District. Furthermore, Defendant's argument on this issue is premised on her assertion that the trial court

erred in modifying custody, an assertion we reject for the reasons explained herein.[3]

Conclusion

For the reasons stated above, we affirm the trial court's order modifying custody.

AFFIRMED.

Judges HUNTER, JR. and ERVIN concur.

STATE OF NORTH CAROLINA
v.
DARIUS CORDALE ALEXANDER, DEFENDANT

No. COA13-461

Filed 18 March 2014

Search and Seizure—plain view doctrine—not applicable to searches—applicable to seizures—findings of fact—lawful right of access to items seized

The trial court erred by partially denying defendant's motion to suppress. The plain view doctrine did not apply to the police officer's observation of the contents of defendant's trailer. Furthermore, while the plain view doctrine applied to whether the officer performed a lawful seizure of the contents of the trailer and the findings of fact supported the trial court's conclusion that the criminal nature of the items was immediately apparent, the case was remanded for further findings of fact and conclusions of law regarding whether the officers had a lawful right of access to the items seized.

Appeal by defendant from judgment entered 17 August 2011 by Judge H. William Constangy in Catawba County Superior Court. Heard in the Court of Appeals 23 September 2013.

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3. We decline to address Defendant's remaining arguments because they merely consist of her contentions as to what should occur in the event that the trial court's 20 September 2012 order is vacated.

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

Appellate Defender Staples Hughes, by Assistant Appellate Defender Jon H. Hunt and Assistant Appellate Defender Benjamin Dowling-Sendor, for defendant-appellant.

GEER, Judge.

Defendant Darius Cordale Alexander appeals from an order denying, in part, his motion to suppress evidence seized during a warrantless search of a trailer parked in front of his mobile home. On appeal, defendant contends that the challenged search and seizure were not reasonable under the plain view doctrine because the criminal nature of the items was not immediately apparent and the officers did not have legal right of access to the items seized. We hold that the findings of fact support the trial court's conclusion that the criminal nature of the items was immediately apparent. However, we remand for further findings of fact and conclusions of law regarding whether the officers had a lawful right of access to the items seized.

Facts

The State's evidence tended to show the following facts. On the morning of 29 October 2010, Officer Stephanie Roberts of the Hickory Police Department responded to a reported theft of air conditioning copper coil at the Century Furniture Company. The maintenance supervisor, Bob Ledford, informed Officer Roberts that he had checked on the air conditioning units the previous day at around 4:30 p.m., but when he arrived that morning, he discovered that approximately 200 pounds of copper coil had been stolen.

After taking Mr. Ledford's statement, Officer Roberts called Mr. Caroll McKinney at McKinney Metals to determine if any coil had been sold to him in the previous 24 hours. Mr. McKinney called Officer Roberts back at around 3:30 p.m. and informed her that coil matching the description and weight of the stolen property had been sold to him that day by defendant. Mr. McKinney provided Officer Roberts with defendant's name and driver's license number, the license plate number of the vehicle defendant used to deliver the coil, and a physical description of defendant and his Infiniti SUV. Officer Roberts used defendant's driver's license number to locate defendant's address and determined that defendant lived in a mobile home in Hollar Mobile Home Park in Burke County.

Hollar Mobile Home Park has about 40 mobile homes on eight to 10 acres of land. There are two paved driveways that run through the park with mobile homes on either side, forming three rows of homes. The homes do not face towards the driveway, but instead are situated facing towards and parallel to the main road, which runs perpendicular to the paved driveways. In each row, there is a grassy area between each mobile home that constitutes the front yard of one home and the back yard of another. The homes are about 100 feet apart from one another, but there are no fences to separate one home from another.

When facing the park from the main road, defendant's mobile home is located in the outer left row of mobile homes. His front door faces the main road and is on the far right side of the mobile home, closest to the paved driveway. The door is accessible by walking up three steps to the front porch. The grassy area in front of his mobile home is bounded on the left by the wooded area bordering the mobile home park, the paved driveway to the right, and, at the front, another empty mobile home closer to the main road.

Officer Roberts drove to the mobile home park to question defendant, arriving at around 4:14 p.m. She drove down the main road and came upon the park on her left. As she approached the park and passed the entrance to the first paved driveway on her left, she observed an Infiniti SUV matching the description given to her by Mr. McKinney with a black male behind the steering wheel. She pulled into the second entrance, parked her car, and walked back towards defendant's mobile home on foot.

Defendant's SUV and a wooden tow-behind trailer were parked on the far left side of the grassy area in front of defendant's mobile home. The SUV was parked alongside the mobile home with its headlights facing towards the mobile home park driveway. The SUV's tailgate was at the edge of the wooded area, and the license plate was not visible from the driveway. Next to the SUV, towards the empty mobile home and the main road, the trailer had also been backed up to the woods so that its license plate was not visible. The SUV was approximately 10 to 15 feet in front of the mobile home, and the trailer was approximately five feet away from the SUV. The trailer had two wheels and was no longer attached to a vehicle, so the trailer hitch was resting on the ground. This caused the bed of the trailer, which was opened and uncovered, to tilt down in a forward angle towards the driveway.

Officer Roberts approached from the paved driveway on the right. When she reached the mobile home the vehicle was no longer occupied,

so she believed that the individual she saw in the SUV had gone inside the mobile home. She walked up to the front porch and knocked on the door, but no one answered. When she turned around, she noticed the open tow-behind trailer parked in the front yard and saw that it contained pieces of air conditioning copper coil. She believed that the pieces of coil were scrap pieces of the coils that had been stolen and sold to Mr. McKinney.

After knocking on the door and getting no response, Officer Roberts walked down from the porch and over towards the wooded area to see behind the SUV and the tow-behind trailer to check the license plate numbers. The license plate on the SUV matched the license plate given to her by Mr. McKinney.

Officer Roberts radioed for assistance and also called Mr. Ledford. She asked Mr. Ledford to bring the ends of the copper coil that were left attached to the air conditioning units so that they could be compared to the pieces of coil in the trailer. While she was waiting for the other officers to arrive, she took photographs of the mobile home, SUV, and trailer.

When Deputy Nathan Smith of the Burke County Sheriff's Office arrived, Officer Roberts again knocked on the front door of the mobile home while Deputy Smith knocked on the back door. Again, they did not get a response. However, as Deputy Smith walked to the front of the mobile home, he saw a child peeping through a curtain. Claiming concern for the welfare of the child, Deputy Smith's partner went to the mobile home park office to speak with the park manager about obtaining a key to the mobile home. At the officers' request, a maintenance man who worked at the park used the landlord's key to allow the officers into defendant's mobile home. The defendant and the child were found hiding behind a door in one of the bedrooms.

After determining that the child was okay, the officers questioned defendant about the larceny of the air conditioning coils. They also found and seized marijuana and a backpack that contained gloves, screwdrivers, pliers, and other tools. Officer Roberts placed defendant under arrest for larceny and breaking and entering. After defendant was placed under arrest, Mr. Ledford arrived and was able to identify the coils. Officer Roberts collected all of the pieces of coil from the trailer as evidence.

Defendant was indicted for felony larceny and misdemeanor possession of stolen goods. On 11 August 2011, defendant filed a motion to suppress all the evidence seized on 29 October 2010, including the

copper coil in the trailer, and any statements made by defendant during the search of his mobile home. On 17 August 2011, following a hearing, the trial court entered an order concluding that the search and seizure of the coils were justified by the plain view doctrine, but that the warrantless entry into the mobile home was not justified by any exigent circumstances, the caretaker exception, or consent of the landlord. The trial court granted defendant's motion to suppress the evidence seized within the mobile home, but denied defendant's motion to suppress the coils seized outside the mobile home.

Thereafter, defendant entered a plea of no contest to felony possession of stolen goods, and the State dismissed the charges of felony larceny and misdemeanor possession of stolen goods. The trial court sentenced defendant to a presumptive-range term of 5 to 6 months imprisonment. The court suspended the sentence and placed defendant on 30 months of supervised probation.

After the entry of judgment, defendant gave oral notice of appeal of the partial denial of his motion to suppress. On 18 December 2012, this Court dismissed defendant's appeal for lack of jurisdiction for failure to give adequate notice of appeal from the trial court's judgment. *See State v. Alexander*, 224 N.C. App. 398, ___ S.E.2d ___, 2012 WL 6590077, 2012 N.C. App. LEXIS 1390 (Dec. 18, 2012) (unpublished). On 27 December 2012, defendant filed a petition for writ of certiorari to review the 17 August 2011 judgment, which this Court granted 14 January 2013.

Discussion

The sole issue on appeal is whether the trial court erred in denying in part defendant's motion to suppress. "The scope of review of the 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. Bone*, 354 N.C. 1, 7, 550 S.E.2d 482, 486 (2001) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)). Unchallenged findings of fact are binding on appeal. *State v. Lupek*, 214 N.C. App. 146, 150, 712 S.E.2d 915, 918 (2011). The trial court's conclusions of law are, however, reviewed de novo and "must be legally correct, reflecting a correct application of applicable legal principles to the facts found." *State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997).

We first note that defendant, the State, and the trial court have all focused both on (1) whether Officer Roberts conducted a *search* justified

by the plain view doctrine, and (2) whether the *seizure* of the copper coils was permissible under that doctrine. The trial court concluded: "Officer Roberts's warrantless examination of the contents of the trailer located adjacent to defendant's mobile home at [sic] WAS a reasonable search, justified by the plain view exception to the warrant requirement. Officer Roberts was lawfully present on the front porch when she inadvertently saw what she believed to be evidence of a crime." The trial court then upheld the seizure: "The examination by Officer Roberts of the tow-behind trailer located in the front yard and the seizure of the suspected stolen property DID NOT violate the defendant's rights under the Constitution of the United States of America or the Constitution of the State of North Carolina."

However, as the Fourth Circuit Court of Appeals has explained, "[t]he 'plain-view' doctrine provides an exception to the warrant requirement for the *seizure* of property, but it does not provide an exception for a search. Viewing an article that is already in plain view does not involve an invasion of privacy and, consequently, does not constitute a search implicating the Fourth Amendment." *United States v. Jackson*, 131 F.3d 1105, 1108 (4th Cir. 1997). *See also Horton v. California*, 496 U.S. 128, 134 n.5, 110 L. Ed. 2d 112, 121 n.5, 110 S. Ct. 2301, 2306 n.5 (1990) (" 'It is important to distinguish "plain view," . . . to justify *seizure* of an object, from an officer's mere observation of an item left in plain view. Whereas the latter generally involves no Fourth Amendment search, . . . the former generally does implicate the Amendment's limitations upon seizures of personal property.' " (quoting *Texas v. Brown*, 460 U.S. 730, 738 n.4, 75 L. Ed. 2d 502, 511 n.4, 103 S. Ct. 1535, 1541 n.4 (1983) (opinion of Rehnquist, J.))).

We therefore hold, as an initial matter, that the trial court erred in applying the plain view doctrine to the question whether Officer Roberts performed a lawful search when she observed the contents of the trailer from the front porch of the mobile home. The plain view doctrine applied only to the question whether Officer Roberts' warrantless seizure of the copper coils was permissible under the plain view doctrine.

Under the plain view doctrine, a warrantless seizure is lawful if (1) the officer views the evidence from a place where he has legal right to be, (2) it is immediately apparent that the items observed constitute evidence of a crime, are contraband, or are subject to seizure based upon probable cause, and (3) the officer has a lawful right of access to the evidence itself. *State v. Nance*, 149 N.C. App. 734, 740, 562 S.E.2d 557, 561-62 (2002).

With respect to the first element of the plain view doctrine, defendant challenges the trial court's finding that Officer Roberts could see the coils from the porch -- a location where, defendant concedes, Officer Roberts had a legal right to be. *See State v. Prevette*, 43 N.C. App. 450, 455, 259 S.E.2d 595, 600–01 (1979) (holding officers legally entitled to be on front porch of defendant's house for purpose of conducting general inquiry or interview). The trial court's finding of fact was supported by Officer Roberts' testimony during cross-examination:

> Q. . . . You mentioned at some point that you knocked on a door eventually, correct?
>
> A. Yes, sir. . . . When I arrived and I seen the Infinity, I walked up on the porch. And when I did I could see over into that trailer -- into that hitch trailer. But I walked up and knocked on the door.
>
> Q. Okay.
>
> A. And that's when I could see inside that hitch trailer.
>
> Q. Okay. And after you did that did you proceed to go over and go behind the automobile to see what tag --
>
> A. To check the plate, yes, sir.
>
> Q. Okay. Did you go behind the -- You also went behind the hitch trailer to see if it had a tag on it.
>
> A. Yes, sir --

While defendant argues that this testimony does not establish that Officer Roberts could in fact see the coils in the trailer, the trial court's finding was a reasonable inference drawn from this testimony when considered together with Officer Roberts' direct examination. Although defendant's interpretation of Officer Roberts' testimony may also be reasonable, it is the trial court who "passes upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom. If different inferences may be drawn from the evidence, he determines which inferences shall be drawn and which shall be rejected." *Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968). Because the evidence and reasonable inferences drawn from that evidence support the trial court's finding that Officer Roberts could see the copper coils from the porch, it is binding on appeal.

Defendant also challenges the sufficiency of the evidence to support the trial court's finding that Officer Roberts "inadvertently" looked

into the trailer from the front porch. This Court, however, has held that "inadvertence is not a necessary condition of a lawful search pursuant to the 'plain view' doctrine." *State v. Church*, 110 N.C. App. 569, 575, 430 S.E.2d 462, 465 (1993) (following *Horton*).[1] Because this finding of fact is, therefore, immaterial to the question whether the seizure was permissible under the Fourth Amendment, we need not address it.

Regarding the second element of the plain view doctrine, defendant argues that the trial court's findings of fact are insufficient to support a conclusion that it was "immediately apparent" to Officer Roberts that the coils were stolen. "The term 'immediately apparent' in a plain view analysis is satisfied only 'if the police have probable cause to believe that what they have come upon is evidence of criminal conduct.' " *State v. Graves*, 135 N.C. App. 216, 219, 519 S.E.2d 770, 772 (1999) (quoting *State v. Wilson*, 112 N.C. App. 777, 782, 437 S.E.2d 387, 389-90 (1993)). When, as here, the item in plain view is considered contraband based solely upon its status as a "stolen good," whether its criminal nature is immediately apparent to an officer depends upon the interplay between extrinsic circumstances known to the officer prior to discovery of the item and the officer's observations of the item's characteristics. *See State v. Connard*, 81 N.C. App. 327, 330, 344 S.E.2d 568, 571 (1986) ("Stolen goods . . . do not qualify automatically as contraband, but generally are innocuous except for the extrinsic circumstance that they have been stolen.").

This Court has held that it was immediately apparent that an item in plain view was evidence of a crime when the officer viewed an item that matched the description of an item he knew to be stolen. *See, e.g.*, *State v. Haymond*, 203 N.C. App. 151, 161, 691 S.E.2d 108, 118 (2010) (immediately apparent microwave, refrigerator, and dishwasher stolen when officer immediately recognized the appliances as those from break-in he was investigating based on officer's recollection of what stolen items looked like); *State v. Weakley*, 176 N.C. App. 642, 649, 627 S.E.2d 315, 320 (2006) (immediately apparent shower curtain contraband when curtain matched pictures of stolen curtain officer had seen).

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1. Nevertheless, many cases subsequent to *Church* have continued to articulate the three factor test for the plain view doctrine which includes inadvertency. Inadvertence is required pursuant to N.C. Gen. Stat. § 15A-253 (2013), which applies to items found in plain view during the execution of a valid search warrant. Because Officer Roberts did not discover the coil while executing a search warrant, N.C. Gen. Stat. § 15A-253 is inapplicable to this case.

We find that the circumstances of this case are analogous to those in *State v. Bembery*, 33 N.C. App. 31, 234 S.E.2d 33 (1977). In *Bembery*, a car dealer discovered that someone had stolen tires from a truck on his lot and provided a description of the stolen tires, including the type and size, to the county sheriff, who relayed the information to the sheriff in a neighboring county. *Id.* at 32, 234 S.E.2d at 34. Four days later, the sheriff in the neighboring county received a call from a reliable informant that two of the stolen tires were in the possession of the defendant and that the defendant was at a friend's house. *Id.* The sheriff drove to the house about 40 minutes later, where he found the defendant getting ready to put tires on his car. *Id.* The tires were in plain view and matched the description given by the car dealer. *Id.* The Court held that "[i]n these circumstances, the seizure of the tires for the purpose of taking them to [the car dealer] for identification was reasonable." *Id.* at 36, 234 S.E.2d at 37.

Here, the trial court's findings of fact establish that Officer Roberts was investigating a recent theft of air conditioning copper coil and was given the description and weight of the stolen coil. Officer Roberts, like the officer in *Bembery*, received reliable information that the defendant was recently in possession of the stolen goods -- a local metal recycler informed Officer Roberts that coil matching the description and weight of the stolen coil had been sold to the recycler by defendant earlier that day. The metal recycler provided Officer Roberts with defendant's name and driver's license number, the license plate number of the vehicle used to deliver the coil, and a physical description of defendant and his vehicle.

Officer Roberts used the information from the metal recycler to locate defendant's residence, where she saw a parked vehicle matching the description given to her by the metal recycler with a black male behind the steering wheel. From the front porch of defendant's mobile home, Officer Roberts noticed air conditioning copper coil in the open-tow trailer parked next to defendant's SUV. As in *Haymond*, *Weakley*, and *Bembery*, the items viewed by Officer Roberts matched the description of goods she knew to be stolen.[2] Furthermore, the additional information Officer Roberts had gathered from her investigation after speaking to the metal recycler bolstered her belief that the items in the

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2. Although the trial court's finding that Officer Roberts believed the coils to be evidence of a crime is found in conclusion of law #1, we treat it as a finding of fact. *See Gainey v. N.C. Dep't of Justice*, 121 N.C. App. 253, 257 n.1, 465 S.E.2d 36, 40 n.1 (1996) ("Although denominated as a conclusion of law, we treat this conclusion as a finding of fact because its determination does not involve the application of legal principles.")

trailer were stolen. These findings sufficiently support the conclusion that it was immediately apparent to Officer Roberts that the coils were evidence of a crime.

Nevertheless, defendant argues that Officer Roberts merely suspected that the coils were stolen, but did not have the level of certainty required to rise to the level of probable cause. Defendant points to the trial court's finding that Officer Roberts called the factory manager, Mr. Ledford, to ask him to come and identify the pieces of scrap metal, and analogizes these facts to cases in which the criminal nature of an item seized by an officer was not apparent until the officer further manipulated the item. *See State v. Sapatch*, 108 N.C. App. 321, 325, 423 S.E.2d 510, 513 (1992) (criminal nature of closed film canisters not apparent until officer opened canisters and discovered rocks of cocaine); *Graves*, 135 N.C. App. at 220, 519 S.E.2d at 773 (officer did not have probable cause to believe brown paper wads were evidence of crime when he did not know items were contraband until after he unfolded them); *State v. Carter*, 200 N.C. App. 47, 55, 682 S.E.2d 416, 422 (2009) (criminal nature of scraps of paper seized by officer not apparent until pieced back together and read).

In contrast to this case, in *Sapatch*, *Graves*, and *Carter*, the criminal nature of the item was not immediately apparent because the contraband was, literally, out of sight. All that could be seen at first were innocuous items -- a film canister, wads of brown paper, and a torn-up piece of paper. The plain view doctrine did not apply because the contraband -- the cocaine inside the canister, the crack pipe inside the wads of brown paper, and the incriminating words on the torn up sheets of paper -- were, simply, not in plain view. Here, however, the items that Officer Roberts saw -- the coils -- constituted the contraband itself and was plainly and completely visible at first glance without any physical manipulation. Officer Roberts possessed sufficient information at the time she saw the coils in the trailer to have probable cause to believe that the coils were stolen. Mr. Ledford merely confirmed that the coils were, in fact, the stolen coils. Accordingly, we conclude that the trial court's findings of fact are sufficient to support the conclusion that the criminal nature of the coils was immediately apparent to Officer Roberts.

Turning to the final element -- whether Officer Roberts had a lawful right of access to the trailer in which the coils were found -- defendant argues that the trial court did not make the findings necessary to establish this element. We agree.

This Court has previously emphasized that a determination that contraband was in plain view is not sufficient to support a warrantless seizure of the contraband:

> What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. Thus, when officers are in a public place or some other area, such as an open field, that is not protected by the Fourth Amendment, knowledge that they gain from their plain-view observations does not constitute a search under the Fourth Amendment. Whether such plain-view observations can justify a warrantless seizure, however, is a separate question. If the boundaries of the Fourth Amendment were defined exclusively by rights of privacy, "plain view" seizures would not implicate that constitutional provision at all. Yet, far from being automatically upheld, "plain view" seizures have been scrupulously subjected to Fourth Amendment inquiry. That is because, the absence of a privacy interest notwithstanding, [a] seizure . . . obviously invade[s] the owner's possessory interest.

Nance, 149 N.C. App. at 739, 562 S.E.2d at 561 (internal citations and quotation marks omitted).

It is well settled that officers have a lawful right of access to items located in a public place. *See Payton v. New York*, 445 U.S. 573, 587, 63 L. Ed. 2d 639, 651, 100 S. Ct. 1371, 1380 (1980) ("objects such as weapons or contraband found in a public place may be seized by the police without a warrant"). The first question to address in establishing whether an officer had a lawful right of access to an object, therefore, is whether the object was located in a public place or on private property. In *Nance*, this Court held that an open field leased by the defendant which was outside of the curtilage of his home was not a public place, noting that "[t]he fact that defendant's property included open fields does not transform private property into public land." 149 N.C. App. at 742, 562 S.E.2d at 563.

If the seized item is not located in a public place, the officers may nevertheless have a lawful right of access to the item to justify its seizure if they entered the private property by consent, pursuant to a warrant, or under exigent circumstances. *Id.* at 741, 744, 562 S.E.2d at 562, 564 (concluding officers did not have a lawful right of access to seize malnourished horses on private property where the officers "had neither

consent nor a warrant authorizing their entry onto defendant's property" and where "exigent circumstances did not exist").

Nance also rejected the argument that officers have lawful access to seize items on private property whenever they "are conducting [a] 'legitimate law enforcement function[].'" *Id.* at 742, 562 S.E.2d at 563. *Nance* acknowledged that it is not a trespass for an officer to enter private property "'for the purpose of a general inquiry or interview.'" *Id.* (quoting *Prevette*, 43 N.C. App. at 455, 259 S.E.2d at 599-600). However, *Nance* clarified that this rule does not "stand[] for the proposition that law enforcement officers may enter private property without a warrant and *seize* evidence of a crime." *Id.* (emphasis added). *Nance* explained:

> If the position advanced by the State were correct, law enforcement officers could enter onto private property and seize evidence of criminal activity without a warrant whenever they had probable cause to suspect that such activity was taking place. Such a position directly contradicts repeated admonitions by the United States Supreme Court that although
>
> > "[t]he seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity[,] [a] different situation is presented . . . when the property in open view is situated on private premises to which access is not otherwise available for the seizing officer."

Id. at 742-43, 562 S.E.2d at 563 (quoting *Texas*, 460 U.S. at 738, 75 L. Ed. 2d at 511, 103 S. Ct. at 1541). This Court, relying on *Nance*, has subsequently confirmed that, absent exigent circumstances, initiating a valid "knock and talk" does not give officers a lawful right of access to walk across the curtilage of a defendant's home to seize contraband in plain view. *State v. Grice*, 223 N.C. App. 460, 465, 735 S.E.2d 357-58 (2012), *disc. review allowed*, ___ N.C. ___, 743 S.E.2d 179 (2013).

Here, the trial court failed to make any findings regarding whether the officers had legal right of access to the coils in the trailer. The trial court did not address whether the trailer was located on private property leased by defendant, private property owned by the mobile home park, or public property. It also did not make any findings regarding whether, assuming that the trailer was located on private property, the officers had legal right of access either by consent or due to exigent

circumstances. We, therefore, remand for further findings of fact and conclusions of law regarding that issue. We leave it to the court's discretion whether to consider additional evidence.[3]

Reversed and remanded.

Chief Judge MARTIN and Judge STROUD concur.

STATE OF NORTH CAROLINA
v.
STEVEN CLARK KOSTICK, DEFENDANT

No. COA13-873

Filed 18 March 2014

1. Jurisdiction—subject matter—trial transcript

The State's motion to dismiss defendant's appeal for an insufficient record as it related to subject matter jurisdiction was denied where defendant provided a pretrial but not a trial transcript. A determination of subject matter jurisdiction does not require the presence of a complete trial transcript.

2. Appeal and Error—record—trial transcript not included—interests of justice

Defendant's contention concerning his pretrial motion to suppress evidence about a traffic checkpoint and his DWI arrest was heard by the Court of Appeals in the interests of justice even though a trial transcript was not included and it could not be determined whether defendant had renewed the motion at trial.

3. Appeal and Error—record—trial transcript not necessary—findings and conclusions at pretrial hearing

A transcript of defendant's jury trial was not necessary for appellate review of his motion under *State v. Knoll*, 322 N.C. 535, in

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3. We find no merit to the State's argument that the seizure of the coils could alternatively be justified pursuant to a search incident to lawful arrest. Under the search incident to arrest warrant requirement exception, "'if the search is incident to a lawful arrest, an officer may conduct a warrantless search of the arrestee's person and the area within the arrestee's immediate control.'" *Carter*, 200 N.C. App. at 51, 682 S.E.2d at 419 (quoting *State v. Logner*, 148 N.C. App. 135, 139, 557 S.E.2d 191, 194 (2001)). The trial court made no findings of fact that would support the State's contention, and the record contains no evidence that would support the necessary findings.

an impaired driving prosecution where the trial court made its findings and conclusions during a pretrial hearing, of which a transcript was provided.

4. Jurisdiction—Cherokee Indian Reservation—DWI arrest

The Court of Appeals overruled a contention of the defendant in a DWI prosecution that the State had no authority to stop and arrest him on a road within the Cherokee Indian Reservation (Reservation) controlled by the Eastern Band of the Cherokee Indians (Tribe). The North Carolina State Highway Patrol has a compact with the Tribe to assist with patrolling and enforcing the traffic laws on roads within the Reservation.

5. Jurisdiction—subject matter—Cherokee Indian Reservation—non-Indian—criminal offense

The trial court did not err in exercising subject matter jurisdiction over defendant, a non-Indian, for a DWI offense incurred while defendant was on the Cherokee Indian Reservation. Tribal courts lack jurisdiction over non-Indians in criminal cases and DWI is a type of criminal offense.

6. Constitutional Law—roadblock—legitimate programmatic purpose

The trial court did not err by finding that a roadblock set up by the Cherokee Police Department was constitutional where it properly determined that the roadblock set up by the Cherokee Tribal Police had a legitimate programmatic purpose and that the factors in *Brown v. Texas*, 443 U.S. 47, were satisfied.

7. Motor Vehicles—driving while impaired—Knoll motion denied—no error

The trial court did not err by denying defendant's motion to dismiss a DWI citation under *State v. Knoll*, 322 N.C. 535. A *Knoll* motion alleges that a magistrate has failed to properly inform a defendant of the charges against him, his rights and of the general circumstances under which he may secure his release. Although the evidence conflicted, the trial court resolved the conflict by weighing all relevant evidence before concluding that the magistrate did not commit a *Knoll* violation.

8. Bail and Pretrial Release—DWI and concealed weapon—unknown South Carolina permit—no prejudice

There was no prejudice in defendant's arraignment for DWI and carrying a concealed weapon where the magistrate acknowledged that he would not have charged the concealed weapons offense if he

had known defendant had a South Carolina permit. The trial court specifically found that the magistrate's processing of defendant was not prejudicial because defendant was so intoxicated that his length of detention and bond amount was proper.

Appeal by defendant from judgment entered 22 February 2013 by Judge James U. Downs in Swain County Superior Court. Heard in the Court of Appeals 11 December 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Neil Dalton and Assistant Attorney General Kathryne E. Hathcock, for the State.

McLean Law Firm, P.A., by Russell L. McLean, III, for defendant-appellant.

BRYANT, Judge.

Pursuant to the Tribal Code of the Eastern Band of the Cherokee Indians and mutual compact agreements between the Tribe and other law enforcement agencies, the North Carolina Highway Patrol has authority to patrol and enforce the motor vehicle laws of North Carolina within the Qualla boundary of the Tribe, including authority to arrest non-Indians who commit criminal offenses on the Cherokee reservation. Our State courts have jurisdiction over the criminal offense of driving while impaired committed by a non-Indian, even where the offense and subsequent arrest occur within the Qualla boundary of the Cherokee reservation. A defendant's *Knoll* motion is properly dismissed where the magistrate follows N.C. Gen. Stat. § 15A-511(b) and any deviation from the statutory requirements is not prejudicial to defendant.

On 24 April 2010, the Cherokee Harley Davidson Rally (the "rally") was held at the fairgrounds in Cherokee, North Carolina. As part of a cooperative agreement between the Eastern Band of the Cherokee Indians (the "Tribe") and Swain County police departments and the North Carolina State Highway Patrol ("State Highway Patrol"), Swain County and State Highway Patrol officers assisted the Cherokee police officers in patrolling the rally, setting up and administering checkpoints, and providing assistance as needed. Checkpoints were established at the roads leading into and out of the fairgrounds, Drama Road/State Highway 1361 and State Highway 441, and were run by a combination of Cherokee and Swain County police officers. The checkpoints were intended to check all vehicles leaving the rally for potential

driving while impaired ("DWI"), driver's license, insurance, and unsafe driving violations.

That evening at around 10:00 p.m., defendant Steven Clark Kostick ("defendant") left the rally's parking lot and encountered a checkpoint on Drama Road. After rolling two car lengths past Cherokee Officer Dustin Wright who signaled for defendant to stop, defendant stopped his vehicle. As Officer Wright approached the vehicle, he immediately noticed an odor of alcohol and saw two open cans of beer in the car's center console cup holders. Officer Wright also noticed that a woman sitting in the front passenger seat of the vehicle was crying. Officer Wright directed defendant to return his vehicle to the parking lot and called for an available officer to come and conduct an investigation of defendant.

The responding officer was State Highway Patrol Trooper Jim Hipp who took over the investigation of defendant at the request of Officer Wright. After noticing that defendant smelled of alcohol, had red, glassy eyes, slurred speech, and an unsteady gait, Trooper Hipp conducted four field sobriety tests and concluded that defendant was likely intoxicated. Defendant told Trooper Hipp that he had consumed four to five beers that evening, and then admitted to having a handgun in his truck. The woman in defendant's car was driven by another officer back to the vacation cabin where she was staying with defendant.

Trooper Hipp arrested defendant on suspicion of DWI. Defendant was taken to the Swain County jail where he blew a 0.15 on a Breathalyzer test. Defendant was arraigned by a magistrate after being charged with DWI and was ordered to be held on a $500.00 secured bond. Defendant was released from the Swain County jail around 4 a.m. on 25 April 2010 after posting bail.

On 24 November 2011, defendant filed handwritten motions to suppress (entitled "Motion to Suppress Stop and Arrest;" "Motion to Suppress"). On 2 December 2011, defendant filed a motion to dismiss alleging lack of jurisdiction over defendant's arrest. The trial court denied all of defendant's motions, and on 6 April 2011, defendant was convicted of DWI in District Court. Defendant appealed his conviction to the Superior Court.

On 8 December 2011, defendant filed a new motion to dismiss alleging that the State Highway Patrol had no arrest authority within the Cherokee reservation and that defendant was on Cherokee, rather than State, property at the time of his arrest. Defendant further moved to suppress the evidence regarding the checkpoint stop and made a *Knoll* motion alleging that the magistrate did not properly inform

defendant of his right to contact counsel and friends upon his arrest. At a pretrial hearing on 20-21 February 2013, defendant's motions were denied. On 22 February 2013, a jury convicted defendant of DWI. Defendant appeals.

On appeal, defendant challenges (I) the subject matter jurisdiction of the trial court, including whether the road on which defendant was stopped was a North Carolina state road, whether the North Carolina Highway Patrol had arrest authority, and whether the trial court erred in denying defendant's pre-trial motion to dismiss the DWI charges; (II) whether the roadblock set-up by the Cherokee Police Department was constitutional; and (III) the trial court's failure to grant defendant's *Knoll* motion to dismiss the DWI citation.

Motion to Dismiss

On 2 October 2013, the State filed a motion to dismiss defendant's appeal, arguing that defendant failed to properly preserve his appeal. Specifically, the State contends that the record on appeal is insufficient because defendant failed to include a complete trial transcript to show that defendant properly renewed his pretrial objections at trial as to subject matter jurisdiction, suppression of evidence from the checkpoint and a Knoll violation, and that without proof that defendant did renew his objections at trial, those objections cannot be deemed to be preserved on appeal. Defendant, on the other hand, counters that he "has preserved each and every issue on appeal."

Pursuant to our Rules of Appellate Procedure, "[t]he record on appeal in criminal actions shall contain . . . so much of the litigation, set out in the form provided in Rule 9(c)(l), as is necessary for an understanding of all issues presented on appeal . . . ." N.C. R. App. P. 9(a)(3)(e) (2013).

> In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion. Any such issue that was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, including, but

> not limited to, whether the judgment is supported by the verdict or by the findings of fact and conclusions of law, whether the court had jurisdiction over the subject matter, and whether a criminal charge is sufficient in law, may be made the basis of an issue presented on appeal.

N.C. R. App. P. 10(a)(1) (2013). Where a defendant does not preserve an issue for appeal, that issue may only then be appealed by claiming plain error pursuant to N.C. R. App. P. 10(a)(4). *State v. Waring*, 364 N.C. 443, 467-68, 701 S.E.2d 615, 631-32 (2010).

The State contends that defendant's appeal should be dismissed in its entirety because by not providing a complete trial transcript the record on appeal is insufficient. At the pretrial hearing, defendant raised three motions: a motion to dismiss for lack of subject matter jurisdiction; a motion to suppress evidence from the checkpoint; and a *Knoll* motion.

A. Defendant's motion to dismiss for lack of subject matter jurisdiction

[1] Defendant provided a trial transcript for the pretrial hearing of 20-21 February 2013 but did not provide the transcript for his jury trial on 22 February 2013. However, a determination of subject matter jurisdiction does not require the presence of a complete trial transcript, as "[j]urisdiction has been defined as 'the power to hear and to determine a legal controversy; to inquire into the facts, apply the law, and to render and enforce a judgment[.]' " *High v. Pearce*, 220 N.C. 266, 271, 17 S.E.2d 108, 112 (1941) (citation omitted). As such, defendant's failure to include a trial transcript for his jury trial on 22 February 2013 does not negate his appeal regarding his motion to dismiss for lack of subject matter jurisdiction. *See* N.C. R. App. P. 10(a)(1). The State's motion to dismiss defendant's appeal as it relates to the issue of subject matter jurisdiction must, therefore, be denied.

B. Defendant's motion to suppress evidence from the checkpoint

> [A] motion in limine is insufficient to preserve for appeal the question of the admissibility of evidence if the defendant fails to further object to that evidence at the time it is offered at trial. Rulings on motions in limine are preliminary in nature and subject to change at trial, depending on the evidence offered, and thus an objection to an order granting or denying the motion is insufficient to preserve for appeal the question of the admissibility of the evidence.

State v. Reaves, 196 N.C. App. 683, 686, 676 S.E.2d 74, 77 (2009) (citation omitted).

[2] Defendant made a pretrial motion to suppress evidence regarding the checkpoint and DWI arrest. However, defendant omitted the transcript of his jury trial; therefore, we have no objective means of ascertaining whether defendant renewed his motion to suppress at trial. "[A] pretrial motion to suppress, a type of motion *in limine*, is not sufficient to preserve for appeal the issue of admissibility of evidence . . . . [Therefore, a] defendant waive[s] appellate review of this issue by failing to object during trial to the admission" of the challenged evidence. *State v. Grooms*, 353 N.C. 50, 66, 540 S.E.2d 713, 723 (2000) (citation omitted). Defendant, however, points to the record of the pretrial hearing; there the trial court denied his motion to suppress and noted defendant's "exception" to the trial court's ruling. Further, defendant points to an agreement between the State and defendant that the pretrial hearing transcript would be sufficient for purposes of defendant's appeal. This agreement is part of the record on appeal.[1] Therefore, even if defendant's issue is not properly preserved, to prevent manifest injustice to defendant we exercise our authority pursuant to Rule 2 and hear defendant's appeal of this issue.

C. Defendant's Knoll motion

[3] A *Knoll* motion, based on *State v. Knoll*, 322 N.C. 535, 369 S.E.2d 558 (1988), alleges that a magistrate has failed to inform a defendant of the charges against him, his right to communicate with counsel, family, and friends, and the general conditions he must meet for pretrial release pursuant to N.C. Gen. Stat. § 15A-511 (2013). "If there is a conflict between the state's evidence and defendant's evidence on material facts, it is the duty of the trial court to resolve the conflict and such resolution will not be disturbed on appeal." *State v. Lewis*, 147 N.C. App. 274, 277, 555 S.E.2d 348, 351 (2001) (citation omitted).

Here, the trial court heard arguments by both sides and made its findings of fact and conclusions of law during the pretrial hearing; therefore,

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1. The Settlement of Transcript, which is signed by counsel for both the State and defendant and dated 14 March 2013, states that:

> NOW COMES the undersigned attorneys on behalf of the Plaintiff, State of North Carolina and the Defendant, Steven Kostick as evidenced by their signatures hereto, and agree that the court reporter who transcribed the proceedings is only required to transcribe all motions to suppress for lack of subject matter jurisdiction and that the trial transcript need not be transcribed since the Defendant is only appealing the court's subject matter jurisdiction over the Defendant to the North Carolina Court of Appeals.

a transcript of defendant's jury trial is not necessary for our review of his *Knoll* motion. *See id.*; *Knoll*, 322 N.C. 535, 369 S.E.2d 558. Accordingly, the State's motion to dismiss defendant's *Knoll* motion is denied.

I.

Subject Matter Jurisdiction

A. North Carolina road

[4] Defendant first argues that the trial court erred in finding that the road on which defendant was stopped was a North Carolina state road. Specifically, defendant contends that the road on which he was stopped, Drama Road, is on federal land because it is controlled by the Tribe, and thus, the State had no authority to stop and arrest defendant while he was driving on it. Defendant's argument as to whether the road is controlled by the State or the Tribe lacks merit, as our State Highway Patrol enjoys an existing compact with the Tribe to assist with patrolling and enforcing roads within this state.

"[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.' " *United States v. Lara*, 541 U.S. 193, 200 (2004) (citations omitted). Congress has defined Indian country as

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (2012). Indian tribes retain "attributes of sovereignty over both their members and their territory." *United States v. Mazurie*, 419 U.S. 544, 557 (1975). "[T]ribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154 (1980). "[S]tate laws may be applied to tribal Indians on their reservations if Congress has expressly so provided." *Cal. v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987).

> Federal recognition of the [Cherokee] Eastern Band as an Indian tribe has at least two major implications for the issue of state jurisdiction: (1) the federal government continues to maintain plenary power over the Eastern Band, a fact which strictly limits extensions of state power, and (2) the Eastern Band, like all recognized Indian tribes, possesses the status of a "domestic dependent nation" with certain retained inherent sovereign powers.

Wildcatt v. Smith, 69 N.C. App. 1, 5-6, 316 S.E.2d 870, 874 (1984) (citations omitted). An Indian tribe may engage in a tribe-state compact "to facilitate the exercise of each government's respective authority." Felix S. Cohen, Handbook of Federal Indian Law § 6.05, at 591 (Nell Jessup Newton ed., 2012). The reservation lands of the Tribe in our State are known as the Qualla boundary. *See Sasser v. Beck*, 40 N.C. App. 668, 670, 253 S.E.2d 577, 579 (1979) ("The United States first recognized the rights of the Indians who had remained in North Carolina by an Act of 1848, establishing a fund for their benefit. The Qualla Boundary lands were purchased partly with money from this fund. In 1866 the North Carolina legislature passed a statute granting the Cherokee permission to remain in the State, and in 1868 Congress provided that the Secretary of the Interior should 'take the same supervisory charge of the Eastern or North Carolina Cherokees as of other tribes of Indians.' In 1889 the eastern Cherokees were incorporated under the laws of North Carolina, and in 1897 their charter was amended to give the Cherokee limited power of government, with special reference to control of tribal property. The title to the Qualla Boundary lands, which had been held by the Commissioner of Indian Affairs, was conveyed to the corporation but remained subject to the supervision of the Commissioner. This title was conveyed to the United States in trust in 1925." (citation omitted)).

The Tribe's Code of Ordinances, section 20-1 states that:

> (a) *In order to ensure consistency in the application and enforcement of all civil and criminal traffic and motor vehicle laws on the Cherokee Indian Reservation and in surrounding areas, the Tribe adopts Chapter 20 of the North Carolina General Statutes and any amendments to that chapter which may be made in the future. In so doing, all persons operating motor vehicles on the Cherokee Indian Reservation must abide by these provisions . . . . Any references in Chapter 20 of the N.C.G.S. to violations occurring within the State of North Carolina*

> *shall also include violations occurring within the Cherokee Indian Reservation.*
>
> . . .
>
> (b) All civil traffic infractions contained therein shall be enforced by the North Carolina Highway Patrol, Federal Law Enforcement Officers, and the Cherokee Police Department . . . .
>
> . . .
>
> (e) *All traffic and motor vehicle violations shall be enforced in accordance with existing compacts in an effort to ensure cooperation between all law enforcement agencies.*

Cherokee Indians Eastern Band, N.C., Code ch. 20, art. 1, § 20-1 (2013) (emphasis added). Moreover, pursuant to section 15-2 of the Tribe's Code,

> (a) The North Carolina Highway Patrol is hereby authorized to patrol the roads and highways on the Cherokee Indian Reservation and to enforce the North Carolina traffic laws as adopted by the Eastern Band of Cherokee Indians.
>
> (b) The North Carolina Highway Patrol is hereby authorized to enforce the North Carolina criminal laws against all persons who are not subject to the criminal laws of the Tribe or the criminal jurisdiction of the Cherokee Court.

Id. § 15-2.

Defendant contends that the road on which he was stopped, Drama Road, was not a road upon which the State Highway Patrol had jurisdiction to operate.

At his pretrial hearing, evidence was presented showing that Drama Road is held and maintained by the State within the Tribe's reservation, the Qualla boundary. However, pursuant to the Tribe's Code, section 20-1, the language of which is identical to that of Chapter 20 of our General Statutes, the State Highway Patrol has authority to "patrol the roads and highways on the . . . reservation." *Id.* Moreover, section 20-1(e) of the Tribal Code notes that "[a]ll traffic and motor vehicle violations shall be enforced in accordance with existing compacts in an effort to ensure cooperation between all law enforcement agencies." *Id.* Furthermore, testimony by Cherokee Officer Teesateskie and State Highway Patrol

Trooper Hipp indicated that the Cherokee Police Department had a compact with the Swain County Police Department and the State Highway Patrol to provide assistance during the rally, and that this agreement had existed for several years.

Defendant was initially stopped by Cherokee Officer Wright on suspicion of Driving While Impaired before Trooper Hipp was called in to assist. As Trooper Hipp was authorized both under Tribal Code § 20-1 and the mutual assistance compact between the Tribe, the Swain County Police Department and the State Highway Patrol, the State Highway Patrol, through Trooper Hipp, had the right to assist the Tribe in stopping, investigating, and arresting defendant on Drama Road. Defendant's argument as to whether the State or the Tribe controls Drama Road is overruled, as is defendant's argument concerning Trooper Hipp's arrest authority.

B. DWI Offense

[5] Defendant also contends the trial court lacked subject matter jurisdiction to prosecute defendant, a non-Indian, for a DWI offense incurred while defendant was on Indian land. We disagree.

A claim that the trial court lacks subject matter jurisdiction presents a question of law which is reviewed de novo. *State v. Satanek*, 190 N.C. App. 653, 656, 600 S.E.2d 623, 625 (2008). "[T]he issue of a court's jurisdiction over a matter may be raised at any time, even for the first time on appeal or by a court *sua sponte*." *State v. Webber*, 190 N.C. App. 649, 650, 660 S.E.2d 621, 622 (2008) (citation omitted).

As discussed in *Issue I*, the Tribe has incorporated Chapter 20 of our General Statutes with regard to the regulation of motor vehicles into its Code. This incorporation and compact with neighboring police departments gave Trooper Hipp arrest authority over defendant. In determining whether the State then had subject matter jurisdiction over defendant's DWI offense, we must look to general principles of Indian sovereignity.

> [T]he Indian Civil Rights Act . . . permit[s] states to assume jurisdiction over civil cases involving Indians and arising in Indian country by consent of the tribe affected. The Eastern Band has never given formal consent to the assumption of state jurisdiction pursuant to the Indian Civil Rights Act.

Wildcatt, 69 N.C. App. at 7, 316 S.E.2d at 875 (citing *Sasser v. Beck*, 40 N.C. App. 668, 253 S.E.2d 577 (1979)). Pursuant to 18 U.S.C. § 1153, an Indian tribe has jurisdiction over crimes committed by both its own

Indian members and by Indian members of other tribes. 18 U.S.C. § 1153 (2012); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (holding that by submitting to the overriding sovereignty of the United States, Indian tribes hold inherent power to try and punish Indians except where otherwise prohibited by Congress). However, "the commonly shared presumption of Congress . . . [is] that tribal courts do not have the power to try non-Indians [for crimes committed on Indian land]." *Oliphant*, 435 U.S. at 207.

Here, defendant concedes in his brief that he is not a member of an Indian tribe. Trooper Hipp testified that at the time he placed defendant under arrest, he assumed that defendant was non-Indian. Moreover, in its findings of fact regarding defendant's pretrial motion to suppress the trial court noted that "[t]he Court can only assume and take notice that [defendant] is a non-Indian . . . ." As such, whether the trial court would have subject matter jurisdiction over defendant's DWI offense would depend on whether a DWI offense, as defined by section 20 of our General Statutes and the Tribal Code, is a criminal or civil offense.

After defendant blew a 0.15 on his breath test, defendant was charged with DWI. A DWI, as defined by N.C. Gen. Stat. § 20-138.1, is a misdemeanor offense; a misdemeanor offense is a type of criminal offense. *See* N.C.G.S. § 20-138.1(a)(1) (2013) ("A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State [] [w]hile under the influence of an impairing substance[.]").

Pursuant to Tribal Code § 20-1, "[c]riminal penalties may only be imposed against persons who are subject to the Cherokee court's criminal jurisdiction . . . ." Cherokee Indians Eastern Band, N.C., Code ch. 20, art. 1, § 20-1. Additionally, the Code requires that a Cherokee magistrate follow specific procedures, known as the "St. Cloud test," to ensure that the Tribal court would have jurisdiction over a defendant. After specific inquiries, "[i]f the Magistrate determines that the defendant is a non-Indian, then the Magistrate shall notify the CIPD (Cherokee Indian Police Department) of same, dismiss the Tribe's charges and turn the defendant over to the CIPD for transport to the appropriate State or local judicial or law enforcement officer or to the Federal authorities." *Id.* § 15, App. A, Cherokee R. Crim. P. 6(b)(1) (2013). Therefore, tribal courts lack jurisdiction over non-Indians. *See Oliphant*, 435 U.S. at 210 ("The power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty. By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of

the United States except in a manner acceptable to Congress." (citation omitted)). As such, the State Highway Patrol had authority over defendant. Therefore, where the Tribal Code of Ordinances adopted N.C.G.S. Chapter 20 and where the Code further authorizes the State Highway Patrol to enforce North Carolina traffic laws as adopted by the Eastern Band of the Cherokee Indians, the trial court did not err in exercising subject matter jurisdiction over defendant. Defendant's argument is overruled.

II.

[6] Defendant next challenges whether the roadblock set-up by the Cherokee Police Department was constitutional.

Defendant first argues that the trial court erred in finding the roadblock constitutional because the State Highway Patrol lacked authority to enforce traffic laws within the Qualla boundary. As we have already determined in *Issue I* that the State Highway Patrol had authority to enforce traffic laws within the Qualla boundary, we need not address this portion of defendant's argument.

Defendant further argues that even if the State Highway Patrol had authority to enforce traffic laws within the Qualla boundary, the trial court erred in finding the roadblock constitutional because the roadblock was improperly conducted. We disagree.

> When considering a challenge to a checkpoint, the reviewing court must undertake a two-part inquiry to determine whether the checkpoint meets constitutional requirements. First, the court must determine the primary programmatic purpose of the checkpoint. . . .
>
> Second, if a court finds that police had a legitimate primary programmatic purpose for conducting a checkpoint . . . [the court] must judge its reasonableness, hence, its constitutionality, on the basis of the individual circumstances.

State v. Veazey, 191 N.C. App. 181, 185-86, 662 S.E.2d 683, 686-87 (2008) (internal quotations and citations omitted).

The State, in arguing that the roadblock was constitutional, presented testimony from Cherokee Officers Wright and Teesateskie and State Highway Patrol Trooper Hipp that the roadblock was one of two established near the rally. Each roadblock was set-up to check all vehicles leaving the rally for potential DWI, driver's license, insurance, and

unsafe driving violations. In its findings of fact the trial court determined the roadblock to have a "legitimate primary programmatic purpose," stating that

> the design of the procedure of a checkpoint was that each vehicle be stopped. The primary purpose was to see if the license was current, the registration of the vehicle, and any other violation of the law that was then eminently detectable by the officer. Each and every vehicle coming out was checked. There was no selectivity in the process . . . .

As defendant presented no evidence in the record to contradict the State's proffered purpose for the roadblock, the trial court could rely on the testifying police officers' assertions of a legitimate primary purpose. *Id.* at 187, 662 S.E.2d at 687-88.

The trial court must, after finding a legitimate programmatic purpose, determine whether the roadblock was reasonable and, thus, constitutional. "To determine whether a seizure at a checkpoint is reasonable requires a balancing of the public's interest and an individual's privacy interest." *State v. Rose*, 170 N.C. App. 284, 293, 612 S.E.2d 336, 342 (2005) (citation omitted). "In order to make this determination, this Court has required application of the three-prong test set out by the United States Supreme Court in *Brown v. Texas*, 443 U.S. 47, 50, 61 L. Ed. 2d 357, 361, 99 S. Ct. 2637, 2640 (1979)." *State v. Jarrett*, 203 N.C. App. 675, 679, 692 S.E.2d 420, 424-25 (2010) (citation omitted). "Under *Brown*, the trial court must consider [1] the gravity of the public concerns served by the seizure[;] [2] the degree to which the seizure advances the public interest[;] and [3] the severity of the interference with individual liberty." *Id.* at 679, 692 S.E.2d at 425 (citation and quotations omitted).

> The first *Brown* factor — the gravity of the public concerns served by the seizure — analyzes the importance of the purpose of the checkpoint. This factor is addressed by first identifying the primary programmatic purpose . . . and then assessing the importance of the particular stop to the public.

Rose, 170 N.C. App. at 294, 612 S.E.2d at 342 (citation omitted). The trial court, in its findings of fact, noted that the rally "added thousands [sic] people to an already burdening population at that particular time of the year . . . to the Cherokee vicinity," and that "the officers concerned about checking traffic with regard to the users and participants for that rally would [sic] probably certainly [sic] justified and that the Court could

almost take notice of the fact that at a Harley Davidson Rally, they're not singing hymns."

When Officer Wright stopped defendant, he did so for the purpose of checking defendant for potential driving violations. After Officer Wright noticed that defendant appeared to be intoxicated and saw two open cans of beer in the truck's center console, he directed defendant to return to the parking lot and requested an available officer to come and assist in a potential DWI investigation. This Court has held that such measures are appropriate under the first prong of *Brown*. *See State v. Nolan*, 211 N.C. App. 109, 712 S.E.2d 279 (2011) (discussing how the first prong of *Brown* is met where an officer stopped the defendant at a roadblock, detected an odor of alcohol and noticed two missing bottles from a six-pack of beer in the vehicle, and began a DWI investigation); *Veazey*, 191 N.C. App. at 191, 662 S.E.2d at 690 ("Both the United States Supreme Court as well as our Courts have suggested that 'license and registration checkpoints advance an important purpose[.]' The United States Supreme Court has also noted that states have a 'vital interest' in ensuring compliance with other types of motor vehicle laws that promote public safety on the roads." (citations omitted)).

Under the second *Brown* prong — "the degree to which the seizure advance[d] the public interest" — the trial court must determine whether "[t]he police appropriately tailored their checkpoint stops to fit their primary purpose." *Veazey*, 191 N.C. App. at 191, 662 S.E.2d at 690 (internal quotation and citation omitted).

> Our Court has previously identified a number of non-exclusive factors that courts should consider when determining whether a checkpoint is appropriately tailored, including: whether police spontaneously decided to set up the checkpoint on a whim; whether police offered any reason why a particular road or stretch of road was chosen for the checkpoint; whether the checkpoint had a predetermined starting or ending time; and whether police offered any reason why that particular time span was selected.

Id.

Here, the trial court made findings of fact indicating that there was a written plan and guidelines set by the Cherokee police department for conducting roadblocks at the rally; a briefing on this plan and guidelines was held for all officers and troopers assisting at the rally; two roadblocks were set up at previously designated points to address traffic leaving the rally; the roadblocks had specific start and end times to

coincide with the conclusion of the rally; and both police cruisers and fire trucks were placed at the roadblocks with their lights flashing to indicate to drivers that roadblocks were being conducted. Such findings "do indicate that the trial court considered appropriate factors to determine whether the checkpoint was sufficiently tailored to fit its primary purpose, satisfying the second *Brown* prong." *Jarrett*, 203 N.C. App. at 680-81, 692 S.E.2d at 425.

"The final *Brown* factor to be considered is the severity of the interference with individual liberty." *Id.* at 681, 692 S.E.2d at 425. "[C]ourts have consistently required restrictions on the discretion of the officers conducting the checkpoint to ensure that the intrusion on individual liberty is no greater than is necessary to achieve the checkpoint's objectives." *Veazey*, 191 N.C. App. at 192-93, 662 S.E.2d at 690-91.

> Courts have previously identified a number of non-exclusive factors relevant to officer discretion and individual privacy, including: the checkpoint's potential interference with legitimate traffic[]; whether police took steps to put drivers on notice of an approaching checkpoint[]; whether the location of the checkpoint was selected by a supervising official, rather than by officers in the field[]; whether police stopped every vehicle that passed through the checkpoint, or stopped vehicles pursuant to a set pattern[]; whether drivers could see visible signs of the officers' authority[]; whether police operated the checkpoint pursuant to any oral or written guidelines[]; whether the officers were subject to any form of supervision[]; and whether the officers received permission from their supervising officer to conduct the checkpoint[.]

Id. at 193, 662 S.E.2d at 691 (citations omitted). "Our Court has held that these and other factors are not 'lynchpin[s],' but instead [are] circumstance[s] to be considered as part of the totality of the circumstances in examining the reasonableness of a checkpoint." *Id.* (internal quotations and citation omitted).

The trial court's findings of fact, which were supported by the testimony of Officers Wright and Teesateskie and Trooper Hipp, found "there was in place a policy for checkpoints to be established by local police as well as assistance from the North Carolina State Highway Patrol, [for] which assistance was solicited by the Cherokee Police Department"; "the local Cherokee Police Department decided to establish two checkpoints that are random, they don't do it regularly at either one of those

places"; and that "there [was] a policy, at that time, in writing, . . . [but] that their office . . . moved twice, and whatever document existed then no longer exists now." As for the policy, the trial court further noted that "the design of the procedure of a checkpoint was that each vehicle be stopped"; "[t]he primary purpose was to see if the license was current, the registration of the vehicle, and any other violation of the law that was then eminently detectable by the officer"; and that"[e]ach and every vehicle coming out was checked . . . [t]here was no selectivity in the process." In its conclusions of law, the trial court stated that "the Court finds that those facts support the propriety of the stop and the measure of it and the substance of it based thereon, [and] the motion to suppress the stop and any information obtained as a result thereof in regard to this defendant is denied." As the trial court properly determined that the roadblock had a legitimate programmatic purpose and that the *Brown* factors were met, defendant's argument is accordingly overruled.

III.

[7] Defendant's final argument on appeal is that the trial court erred in failing to grant defendant's *Knoll* motion to dismiss the DWI citation. We disagree.

A Knoll motion, based on *State v. Knoll*, 322 N.C. 535, 369 S.E.2d 558 (1988), alleges that a magistrate has failed to inform a defendant of the charges against him, his right to communicate with counsel, family, and friends, and of the general circumstances under which he may secure his release pursuant to N.C. Gen. Stat. § 15A-511. *See* N.C.G.S. § 15A-511(b) (2013); *Knoll*, 322 N.C. at 536, 369 S.E.2d at 559 ("Upon a defendant's arrest for DWI, the magistrate is obligated to inform him of the charges against him, of his right to communicate with counsel and friends, and of the general circumstances under which he may secure his release."). If a defendant is denied these rights, the charges are subject to being dismissed. *Knoll*, 322 N.C. at 544, 369 S.E.2d at 564. On appeal, the standard of review is whether there is competent evidence to support the trial court's findings and the conclusions. *State v. Chamberlain*, 307 N.C. 130, 143, 297 S.E.2d 540, 548 (1982) (citation omitted). "If there is a conflict between the state's evidence and defendant's evidence on material facts, it is the duty of the trial court to resolve the conflict and such resolution will not be disturbed on appeal." *Id.*

Defendant raised his *Knoll* motion during the pretrial hearing, arguing that the magistrate failed to promptly release him after his arrest. Defendant appeared before the magistrate at 1:05 a.m., and was released from jail after posting bond at 4:50 a.m. In making his *Knoll* motion,

defendant contends that the magistrate violated his rights to a timely pretrial release by setting a $500.00 bond and holding him in jail for approximately three hours and 50 minutes. Defendant's argument is without merit. Pursuant to our standard of review, the trial court properly denied defendant's *Knoll* motion.

> In determining which conditions of release to impose, the judicial official must, on the basis of available information, take into account the nature and circumstances of the offense charged; the weight of the evidence against the defendant; the defendant's family ties, employment, financial resources, character, and mental condition; whether the defendant is intoxicated to such a degree that he would be endangered by being released without supervision; the length of his residence in the community; his record of convictions; his history of flight to avoid prosecution or failure to appear at court proceedings; and any other evidence relevant to the issue of pretrial release.

N.C. Gen. Stat. § 15A-534(c) (2013). "If the provisions of the . . . pretrial release statutes are not complied with by the magistrate, *and* the defendant can show irreparable prejudice directly resulting from [this noncompliance], the DWI charge must be dismissed." *State v. Labinski*, 188 N.C. App. 120, 126, 654 S.E.2d 740, 744 (2008) (citation omitted).

During the pretrial hearing, defendant presented evidence in support of his Knoll motion that the magistrate failed to promptly release him. The State disputed this evidence in its response. In denying defendant's motion, the trial court made the following findings of fact and conclusions of law:

> The defendant was arrested at or about 10:30 p.m., was referred to a trooper, was taken to the jail in Swain County, and test administered on or about -- wait, let's see -- it was 12:34. Then he was released at approximately 4:50 a.m., after making bond. The magistrate upon receiving notification from the trooper that the breathalyser [sic] has registered in both tests .15, knowing that the defendant was a non-resident, the magistrate also opined that upon observing the defendant, he was, and I quote, "pretty drunk," end of quote.
>
> Furthermore, that the magistrate was under an obligation not to turn him out in the public in that kind of condition notwithstanding the defendant's assertion that

> a breathalyser [sic] test is not accurate, and he wanted a blood test to show that. The Court further finds the magistrate did not deny him any rights by setting a bond, and the bond he made, albeit some four hours later. In any event, due to those circumstances the Court finds that his rights have not been violated.
>
> There's no prejudice shown to it, especially due to the fact that when he was released, he was in the company of a bondsman or bonds-lady, eventually back to the cabin where his then girlfriend, now wife, was. Either one of those ladies, either one could have helped him or assisted him in getting to a hospital to get a blood test. And if in the event I do take notice of alcohol dissipating from the body at .16 per hour, then extrapolating forward or at least backwards at the time he was arrested he had a .18. Now, going forward, had he gone ahead and gotten the blood test when he had a chance to, he still would have been at or near .08, if the breathalyser [sic] was accurate. He had the chance to do so. He hasn't been denied any rights that he could have exercised on his own. Therefore, that motion under the Knoll test is denied.

At the pretrial hearing, defendant testified that the magistrate told him of his right to contact family, friends and counsel; defendant could not recall if the magistrate told him that he could seek to have an independent chemical analysis done. Defendant also acknowledged that when the magistrate asked if he wanted to contact someone, defendant declared that he did not, and signed the release forms indicating this. Defendant further testified that he wanted to undergo an independent chemical analysis at the hospital, but that the four hour delay in his release prevented him from doing so. The magistrate testified that he had a "cordial conversation" with defendant, and that defendant was properly informed of his rights pursuant to N.C.G.S. § 15A-511(b). The magistrate further testified that defendant was given access to a telephone at the jail where he could have contacted counsel or another person to assist him in obtaining an independent analysis; defendant admitted that he used this telephone to call a bail bondsman. As such, although there was conflicting evidence between defendant and the State as to whether the magistrate erred in his arraignment of defendant, the trial court resolved this conflict by weighing all relevant evidence before concluding that the magistrate did not commit a *Knoll* violation. *See State v. Lewis*, 147 N.C. App. 274, 279, 555 S.E.2d 348, 351 (2001) ("At the

hearing on the *Knoll* motion, the defendant stipulated that Magistrate Alexander informed him of his right to communicate with counsel, family, and friends. The defendant testified that he was given a telephone and he attempted to make calls. Although there was conflicting evidence, the trial court found the defendant was informed of his rights by Trooper Jackson and Magistrate Alexander. Further, it found that the defendant was given the opportunity to exercise those rights but he failed to do so. The findings of the trial court support its conclusions. Thus, the trial court did not err in denying the motion to dismiss.").

[8] Defendant further argues that the magistrate erred in his arraignment by also charging defendant with carrying a concealed weapon. During Trooper Hipp's investigation defendant admitted that he had a handgun in his truck. Although defendant had a permit for the handgun issued in South Carolina, defendant did not produce this permit until his trial at which time the charge was dismissed. As such, the magistrate was unaware of defendant's handgun permit at the time defendant was brought before him.

In determining whether to hold defendant under bond, the magistrate testified that he considered all relevant circumstances surrounding defendant pursuant to N.C.G.S. § 15A-534(c). The magistrate stated that he set defendant's bond at $500.00 because defendant was, based on the chemical analysis, "pretty drunk," defendant was from out-of-state and therefore "[i]t's very common to ask for some kind of a secured bond when people are not from this area[,]" and because defendant had a firearm on him at the time of his arrest. The magistrate then acknowledged that had he known defendant had a South Carolina permit for the handgun, he "would not have charged him with that because we honor South Carolina permits." Therefore, as the magistrate made his decision as to defendant's bond by considering all of the evidence before him, the magistrate did not err in charging defendant for carrying a concealed weapon. Furthermore, even if the magistrate erred in considering defendant's handgun in determining defendant's bond, such error was not prejudicial. In its conclusions of law denying defendant's *Knoll* motion, the trial court noted that

> [t]here's no prejudice shown . . . . And if in the event I do take notice of alcohol dissipating from the body at .16 per hour, then extrapolating forward or at least backwards at the time he was arrested he had a .18. Now, going forward, had he gone ahead and gotten the blood test when he had a chance to, he still would have been at or near .08, if the breathalyser was accurate.

As such, the trial court specifically found that the magistrate's processing of defendant was not prejudicial because defendant was so intoxicated that his length of detention and bond amount was thus proper. *See Labinski*, 188 N.C. App. 120, 654 S.E.2d 740 (finding no prejudicial error where the defendant was arrested for DWI, blew at 0.08, was assigned a $500.00 bond, and was held in the jail for over two hours until she posted bond, despite the magistrate failing to determine whether the defendant would pose a threat if released "under conditions other than a secured bond"). Accordingly, defendant's final argument on appeal is overruled.

The State's motion to dismiss is denied. The trial court's denial of defendant's pretrial motions is affirmed.

Judges CALABRIA and GEER concur.

STATE OF NORTH CAROLINA
v.
EDWARD EARL MULDER

No. COA13-672

Filed 18 March 2014

1. Appeal and Error—preservation of issues—issue not raised at trial—right to appeal waived—review under Rule 2

Defendant waived his right to appellate review of whether the trial court erred by failing to arrest judgment on two convictions on double jeopardy grounds where he failed to raise the double jeopardy issue at trial. However, the Court of Appeals elected to review the issue under Rule 2 of the Rules of Appellate Procedure.

2. Sentencing—judgment arrested—speeding—reckless driving—elements of speeding to elude arrest

The trial court erred by failing to arrest judgment on defendant's speeding and reckless driving convictions where defendant was also convicted of speeding to elude arrest. The speeding and reckless driving factors increased the maximum penalty for speeding to elude arrest and thus, those factors constituted elements of speeding to elude arrest for double jeopardy purposes. Furthermore, the legislature did not intend for them to be punished separately. Judgment was arrested on the speeding and reckless driving convictions and the case was remanded for re-sentencing.

Appeal by Defendant from judgments entered 15 October 2012 by Judge Carl R. Fox in Lee County Superior Court. Heard in the Court of Appeals 7 November 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Karen A. Blum, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Mary Cook, for Defendant.

STEPHENS, Judge.

Procedural History and Evidence

Defendant began a dating relationship with Brenda Swann approximately seven years before the trial of this case. When the relationship ended, Swann obtained a Domestic Violence Protective Order ("DVPO") against Defendant. This appeal arises from the domestic disturbance and car chase that followed.

On 6 January 2011, around 7:00 p.m., Swann heard a loud noise outside her home. Swann's son went to the front door to investigate. From that vantage point, the son observed Defendant striking Swann's car with a hammer. Defendant was wearing a black ski mask, which was "kind of rolled up [and] pulled . . . over his head." The son confronted Defendant and asked him what he was doing. Without responding or releasing the hammer, Defendant began approaching the son. Concerned for his mother's safety, the son returned to the house and attempted to close the door. Defendant pushed back on the door, and the two began struggling. During the struggle, the son told Swann to call the police. The son eventually succeeded in closing the door, and Defendant left the premises. The police arrived two to three minutes later.

While police officers were speaking with Swann and her son, Sergeant Scott Norton was on nearby patrol. After learning about the disturbance, he observed Defendant's vehicle driving down the road. Norton activated his lights and began following the car. Defendant then turned his vehicle around, swerved into a yard, jumped over a curb, and accelerated away. According to Norton, "[i]t was obvious that [Defendant] was running [and] wasn't going to surrender." Norton requested backup and continued pursuit. Defendant eventually stopped at the top of a bridge, leading Norton to believe that he was finished fleeing. When Norton opened his door, however, Defendant "accelerated, squealing tires," and left. Norton commented at trial that Defendant

appeared to be "swerve[ing] . . . as if he was trying to hit [civilian cars] . . . . Just innocent people on the highway."

Other police cars joined in the chase and tried to "box in" Defendant. During the attempt, Defendant swerved toward Norton, missing him, and escaped. As the pursuit wore on, the vehicles reached speeds in excess of 100 miles per hour, and officers observed Defendant toss papers and other objects out the car window.[1] After a time, another officer drove down the road in the opposite direction of Defendant. Defendant then exited the road, veered off the right-hand shoulder, and overcorrected. Next, he went over to the left-hand side of the road, "slammed on the brakes," and came back across the road, heading toward Norton's vehicle.

Instead of hitting Norton, Defendant's car "went into a ditch." Officers then tried to "box [Defendant] in" a second time. They were unsuccessful, and Defendant drove out of the ditch, "ramm[ing]" another officer's vehicle in the process. Worried that Defendant would cause injury or further damage to the other officer's car, Norton then used his own vehicle to "ram[D]efendant's car in the driver's side door."

After striking Defendant's car, Norton exited his vehicle and approached Defendant. Norton had his gun out and told Defendant to raise his hands and turn off the car. In response, Defendant reached out the window, slapped Norton's pistol, and said "shoot me, mother[] fucker." Norton then reached into Defendant's car and attempted to pull him out. At the same time, Defendant "[shifted his car into] reverse and accelerate[d] while [Norton was] hanging in the driver's side window . . . ." The other officer was hanging in the passenger side window, and more officers began to approach from behind. Before Defendant was able to make contact with the approaching officers, the passenger-side officer reached inside Defendant's car, put it into park, and shut off the engine. Defendant remained "[u]ncooperative, belligerent, cussing at us, [and] trying to fight" as he was pulled from the vehicle and arrested.

Defendant was later indicted for (1) one count of failure to heed light or siren, (2) one count of first-degree burglary, (3) two counts of violating a DVPO, (4) one count of speeding, (5) one count of reckless driving to endanger, (6) one count of littering, (7) one count of failure to maintain lane control, (8) five counts of assault with a deadly weapon on a government officer ("AWDWOGO"), (9) one count of speeding to

1. A black ski mask was later recovered from the area.

elude arrest with a motor vehicle,[2] (10) one count of injury to personal property, and (11) one count of breaking or entering. The case came on for trial beginning 8 October 2012.

On 15 October 2012, the jury found Defendant guilty on all counts except first-degree burglary. Instead of burglary, Defendant was found guilty of the lesser-included offense of misdemeanor breaking and entering. Afterward, the trial court imposed consecutive sentences of 15–18 months in prison for the first two counts of AWDWOGO; 19–23 months in prison for the next three counts of AWDWOGO; 6–8 months in prison for the consolidated offenses of speeding, reckless driving, speeding to elude arrest, failure to heed light or siren, failure to maintain lane control, and littering; and 75 days in prison for the DVPO violations, the injury to personal property offense, and the breaking or entering offense. Defendant gave notice of appeal in open court.

Discussion

On appeal, Defendant argues that the trial court erred in failing to arrest judgment on the speeding and reckless driving convictions because each of those offenses is a lesser-included offense of felony speeding to elude arrest and, therefore, subjects Defendant to double jeopardy. Alternatively, Defendant argues that the speeding and reckless driving convictions must be vacated because the State failed to present sufficient evidence distinguishing them from the aggravating factors applied to enhance Defendant's speeding to elude arrest conviction from a misdemeanor to a felony. We arrest judgment on the speeding and reckless driving convictions and remand for re-sentencing.

I. Appellate Review

[1] As a preliminary matter, we address the State's argument that Defendant is barred from seeking to arrest judgment on double jeopardy grounds because he admittedly failed to raise the double jeopardy issue at trial. In response, Defendant contends (1) that a motion to arrest judgment based on a fatal error or defect in the record may be raised for the first time on appeal or, in the alternative, (2) that this Court should invoke Rule 2 of the North Carolina Rules of Appellate Procedure and review this issue in order to prevent manifest injustice. We hold that

2. The indictment refers to this charge as "FLEE/ELUDE ARREST WITH A MOTOR VEHICLE." The cited statute, however, describes the crime as "Speeding to elude arrest[.]" N.C. Gen. Stat. § 20-141.5 (2013). Thus, for purposes of consistency with the legislature, we refer to this charge as "speeding to elude arrest."

Defendant waived his right to appellate review by failing to raise the double jeopardy issue at trial, but elect to review the issue nonetheless under Rule 2 of the North Carolina Rules of Appellate Procedure.

A. Arrest of Judgment

As a general rule, "constitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal." *State v. Davis*, 364 N.C. 297, 301, 698 S.E.2d 65, 67 (2010) (citations, internal quotation marks, and brackets omitted) (declining to review the defendant's double jeopardy argument because he failed to raise it at trial). Furthermore, our appellate rules require a party to make "a timely request, objection, or motion [at trial], stating the specific grounds for the [desired] ruling" in order to preserve an issue for appellate review. N.C.R. App. P. 10(a)(1).

Despite this general rule, Defendant contends that we should review his argument seeking arrest of judgment on double jeopardy grounds pursuant to our Supreme Court's opinion in *State v. Sellers*, 273 N.C. 641, 645, 161 S.E.2d 15, 18 (1968) and our opinion in *State v. Wilson*, 128 N.C. App. 688, 691, 497 S.E.2d 416, 419 (1998) (citing *Sellers*). We disagree.

In *Sellers*, our Supreme Court stated that

> [a] motion in arrest of judgment predicated upon some fatal error or defect appearing on the face of the record proper may be made at any time in any court having jurisdiction of the matter. This is true even though the motion is made for the first time . . . at the hearing of the appeal from the judgment of the Superior Court.

Sellers, 273 N.C. at 645, 161 S.E.2d at 18. Applying *Sellers*, Defendant contends that the alleged double jeopardy problem in this case constitutes a fatal defect on the face of the record and, therefore, may be raised for the first time on appeal. This is incorrect.

A double jeopardy problem is *distinct* from a "fatal flaw which appears on the face of the record." *See State v. Pakulski*, 326 N.C. 434, 439, 390 S.E.2d 129, 132 (1990). In *Pakulski*, our Supreme Court confirmed that a fatal flaw on the face of the record is akin to a "substantive error on the indictment," which is separate and apart from a double jeopardy issue. *See id.* ("When judgment is arrested because of a fatal flaw which appears on the face of the record, such as a substantive error on the indictment, the verdict itself is vacated . . . . [W]hen judgment is arrested on predicate felonies in a felony murder case to avoid a double jeopardy problem, [however,] the guilty verdicts on the

underlying felonies remain on the docket . . . ."). Therefore, Defendant's double jeopardy argument cannot be raised for the first time on appeal on a motion for arrest of judgment because a double jeopardy problem does not constitute a fatal defect on the face of the record. *See id.* Accordingly, Defendant's double jeopardy argument is waived pursuant to the general rule described above.

B. Rule 2

Despite the rule disallowing appellate review of issues not raised at trial, our Supreme Court has stated that the appellate courts may elect to review an unpreserved double jeopardy issue on appeal pursuant to our "supervisory power over the trial divisions [and] Rule 2 of the North Carolina Rules of Appellate Procedure . . . ." *State v. Dudley*, 319 N.C. 656, 659, 356 S.E.2d 361, 364 (1987); N.C.R. App. P. 2 ("To prevent manifest injustice to a party . . . either court of the appellate division may . . . suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions."). The decision to review an unpreserved argument relating to double jeopardy is entirely discretionary. *See, e.g.*, *State v. McLaughlin*, 321 N.C. 267, 272, 362 S.E.2d 280, 283 (1987) (declining to review the defendant's double jeopardy argument because the defendant failed to raise that issue at trial and thus waived appellate review); *Dudley*, 319 N.C. at 659, 356 S.E.2d at 364 (reviewing the defendant's double jeopardy argument even though it was waived); *State v. Mebane*, 106 N.C. App. 516, 532–33, 418 S.E.2d 245, 255–56 (declining to review the defendant's double jeopardy argument because it was not raised at trial and noting that "[e]ven if we opted to review the double jeopardy issue . . . , we [would conclude that Defendants failed to establish] . . . . error on appeal"), *disc. review denied*, 332 N.C. 670, 424 S.E.2d 414 (1992). After a careful review of Defendant's double jeopardy argument in this case, we elect to suspend the rules and review the issue under Rule 2.

II. Double Jeopardy

"Both the fifth amendment to the United States Constitution and article I, section 19 of the North Carolina Constitution prohibit multiple punishments for the *same* offense *absent clear legislative intent to the contrary*." *State v. Etheridge*, 319 N.C. 34, 50, 352 S.E.2d 673, 683 (1987) (citation omitted; certain emphasis added). In *State v. Ezell*, we described the double jeopardy doctrine as follows:

> For decades, the Supreme Court of the United States has applied . . . the *Blockburger* test in analyzing multiple

> offenses for double jeopardy purposes. The Court in *Blockburger v. United States*, 284 U.S. 299, 76 L. Ed. 306 (1932), held as follows:
>
> > The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not.
>
> If what purports to be two offenses is actually one under the *Blockburger* test, double jeopardy prohibits prosecution for both.

159 N.C. App. 103, 106–07, 582 S.E.2d 679, 682 (2003) (certain citations omitted). The United States Supreme Court has clarified, however, that

> double jeopardy does not prohibit multiple punishment for two offenses — even if one is included within the other under the *Blockburger* test — if both are tried at the same time and the legislature intended for both offenses to be separately punished . . . .

Id. at 107, 582 S.E.2d at 682 (citing, *inter alia*, *Missouri v. Hunter*, 459 U.S. 359, 74 L. Ed. 2d 535 (1983)). The North Carolina Supreme Court has relied on both *Blockburger* and *Hunter* when determining whether double jeopardy applies under article I, section 19 of the North Carolina Constitution. *See*, *e.g.*, *State v. Gardner*, 315 N.C. 444, 340 S.E.2d 701 (1986). Thus, a defendant convicted of multiple criminal offenses in the same trial is only protected by double jeopardy principles if (1) those criminal offenses constitute the "same offense" under *Blockburger* and (2) the legislature did not intend for the offenses to be punished separately. *See id.* at 454–55, 340 S.E.2d at 709.

Here, Defendant argues that the judgments against him violate principles of double jeopardy because he was separately convicted of speeding and reckless driving and also convicted of felony speeding to elude arrest, which was raised from a misdemeanor to a felony because Defendant was speeding and driving recklessly. Therefore, pursuant to the test articulated above, we must first determine whether Defendant's convictions for speeding and reckless driving in addition to felony speeding to elude arrest constitute punishments for the same offense. If so, we must then determine whether the legislature intended for those offenses

to be punished alternatively or separately. After a thorough review, we conclude that Defendant's convictions constitute the same offense for purposes of double jeopardy and, further, that the legislature intended for them to be punished alternatively, not separately.

A. The Same Offense

As discussed above, the applicable test to determine whether double jeopardy attaches in a single prosecution is "whether each statute requires proof of a fact which the others do not." *Etheridge*, 319 N.C. at 50, 352 S.E.2d at 683 (citing Blockburger).

> By definition, all essential elements of a lesser[-]included offense are also elements of the greater offense. Invariably then, a lesser[-]included offense requires no proof beyond that required for the greater offense, and the two crimes are considered identical for double jeopardy purposes. If neither crime constitutes a lesser[ ]included offense of the other, the convictions will fail to support a plea of double jeopardy.

Id. (citations omitted).

In this case, as discussed above, Defendant was convicted of speeding, reckless driving, and felony speeding to elude arrest based on the aggravating factors of speeding and reckless driving. The essential elements of speeding under section 20-141(j1) are: (1) driving (2) a vehicle (3) on a highway (4) more than 15 miles per hour over the speed limit or over 80 miles per hour. N.C. Gen. Stat. § 20-141(j1) (2013). The essential elements of reckless driving under section 20-140(b) are: (1) driving (2) any vehicle (3) on a highway or any public vehicular area (4) without due caution and circumspection and (5) at a speed or in a manner so as to endanger or be likely to endanger any person or property. N.C. Gen. Stat. § 20-140(b) (2013). The essential elements of misdemeanor speeding to elude arrest under section 20-141.5(a) are: (1) operating a motor vehicle (2) on a street, highway, or public vehicular area (3) while fleeing or attempting to elude a law enforcement officer (4) who is in the lawful performance of his duties. N.C. Gen. Stat. § 20-141.5(a). The elements of the two aggravating factors used to raise the crime to a felony in this case are (i)(1) speeding (2) in excess of 15 miles per hour over the legal speed limit and (ii) "reckless driving as proscribed in G.S. 20-140." Both of these factors contain the same essential elements as the separate crimes listed above. Therefore, whether Defendant was subjected to multiple punishments for the "same offense" turns on whether these

aggravating factors are considered "essential elements" of the felony speeding to elude arrest conviction in this case. We hold that they are.

In its brief, the State argues that Defendant has not been punished for the same offense because the aggravating factors used to raise speeding to elude arrest from a misdemeanor to a felony are not essential elements of that offense. In so arguing, the State relies on the following language from this Court's opinion in *State v. Funchess*:

> Although many of the enumerated aggravating factors [for speeding to elude arrest] are in fact separate crimes under various provisions of our General Statutes, they are not separate offenses . . . , but are merely alternate ways of enhancing the punishment for speeding to elude arrest from a misdemeanor to a Class H felony.

141 N.C. App. 302, 309, 540 S.E.2d 435, 439 (2000). The State misapplies this language to the circumstances presented by this case.

In *Funchess*, the defendant was indicted for felonious speeding to elude arrest based on three of the eight listed aggravating factors. *Id.* at 306, 540 S.E.2d at 438. At trial, the court instructed the jury that the State was required to prove "two or more" of those three factors in order to convict the defendant of felony speeding to elude arrest. *Id.* On appeal, the defendant argued that the trial court's instruction violated the constitutional provision requiring a unanimous jury verdict because it did not tell the jury to "unanimously agree on the same two factors[.]" *Id.* at 307, 540 S.E.2d at 438. In finding that the trial court did not violate the unanimity requirement, we held that the aggravating factors enumerated in section 20-141.5 did not constitute separate criminal offenses when used to elevate the misdemeanor offense of speeding to elude arrest to a felony and, therefore, did not allow the jury to separately convict the defendant of more than one possible crime. *Id.* Thus, we determined that the aggravating factors — while they might constitute criminal offenses in other sections of the code — could not be separately punished in the context of section 20-141.5. This holding has no direct bearing on whether the listed aggravating factors may be considered "essential elements" of felony speeding to elude arrest for purposes of double jeopardy.

In addition, the United States Supreme Court has clarified that "the existence of any fact (other than a prior conviction) [which] increases the maximum punishment that may be imposed on a defendant . . . — no matter how the State labels it — constitutes an element [of the offense]"

for purposes of the Sixth Amendment right to a jury trial. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 111, 154 L. Ed. 2d 588, 598 (2003) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000)); *see also Ring v. Arizona*, 536 U.S. 584, 609, 153 L. Ed. 2d 556, 577 (2002) (holding that aggravating circumstances that make a defendant eligible for the death penalty "operate as the functional equivalent of an element of a greater offense" for purposes of the Sixth Amendment's jury trial guarantee) (citation and internal quotation marks omitted). The Court also commented that there is "no principled reason to distinguish, [in the context of a capital case], between what constitutes an offense for purposes of the Sixth Amendment's jury-trial guarantee and what constitutes an 'offence'[3] for purposes of the Fifth Amendment's Double Jeopardy Clause." *Sattazahn*, 537 U.S. at 111–12, 154 L. Ed. 2d at 599 (citation omitted).

Pursuant to the Supreme Court opinions discussed above and because the speeding and reckless driving factors increased the maximum penalty for speeding to elude arrest from 45 days to 10 months, *see* N.C. Gen. Stat. §§ 15A-1340.17, 1340.23 (2013), we conclude that those factors constituted elements of speeding to elude arrest in this case for double jeopardy purposes. Therefore, we hold that Defendant was twice subjected to punishment for the "same offense" under *Blockburger* when he was convicted of speeding, reckless driving, and felony speeding to elude arrest.

B. The Intent of the Legislature

Even when a defendant is punished twice in the same trial for the "same offense," however, our Supreme Court has stated that relief under double jeopardy principles is only available if the legislature did not intend for multiple punishments to be imposed. Citing the United States Supreme Court's opinion in *Hunter*, 459 U.S. at 368–69, 74 L. Ed. 2d at 544, our Supreme Court has described the intention doctrine as follows:

> The Double Jeopardy Clause plays only a limited role in deciding whether cumulative punishments may be imposed under different statutes at a single criminal proceeding — that role being only to prevent the sentencing

3. The Fifth Amendment uses the archaic spelling of the word offense, writing it with a "c." See U.S. Const. amend. V; *see generally* Webster's Third New International Dictionary of the English Language Unabridged 1566 (3d ed. 2002).

> court from prescribing *greater punishments than the legislature intended*. . . . [W]here our legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the "same" conduct under *Blockburger*, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.

Gardner, 315 N.C. at 460–62, 340 S.E.2d at 712–13 (citations and certain quotation marks omitted; emphasis added) (determining that the defendant could be punished for the crimes of felony larceny and breaking or entering because those crimes deal with "separate and distinct social norms" and were placed in different articles and subchapters of the criminal code, which were entitled "Offenses Against the Habitation and Other Buildings" and "Offenses Against Property," respectively); *see also State v. Pipkins*, 337 N.C. 431, 434–35, 446 S.E.2d 360, 362–63 (1994) (holding that the defendant's convictions and punishments for trafficking in cocaine by possession and felonious possession of cocaine did not violate the principles of double jeopardy because the legislature intended the punishments to protect against two distinct "perceived evils" — the use of cocaine in the possession offense and the "growing concern regarding the gravity of illegal drug activity in North Carolina" in the trafficking offense). *But see Ezell*, 159 N.C. App. at 110–11, 582 S.E.2d at 684–85 (holding that the defendant was impermissibly subjected to double jeopardy when — in the same case — he was convicted of assault with a deadly weapon with intent to kill inflicting serious injury and assault inflicting serious bodily injury because the legislature intended the offenses to allow *alternative* punishments, not separate ones). In addition, our Supreme Court has noted that

> the presumption raised by the *Blockburger* test . . . may be rebutted by a clear indication of legislative intent; and, when such intent is found, it must be respected, regardless of the outcome of the application of the *Blockburger* test. That is, even if the elements of the two statutory crimes are identical and neither requires proof of a fact that the other does not, the defendant may, in a single trial, be convicted of and punished for both crimes if it is found that the legislature so intended.

Gardner, 315 N.C. at 455, 340 S.E.2d at 709 (citations omitted). Given our jurisprudence on this doctrine, we must determine whether the

legislature intended for the crimes of speeding and reckless driving to be punished *separately*, or *alternatively*, from felony speeding to elude arrest when the latter is based on the aggravating factors of speeding and reckless driving. After careful review, we conclude that the legislature intended the latter.

The speeding charge in this case is prohibited under section 20-141(j1) of the North Carolina General Statutes. In determining the legislature's purpose for enacting section 20-141, we have commented that the section was created "for the protection of persons and property and in the interest of public safety[] and the preservation of human life." *State v. Bennor*, 6 N.C. App. 188, 190, 169 S.E.2d 393, 394 (1969) (citation and internal quotation marks omitted). In addition, our Supreme Court has stated more generally that speeding laws are intended to protect both "those traveling on arterial highways and those entering them from intersecting roads[] from the dangers arising because of the frequency of travel along the through highway." *Groome v. Davis*, 215 N.C. 510, 515, 2 S.E.2d 771, 774 (1939). Therefore, the speeding statute was enacted to protect against harm to persons and property.

Reckless driving is prohibited under section 20-140(b) of the North Carolina General Statutes. Subsection (b) provides that "[a]ny person who drives any vehicle upon a highway or any public vehicular area without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property shall be guilty of reckless driving." N.C. Gen. Stat. § 20-140(b). As with speeding, our Supreme Court has stated that this conduct was prohibited by the legislature "for the protection of persons and property and in the interest of public safety[] and the preservation of human life." *State v. Norris*, 242 N.C. 47, 53, 86 S.E.2d 916, 920 (1955).

Speeding to elude arrest is prohibited under section 20-141.5 of the North Carolina General Statutes. Subsection (a) provides that "[i]t shall be unlawful for any person to operate a motor vehicle on a street, highway, or public vehicular area while fleeing or attempting to elude a law enforcement officer who is in the lawful performance of his duties." Subsection (b) raises that offense from a misdemeanor to a felony in the presence of two or more of the following factors: (1) speeding, (2) gross impairment while driving, (3) reckless driving, (4) negligent driving leading to an accident causing property damage or personal injury, (5) driving while license revoked, (6) speeding on school property or in an area designated as a school zone or a highway work zone, (7) passing a stopped school bus, or (8) driving with a child under

12 years old. N.C. Gen. Stat. § 20-141.5(a)–(b). Our appellate courts have not offered a distinct legislative rationale for this statute. Nonetheless, the statute's own terms state that an individual in violation of subsection (a) whose act results in "the death of *any* person" shall be subject to a higher penalty. N.C. Gen. Stat. § 20-141.5(b1) (emphasis added). In addition, by transforming the crime from a misdemeanor into a felony for actions like speeding, reckless driving, causing property damage or personal injury, and endangering the lives of children, the plain language of the statute suggests that the legislature intended to deter actions subjecting persons, property, and public safety to greater risk. Thus, at least to the extent that speeding to elude arrest is raised from a misdemeanor to a felony pursuant to the aggravating factors of speeding and reckless driving, we see no reason to conclude that the legislature intended this crime to permit a separate punishment from speeding and reckless driving.

In *Gardner*, as noted above, our Supreme Court determined that the defendant's convictions for larceny and breaking or entering did not invoke principles of double jeopardy because the legislature intended for those offenses to prohibit "two separate and distinct social norms, the breaking into or entering the property of another and the stealing and carrying away of another's property." *Gardner*, 315 N.C. at 461, 340 S.E.2d at 712. In so holding, the Court pointed out that this was evidenced by the fact that the two offenses were placed in different articles and subchapters of the criminal code. *Id.* at 462, 340 S.E.2d at 713.

In this case, the crimes of speeding, reckless driving, and felony speeding to elude arrest (when supported by the aggravating factors of speeding and reckless driving) all seek to deter the same conduct — driving on public roads in a way that might endanger public safety or property. In addition, unlike the statutes in *Gardner*, each offense is listed in approximately the same section of the Motor Vehicle Act — Chapter 20 (Motor Vehicles), Article 3 (The Motor Vehicle Act of 1937), Part 10 (Operation of Vehicles and Rules of the Road). Therefore, pursuant to the rationale employed in *Gardner*, it is apparent that the legislature intended for the offenses of "speeding" and "reckless driving" to permit alternative, not separate, punishments to "felony speeding to elude arrest" when supported by the aggravating factors of speeding and reckless driving.

Accordingly, we hold that Defendant was unconstitutionally subjected to double jeopardy when he was convicted of speeding and

reckless driving in addition to felony fleeing to elude arrest based on speeding and reckless driving. As a result, we need not address Defendant's second, alternative, argument on appeal. For the foregoing reasons, we arrest judgment on the speeding and reckless driving convictions in 11 CRS 50049[4] and remand for resentencing.

JUDGMENT ARRESTED; REMANDED FOR RESENTENCING.

Judges GEER and ERVIN concur.

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4. The speeding and reckless driving convictions were consolidated for sentencing purposes with other convictions, including felony speeding to elude arrest. As a result, Defendant was sentenced to 6 to 8 months in prison. This is within the presumptive range for felony speeding to elude arrest, alone, when the defendant has a prior record level II, as here. *See* N.C. Gen. Stat. §§ 15A-1340.17, 20-141.5(b). Though the State does not argue that resentencing would be unnecessary in this case, we nonetheless point out that the judgment must be remanded because we cannot assume that the trial court's consideration of the speeding and reckless driving convictions had no effect on the sentence imposed. *State v. Brown*, 350 N.C. 193, 213, 513 S.E.2d 57, 69–70 (1999) ("[W]e . . . conclude that the judgment on this offense must be remanded for resentencing because the trial court consolidated it with the solicitation conviction, which we have now vacated, in imposing a single sentence of thirty years, and we cannot assume that the trial court's consideration of two offenses, as opposed to one, had no affect [sic] on the sentence imposed."); *see also State v. Williams*, 150 N.C. App. 497, 505–06, 563 S.E.2d 616, 621 (2002) (arresting judgment on the crime of first degree trespass, when that conviction was consolidated for trial with the crime of resisting a public officer, and remanding for resentencing on the resisting crime even though both crimes had a presumptive sentence of 60 days because "whether the crime warrants the sentence imposed in connection with the two consolidated crimes is a matter for the trial court to reconsider") (citation omitted).

STATE OF NORTH CAROLINA
v.
NEIL MATTHEW SARGENT

No. COA13-482

Filed 18 March 2014

1. Criminal Law—prosecutor's argument—alleged discussion of facts not in evidence

The trial court did not err in a first-degree murder, first-degree kidnapping, robbery with a dangerous weapon, and burning personal property case by failing to intervene *ex mero motu* during closing arguments to address the prosecutor's alleged discussion of facts not in evidence. The fact that evidence refuted the State's closing argument did not indicate that the State argued facts not in evidence. Further, the State's remarks were supported by evidence presented at trial that Dalrymple played an active role in the murder of the victim.

2. Criminal Law—prosecutor's argument—offer of opinion on credibility of witness—opened the door

The trial court did not err in a first-degree murder, first-degree kidnapping, robbery with a dangerous weapon, and burning personal property case by failing to intervene *ex mero motu* during closing arguments to address the prosecutor's alleged offer of an opinion on the credibility of a witness. Our Supreme Court has found no error in a credibility argument based on personal opinion from the State where the defendant "opened the door" to the argument.

3. Evidence—prior crimes or bad acts—assault—character—positive military service record—circumstances of discharge

The trial court did not commit plain error in a first-degree murder, first-degree kidnapping, robbery with a dangerous weapon, and burning personal property case by allowing the State's evidence of defendant's prior assault. Defendant placed his character at issue by testifying at length about his positive military service record, and thus, the State was entitled to examine the circumstances that led to defendant's discharge.

Appeal by defendant from judgments entered 8 November 2012 by Judge James U. Downs in Watauga County Superior Court. Heard in the Court of Appeals 22 October 2013.

Attorney General Roy Cooper, by Special Deputy Attorney David J. Adinolfi II, for the State.

Michele Goldman for defendant-appellant.

BRYANT, Judge.

Where the prosecutor responded to defense counsel's endorsement of defendant's witness as truthful by stating that defendant's witness did not give truthful testimony, the trial court did not err in failing to intervene during the prosecutor's closing argument. Where defendant placed his character at issue by testifying at length about his positive military service, the prosecution was allowed to examine the circumstances of his general discharge from the United States Army.

On 28 November 2005, a Watauga County grand jury indicted defendant Neil Matthew Sargent on charges of first-degree murder with aggravating factors, first-degree kidnapping, burning of personal property, and robbery with a dangerous weapon stemming from events leading to the death of Steven William Harrington. On 5 November 2007, defendant was indicted on a second count of robbery with a dangerous weapon.

On 24 April 2008, following a jury trial in Watauga County Superior Court, the Honorable Ronald K. Payne, Judge presiding, entered judgment against defendant on the charges of first-degree murder, first-degree kidnapping, robbery with a dangerous weapon, and burning of personal property. Defendant appealed to this Court from the entry of these judgments. In *State v. Sargeant*, 206 N.C. App. 1, 696 S.E.2d 786 (2010), this Court granted defendant a new trial due in part to the exclusion of a statement made by Matthew Brandon Dalrymple to law enforcement officers on 10 September 2007. Following an appeal by the State, our Supreme Court affirmed the decision of this Court to grant defendant a new trial. *See State v. Sargeant*, 365 N.C. 58, 707 S.E.2d 192 (2011) (hereinafter *Sargeant I*).

A new trial commenced during the 29 October 2012 session of Watauga County Criminal Superior Court, the Honorable James U. Downs, Judge presiding. The evidence presented at trial tended to show that on the evening of 7 November 2005, Harrington was assaulted, robbed, and asphyxiated in a residence located at 121 Poplar Drive in Boone, then driven to another location where his body was doused with lighter fluid and set on fire in the trunk of a car. Three people were present in the home at the time of Harrington's death and at the location of the burning car: defendant, Kyle Triplett, and Dalrymple.

During the prosecution's case-in-chief, the prosecutor called Kyle Triplett, a witness who had also testified at defendant's first trial. Triplett testified that defendant orchestrated an ambush of Harrington. On the evening in question, Triplett followed defendant's explicit instructions whereby Triplett was to grab Harrington by the throat and hold a gun to his head. Defendant provided Triplett with a gun. Triplett testified that when Harrington appeared, Triplett grabbed Harrington by the throat and choked him until his face turned red. When Harrington dropped to the floor, defendant began wrapping Harrington's head in duct tape. Triplett testified that following this, he and defendant began punching Harrington and then kicking him, at which point Dalrymple joined in. After Harrington stopped moving, Dalrymple reached into Harrington's pants pocket and removed a softball sized box that contained four to six ounces of cocaine. Harrington's body was then carried outside and placed in the trunk of Harrington's car. Triplett testified that he drove Harrington's car with defendant as a passenger and Dalrymple following in a second vehicle. Triplett stopped Harrington's car on a roadside along Sleepy Hollow Lane. Triplett testified that defendant opened the trunk, doused lighter fluid on Harrington's body and ignited a fire. Triplett and defendant then got into the car driven by Dalrymple and returned to defendant's residence.

During the presentation of defendant's case, defendant called Dalrymple to testify. Dalrymple testified that on the evening of 7 November 2005, he was using the bathroom when he heard a knock on an outside door. When Dalrymple exited the bathroom, he observed Triplett choking a man at gunpoint. Dalrymple had never before seen the man being choked. Dalrymple testified that Triplett hit the victim in the temple with the butt of a handgun. When the victim dropped to the floor, Triplett began kicking the victim in the ribs. Dalrymple testified that Triplett wrapped the victim's head in duct tape and taped his hands behind his back. Dalrymple testified that when Triplett told Dalrymple that Dalrymple was to drive one of the vehicles, Dalrymple refused, but then Triplett pointed the gun at him. When Dalrymple headed toward a bedroom to retrieve his clothes, he passed defendant in the hallway. Defendant asked, "what the f**k is going on[.]" Having gotten dressed and stepped outside, Dalrymple testified that he observed Triplett placing the victim's body in the trunk of a car. Triplett then drove the car containing the victim's body while Dalrymple followed in a second vehicle with defendant as a passenger. When Triplett pulled onto the roadside off of Sleepy Hollow Lane, Dalrymple observed Triplett open the trunk of the vehicle. Dalrymple soon saw flames. Triplett got into

Dalrymple's car, and the three men drove off. According to Dalrymple, defendant did not exit the vehicle in which he was riding.

Defendant testified on his own behalf, consistent with the version of events testified to by Dalrymple.

Following the close of the evidence, the jury returned verdicts finding defendant guilty of first-degree murder on the bases of lying in wait, felony murder, and premeditation and deliberation; first-degree kidnapping; robbery with a dangerous weapon; and burning personal property. The trial court entered judgment in accordance with the jury verdicts. On the charge of first-degree murder, the trial court sentenced defendant to a term of life imprisonment without parole. On the charges of first-degree kidnapping, robbery with a dangerous weapon, and burning personal property, the trial court entered a separate consolidated judgment and sentenced defendant to a term of 80 to 105 months to be served consecutive to the life sentence. Defendant appeals.

On appeal, defendant raises the following issues: whether the trial court (I) erred in failing to intervene during the prosecutor's closing argument; and (II) committed plain error in allowing the prosecution to introduce evidence of defendant's prior assault.

I

Defendant first argues that the trial court erred by failing to intervene *ex mero motu* during closing arguments to address the prosecutor's discussion of facts not in evidence, misstating the evidence not in evidence, and offering an opinion on the credibility of a witness. We disagree.

"The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (citation omitted).

Pursuant to North Carolina General Statutes, section 15A-1230, "Limitations on argument to the jury,"

> [d]uring a closing argument to the jury an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make

> arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice. An attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue.

N.C. Gen. Stat. § 15A-1230(a) (2013); *see also State v. Gladden*, 315 N.C. 398, 422, 340 S.E.2d 673, 688 (1986) ("Although the closing arguments of counsel are largely within the control and discretion of the trial court, it is well established that counsel is to be afforded wide latitude in the argument of fiercely contested cases. Counsel for both sides may argue the law and the facts in evidence, along with all reasonable inferences to be drawn from them. Counsel may not, however, raise incompetent and prejudicial matters nor refer to facts not in evidence. Counsel is also prohibited from placing before the jury his own knowledge, beliefs, and personal opinions not supported by the evidence."). "Only where the prosecutor's argument affects the right of the defendant to a fair trial will the trial judge be required to intervene where no objection has been made." *State v. Zuniga*, 320 N.C. 233, 253, 357 S.E.2d 898, 911 (1987) (citation omitted). "A prosecutor's argument is not improper where it is consistent with the record and does not travel into the fields of conjecture or personal opinion." *Id.*

a. Argument of Facts Not In Evidence

[1] Defendant contends the State lacked evidence to support its claims that "Dalrymple [was] [the State's] deal with the devil[,]" that the deal "was a mistake[,]" that the State had "figured if we put a big enough carrot in front of [Dalrymple], maybe [Dalrymple would] tell the truth[,]" that Dalrymple did not tell the truth, and the State was "stuck with [Dalrymple's] plea."

The State responds that the Dalrymple plea offer was in evidence as defense exhibit #9. However, defense exhibit #9 was actually an agreement wherein the State agreed to forego seeking the death penalty in exchange for Dalrymple's truthful testimony at his own trial. The agreement provided that the truthfulness of his testimony was to be measured against his September 2007 statement.

Defendant contends that the State's claim that it would not call Dalrymple as a witness because he "would not know the truth if it came up and slapped him in the head" was refuted by defense exhibit #9. However, even assuming that defense exhibit #9 does refute the State's claim, the fact that evidence refutes the State's closing argument does not indicate that the State argued facts not in evidence.

Defendant further challenges the State's remarks that the Dalrymple plea was a mistake "because that man was just as guilty of first-degree murder [and] kidnapping as every other defendant here." Defendant contends that the remarks were improper because, by "offering unchallenged testimony to the jury during its closing, the State was able to strike an unfair blow against [defendant's] most crucial witness." However, the State's remarks are supported by evidence presented at trial that Dalrymple played an active role in the murder of Harrington as discussed earlier in this opinion. Defendant has not shown error on this basis and his argument is overruled.

b. Offered A Personal Opinion On Witness Credibility

[2] Defendant also argues that the State's claim that "it would not call Dalrymple to testify because Dalrymple 'would not know the truth if it came up and slapped him on the head' offered a personal opinion" as to witness credibility. Defendant cites *State v. Holloway*, 82 N.C. App. 586, 347 S.E.2d 72 (1986), in which two doctors were improperly permitted to testify "that in their opinion the child had testified *truthfully*." *Id.* at 587, 347 S.E.2d at 73. The present case is distinguishable from *Holloway* because the prosecutor was not giving an opinion as to witness credibility in the form of sworn testimony.

Defendant's argument emphasizes the significance of any improprieties in this case where the jury's verdict "hinged on its determination of Triplett's, Dalrymple's, and [Defendant's] credibility[.]" Similarly, our Supreme Court noted that the first trial indicated that "the objective facts of what happened the night the victim was killed are elusive." *Sargeant I*, 365 N.C. at 67, 707 S.E.2d at 198. The Supreme Court further noted that "the reason for the State's decision to jettison Dalrymple in favor of Triplett is not in the record." *Id.*

In the present case, Defendant made the following statements in his closing argument to the jury:

> Just as Mr. Dalrymple's agreement states, he will testify truthfully if called upon by the State to do so. Why didn't the State call him at this trial? Why not? It's in black and white. Don't take my word for it. Look at this. They never called him. I had to call him, and he gave truthful testimony. He has been pretty much consistent throughout.

In its closing, the State made the following statements to the jury regarding Dalrymple:

> You darn right we're not going to put him up, because that man would not know the truth if it came up and slapped him in the head. But they want you to believe that version of truth or what they believe the truth was.

The challenged portion of the prosecutor's argument seems to answer the very question that the Supreme Court noted was not in the record of the first trial. As to the question of why the State jettisoned Dalrymple in favor of Triplett, the prosecutor stated:

> Dalrymple is our deal with the devil. It was a mistake . . . . We're stuck with that plea. The plea was a mistake and should never have happened . . . because that man was just as guilty of first-degree murder [and] kidnapping as every other defendant here.

Evidence that Dalrymple entered into a plea agreement with the State does not tell *why* the State "jettison[ed] Dalrymple in favor of Triplett" at this trial. *Id.* The prosecutor informed the jury, by way of closing argument, of her opinion and belief as to the credibility of the various defendants and that the prosecution had made a mistake by entering into the plea agreement with Dalrymple. This statement, made in response to defendant's closing argument, seems to venture close to the area of "conjecture or personal opinion." *Zuniga*, 320 N.C. at 253, 357 S.E.2d at 911. However, our Supreme Court has found no error in a credibility argument based on personal opinion from the State where the defendant "opened the door" to the argument. *State v. Gladden*, 315 N.C. 398, 423, 340 S.E.2d 673, 689 (1986). In *Gladden*, the defendant stated that a State's witness "could not possibly remember . . . every detail in this case" and "insinuated that [the witness's] testimony had not been truthful." *Id.* The State, in its closing, argued that its witness was "one of the finest Sheriffs that [the prosecutor had] ever met[.]" *Id.* at 423, 340 S.E.2d at 688. Our Supreme Court held that the "expression of personal opinion by the prosecutor, while improper, was not, however, so grossly improper as to require the trial court to intervene *ex mero motu*." *Id.* at 423, 340 S.E.2d at 688-89.

The State's remarks appear to be in response to defendant's attempt to bolster Dalrymple's credibility. As in *Gladden*, defendant's statements in closing opened the door to the State's response. Therefore, while the State's remarks may have been improper, they were "not, however, so grossly improper as to require the trial court to intervene *ex mero motu*." *Id.* at 423, 340 S.E.2d at 689. Defendant's argument is overruled.

II

[3] Next, defendant argues that the State's evidence of a prior assault constituted evidence of a propensity for violence and amounted to plain error. We disagree.

> [T]he plain error rule ... is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

State v. Lawrence, 365 N.C. 506, 516-17, 723 S.E.2d 326, 333 (2012) (citation and quotations omitted).

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

Id. at 518, 723 S.E.2d at 334 (citations and quotations omitted).

Pursuant to General Statutes, section 8C-404,

> 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 . . . [e]vidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same[.]

N.C. Gen. Stat. § 8C-1, Rule 404(a)(1) (2013); *see also State v. Roseboro*, 351 N.C. 536, 553, 528 S.E.2d 1, 12 (2000) ("A criminal defendant is entitled to introduce evidence of his good character, thereby placing his

character at issue. The State in rebuttal can then introduce evidence of defendant's bad character. *See State v. Gappins*, 320 N.C. 64, 69, 357 S.E.2d 654, 658 (1987). Such evidence offered by the defendant or the prosecution in rebuttal must be 'a pertinent trait of his character.' N.C.G.S. § 8C–1, Rule 404(a)(1) (1999).").

Before this Court, defendant challenges the prosecution's cross-examination of him as to his use of cocaine and prior accusation of assaultive behavior while a member of the United States Army. In response, the State argues that on direct examination, defendant placed his character at issue by testifying about his military service. On direct examination, defendant testified at length about his positive military service: serving in the United States Army from September 1999 to January 2003, defendant worked with a field artillery unit in both Kosovo and Afghanistan; also, he was awarded the United Nations Kosovo Liberation Medal, Army Service Ribbon, and a National Defense bar. Defendant's Kosovo Liberation medal was admitted into evidence. Defendant engaged in the following examination on direct examination:

> Q Now, Mr. Sargent, when did you get discharged from the US Army?
>
> A I believe the exact date was January 3rd, 2003.
>
> Q And do you remember, do you recall what the character of your discharge was?
>
> A It was on, on other than honorable conditions.
>
> Q What they call general?
>
> A General.
>
> . . .
>
> Q Who were you living with?
>
> A Well, when I initially got out of the Army I was having some substance abuse problems with alcohol and marijuana so my aunt and uncle that I lived with before I went in the Army they thought it would be a good idea if I came back and was in a better environment . . . .

On cross-examination, the prosecutor focused on the circumstances of defendant's discharge from the military. We look to the following exchange, which took place in the absence of any objection by defendant:

Q . . . [I]n fact, when you were talking about all of your military accomplishments, you didn't tell the jury [about your] less than honorable circumstances for using cocaine, did you?

A I said I was discharged for other than honorable conditions, I said that.

Q Did you tell the jury that you were discharged for other than honorable conditions you were discharged . . . on 11 December, 2002 for using cocaine and for assault, is that right?

A That is correct.

Q And in fact, it was so bad, sir, that the commander there at Fort Bragg . . . requested that you be barred from Fort Bragg pending your hearing because of your assault and use of cocaine, didn't he?

A That's correct.

Q You didn't tell the jury that, did you?

A I wasn't asked.

Q Well, sir, you told the jury all about all the fine things you had done in the military, and all the honors, I believe you held up a certificate here about service overseas and the battalions you were in, and how you supported the artillery, supported people over in the, the Vulcans and all of that, but you didn't tell them about being dishonorably discharged, did you?

A I just answered the questions my lawyer asked me.

. . .

Q You tried to mislead the jury into believing you were a wonderful fine soldier serving your country when in fact you were dishonorably discharged for the use of cocaine and for assault?

. . .

And that is exactly what you're here today for is using cocaine and murder, isn't it?

A That's correct.

Because defendant placed his character at issue by testifying at length about his positive military service record and acknowledging that he received a general discharge from the United States Army, the State was entitled to examine the circumstances that led to defendant's discharge. *See Roseboro*, 351 N.C. 536, 553, 528 S.E.2d 1, 12 (2000) ("A criminal defendant is entitled to introduce evidence of his good character, thereby placing his character at issue. The State in rebuttal can then introduce evidence of defendant's bad character."). Therefore, we hold there was no error in the admission of this evidence. Defendant's argument is overruled.

No error.

Judges McGEE and STROUD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 18 MARCH 2014)

ALLEN INDUS., INC. v. KLUTTZ No. 13-1032	Guilford (13CVS5637)	Dismissed
BROWN v. ARTISAN 2510, INC. No. 13-868	Mecklenburg (11CVS18370)	Affirmed in part; reversed and remanded in part; vacated in part
FOSS v. McGUIRE, WOOD & BISSETTE, PA No. 13-894	Buncombe (09CVS2352)	Affirmed
FRIEDMAN v. BANK OF AM., N.A. No. 13-483	Iredell (12CVS1812)	Affirmed
IN RE FORECLOSURE OF LOPEZ No. 13-1015	Catawba (11SP841)	Affirmed
IN RE B.K. No. 13-938	Madison (11JA36)	Affirmed in part and remanded in part.
IN RE C.G., M.G., A.G. No. 13-971	Orange (11JT76-78)	Affirmed
IN RE Z.D.N.T. No. 13-1098	Craven (13JT6)	Reversed and Remanded
JERNIGAN v. TART No. 13-919	Johnston (11CVS987)	New Trial; Dismissed in part
MDT PERS., LLC v. APH CONTRACTORS, INC. No. 13-802	Guilford (12CVS3555)	Dismissed
MEHERRIN INDIAN TRIBE v. LEWIS No. 13-882	Hertford (08CVS159)	Affirmed
PEEK v. WATSON No. 13-797	Chatham (11CVS482)	No Error
PIGNATIELLO v. SYNOVUS FIN. CORP. No. 13-901	Henderson (10CVS1303)	Affirmed in part; dismissed in part

RABUN CNTY. BANK v. HIGHLANDS LAND HOLDING GRP., LLC No. 13-718	Jackson (12CVS344)	Affirmed
STATE v. BROWN No. 13-562	Columbus (07CRS53687)	Reversed and Remanded
STATE v. CALL No. 13-706	Rowan (10CRS53951)	No Error
STATE v. CARROLL No. 13-989	Cleveland (11CRS50468) (11CRS50471) (11CRS50473)	No Error
STATE v. CROWDER No. 13-824	Mecklenburg (10CRS205883)	Reversed
STATE v. DENNING No. 13-724	Wake (11CRS228201) (12CRS3448)	No Error
STATE v. HOWIE No. 13-553	Union (10CRS56325-26) (11CRS2520) (12CRS2040)	No Error in Part; Vacated in Part
STATE v. HUTCHESON No. 13-842	Nash (11CRS51133) (11CRS51314)	No Error
STATE v. MELTON No. 13-940	Wake (12CRS4725) (12CRS4726)	No Prejudicial Error
STATE v. PHELPS No. 13-957	Washington (11CRS50589)	No prejudicial error in part; remanded in part
STATE v. WARNER No. 13-699	Cabarrus (11CRS55594) (12CRS1086)	No Error
STATE v. WHITTINGTON No. 11-1197-2	Nash (09CRS51601)	Vacated in part, no error in part.

GREEN v. FREEMAN

[233 N.C. App. 109 (2014)]

MICHAEL A. GREEN AND DANIEL J. GREEN, PLAINTIFFS
v.
JACK L. FREEMAN, JR., CORINNA W. FREEMAN, PIEDMONT CAPITAL HOLDING OF NC, INC., PIEDMONT EXPRESS AIRWAYS, INC., PIEDMONT SOUTHERN AIR FREIGHT, INC., AND NAT GROUP, INC., DEFENDANTS
v.
LAWRENCE J. D'AMELIO, III, THIRD-PARTY DEFENDANT

No. COA11-548-2

Filed 1 April 2014

1. Agency—directed verdict—relationship between corporation and other parties

A trial court order directing a verdict on the issue of agency was affirmed where, even assuming that a letter created an agency relationship, it was an agency relationship between certain companies and defendant Jack Freeman (Jack), not between defendant Corinna Freeman (Corinna) and Jack. Although it may have been proper to pierce the corporate veil, plaintiffs only argued that Jack was Corinna's *personal* agent, not that he was an agent of the corporation.

2. Agency—apparent authority—evidence not sufficient

There was insufficient evidence to establish the apparent authority of defendant Jack Freeman (Jack) to act as a personal agent of defendant Corinna Freeman (Corinna). Plaintiffs introduced no evidence that Corinna ever made any representations to them, let alone any representations that Jack had authority to act on her behalf; plaintiffs failed to show that Corinna otherwise acted in such a way as to convey to them the idea that Jack had authority to act on her behalf; and Jack's out-of-court representations about his authority to act for Corinna are irrelevant.

3. Evidence—use of deposition—witness present and able to testify

The trial court erred by excluding the proffered portions of a deposition where Defendant Corinna Freeman had objected on the basis that she was present and available to testify. The plain language of N.C.G.S. § 1A-1, Rule 32 permits the use of the deposition of a party by an adverse party for any purpose, regardless of whether or not the deponent testifies. Moreover, for purposes of Rule 32, it is irrelevant that there were multiple defendants at trial.

4. Evidence—deposition—confusion—misapprehension of law

The trial court abused its discretion in excluding the offered portions of a deposition as confusing. The only possible confusion raised by defendants was that the evidence given might have been used against defendant Corinna Freeman by co-defendants, but such use is explicitly permitted under N.C.G.S. § 1A-1, Rule 32 when the co-defendant was represented at the deposition which an adverse party seeks to admit. It was clear that the trial court made its decision under a misapprehension of the applicable law and not based upon the actual content of the portions of the deposition which plaintiffs sought to admit.

5. Evidence—deposition—exclusion not prejudicial

Although the trial court erred by excluding a deposition under Rule 32 of the North Carolina Rules of Civil Procedure and under Rule 403 of the North Carolina Rules of Evidence in an action involving agency, that error was not prejudicial because the inclusion of this deposition would have had no effect on the agency theory of liability.

Appeal by defendant Corinna Freeman and cross-appeal by plaintiffs from order entered 8 July 2010 and judgment entered 2 June 2010 and by Judge Edwin G. Wilson, Jr. in Superior Court, Guilford County. Heard in the Court of Appeals 16 November 2011. By opinion entered 4 September 2012, this Court affirmed the trial court's orders. By opinion entered 8 November 2013, the North Carolina Supreme Court reversed this Court's opinion and remanded for consideration of additional issues.

Thomas B. Kobrin, for plaintiff-appellants.

Forman Rossabi Black, P.A., by T. Keith Black, Gavin J. Reardon, and Elizabeth Klein, for defendant-appellant Corinna Freeman.

STROUD, Judge.

This case comes to us on remand from the North Carolina Supreme Court, which reversed this Court's prior opinion and remanded for us to consider the issue of agency. We affirm the trial court's order allowing defendant Corinna's motion for directed verdict on the issue of agency.

I. Background

The relevant background facts have been laid out by our Supreme Court in *Green v. Freeman*, ___ N.C. ___, ___, 749 S.E.2d 262, 265-67

(2013) (*Green I*), and we will not repeat them here. The Supreme Court held that plaintiffs' evidence on breach of fiduciary duty was insufficient as a matter of law, but remanded for this Court to consider whether the trial court erred in allowing defendant Corinna Freeman's motion for directed verdict on an agency theory of liability and piercing the corporate veil. *Id.* at ___, 749 S.E.2d at 271.

II. Agency and Piercing the Corporate Veil

[1] To hold Corinna personally liable for the actions of the corporation,

> plaintiffs must present evidence of three elements:
>
> (1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
>
> (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of [a] plaintiff's legal rights; and
>
> (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

Id. at ___, 749 S.E.2d at 270 (citation and quotation marks omitted).

The Supreme Court has already held that plaintiffs presented sufficient evidence on the first element. It remanded to this Court for us to consider whether plaintiffs presented sufficient evidence on the other two elements. The only remaining issue to be considered is that of agency. Plaintiffs argue that the trial court erred in allowing defendant Corinna's motion for directed verdict on an agency theory because there was evidence that Jack Freeman, her son, was her agent.

We conclude that, even assuming the 2001 letter created an agency relationship, it was an agency relationship between the Piedmont companies and Jack, not between Corinna and Jack. Although the Supreme Court held that it was proper to pierce the corporate veil, plaintiffs only argue that Jack was Corinna's *personal* agent, not that he was an agent of the corporation, and that piercing the corporate veil therefore makes Corinna liable for his acts. Accordingly, we affirm the trial court's order directing verdict on the issue of agency.

A. Standard of Review

> The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury. When determining the correctness of the denial for directed verdict or judgment notwithstanding the verdict, the question is whether there is sufficient evidence to sustain a jury verdict in the non-moving party's favor or to present a question for the jury.

Davis v. Dennis Lilly Co., 330 N.C. 314, 322-23, 411 S.E.2d 133, 138 (1991) (citations omitted).

B. Analysis

Agency, like piercing the corporate veil, is not itself a cause of action; it is "the relationship that arises from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *Outer Banks Contractors, Inc. v. Daniels & Daniels Const., Inc.*, 111 N.C. App. 725, 730, 433 S.E.2d 759, 762 (1993) (citation and quotation marks omitted).

"Agency is a fact to be proved as any other, and where there is no evidence presented tending to establish an agency relationship, the alleged principal is entitled to a directed verdict." *Albertson v. Jones*, 42 N.C. App. 716, 718, 257 S.E.2d 656, 657 (1979); *Outer Banks Contractors, Inc.*, 111 N.C. App. at 730, 433 S.E.2d at 762 ("The presence of a principal-agent relationship is a question of fact for the jury when the evidence tends to prove it; a question of law for the trial court if the facts lead to only one conclusion.").

To establish an agency relationship, "[t]he principal must intend that the agent shall act for him, the agent must intend to accept the authority and act on it, and the intention of the parties must find expression either in words or conduct between them." *Ellison v. Hunsinger*, 237 N.C. 619, 628, 75 S.E.2d 884, 891 (1953) (citation and quotation marks omitted). "An agency can be proved generally, by any fact or circumstance with which the alleged principal can be connected and having a legitimate tendency to establish that the person in question was his agent for the performance of the act in controversy." *Munn v. Haymount Rehabilitation & Nursing Center, Inc.*, 208 N.C. App. 632, 637-38, 704 S.E.2d 290, 295 (2010) (citation and quotation marks omitted).

An agency relationship can impose vicarious liability on a principal for the torts committed by an agent when he "is acting within the

line of his duty and exercising the functions of his employment." *King v. Motley*, 233 N.C. 42, 45, 62 S.E.2d 540, 543 (1950). "If the act of the employee was a means or method of doing that which he was employed to do, though the act be unlawful and unauthorized or even forbidden, the employer is liable for the resulting injury . . . ." *Wegner v. Delly-Land Delicatessen, Inc.*, 270 N.C. 62, 66, 153 S.E.2d 804, 808 (1967). Here, the claims against Jack—the purported agent—were fraud, breach of fiduciary duty, and unfair and deceptive business practices.

Plaintiffs argue that Corinna made Jack her agent by writing and signing the following letter, dated 30 November 2001 and entitled "RE: CORPORATE RESOLUTION":

> Dear Jack:
>
> As of this date, November 30, 2001, please be advised that I am delegating responsibility and authority for making all corporate, financial, operational, and administrative decisions for the company to you.
>
> You are free to delegate further in any area of the business to persons you decide are appropriate and qualified to insure the smooth and successful operation of the company.
>
> Sincerely,
> [signature]
>
> Corinna Freeman
> Chairperson

Although we agree that this letter and the other evidence could establish an agency relationship, plaintiffs misidentify the principal. This evidence, in the light most favorable to plaintiffs, shows that Corinna appointed Jack a general agent on behalf of "the company" in her capacity as "Chairperson." He was empowered to make "all corporate, financial, operational, and administrative decisions for the company." Nothing in the 2001 letter—and no other evidence presented at trial—indicates that Corinna appointed Jack as her personal agent or that she intended to empower him to act on her own behalf in any way other than as the corporate "chairperson." If Jack was the corporation's agent, not Corinna's, then the corporation, not Corinna, would normally be liable for the torts committed within the scope of his duties. *See Green I*, ___ N.C. at ___, 749 S.E.2d at 270 ("The general rule is that in the ordinary course of business, a corporation is treated as distinct from its shareholders." (citation

and quotation marks omitted)); *Holleman v. Aiken*, 193 N.C. App. 484, 504, 668 S.E.2d 579, 592 (2008) (stating that "a principal is liable for the torts of its agent which are committed within the scope of the agent's authority" (citation and quotation marks omitted)).

Legally, there is a distinction between Jack's actions on behalf of the corporation and his actions purportedly as Corinna's agent, and it appears that this is the distinction which the Supreme Court directed us to address:

> In other words, if the trial court properly dismissed plaintiffs' agency claims, it is irrelevant whether Corinna exercised domination and control over the Piedmont companies. On the other hand, if the trial court erred in dismissing the agency claims, the question remains whether plaintiffs may recover against Corinna on those claims through the piercing the corporate veil doctrine. Therefore, we reverse and remand to the Court of Appeals for a determination of whether the trial court erred in granting Corinna's motion for a directed verdict on plaintiffs' agency claims for fraud and breach of fiduciary duty.

Green I, ___ N.C. at ___, 749 S.E.2d at 271.

Because the parties' original briefs failed to address this distinction, we ordered that the parties submit supplemental briefing to address the issues on remand from the Supreme Court. They did so, but plaintiffs made no argument that Corinna is liable for Jack's actions *as a corporate agent* through piercing the corporate veil, or on any other theory. It is not the duty of this Court to construct arguments for appellants. *Foster v. Crandell*, 181 N.C. App. 152, 162, 638 S.E.2d 526, 533, *cert. and disc. rev. denied*, 361 N.C. 567, 650 S.E.2d 602 (2007). Therefore, we address only the argument presented—that Jack was Corinna's personal agent empowered to act on her behalf. For the foregoing reasons, we conclude that there was insufficient evidence that Jack was Corinna's personal agent, acting under actual authority.

[2] Plaintiffs also argue that even if Jack did not have actual authority to act as Corinna's personal agent, he had apparent authority to do so. "Apparent authority is that authority which the principal has held the agent out as possessing or which he has permitted the agent to represent that he possesses." *Pet, Inc. v. University of North Carolina*, 72 N.C. App. 128, 135, 323 S.E.2d 745, 750 (1984) (citation, quotation marks, and ellipses omitted). Plaintiffs introduced no evidence that Corinna ever made any representations to them, let alone any representations that

Jack had authority to act on her behalf. Plaintiffs failed to show that Corinna otherwise acted in such a way as to convey to plaintiffs the idea that Jack had authority to act on her behalf. Jack's out-of-court representations about his authority to act for Corinna are irrelevant. *See Dailey v. Integon General Ins. Corp.*, 75 N.C. App. 387, 399, 331 S.E.2d 148, 156 (noting that "the general rule is that neither the fact nor the extent of an agency relationship can be proved by the out-of-court statements of an alleged agent."), *disc. rev. denied*, 314 N.C. 664, 336 S.E.2d 399 (1985); *Munn*, 208 N.C. App. at 639, 704 S.E.2d at 296 ("The scope of an agent's apparent authority is determined not by the agent's own representations but by the manifestations of authority which the principal accords to him." (citation and quotation marks omitted)); *State v. Sturgill*, 121 N.C. App. 629, 638, 469 S.E.2d 557, 563 (1996) ("Apparent authority arises when a *principal* intentionally or by want of ordinary care causes or allows a third person to believe that an agent possesses authority to act for that principal." (citation, quotation marks, and brackets omitted) (emphasis added)). Therefore, there was insufficient evidence to establish Jack's apparent authority to act as a personal agent of Corinna.

We conclude that plaintiffs failed to present sufficient evidence, taken in the light most favorable to plaintiffs, that Jack was Corinna's personal agent empowered with either actual or apparent authority to sustain a jury verdict in their favor on that theory. Therefore, we hold that the trial court did not err in granting defendant Corinna's motion for directed verdict on the theory of agency.

III. Exclusion of Deposition

[3] Plaintiffs further argue that the trial court erred in excluding the deposition of Corinna that they attempted to introduce at trial under N.C. Gen. Stat. § 1A-1, Rule 32. Defendant Corinna objected on the basis that she was present and available to testify, and that therefore reading the deposition was unnecessary.

Under N.C. Gen. Stat. § 1A-1, Rule 32(a)(3) (2007), "[t]he deposition of a party . . . may be used by an adverse party for any purpose, whether or not the deponent testifies at the trial or hearing." Here, the trial court excluded the portions of Corinna's deposition offered by plaintiffs because

> [i]t just stands in the face of reason that you would have three co-defendants sitting here in court and that you could get their testimony just by introducing the deposition, with no attempt at that point for them to be cross examined.

It further sustained the objection under Rule 403 on the basis that the evidence would confuse the jury, reasoning that there were multiple defendants and that the jury might be tempted to use one defendant's admissions against the others.

First, we conclude that the trial court's interpretation of Rule 32 was error. The plain language of the rule permits the use of a deposition of a party by an adverse party for any purpose, regardless of "whether or not the deponent testifies." N.C. Gen. Stat. § 1A-1, Rule 32(a)(3). Indeed, this Court has specifically held that a party's presence at trial is not a reason to prevent an adverse party from introducing her deposition. *Stilwell v. Walden*, 70 N.C. App. 543, 547-48, 320 S.E.2d 329, 332 (1984). Therefore, the presence of defendant at trial or her availability as a witness is wholly immaterial to the issue of whether her deposition may be used against her.

Moreover, for purposes of Rule 32, it is irrelevant that there were multiple defendants at trial. Rule 32(a) specifically permits the use of a deposition "against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof." N.C. Gen. Stat. § 1A-1, Rule 32(a); *see Floyd v. McGill*, 156 N.C. App. 29, 40, 575 S.E.2d 789, 796 (holding that admission of one defendant's deposition was proper where she was present at the deposition, even though she was represented at the time by the same counsel as her co-defendants), *disc. rev. denied*, 357 N.C. 163, 580 S.E.2d 364 (2003). There is no dispute that all of the co-defendants received adequate notice that her deposition would be taken and that all were represented at the taking of Corinna's deposition. *Cf. Craig v. Kessig*, 36 N.C. App. 389, 400, 244 S.E.2d 721, 727 (1978) (noting that a party's deposition can be used against him, even if his co-defendants were not present when the deposition was taken, and that were such a situation to arise in a jury trial the proper remedy would be appropriate limiting instructions), *aff'd*, 297 N.C. 32, 253 S.E.2d 264 (1979). We conclude that the trial court erred in excluding the proffered portions of Corinna's deposition under Rule 32. Further, we note, as there was some confusion on this point at trial, that "there is no distinction between a discovery deposition and a trial deposition[] under Rule 32." *Robertson v. Nelson*, 116 N.C. App. 324, 327, 447 S.E.2d 488, 490 (1994). If the trial court had allowed plaintiff to use Corinna's deposition testimony, defendant would have had the opportunity to raise objections to portions of the deposition testimony and the trial court could have ruled upon those objections.

[4] Second, the trial court abused its discretion in excluding the offered portions of Corinna's deposition under the North Carolina Rules of

Evidence, Rule 403. Under Rule 403, otherwise admissible evidence may nonetheless be excluded if its probative value "is substantially outweighed by the danger of unfair prejudice [or] confusion of the issues." N.C. Gen. Stat. § 8C-1, Rule 403 (2007). We review a trial court's application of Rule 403 for an abuse of discretion. *Warren v. Jackson*, 125 N.C. App. 96, 99, 479 S.E.2d 278, 280, *disc. rev. denied*, 345 N.C. 760, 760, 485 S.E.2d 310, 310-11 (1997). "An abuse of discretion occurs when the trial court's decision was unsupported by reason and could not have been a result of competent inquiry." *Leggett v. AAA Cooper Transp., Inc.*, 198 N.C. App. 96, 101, 678 S.E.2d 757, 761 (2009) (citation and quotation marks omitted).

Here, the only possible confusion raised by defendants was the risk that the jury might use the information contained in one defendant's deposition against the other two defendants. The questions and answers in the portions of Corinna's deposition offered by plaintiffs all concerned her role in the Piedmont companies, her awareness of Jack's actions, and her training and experience in the cargo aviation business. We fail to see any possible reason that admission of this evidence would lead the jury to confuse the issues.

The only possible confusion raised by defendants was that the evidence given by Corinna might be used against her co-defendants. But it is common sense that this is exactly the reason that the plaintiffs would want to use the evidence, and such use is explicitly permitted under Rule 32 when the co-defendant was represented at the deposition which an adverse party seeks to admit. *See* N.C. Gen. Stat. § 1A-1, Rule 32(a); *Craig*, 36 N.C. App. at 400, 244 S.E.2d at 727. It is clear that the trial court made its decision under a misapprehension of the applicable law and not based upon the actual content of the portions of the deposition which plaintiffs sought to admit. Therefore, we conclude that the trial court abused its discretion in excluding the proffered portions of Corinna's deposition under Rule 403.

[5] Having concluded that the trial court erred in excluding Corinna's deposition, we must consider whether this error requires reversal. "The exclusion of evidence constitutes reversible error only if the appellant shows that a different result would have likely ensued had the error not occurred. The burden is on the appellant not only to show error, but to show *prejudicial* error." *Latta v. Rainey*, 202 N.C. App. 587, 603, 689 S.E.2d 898, 911 (2010) (citations, quotation marks, and ellipses omitted). We hold that plaintiffs have failed to show that the trial court's error here was prejudicial.

First, the deposition testimony does not change the fact that "[b]ecause plaintiffs never became shareholders, Corinna could not have owed them, as shareholders, fiduciary duties." *Green I*, ___ N.C. at ___, 749 S.E.2d at 269. Second, Corinna's deposition does not indicate that she had any contact with plaintiffs or that "they relied on or trusted in her when they chose to invest in the Piedmont companies." *Id.* Therefore, the inclusion of the deposition would have had no effect on plaintiffs' breach of fiduciary duty claims. *See id.* Finally, the inclusion of this deposition would have had no effect on the agency theory of liability, given our discussion above. Nothing in the deposition indicates that Corinna authorized Jack to act on her behalf in a personal capacity. The deposition does include additional evidence that Corinna continued to be involved in the Piedmont companies after her 2001 letter and that she delegated to Jack all of her corporate responsibilities. But this evidence has no bearing on her intent to make Jack a personal agent.

We conclude that plaintiffs have failed to show "that a different result would have likely ensued had the error not occurred." *Latta*, 202 N.C. App. at 603, 689 S.E.2d at 911. As a result, we hold that although the trial court erred in excluding Corinna's deposition under Rule 32 of the North Carolina Rules of Civil Procedure and under Rule 403 of the North Carolina Rules of Evidence, that error was not prejudicial.

IV. Conclusion

For the foregoing reasons, we affirm the trial court's order allowing defendant Corinna Freeman's motion for directed verdict on the issue of agency. We further conclude that plaintiffs have failed to show that the trial court's error in excluding Corinna's deposition was prejudicial.

AFFIRMED; NO PREJUDICIAL ERROR.

Judges BRYANT and CALABRIA concur.

IN THE MATTER OF K.A., E.A., AND K.A.

No. COA13-972

Filed 1 April 2014

1. Appeal and Error—preservation of issues—proper objection made at trial

Respondent mother properly preserved for appellate review her argument that the trial court erred in an abuse, neglect and dependency hearing by determining that respondent was collaterally estopped and/or barred by the doctrine of *res judicata* from re-litigating the allegations in a custody petition that were addressed in a civil custody order. Counsel for respondent made a clear, cogent argument at the hearing for why she objected to the trial court's application of the collateral estoppel rule.

2. Collateral Estoppel and Res Judicata—collateral estoppel—not applicable—different burdens of proof in proceedings

The trial court erred in an abuse, neglect and dependency hearing by determining that respondent mother was collaterally estopped and/or barred by the doctrine of *res judicata* from re-litigating the allegations in a custody petition that were addressed in a civil custody order. Even if privity is not a requirement of collateral estoppel, the trial court erroneously applied the doctrine because of the different burdens of proof used in custody and neglect hearings. Moreover, the trial court's erroneous application of the collateral estoppel rule was prejudicial to respondent because it made it impossible for her to effectively contest the allegations made in the petition under the higher, clear and convincing evidence standard.

Appeal by Respondent-Mother from orders entered 19 April 2013 and 14 June 2013 by Judge Elizabeth T. Trosch in Mecklenburg County District Court. Heard in the Court of Appeals 27 February 2014.

Senior Associate Attorney Twyla Hollingsworth-Richardson for Mecklenburg County Department of Social Services, Youth & Family Services.

Mercedes O. Chut for Respondent-Mother.

Parker Poe Adams & Bernstein LLP, by Deborah L. Edney, for Guardian ad Litem.

STEPHENS, Judge.

Factual Background and Procedural History

This case arises from an adjudication of neglect and dependency in Mecklenburg County District Court. Three minor children, referred to as "Katie," "Elliot," and "Karen" in this opinion,[1] were the subject of the hearing. Their parents, Respondent-Mother and "the father," were married on or about 30 July 1994 and separated on or about 11 December 2010. Prior to separation, Respondent-Mother "became determined to prove [that the father] had molested all three minor children."

On 20 December 2010, Respondent-Mother initiated a custody action and filed a motion for a domestic violence protective order. The parties reached a consent order in the domestic violence matter in February of 2011. On 19 September 2012, the Mecklenburg County District Court, Judge Christy T. Mann presiding, entered a permanent civil custody order. The court found that "[i]t [was] highly unlikely that [Karen] ha[d] been molested or abused by [the father]" and that Respondent-Mother had "perpetuated a false set of beliefs onto the children which they now believe." The court placed the juveniles in the father's legal custody, but ordered the children and the father to "undergo intensive counseling with therapists to prepare them for the transition from [Respondent-Mother's] home to [the father's] home," given the "significant psychological damage" suffered by the children as a result of the parties' divorce and the Respondent-Mother's attempts to alienate the children from the father. On 6 November 2012, the court entered a second custody order placing Katie and Elliot in the father's physical custody and ordering therapy to allow Karen to be placed with the father. The order also provided that Respondent-Mother could only visit with Katie and Elliot under supervision. The record indicates that neither party appealed the custody orders.

Seven days later, on 13 November 2012, Petitioner Mecklenburg County Department of Social Services, Youth & Family Services ("YFS"), filed a juvenile petition alleging that all three juveniles were abused, neglected, and dependent. The petition recited certain findings from the trial court's 19 September 2012 civil custody order and alleged that, "[d]uring one of the . . . therapy sessions, [which were ordered so that Karen could be returned to her father's care, Karen] attacked [the] father and had to be pulled off of him by a therapist." The petition also alleged

1. Pseudonyms are used to protect the juveniles' identities.

that Elliot had accused the father of sexual abuse, but noted that the accusation was "suspect."

On 20 November 2012, the trial court entered a nonsecure custody order placing Karen in foster care. The court also determined that Katie and Elliot would remain with the father, noting that "YFS ha[d] taken appropriate steps to assess the safety of the two children remaining in the father's care [and] enter[ed] into a safety plan with the father to ensure the children's continued safety." In addition, the trial court found there was a reasonable factual basis to believe the allegations in the petition and that placement in foster care was the most appropriate arrangement as to Karen. Lastly, the court noted that "[Respondent-Mother] is collaterally estopped from re-litigating the issues adjudicated by Judge Mann. YFS shall begin the [Interstate Compact on the Placement of Children] process for the maternal grandparents[,] but the [c]ourt will not consider temporary custody with them."

The petition came on for hearing on 14 January 2013. At the outset of the hearing, the trial court orally re-stated its determination that Respondent-Mother "would be collaterally estopped from re-litigating those issues that were litigated by those parties as Petitioner and [Respondent-Mother] in a child custody action before the Honorable Christy T. Mann in 10 CVD 25443." The court also received documents from the civil custody case into evidence. The father stipulated to a mediated petition agreement, but YFS offered no further evidence at adjudication. Respondent-Mother called several witnesses, including the father. During the presentation of evidence, the trial court sustained a number of objections to Respondent-Mother's questions about the father's alleged abuse of the juveniles on grounds that Respondent-Mother was collaterally estopped from re-litigating that issue.

The trial court entered an adjudication and disposition order on 11 March 2013 and an amended adjudication order on 19 April 2013.[2] In the amended order, the trial court found as fact that "[t]he [c]ourt has previously ruled that the parents are collaterally [e]stopped from re-litigating issues which have already been ruled upon in the custody case.

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2. In the 11 March 2013 order, the court elected to continue disposition in order to "fully assess the most appropriate way to achieve the purpose of the [c]ourt's exercising jurisdiction over the children [by obtaining] more information about the needs of the children." Oddly, the 11 March 2013 adjudication and disposition order purports to continue the disposition hearing to 6 March 2013, an obvious impossibility that was repeated in the 19 April 2013 amended order. In any event, the 14 June 2013 disposition order makes clear that the hearing occurred on 16 May 2013.

The [c]ourt takes judicial notice of the findings made by Judge Mann and those findings are incorporated herein." Given the findings of fact in its order, the trial court adjudicated all three juveniles neglected and additionally adjudicated Karen dependent. The trial court entered a dispositional order on 14 June 2013, providing that Karen would remain in the legal custody of YFS and continue treatment "in order to change her false beliefs about her father so she can be reintegrated into his home." Respondent-Mother appeals.

Discussion

Respondent-Mother appeals from the trial court's adjudication and disposition orders on grounds that the trial court (1) erroneously found that Respondent-Mother was collaterally estopped and/or barred by the doctrine of *res judicata*[3] from litigating the allegations in the petition that were addressed in the 19 September 2012 civil custody order or, in the alternative, (2) failed to make sufficient findings of fact to support its adjudication order. We reverse the adjudication and disposition orders on grounds that the trial court erred by invoking the doctrine of collateral estoppel and remand for further proceedings consistent with this opinion.

I. Appellate Review

[1] As a preliminary matter, we address YFS's argument that Respondent-Mother failed to preserve her first argument for appellate review because she did not object when the trial court stated at the beginning of the hearing that collateral estoppel would work to bar re-litigation of those issues raised and determined in the custody case. For support, YFS points out that, during a discussion of *res judicata* and collateral estoppel, counsel for Respondent-Mother "state[d] that she [was] not re-litigating any of the issues decided by Judge Mann" and even stated in her closing argument that she "obviously accepted" the collateral estoppel ruling. These statements are taken out of context and do not accurately represent what occurred at the hearing.

Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure provides that

> [i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request,

3. The record indicates that, despite Respondent-Mother's argument, the trial court relied exclusively on the doctrine of collateral estoppel to bar litigation on the relevant allegations in the petition, not *res judicata*. Therefore, we tailor our analysis to her collateral estoppel argument.

> objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion. . . .

N.C.R. App. P. 10(a)(1).

Relevant to the preservation issue, the following colloquy occurred between counsel for Respondent-Mother, the father, counsel for the father, and the court during the 14 January 2013 hearing:

> [COUNSEL FOR RESPONDENT-MOTHER:] These allegations, when did they first surface?
>
> [THE FATHER:] Which allegations are you referring to?
>
> [COUNSEL FOR RESPONDENT-MOTHER:] Sexual abuse.
>
> [THE FATHER:] Approximately December of 2010.
>
> [COUNSEL FOR RESPONDENT-MOTHER:] And what — when it surfaced, what did you offer to do?
>
> [COUNSEL FOR THE FATHER]: I'm gonna object. I don't know how far we're gonna go with this. My understanding is the only allegation that would be relevant here is the one that's in the petition . . . . Everything else would have been covered by the previous orders of Judge Christy Mann and should be collaterally estopped . . . .
>
> THE COURT: All right. So you're objecting to this evidence on the basis that [Respondent-Mother] would be collaterally estopped from re-litigating it?
>
> [COUNSEL FOR THE FATHER]: Collaterally estopped or *res judicata* or beyond the scope.
>
> THE COURT: All right. The objection is sustained.
>
> [COUNSEL FOR RESPONDENT-MOTHER]: May I be heard?
>
> THE COURT: Yes. What is your argument for the admissibility of this evidence?
>
> [COUNSEL FOR RESPONDENT-MOTHER]: Well, the issue I'm trying to ask him about actually was not provided

in any of the orders. I asked him what he did. There's nothing about what he did.

And my position is collateral estoppel does not apply or *res judicata* in these proceedings. For *res judicata* or collateral estoppel to apply, the [c]ourt has to find that the parties are identical, the issues are identical, and we don't have that here. You had a — you had a civil action between [the father] and [Respondent-Mother] in civil court.

In this court, you have — and that was with [Respondent-Mother] as the plaintiff and [the father] as the defendant. We are in juvenile court. A different statute applies, which is the 7B statute. You have different parties now. You don't have [Respondent-Mother] bringing an action against [the father].

You have [YFS] as the petitioner in this case. You have the *Guardian ad Litem*'s office . . . representing the children. You have the mother and the father . . . as respondents in this action. So I say there is no identity of parties. The issues are not the same.

I'm not re-litigating anything, and there are additional allegations in the petition that are not referenced here. . . .

I met with [counsel for YFS] on Friday when I was getting my discovery, and I said, I don't have any police reports, I don't have any of this. [He s]aid, well, I'm not going to be offering any of those. And now we have a stipulation dealing with police reports. And if the [c]ourt adopts that stance, [Respondent-Mother] cannot litigate anything.

I say there's no identity of parties and there's no *res judicata* as far as what I'm questioning. There's some things that I'm not going to be re-litigating, but I asked him specifically when the allegations surfaced what did you do. He took certain steps that I know weren't reflected in any of the orders, and I think I should be allowed to ask that.

And I clearly wasn't a party to that proceeding. My client was unrepresented in the civil proceeding.

THE COURT: All right. Well, the Honorable Christy T. Mann presided over a hearing July 10th through 11th, 2012. . . .

. . .

> And so I'm going to conclude that [Respondent-Mother] should not be allowed to re-litigate those factual allegations in this proceeding . . . . So the objection is sustained.

(Italics added). Later, in her closing argument, counsel for Respondent-Mother made the following comment:

> [COUNSEL FOR RESPONDENT MOTHER]: . . .
>
> While I feel that the Court has ruled that we can't litigate anything because of collateral estoppel and *res judicata*, which obviously we have accepted, I feel my hands are tied. I'm not really properly able to argue but . . . that the petition be dismissed. . . .

(Italics added). This is clearly sufficient to preserve review of the collateral estoppel issue under Rule 10.

When counsel for the father sought to halt questioning on the issue of the alleged abuse, counsel for Respondent-Mother made a clear, cogent argument for why she objected to the trial court's application of the collateral estoppel rule. Afterward, the court specifically ruled against her. As the hearing continued, counsel for Respondent-Mother maintained that she did not believe her line of questioning was barred by the doctrines of *res judicata* or collateral estoppel. Indeed, a reading of counsel's closing argument in context makes it clear that she "accepted" the trial court's ruling only to the extent that she had to do so in order to try the case, not because she believed the ruling was correct. For these reasons, we hold that this issue was properly preserved for appellate review under Rule 10. Therefore, YFS's preservation argument is overruled.

II. Collateral Estoppel

[2] In her first argument on appeal, Respondent-Mother contends the trial court prejudicially erred by finding in the 19 April 2013 neglect order that she was collaterally estopped from re-litigating the issues addressed in the 19 September 2012 civil custody order because the neglect hearing and the custody hearing involved different parties and different burdens of proof. In response, YFS asserts that (1) mutuality of parties is no longer a requirement for collateral estoppel, (2) North Carolina law allows the application of the collateral estoppel doctrine despite the different burdens of proof in juvenile cases under Chapters 7B and 50, and (3) any error that the trial court made in applying the

doctrine of collateral estoppel is harmless. The Guardian *ad Litem* contends that, even though mutuality is no longer a requirement for collateral estoppel, the trial court erred in applying the doctrine because of the different burdens of proof between this case and the civil custody case. Nonetheless, the Guardian *ad Litem* asserts that the trial court's error is harmless. After a thorough review of the case, we conclude that the trial court prejudicially erred in applying the doctrine of collateral estoppel. Accordingly, we reverse the order of the trial court and remand for further proceedings.

Under the traditional definition of collateral estoppel, our Supreme Court has said in *Thomas M. McInnis & Assocs., Inc. v. Hall* that "a final judgment on the merits prevents re[ ]litigation of issues actually litigated and necessary to the outcome of the prior action in a later suit involving a different cause of action between the parties or their privies." 318 N.C. 421, 429, 349 S.E.2d 552, 557 (1986) ("Traditionally, courts limited the application of both [*res judicata* and collateral estoppel] to parties or those in privity with them by requiring so-called 'mutuality of estoppel:' both parties had to be bound by the prior judgment.") (citation omitted). After explaining the traditional definition of collateral estoppel, however, the Supreme Court went on to decide that there was "no good reason for continuing to require mutuality of estoppel" and abolished the requirement as a defensive tactic. *Id.* at 434, 349 S.E.2d at 560. Relying on that decision, this Court has since stated that "mutuality of parties is no longer required when invoking either offensive or defensive collateral estoppel," intending to abolish the element altogether. *Rymer v. Estate of Sorrells*, 127 N.C. App. 266, 269, 488 S.E.2d 838, 840 (1997). These are the cases relied on by the Guardian *ad Litem* and YFS to support their assertion that mutuality is no longer an element of collateral estoppel.

Inexplicably, however, our Supreme Court has since defined the doctrine of collateral estoppel using the traditional definition, providing a lengthy analysis of the mutuality element. *See State v. Summers*, 351 N.C. 620, 626, 528 S.E.2d 17, 22 (2000) (holding that "the elements of collateral estoppel were satisfied" when, *inter alia*, "the district attorney is in privity with the Attorney General"). Though the *Summers* court cites *Hall*, it does not discuss the apparent divergence from *Hall* and *Rymer* on the issue of mutuality. *See id.* at 622, 528 S.E.2d at 20. The result is that our courts have defined collateral estoppel variously, applying the privity element in some cases and refraining to do so in others. *See, e.g.*, *Youse v. Duke Energy Corp.*, 171 N.C. App. 187, 192–93, 614 S.E.2d 396, 401 (2005) (defining collateral estoppel without the privity element); *Bee Tree Missionary Baptist Church v. McNeil*, 153 N.C. App. 797, 799,

570 S.E.2d 781, 783 (2002) ("For collateral estoppel to bar [the] plaintiff's action, [the] defendants must show . . . (4) both parties are either identical to or in privity with a party or the parties from the prior suit.") (citations omitted); *In re Foreclosure of Azalea Garden Bd. & Care, Inc.*, 140 N.C. App. 45, 54, 535 S.E.2d 388, 395 (2000) ("[M]utuality of parties is no longer required when invoking either offensive or defensive collateral estoppel . . . .").

We need not resolve the mutuality issue here. Even if privity is not a requirement of collateral estoppel, the trial court erroneously applied the doctrine because of the different burdens of proof used in custody and neglect hearings. As Respondent-Mother points out and the Guardian *ad Litem* concedes, "case law is well[ ]settled that collateral estoppel cannot apply where the proceedings involve a different burden of proof." *See, e.g.*, *State v. Safrit*, 154 N.C. App. 727, 729, 572 S.E.2d 863, 865 (2002) ("It is clear that the difference in the relative burdens of proof in the criminal and civil actions precludes the application of the doctrine of collateral estoppel.") (citations and internal quotation marks omitted), *disc. review denied*, 357 N.C. 65, 579 S.E.2d 571 (2003). YFS's unsupported assertion that "civil actions intertwined around the best interest[s] of the juveniles" are somehow exempt from this precept is without merit.

Here, the burden of proof in the custody action was preponderance of the evidence. N.C. Gen. Stat. § 50-13.5(a) (2013) ("The procedure in actions for custody and support of minor children shall be as in civil actions . . . ."); *McCorkle v. Beatty*, 225 N.C. 178, 181, 33 S.E.2d 753, 755 (1945) ("Ordinarily, in civil matters, the burden of the issue is required to be carried only by the preponderance or greater weight of the evidence . . . .") (citations omitted). The standard of proof for an adjudicatory order entered on a petition alleging abuse, neglect, or dependency in a juvenile matter, however, is "clear and convincing evidence." N.C. Gen. Stat. § 7B-805 (2013); *In re C.B.*, 180 N.C. App. 221, 222, 636 S.E.2d 336, 337 (2006) (citation omitted), *affirmed per curiam*, 361 N.C. 345, 643 S.E.2d 587 (2007). Therefore, we hold that the trial court erred by applying the doctrine of collateral estoppel in this case to bar Respondent-Mother's questions because the neglect hearing was held pursuant to a different burden of proof. *See Safrit*, 154 N.C. App. at 729, 572 S.E.2d at 865.

Nevertheless, the Guardian *ad Litem* and YFS contend that such error was harmless. In support of this point, the Guardian *ad Litem* notes that "the trial court . . . properly found Karen to be neglected and dependent and the issue as to the neglect of Elliot and Katie is now moot." In addition, YFS points out that the trial court received "other items" into evidence beyond the testimony that was barred on grounds

of collateral estoppel. Specifically, YFS points out that the court properly considered the father's mediated agreement, the father's testimony, testimony of the YFS social worker, and the Respondent-Mother's own evidence in determining that Katie and Elliot were neglected and that Karen was both neglected and dependent. We are unpersuaded.

When the appellant in a civil case is seeking a new trial pursuant to prejudicial error, as here, the appealing party must "enable the Court to see that [s]he was prejudiced and that a different result would have likely ensued had the error not occurred." *Hasty v. Turner*, 53 N.C. App. 746, 750, 281 S.E.2d 728, 730 (1981). Respondent-Mother argues on appeal that she was prejudiced by the trial court's erroneous application of the collateral estoppel rule in this case because

> the trial court sustained objections to questions asked by [Respondent-Mother] . . . to the point that the court limited the evidence to those orders in the [c]ustody [a]ction. The court did not allow any questioning of the allegations in the petition to the extent that they mirrored or related to the findings of fact made in orders in the [c]ustody [a]ction.

This comports with our reading of the transcript. The trial court's erroneous application of the collateral estoppel rule made it impossible for Respondent-Mother to effectively contest the allegations made in the petition under the higher, clear and convincing evidence standard.[4] For this reason, we cannot conclude that, if Respondent-Mother had been given the opportunity to contest *all* of the allegations made in the petition, a different result might not have ensued. Therefore, we reverse the trial court's order and remand for further proceedings consistent with this opinion.[5]

REVERSED and REMANDED.

Judges CALABRIA and ELMORE concur.

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4. The Guardian *ad litem* asserts that the trial court's order was nonetheless correct because it is permissible to take judicial notice of findings of fact made in a previous order, which was decided under a different, lower standard of review, citing *In re J.B.*, 172 N.C. App. 1, 16, 616 S.E.2d 264, 273 (2005) [hereinafter *J.B.*]. This is incorrect. In *J.B.* we held that a trial court may take judicial notice of "prior disposition orders" even though such orders were based on a lower evidentiary standard. *Id.* Taking judicial notice of the existence of an order or the disposition in that order is not the same thing as taking judicial notice of each of the facts resolved in that order. Here, the court did the latter.

5. Because we resolve this case on collateral estoppel grounds, we need not address Respondent-Mother's second, alternative argument.

LAWYERS MUTUAL LIABILITY INSURANCE COMPANY OF NORTH CAROLINA, PLAINTIFF

v.

SUE E. MAKO; R. SCOTT GIRDWOOD; AND MAKO & ASSOCIATES, P.A., DEFENDANTS

No. COA13-691

Filed 1 April 2014

Insurance—interpretation of policy—term not ambiguous—cashier's check treated as traditional check

The trial court did not err in a declaratory relief action by granting summary judgment in favor of plaintiff insurer. The term "irrevocably credited" was not ambiguous in the insurance policy as, pursuant to N.C.G.S. § 25-3-104(f), a cashier's check is treated the same as a traditional check. Therefore, the insurance policy would not have protected defendants unless defendants had deposited the cashier's check and waited until the provisional settlement period had finally elapsed.

Appeal by defendants from order entered 18 December 2012 by Judge Lucy N. Inman in Wake County Superior Court. Heard in the Court of Appeals 5 November 2013.

Poyner Spruill LLP, by T. Richard Kane and Andrew H. Erteschik, for plaintiff-appellee.

Girdwood & Williams, PLLC, by Benjamin D. Williams, for defendant-appellants.

BRYANT, Judge.

As our General Statutes hold that a cashier's check is to be treated in the same fashion as a traditional check, a cashier's check must undergo a provisional settlement period before it can be deemed irrevocably credited by the payor bank. Where there is no issue as to any material fact regarding our statutory language concerning the processing of a cashier's check, summary judgment is appropriate.

Defendants Sue E. Mako; R. Scott Girdwood; and Mako & Associates, P.A. ("defendants") had a professional liability insurance policy ("the policy") with plaintiff Lawyers Mutual Liability Insurance Company ("Lawyers Mutual") for the period of 7 August 2011 through 7 August 2012. On 17 June 2011, defendants received an email from a potential

client, Oliver Burkeman ("Burkeman"). Burkeman contacted defendants seeking assistance in collecting $350,000.00 allegedly owed him by his former employer, Crest Iron and Steel; Burkeman claimed the money was part of a workers' compensation claim settlement.

On 23 June 2011, Burkeman sent a signed Fee Agreement to defendants, and defendants agreed to represent Burkeman in collecting his settlement money. Defendants would assess Burkeman a contingent fee of 20% of any amount obtained.

On 11 July 2011, defendants received an initial check for $175,000.00 from Crest Iron and Steel in partial payment of the amount purportedly owed to Burkeman. Defendants deposited the check into their trust account on 12 July 2011. Although defendants had a policy of holding funds for ten days prior to distribution, the policy was not enforced and distribution of the funds was authorized that same day. Burkeman was to collect $140,000.00 after defendants' contingent fee of $35,000.00 had been deducted from the $175,000.00 check. Defendants attempted to wire $140,000.00 to a bank account in Japan per Burkeman's instructions. However, due to an error in account information, the wire was unsuccessful and defendants could not collect their contingent fee.[1]

On 14 July 2011, defendants received a second check for $175,000.00 from Crest Iron and Steel in partial payment of the amount purportedly owed to Burkeman. On 15 July 2011, defendants deposited the second check and, again not abiding by their policy of holding funds for ten days, immediately wired $140,000.00 to the Japanese bank account. Defendants collected from the second check a $35,000.00 contingent fee which was deposited to defendants' trust account. Also on 15 July 2011, defendants were notified by RBC Bank that the first of the two checks was being returned unpaid. On 18 July 2011, RBC Bank notified defendants that the second check was also being returned unpaid. Both checks were determined to be fraudulent. As a result, defendants suffered a total loss of $175,000.00 from their client trust account.

On 1 November 2011, defendants filed a claim with Lawyers Mutual to recover $175,000.00 in funds lost as a result of the fraud. Lawyers Mutual filed a complaint for declaratory relief on 2 November 2011. On

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1. Defendants charged Burkeman a 20% contingent fee for any amount recovered; as such, defendants' contingent fee for assisting Burkeman with the first purported settlement check of $175,000.00 was $35,000.00. Defendants would likewise assess a contingent fee of $35,000.00 for assisting Burkeman in collecting the second purported settlement check of $175,000.00.

12 December 2011, Lawyers Mutual filed a motion for summary judgment but withdrew that motion on 21 December 2011. Lawyers Mutual then filed a motion for judgment on the pleadings that same day, but the motion was not heard. Defendants filed a motion for summary judgment on 23 December 2011, which was denied by the trial court on 3 April 2012.

On 30 May 2012, Lawyers Mutual filed an amended complaint for declaratory relief. Lawyers Mutual then filed for summary judgment on 15 October 2012. On 18 December 2012, the trial court granted Lawyers Mutual's motion for summary judgment determining in relevant part that: "It is undisputed that the funds at issue in this action were lost at a time when the deposit had not yet 'cleared' Defendants' trust account at the depositary bank. The court concludes that the phrase 'irrevocably credited' in the insurance policy precludes coverage of Defendants' claim of loss." Defendants appeal.

On appeal, defendants argue that the trial court erred in granting Lawyers Mutual's motion for summary judgment. We disagree.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2013). Thus, this Court must "determine, on the basis of the materials presented to the trial court, whether there is a genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law." *Coastal Plains Utils., Inc. v. New Hanover Cnty.*, 166 N.C. App. 333, 340, 601 S.E.2d 915, 920 (2004) (citation omitted). We review the granting of summary judgment *de novo*. *Va. Elec. & Power Co. v. Tillett*, 80 N.C. App. 383, 385, 343 S.E.2d 188, 190-91 (1986).

Defendants contend that the trial court erred in granting summary judgment to Lawyers Mutual because, under Provision I., Section (r) of their insurance policy with Lawyers Mutual, the term "irrevocably credited" is ambiguous. Specifically, defendants argue that they understood "irrevocably credited" to mean that the policy would cover losses involving forged cashier's checks because they assumed that a cashier's check is, like cash, irrevocably credited upon deposit. Defendants' insurance policy provides in part that:

> I. Exclusions . . . [T]his policy does not afford to any **Insured** any coverage or benefits whatsoever,

> including, but not limited to, any right to any defense, with respect to:
>
> . . .
>
> (r) any **claim**, or any theory of liability asserted in a **suit**, based in whole or in any part upon disbursement by any **Insured**, or any employee or agent of any **Insured**, of funds, checks or other similar instruments deposited to a trust, escrow or other similar account unless such deposit is irrevocably credited to such account[.]

Pursuant to N.C. Gen. Stat. § 25-3-104(f), " 'Check' means (i) a draft, other than a documentary draft, payable on demand and drawn on a bank or (ii) a cashier's check or teller's check." N.C.G.S. § 25-3-104(f) (2013); *Thompson v. First Citizens Bank & Trust Co.*, 151 N.C. App. 704, 707, 567 S.E.2d 184, 187 (2002) ("Negotiable instruments, also called simply "instruments," may include, *e.g.*, a personal check, cashier's check, traveler's check, or CD [pursuant to] N.C.G.S. § 25-3-104."). A settlement agreement to pay a negotiable instrument can be either provisional or final. N.C. Gen. Stat. § 25-4-104(11) (2013). A negotiable instrument may also be referred to as an "item." *Id.* § 25-4-104(9).

> An item is finally paid by a payor bank when the bank has first done any of the following:
>
> (1) Paid the item in cash;
>
> (2) Settled for the item without having a right to revoke the settlement under statute, clearing-house rule, or agreement; or
>
> (3) Made a provisional settlement for the item and failed to revoke the settlement in the time and manner permitted by statute, clearing-house rule, or agreement.

Id. § 25-4-213(a). A payor bank may revoke a provisional settlement prior to making final payment and before its midnight deadline by returning the item. *Id.* § 25-4-301(a).

Defendants argue that "irrevocably credited" is ambiguous because a cashier's check differs from a traditional check. Defendants further argue that it was their understanding that a cashier's check was as good as cash. Defendants' argument is without merit, as pursuant to N.C.G.S. § 25-3-104(f), a cashier's check is treated the same as a traditional check. A traditional check cannot be deemed fully credited until

its provisional settlement period has elapsed without action by the bank to reject the check; the same is true for a cashier's check. Therefore, the provisional settlement period that accompanies traditional checks must also apply to cashier's checks. As such, Lawyers Mutual's policy's use of "irrevocably credited" refers to the statutory provisions which govern a check's acceptance or rejection during its provisional settlement period. Accordingly, Provision I., Section (r) of Lawyers Mutual's insurance policy would not protect defendants unless defendants deposited a check and waited until the provisional settlement period had finally elapsed to ensure that the check had been accepted and fully credited by the payor bank, regardless of whether it was a traditional check or cashier's check. Therefore, the trial court did not err in granting Lawyers Mutual's motion for summary judgment.

Affirmed.

Judges McGEE and STROUD concur

MARK R. PATMORE; MERCIA RESIDENTIAL PROPERTIES, LLC; WILLIAM T. GARTLAND; AND 318 BROOKS LLC, PLAINTIFFS
v.
TOWN OF CHAPEL HILL NORTH CAROLINA, DEFENDANT

No. 13-1049

Filed 1 April 2014

1. Zoning—parking ordinance—cars at rental property—substantive process—not violated

A zoning amendment that limited the number of parked cars at rental properties did not violate substantive due process where the increased effectiveness of this enforcement mechanism was rationally related to the goal of decreasing over-occupancy in the Northside Neighborhood Conservation District.

2. Zoning—parking at rental properties and public areas—fundamentally different

The doctrine of *expressio unius est exclusio alterius* was not applicable to the relationship between N.C.G.S. § 160A-301 (which concerns a city's authority to regulate parking in public areas) and a zoning amendment limiting parking at rental properties. Regulation

of parking in public vehicular areas is fundamentally different from zoning restrictions on the number of cars that may be parked on a private lot by tenants of a house.

3. Zoning—parking—statutes addressing different subjects

A town zoning amendment addressing the number of vehicles that may be parked on a private lot did not address ordinary parking in public vehicular areas which was governed N.C.G.S. § 160A-301. Therefore, N.C.G.S. § 160A-301 is not a more specific statute than N.C.G.S. § 160A-4 (broad construction of municipal powers), but simply addressed a different subject.

4. Zoning—parking regulation—not controlled by Lanvale

The decision of the North Carolina Supreme Court in *Lanvale Props., LLC v. Cnty. of Cabarrus*, 366 N.C. 142, did not address a local government's authority to enact a *bona fide* zoning ordinance or the requirements of a valid zoning regulation and did not control this case.

Appeal by plaintiffs from order entered 4 June 2013 by Judge W. Osmond Smith, III, in Orange County Superior Court. Heard in the Court of Appeals 4 February 2014.

The Brough Law Firm, by G. Nicholas Herman, for plaintiff-appellants.

Parker Poe Adams & Bernstein, LLP, by Anthony Fox, and Benjamin R. Sullivan, for defendant-appellee.

STEELMAN, Judge.

Where defendant enforced a zoning amendment by citing the owners of rental properties rather than their tenants because it was a more effective method of enforcement, their enforcement against property owners was rationally related to the purpose of the zoning restriction and did not violate plaintiffs' right to substantive due process. N.C. Gen. Stat. § 160A-301 governs a municipality's authority to regulate parking in public vehicular areas, while the zoning amendment was a land use restriction intended to curb over-occupancy of rental properties by limiting the number of cars parked on a rental property. Because the zoning amendment and N.C. Gen. Stat. § 160A-301 do not address the same subject, the principle of *expressio unius est exclusio alterius* does not apply. *Lanvale Properties, LLC v. County of Cabarrus*, 366 N.C. 142,

731 S.E.2d 800, *reh'g denied*, 366 N.C. 416, 733 S.E.2d 156 (2012), held that an ordinance was not a zoning ordinance, and did not change the law governing the requirements for a valid zoning ordinance.

I. Factual and Procedural Background

Defendant Town of Chapel Hill enacted a zoning ordinance as part of its Land Use Management Ordinance. One of the zoning districts created is the Northside Neighborhood Conservation District (NNC district), a residential neighborhood located near the campus of UNC-Chapel Hill. Special design standards apply to development in the NNC district and govern such things as maximum building height and the bedroom to bathroom ratio of rental houses. Despite the standards in the zoning ordinance, over-occupancy, or rental to a greater number of tenants than bedrooms, was a "significant problem" in the NNC district for several years, and was associated with a number of problems, including parking and traffic congestion, excess garbage, and "significantly higher complaints of violations" of town regulations than in other town residential neighborhoods.

Defendant's planning department determined that although "it is not a perfect measure, the number of vehicles parked on a residential lot in the [NNC] is a reasonable approximation of how many people are living at the property." After conducting a public hearing to address "the community's concerns about student rental," the Town Council adopted an amendment to the zoning ordinance that limited the number of cars that may be parked on a residential lot in the NNC district to four cars. The amendment was adopted on 9 January 2012 and took effect on 1 September 2012. The amendment is applied to both owner-occupied and rental properties. If a property is rented, the amendment is enforced by citing the owner of the property for violations, rather than the tenants. Plaintiffs are property owners who rent houses in the NNC district and were cited for violation of the amendment. Plaintiffs do not dispute that their properties were in violation of the ordinance.

On 27 November 2012 plaintiffs filed a complaint and an application for declaratory judgment and permanent injunction. Plaintiffs alleged that defendant enforced the zoning amendment "solely against the owner(s) of record of the real properties subject to the Zoning Regulation" "without any determination as to the reason for the parking of those cars" and that plaintiffs were not "in any position to control the number of cars parked" on the properties that they owned and rented. Plaintiffs asserted that the zoning amendment was "unlawful, *ultra vires*, and void" and that "its enforcement and application is unreasonable, arbitrary and capricious, and violates Article I § 19 of

the North Carolina Constitution and substantive due process[.]" On 7 December 2012 plaintiffs filed an amended complaint seeking either "a judgment declaring the Zoning Regulation unlawful, void and unenforceable, and permanently enjoin[ing] the enforcement of the Zoning Regulation" or an injunction "permanently enjoin[ing] the enforcement of the Zoning Regulation against property owners who have no knowledge of and/or have taken no action to create or maintain any violation of the Zoning Regulation[.]" In its answer to the amended complaint, defendant admitted citing plaintiffs for violation of the zoning amendment, but denied plaintiffs' allegations concerning their ability to control the number of cars on their properties, and moved for dismissal of plaintiffs' complaint under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

Defendant and plaintiffs filed cross-motions for summary judgment on 22 and 28 May 2013, respectively. The parties' summary judgment motions were heard by the trial court on 3 June 2013, and on 4 June 2013 the trial court entered an order granting summary judgment in favor of defendant.

Plaintiffs appeal.

II. Standard of Review

Under N.C. Gen. Stat. § 1A-1, Rule 56(a), summary judgment is properly entered "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." "In a motion for summary judgment, the evidence presented to the trial court must be admissible at trial, N.C.G.S. § 1A-1, Rule 56(e) (2003), and must be viewed in a light most favorable to the non-moving party." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 467, 597 S.E.2d 674, 692 (2004) (citing *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975)). "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 lower tribunal." *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (quoting *In re Appeal of The Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

III. N.C. Constitution Art. I § 19

[1] In their first argument, plaintiffs contend that the "enforcement and application" of the zoning amendment "against Plaintiffs violates

substantive due process under Article I, Section 19 of the North Carolina Constitution, the Law of the Land Clause" "because the ordinance is enforced exclusively based on the existence of more than four parked cars on a lot without any determination as to the reason for the parking of those cars." We disagree.

N. C. Constitution Art. I, § 19 provides that:

> No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

"The term 'law of the land' as used in Article I, Section 19, of the Constitution of North Carolina, is synonymous with 'due process of law' as used in the Fourteenth Amendment to the Federal Constitution." *In re Moore*, 289 N.C. 95, 98, 221 S.E.2d 307, 309 (1976) (citing *Surplus Store, Inc. v. Hunter*, 257 N.C. 206, 125 S.E. 2d 764 (1962)).

"Due process has come to provide two types of protection for individuals against improper governmental action, substantive and procedural due process." *State v. Bryant*, 359 N.C. 554, 563-64, 614 S.E.2d 479, 485 (2005) (citing *State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 282 (1998). " 'The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property.' " *Johnston v. State*, __ N.C. App. __, __, 735 S.E.2d 859, 875, (2012) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 569, 92 S. Ct. 2701, 2705, 33 L. Ed. 2d 548, 556 (1972)), *aff'd* __ N.C. __, 749 S.E.2d 278 (2013). In this case, plaintiffs do not allege the deprivation of a constitutionally protected interest. Rather, plaintiffs assert a violation of their right to substantive due process.

"Substantive due process is a guaranty against arbitrary legislation, demanding that the law be substantially related to the valid object sought to be obtained." *Lowe v. Tarble*, 313 N.C. 460, 461, 329 S.E.2d 648, 650 (1985) (citing *State v. Joyner*, 286 N.C. 366, 211 S.E. 2d 320 (1975)). "Similar to the rational basis test for equal protection challenges, 'as long as there could be some rational basis for enacting [the statute at issue], this Court may not invoke [principles of due process] to disturb the statute.' " *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 181, 594 S.E.2d 1, 15 (2004) (quoting *Lowe*, 313 N.C. at 462, 329 S.E.2d at 650) (alterations in

Rhyne). "If the challenging party cannot prove that the statute bears no rational relationship to any legitimate government interest, the statute is valid." *Liebes v. Guilford Cnty. Dep't of Pub. Health*, 213 N.C. App. 426, 429, 724 S.E.2d 70, 73 (citing *State v. Fowler*, 197 N.C. App. 1, 26, 676 S.E.2d 523, 544 (2009), *disc. review denied*, 364 N.C. 129, 696 S.E.2d 695 (2010)), *disc. review denied*, 365 N.C. 361, 718 S.E.2d 396 (2011). Plaintiffs concede that their complaint "does not challenge the ordinance on any substantive due process ground that the ordinance was enacted without any conceivable rational relationship to a legitimate governmental objective." "Instead, Plaintiffs challenge the ordinance on the ground" that "enforcement of the ordinance solely against non-culpable landowner-lessors is arbitrary and capricious in violation of [Art.] I, [§] 19 of the North Carolina Constitution[.]"

Although plaintiffs characterize themselves as "non-culpable" and assert that they have no ability to control the number of cars on their rental properties, they failed to submit any affidavits or other evidence addressing this issue. Furthermore, plaintiffs proffered leases establishing that they have a number of mechanisms for enforcing the terms of such agreements, including eviction, indemnification, and security deposits. Therefore, we do not consider plaintiffs' allegations regarding their "innocence" or their inability to enforce the terms of the leases executed with their tenants, as these assertions were not supported by affidavits before the trial court. Moreover, plaintiffs have not challenged defendant's determination that the number of cars on a lot generally indicates the number of residents, which we accept as accurate for purposes of this appeal.

Plaintiffs do not allege that enforcement of the zoning amendment implicated a fundamental right, protected class, or denial of their right to equal protection. Instead, plaintiffs assert, without citation to authority, that "the enforcement of the Town's ordinance solely against owners or lessors of property, based solely on the existence of more than four cars on a lot and irrespective of the actual reasons for and person(s) who caused or permitted the violation, is entirely irrational, arbitrary and capricious." However, as discussed above, the zoning amendment was enacted to address the problem of over-occupancy of rental houses, and thereby reduce the problems associated with over-occupancy. Plaintiffs do not dispute that over-occupancy leads to other problems, or that decreasing the over-occupancy of rental properties is a valid goal of a zoning ordinance. In addition, in support of their summary judgment motion, defendant submitted the affidavit of Judy Johnson, defendant's Senior Planner in the town's Planning Department, which averred that:

> When the parking regulation at issue is violated with respect to a [rental] property . . . the Town cites the Property's owner for the violation rather than the tenants. Trying to cite tenants and enforce the parking regulation directly against them would be burdensome, impractical, and ineffective. Based on my years of experience with enforcing zoning regulations, compared to property owners, tenants tend to be more transient and difficult to locate, and many District tenants are students who are not permanent residents of the Town. If the Town issued citations to tenants, it often would be difficult to locate those tenants once they moved out of the District, and it would be administratively difficult to collect fines from such tenants if they no longer lived in Town or even in the State of North Carolina. By comparison, someone who owns property in the District will generally be easier to locate for purposes of issuing citations and enforcing zoning regulations. And, because a property owner will have a lease with his or [her] tenants, the owner can use his authority under the lease to help ensure that tenants comply with the parking regulations. As a result, enforcing the parking regulation against property owners instead of against tenants makes the regulation more effective and reduces the Town's administrative burdens and costs in enforcing the regulation.

(emphasis added). Defendant also submitted the affidavit of Chelsea Laws, defendant's Senior Code Enforcement Officer, who averred that:

> Based on my experience as a Senior Code Enforcement Officer for the Town, enforcing the new parking regulation against property owners is less burdensome and difficult, and more effective, than it would be to enforce the regulation against tenants. Tenants tend to change their places of residence frequently. This is especially true of students, who represent a significant portion of the tenants in the NNC District. In contrast with tenants, owners of District properties . . . are easier to locate. This make it less burdensome and more effective to enforce zoning regulations and penalties against the owners rather than against tenants, as the tenants may be hard to locate and may move away without paying any penalties assessed against them for violating Town regulations.

(emphasis added). These affidavits, which were tendered by defendant's employees with experience in enforcing zoning regulations, state that enforcement of the zoning amendment against property owners was more effective than trying to track down transient student tenants. We hold that the increased effectiveness of this enforcement mechanism is rationally related to the goal of decreasing over-occupancy in the NNC district. "On its face, the practice of more avidly enforcing the Code against owners of property in the City than against their relatively transient tenants appears to be reasonably calculated to efficiently and effectively secure compliance with the Housing Code." *Cunningham v. City of E. Lansing*, 2001 U.S. Dist. LEXIS 15967, *7-8 (W.D. Mich. Sept. 28, 2001).

Plaintiffs do not dispute that it is more effective to enforce the zoning amendment against property owners than their tenants, but simply argue that it is wrong to impose liability on property owners for the number of cars parked on a rental property without proof that the landlord had "knowledge of the violation or any ability to prevent or correct the violation." Plaintiffs' argument is that an alternative enforcement plan might have been fairer to them. However, "[a] duly adopted zoning ordinance is presumed to be valid. The burden is on the complaining party to show it to be invalid. 'When the most that can be said against such ordinances is that whether it was an unreasonable, arbitrary or unequal exercise of power is fairly debatable, the courts will not interfere.' " *Graham v. City of Raleigh*, 55 N.C. App. 107, 110, 284 S.E.2d 742, 744 (1981) (quoting *In re Appeal of Parker*, 214 N.C. 51, 55, 197 S.E. 706, 709 (1938)). We conclude that the zoning amendment did not violate plaintiffs' rights to substantive due process of law. This argument is without merit.

III. N.C. Gen. Stat. § 160A-301

[2] In their next argument, plaintiffs contend that the zoning amendment "is invalid as being unauthorized under N.C. Gen. Stat. § 160A-301." We disagree.

N.C. Gen. Stat. § 160A-301 is part of Chapter 160A Article 15, "Streets, Traffic and Parking," and provides that a city "may by ordinance regulate, restrict, and prohibit the parking of vehicles on the public streets, alleys, and bridges within the city." The statute addresses a city's authority to "regulate the use of lots, garages, or other facilities owned or leased by the city and designated for use by the public as parking facilities," or to "regulate the stopping, standing, or parking of vehicles in specified

areas of any parking areas or driveways of a hospital, shopping center, apartment house, condominium complex, or commercial office complex, or any other privately owned public vehicular area[.]" Plaintiffs contend that the fact that N.C. Gen. Stat. § 160A-301 only addresses a city's authority to regulate parking in public vehicular areas represents a legislative intent to prohibit municipalities from regulating parking on private property, and that "the doctrine of *expressio unius est exclusion alterius* forecloses" any argument that defendant had the authority to enact the zoning amendment. We do not agree.

"Under the doctrine of *expressio unius est exclusio alterius*, when a statute lists the situations to which it applies, it implies the exclusion of situations not contained in the list." *Evans v. Diaz*, 333 N.C. 774, 779-80, 430 S.E.2d 244, 247 (1993) (citations omitted). However, "the canon *expressio unius est exclusio alterius* does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168, 123 S. Ct. 748, 760, 154 L. Ed. 2d 653, 671 (2003) (quoting *United States v. Vonn*, 535 U.S. 55, 65, 152 L. Ed. 2d 90, 122 S. Ct. 1043 (2002).

"The foremost task in statutory interpretation is 'to determine legislative intent while giving the language of the statute its natural and ordinary meaning unless the context requires otherwise.' " *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 518, 597 S.E.2d 717, 722 (2004) (quoting *Spruill v. Lake Phelps Vol. Fire Dep't, Inc.*, 351 N.C. 318, 320, 523 S.E.2d 672, 674 (2000)) (internal quotation omitted). In this regard, we note that the ordinary meaning of "park" is to "put or leave (a vehicle) for a time in a certain location." *The American Heritage College Dictionary* 993 (3rd. ed. 1997). N.C. Gen. Stat. § 160A-301 clearly deals with regulation of parking in this ordinary sense of the word.

However, the zoning amendment was "drafted to help address the [NNC] neighborhood's over-occupancy problem directly." Defendant's planning department found that "the number of vehicles parked on a residential lot" provided a "reasonable approximation of how many people are living at the property" and determined that "[l]imiting the number of parked cars therefore helps limit over-occupancy" without "trying to count and limit the number of occupants directly." We conclude that, although the parties have referred to the zoning amendment as a "parking" regulation, the context establishes that the amendment was intended to regulate the ratio of bedrooms to tenants in rental

properties in the NNC District by restricting the number of vehicles parked in the yard.[1]

We hold that regulation of parking in public vehicular areas is fundamentally different from zoning restrictions on the number of cars that may be parked on a private lot by tenants of a house, and that there is no basis for assuming that our General Assembly intended legislation allowing a city to regulate parking in public vehicular areas to diminish a town's authority to adopt land use zoning regulations that deal with population density or over-occupancy of rental homes. The fact that defendant chose to restrict the number of cars parked on a lawn as a rough proxy for the number of tenants does not transform this into a "parking" ordinance within the meaning of N.C. Gen. Stat. § 160A-301. We hold that the doctrine of *expressio unius est exclusio alterius* is not applicable to the relationship between N.C. Gen. Stat. § 160A-301 and the zoning amendment.

[3] For similar reasons, we reject plaintiffs' argument that N.C. Gen. Stat. § 160A-301 is a more "specific" statute that renders the provisions of N.C. Gen. Stat. § 160A-4 inapplicable. Defendant cites N.C. Gen. Stat. § 160A-4, "Broad Construction," which provides that:

> It is the policy of the General Assembly that the cities of this State should have adequate authority to execute the powers, duties, privileges, and immunities conferred upon them by law. To this end, the provisions of this Chapter and of city charters shall be broadly construed and grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect[.]

Defendant contends that N.C. Gen. Stat. § 160A-4 should be applied to N.C. Gen. Stat. § 160A-383, which provides in relevant part that:

> Zoning regulations shall be designed to promote the public health, safety, and general welfare. To that end, the regulations may address, among other things, the

1. The zoning amendment was enacted to increase compliance with the zoning ordinance's restrictions on over-occupancy of rental properties, by using the number of cars in a yard as an indication of the number of tenants. Plaintiffs have not challenged the general accuracy of this measure, or asserted that in any specific instance the house where excess cars were parked was not over-occupied. Given this factual scenario, we are not called upon to express an opinion concerning whether it would be a valid defense to a citation that the number of cars on a property did not indicate the number of tenants, but instead were cars belonging to temporary visitors.

> following public purposes: to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to lessen congestion in the streets; to secure safety from fire, panic, and dangers; and to facilitate the efficient and adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. . . .

Defendant asserts that its zoning amendment was "reasonably necessary" to achieve its statutorily approved purpose of regulating population density and traffic congestion. Plaintiffs do not dispute this contention, but argue that because N.C. Gen. Stat. § 160A-301 deals specifically with parking, the general rule stated in N.C. Gen. Stat. § 160A-4 is not applicable, based on the longstanding "principle 'that where there are two opposing acts or provisions, one of which is special and particular and certainly includes the matter in question, and the other general, which, if standing alone, would include the same matter, and thus conflict with the special act or provision, the special must be taken as intended to constitute an exception to the general act.' " *Blair v. Commissioners*, 187 N.C. 488, 489-90, 122 S.E. 298, 299 (1924) (quoting *State v. Johnson*, 170 N.C. 685, 690, 86 S.E. 788, 791 (1915) (other citation omitted). "[T]o the extent of any necessary repugnancy between them, the special statute . . . will prevail over the general statute." *Krauss v. Wayne Cty. Dep't of Soc. Servs.*, 347 N.C. 371, 378, 493 S.E.2d 428, 433 (1997) (internal quotation omitted). However, we have held that the zoning amendment, which addresses the number of vehicles that may be parked on a private lot, does not address the same subject as N.C. Gen. Stat. § 160A-301, which governs ordinary parking on public vehicular areas. Therefore, N.C. Gen. Stat. § 160A-301 is not a more "specific" statute, but simply addresses a different subject.

IV. *Lanvale Properties, LLC v. County of Cabarrus*

[4] In their next argument, plaintiffs contend that the decision of our Supreme Court in *Lanvale Properties, LLC v. County of Cabarrus*, 366 N.C. 142, 731 S.E.2d 800 (2012), "establishes that the instant parking regulation is not authorized by the general zoning power." We disagree.

Lanvale arose from Cabarrus County's enactment of an "adequate public facilities ordinance ('APFO') that effectively conditions approval of new residential construction projects on developers paying a fee to subsidize new school construction to prevent overcrowding in the County's public schools." *Lanvale*, 366 N.C. at 143, 731 S.E.2d at 803. Defendant appealed from the trial court's entry of summary judgment

in favor of plaintiff-developer and from its ruling that defendant did not have the authority under zoning or subdivision statutes to enact an APFO. This Court affirmed the trial court, and defendant appealed to our Supreme Court, arguing that it was authorized under its general zoning power to adopt the APFO. The Supreme Court first addressed the "distinction between zoning ordinances and subdivision ordinances[,]" and observed that "the primary purpose of county zoning ordinances is to specify the types of land use activities that are permitted, and prohibited, within particular zoning districts." *Lanvale* at 157-58, 731 S.E.2d at 811-12 (citing *Chrismon v. Guilford County*, 322 N.C. 611, 617, 370 S.E.2d 579, 583 (1988)). Based upon its review of the characteristics of zoning regulations, the Court held that "the APFO does not define the specific land uses that are permitted, or prohibited, within a particular zoning district" and that "the County's APFO cannot be classified as a zoning ordinance because . . . [it] simply does not 'zone.' " *Id.* at 160, 731 S.E.2d at 813. Because the Supreme Court held in *Lanvale* that the ordinance at issue was not a zoning regulation, the Court did not address a local government's authority to enact a *bona fide* zoning ordinance or the requirements of a valid zoning regulation. We conclude that plaintiffs are not entitled to relief on the basis of the holding in *Lanvale*.

For the reasons discussed above, we conclude that the zoning amendment did not violate plaintiffs' right to substantive due process, and was not barred by N.C. Gen. Stat. § 160A-301 or the holding in *Lanvale*, and that the trial court's summary judgment order should be affirmed.

AFFIRMED.

Judges McGEE and ERVIN concur.

THE ROYAL OAK CONCERNED CITIZENS ASSOCIATION, MARK HARDY, CURTIS MCMILLIAN AND DENNIS MCMILLIAN, PLAINTIFFS
v.
BRUNSWICK COUNTY, DEFENDANT

No. COA13-884

Filed 1 April 2014

THE ROYAL OAK CONCERNED CITIZENS ASSOCIATION, JAMES HARDY, CURTIS MCMILLIAN AND DENNIS MCMILLIAN, PLAINTIFFS
v.
BRUNSWICK COUNTY, DEFENDANT

No. COA13-885

Filed 1 April 2014

Appeal and Error—interlocutory orders and appeals—no substantial right affected—objection to privileged information—deposition

Defendant county's appeal from the trial court's interlocutory orders compelling defendant to produce the county manager for deposition did not affect a substantial right and was dismissed. The orders did not preclude defendant from making good-faith objections to privileged information at the county manager's deposition.

Appeals by defendant from orders entered 5 March and 6 May 2013 by Judge Mary Ann Tally in Brunswick County Superior Court. Heard in the Court of Appeals 9 January 2014.

UNC Center for Civil Rights, by Elizabeth Haddix and Bethan Eynon, Higgins & Owens, PLLC, by Raymond E. Owens, Jr., and Fair Housing Project, Legal Aid of North Carolina, by Jack Holtzman, for plaintiffs-appellees.

Womble Carlyle Sandridge & Rice, LLP, by Julie B. Bradburn, Jacqueline Terry Hughes, and Kristen Y. Riggs, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Brunswick County ("Defendant") appeals from interlocutory orders compelling former Brunswick County Manager Marty Lawing ("Mr. Lawing") to appear for deposition. Defendant contends that because the orders do not indicate that Mr. Lawing is entitled to assert legislative and/or quasi-judicial immunity, he has been denied a substantial right that warrants our immediate review. For the following reasons, we disagree and dismiss Defendant's appeals.

I. Factual & Procedural History

On 3 June 2011, The Royal Oak Concerned Citizens Association, Curtis McMillian, and Dennis McMillian (collectively, "Plaintiffs") began this action by filing a complaint in Brunswick County Superior Court.[1] Plaintiffs' complaint was amended multiple times. Plaintiffs' third amended complaint, operative here, alleges violations of the North Carolina Fair Housing Act, the Equal Protection Clause under Article I, Section 19 of the North Carolina Constitution, and N.C. Gen. Stat. § 153A-136(c). These causes of action stem from an alleged pattern and practice of racial discrimination by Defendant, culminating in Defendant's decision to rezone property in Plaintiffs' community to accommodate the expansion of an existing landfill. The complaint also seeks a declaration that Defendant's rezoning of the property was unlawful, invalid, and void.

During discovery, Plaintiffs noticed the depositions of Mr. Lawing and former Brunswick County Commissioner William Sue ("Mr. Sue"). Following Defendant's refusal to produce Mr. Lawing and Mr. Sue, Plaintiffs filed a motion to compel their depositions. Defendant responded by filing a motion for a protective order prohibiting the depositions on the grounds that Mr. Lawing and Mr. Sue have legislative and quasi-judicial immunity. Following a hearing on the matter, the trial court filed a written order dated 5 March 2013 allowing Plaintiffs' motion to compel. The order, in part, stated:

> The Court will compel Mr. Sue and Mr. Lawing to appear for depositions at a time that is mutually convenient for the parties and the attorneys but will set the following conditions upon the deposition of former County Commissioner William Sue:

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1. The case number assigned to this action was Brunswick County No. 11 CVS 1301. Plaintiff Mark Hardy originally filed a separate action, Brunswick County No. 12 CVS 1138, which was consolidated by the trial court with 11 CVS 1301. Hereafter, use of the moniker "Plaintiffs" includes Mark Hardy.

a. William Sue is entitled to assert a testimonial privilege.

b. The Plaintiffs are prohibited from inquiring as to Mr. Sue's intentions, motives, or thought processes with respect to any quasi-judicial or legislative matters clearly defined by North Carolina law as such.

The order contained no conditions with respect to Mr. Lawing's deposition. On 4 April 2013, Defendant filed notice of appeal from the order.[2]

Following Defendant's notice of appeal, Plaintiffs again noticed the deposition of Mr. Lawing and filed another motion to compel Mr. Lawing's deposition. By written order dated 6 May 2013, the trial court concluded that:

1. The March 5, 2013 order does not affect a substantial right of Defendant's that would injure Defendant if not corrected before appeal from final judgment, and thus the order is a non-appealable interlocutory order.

2. Therefore, a stay of this Court's March 5, 2013 order is not warranted and the trial court retains jurisdiction of this issue.

3. Defendant is again compelled to produce County Manager Marty Lawing.

On 30 May 2013, Defendant filed notice of appeal from this order as well.[3]

Following Defendant's second notice of appeal, Defendant filed a petition for writ of supersedeas and a motion for a temporary stay with this Court on 31 May 2013. By order entered 3 June 2013, we allowed the motion for a temporary stay. By order entered 18 June 2013, we allowed the petition for writ of supersedeas and stayed the 5 March and 6 May orders of the trial court pending the outcome of Defendant's appeals.

II. Jurisdiction

At the outset, we must determine whether this Court has jurisdiction to hear Defendant's interlocutory appeals. Defendant contends that

2. Defendant's appeal from the 5 March 2013 order is the subject of COA13-885.

3. Defendant's appeal from the 6 May 2013 order is the subject of COA13-884.

"[t]he trial court rejected out of hand that [Mr.] Lawing was entitled to assert any form of immunity, and testimonial privilege, at his deposition[,]" and that such denial is immediately appealable as affecting a substantial right. For the following reasons, we hold that the trial court's 5 March and 6 May 2013 orders do not preclude Defendant from making good-faith objections to privileged information at Mr. Lawing's deposition. Consequently, no substantial right has been affected and we dismiss Defendant's appeals as interlocutory.

"Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). Thus, because the trial court's orders compelling Mr. Lawing to testify did not dispose of the case below, Defendant's appeals are interlocutory in nature.

However, an "immediate appeal is available from an interlocutory order or judgment which affects a substantial right." *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (quotation marks omitted); *accord* N.C. Gen. Stat. §§ 1-277(a), 7A-27(d) (2013). Our Supreme Court has defined a "substantial right" as "a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a [person] is entitled to have preserved and protected by law: a material right." *Sharpe*, 351 N.C. at 162, 522 S.E.2d at 579 (quotation marks and citation omitted) (alteration in original).

"Admittedly the 'substantial right' test for appealability of interlocutory orders is more easily stated than applied. It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered." *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978). "Essentially a two-part test has developed—the right itself must be substantial and the deprivation of that substantial right must potentially work injury . . . if not corrected before appeal from final judgment." *Goldston*, 326 N.C. at 726, 392 S.E.2d at 736. "The burden is on the appellant to establish that a substantial right will be affected unless he is allowed immediate appeal from an interlocutory order." *Embler v. Embler*, 143 N.C. App. 162, 166, 545 S.E.2d 259, 262 (2001).

Here, Defendant contends that because the trial court's orders do not indicate that Mr. Lawing is entitled to assert legislative and/or quasi-judicial immunity, he has been denied a substantial right that warrants our immediate review. Defendant invites this Court to decide, as a general matter, that "any public official, [including a county manager,] is entitled to assert immunity and the accompanying testimonial privilege as to those actions which were taken in the sphere of legitimate legislative or quasi-judicial activity."

As an initial matter, we note that claims of immunity, including claims of legislative and quasi-judicial immunity, affect a substantial right for purposes of appellate review. *Cf. Farrell ex rel. Farrell v. Transylvania Cnty. Bd. of Educ.*, 199 N.C. App. 173, 176, 682 S.E.2d 224, 227 (2009) (stating that "claims of immunity affect a substantial right entitled to immediate appeal"). Moreover, we have held that individuals are "entitled to absolute legislative immunity for all actions taken in the sphere of legitimate legislative activity." *Northfield Dev. Co., Inc. v. City of Burlington*, 136 N.C. App. 272, 281, 523 S.E.2d 743, 749, *aff'd in part, review dismissed in part*, 352 N.C. 671, 535 S.E.2d 32 (2000) (quotation marks and citations omitted). Individuals are also "entitled to absolute quasi-judicial immunity for actions taken in the exercise of their judicial function." *Id.* "These immunities shield the individual from the consequences of the litigation results and provide a testimonial privilege." *Id.* at 282, 523 S.E.2d at 749. Thus, to the extent that Mr. Lawing, as a county manager, performed actions "in the sphere of legitimate legislative activity" or "in the exercise [of a] judicial function," we understand Defendant's desire to keep Mr. Lawing's intentions and motives with respect to such conduct privileged.

However, Defendant's contention that legislative and/or quasi-judicial immunity has been deprived in this case is premised on the assumption that the trial court's orders preclude Defendant from making good-faith objections based on privilege at Mr. Lawing's deposition. Indeed, at oral argument, counsel for Defendant indicated that the trial court's orders summarily deny Defendant the ability to claim legislative and/or quasi-judicial immunity during Mr. Lawing's deposition. We find no such exclusion in the trial court's orders or in the transcript of the motion hearing.

With respect to the trial court's written orders, there are no conclusions denying Mr. Lawing the ability to assert legislative and/or quasi-judicial immunity. While the trial court's 5 March 2013 order does explicitly conclude that Mr. Sue is entitled to legislative and/or

quasi-judicial immunity, such a conclusion does not necessarily deny the right to Mr. Lawing. Furthermore, the transcript of the motion hearing supports this interpretation of the trial court's orders. Specifically, after allowing the motion to compel, the trial court stated:

> If there is an objection at a deposition, it can be noted. And, again, it's my understanding of the rules that if the parties feel that they're at an impasse during the taking of the deposition, that there are provisions for the parties to go to the Court and ask for resolution of the specific issue[.]

Plainly, the trial court contemplated the possibility that Defendant could make good-faith objections based on legislative and/or quasi-judicial immunity during Mr. Lawing's deposition and that any impasse between the parties would then be decided by the trial court in the factual context in which it arises.

Furthermore, when discussing the contents of the written order, the trial court stated:

> I'm not comfortable signing an order that says that Mr. Lawing is entitled to the testimonial privilege, because I'm not sure if that's the law[.]

Thus, the trial court expressed reservation in deciding whether Mr. Lawing is entitled to legislative and/or quasi-judicial immunity. Given this reservation, it would be inconsistent to presume that the trial court was definitively precluding Mr. Lawing's entitlement to immunity in its written orders. Rather, the more consistent interpretation of the trial court's orders is that Defendant may object on behalf of Mr. Lawing if the information sought in Plaintiffs' questioning was generated either "in the sphere of legitimate legislative activity" or "in the exercise [of a] judicial function." *Id.* at 281, 523 S.E.2d at 749.

We therefore hold that the trial court's orders do not preclude Defendant from making objections based on privilege at Mr. Lawing's deposition if Defendant has a good-faith basis to believe that the information is protected by legislative or quasi-judicial immunity. Whether Mr. Lawing, as a county manager, actually performed actions "in the sphere of legitimate legislative activity" or "in the exercise [of a] judicial function" is not properly before us at this time. Once a specific question has been propounded by Plaintiffs to Mr. Lawing at the deposition, the trial court can properly decide whether the information sought is protected by privilege.

Moving forward, we note that if Defendant withholds information at Mr. Lawing's deposition that would otherwise be discoverable by claiming that the information is privileged, Defendant must "(i) expressly make the claim and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed, and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." N.C. R. Civ. P. 26(b)(5). Furthermore, if Mr. Lawing fails to answer a question at the deposition based on a claim of privilege, and the parties reach an impasse as to whether the claim of privilege applies, Plaintiffs may move for an order compelling an answer pursuant to N.C. R. Civ. P. 37(a).[4] However, "[i]f the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c)." N.C. R. Civ. P. 37(a)(2); *see also* N.C. R. Civ. P. 26(c) (providing that the protective order can, among other things, order "(i) that the discovery not be had; (ii) that the discovery may be had only on specified terms and conditions[; and] . . . (iv) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters").

Accordingly, because we hold that the trial court's orders do not preclude Defendant from making good-faith objections based on privilege at Mr. Lawing's deposition, Defendant has not been deprived of any right nor suffered injury warranting our immediate review.

III. Conclusion

For the foregoing reasons, we dismiss Defendant's appeals as interlocutory.

DISMISSED.

Judges STROUD and DILLON concur.

4. At the discretion of the trial court, telephoning the judge during the deposition may be an appropriate solution if a matter arises to which to the parties feel an immediate decision is required. North Carolina AIC Civil Procedure Pretrial 2 § 24:14 (1998).

STATE OF NORTH CAROLINA
v.
KENNETH EUGENE ALSTON, DEFENDANT

NO. COA13-429

Filed 1 April 2014

1. Appeal and Error—preservation of issues—failure to object at trial

By not objecting at trial to the trial court joining for trial defendant's charges of robbery with a dangerous weapon and possession of a firearm by a felon, defendant failed to preserve the issue for appellate review.

2. Constitutional Law—effective assistance of counsel—objection to joinder of charges at trial—no error—no deficient performance

Defendant did not receive ineffective assistance of counsel in a robbery with a dangerous weapon case where his trial counsel did not to object to the joinder for trial of defendant's charges of robbery with a dangerous weapon and possession of a firearm by a felon. Possession of a firearm by a felon is a criminal offense that was properly joined for trial with another criminal offense, robbery with a dangerous weapon. As there was no error in the joinder decision, defense counsel's failure to object to the joinder did not constitute deficient performance.

3. Constitutional Law—effective assistance of counsel—stipulation of felony conviction — not applicable to possession of firearm by felon

Defendant did not receive ineffective assistance of counsel in a robbery with a dangerous weapon and possession of a firearm by a felon case where his trial counsel failed to prevent the jury from hearing that defendant had a prior felony conviction by stipulating to such conviction under N.C.G.S. § 15A-928. N.C.G.S. § 15A-928 does not apply to the offense of possession of a firearm by a felon.

4. Constitutional Law—right to cross-examine witnesses—pending charges in other counties—marginal relevance

The trial court did not violate defendant's Sixth Amendment right to cross-examine witnesses against him by prohibiting him from cross-examining two of the State's witnesses about criminal charges pending against them in counties in different prosecutorial districts

than the district in which defendant was tried. The trial court was reasonable in barring defendant from further cross-examining the witnesses regarding their pending charges in other counties where defendant was allowed to thoroughly cross-examine the witnesses and the relevance of the cross-examination regarding the pending charges in other counties was marginal.

5. Constitutional Law—right to confrontation—not preserved—right to due process—harmless error

By failing to object at trial, defendant did not preserve for appellate review his argument that his right to confrontation under the Sixth Amendment was violated where he was not given the opportunity to question a trial bystander and juror number six about alleged juror misconduct. Furthermore, defendant's argument that statements by the prosecutor in closing argument regarding defendant's attempts to derail justice violated his right to due process under the Fourteenth Amendment was without merit. The record supported the majority of the prosecutor's sentencing argument about defendant's attempts to derail justice. Moreover, even assuming, without deciding, that the sole unsubstantiated statement by the prosecutor at sentencing amounted to a denial of due process, any constitutional error was harmless beyond a reasonable doubt.

Appeal by defendant from judgment entered 17 December 2012 by Judge Allen Baddour in Chatham County Superior Court. Heard in the Court of Appeals 24 October 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General David P. Brenskelle, for the State.

The Law Office of Bruce T. Cunningham, Jr., by Bruce T. Cunningham, Jr., for defendant-appellant.

GEER, Judge.

Defendant Kenneth Eugene Alston appeals from his conviction of robbery with a dangerous weapon. On appeal, defendant primarily contends that he received ineffective assistance of counsel ("IAC") when his trial counsel failed to object to the joinder for trial of defendant's charges of robbery with a dangerous weapon and possession of a firearm by a felon. Defendant argues that the statute prohibiting possession of a firearm by a felon is a "civil regulatory measure" and, therefore, a violation of that statute may not be joined for trial with a criminal offense.

While our Supreme Court has held that the ban on felons possessing firearms does not impose additional punishment for prior convictions because the General Assembly adopted the prohibition as a civil regulatory measure, that holding does not in any way mean that a violation of that civil regulatory measure cannot be a crime. As both the Supreme Court and this Court have previously recognized, when a felon possesses a firearm, he commits a crime. Consequently, we hold defendant did not receive IAC when his trial counsel failed to object to the joinder of the charges brought against defendant.

Facts

The State's evidence tended to show the following facts. At some point between 22 July 2010 and 25 July 2010, Chad Taylor called an acquaintance, Calvin Moore, and told Moore that he wanted to sell some marijuana. Moore told defendant about the offer, but did not tell defendant that Taylor, defendant's distant cousin, was the seller. In the evening of 25 July 2010, Taylor and Moore agreed by phone that Taylor would sell Moore three pounds of marijuana.

Late in the night on 25 July or early in the morning on 26 July 2010, defendant drove Moore and three young women, including Tiffany Jarrell, to the house where the drug deal was to take place. Defendant, Moore, and the women all agreed in advance that they would rob the sellers rather than purchase the marijuana. As defendant neared the house, he realized that the house belonged to one of his family members. Defendant nonetheless decided to go forward with the robbery. Defendant parked at the house, and defendant and Moore got out and talked to Taylor and Taylor's friend, Jesus Sifuentes.

Sifuentes left the house in his car and then returned in 10 or 15 minutes with the marijuana. Sifuentes handed Moore the marijuana, and defendant and Moore then pulled out handguns and aimed them at Taylor and Sifuentes. Jarrell and the other women then searched Taylor's and Sifuentes' pockets and took wallets, cell phones, and about $1,500.00 in cash, as well as the marijuana. The robbers then left in defendant's car with defendant driving.

After the robbers left, Taylor got a shotgun and Sifuentes and Taylor chased the robbers in Sifuentes' car. Sifuentes and Taylor caught up with the robbers on the highway, and Sifuentes drove his car into the back of defendant's car, causing both cars to wreck. After the crash, the robbers believed Taylor and Sifuentes had fled, and defendant decided to stay with his car and to tell the police that he was involved in a hit and run. Defendant convinced Jarrell to stay with the car as well. Moore and the

other two women called a friend and got a ride home. Moore took the marijuana and the two guns used in the robbery with him.

Defendant and Jarrell went to the hospital, and a nurse at the hospital discovered the cash proceeds from the robbery in Jarrell's underwear. Jarrell lied about where she got the money. Jarrell then went to the police station, where she also lied to the police about what had occurred.

Defendant was indicted for accessory after the fact to robbery with a dangerous weapon on 10 October 2011 and for possession of a firearm by a felon on 21 May 2012. Defendant was also indicted for robbery with a dangerous weapon.[1] The jury found defendant guilty of robbery with a dangerous weapon and, accordingly, did not render a verdict with respect to the accessory after the fact charge. However, the jury found defendant not guilty of possession of a firearm by a felon. In an amended judgment, the court sentenced defendant to an aggravated-range term of 152 to 192 months imprisonment. Defendant timely appealed to this Court.

I

[1] Defendant first contends that the trial court erroneously joined for trial defendant's charges of robbery with a dangerous weapon and possession of a firearm by a felon. Defendant argues that the latter charge was for violation of a "civil regulatory measure" that could not be properly tried alongside a criminal offense.

Defendant did not make his joinder argument to the trial court, but he argues on appeal that the trial court committed plain error in the joinder. However, our Supreme Court has expressly held that plain error review does not apply to the issue whether joinder of charges was appropriate. *State v. Golphin*, 352 N.C. 364, 460, 533 S.E.2d 168, 230-31 (2000). Consequently, due to defendant's failure to preserve this issue for review, it is not properly before this Court.

[2] Defendant alternatively argues that he received IAC due to his counsel's failure to object to the joinder of the charges of robbery with a dangerous weapon and possession of a firearm by a felon. Defendant must satisfy a two-part test in order to prevail on his IAC claim:

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel

1. The record on appeal does not contain defendant's indictment for robbery with a dangerous weapon. However, the transcript indicates defendant was indicted for that offense.

> made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

State v. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (emphasis omitted) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693, 104 S. Ct. 2052, 2064 (1984)).

Defendant argues that his counsel's performance was deficient because, in *State v. Whitaker*, 364 N.C. 404, 411, 700 S.E.2d 215, 220 (2010), our Supreme Court held that the statute prohibiting possession of a firearm by a felon is a "civil regulatory measure" rather than a criminal offense, and, according to defendant, it is inherently improper to try a criminal offense together with a civil regulatory matter. Defendant asserts that his trial counsel should have been aware of *Whitaker*, a "well-known" case decided roughly two years before defendant's trial, since "Second Amendment litigation has been the topic of much discussion in the last several years and *Whitaker* was relevant to that discussion."

In *Whitaker*, our Supreme Court rejected the defendant's argument that an amendment broadening the scope of the statute making it unlawful for felons to possess firearms, N.C. Gen. Stat. § 14-415.1 (2013), was an unconstitutional *ex post facto law*. 364 N.C. at 411, 700 S.E.2d at 220. The Court first noted, with respect to *ex post facto* principles, that the defendant had not been retroactively punished for an act that was innocent when committed since the "defendant's conviction [was] for an *offense* that he committed after his actions were deemed *criminal*, namely the possession of any firearm by a felon." *Id.* at 408, 700 S.E.2d at 218 (emphasis added). The Court explained that "[t]he question then becomes whether the 2004 amendment to N.C.G.S. § 14–415.1 is an ex post facto law, *not because it imposes punishment for future acts*, but because it prohibits the possession of firearms by a convicted felon, which defendant asserts operates as a form of enhanced punishment for his prior felonies." *Id.* (emphasis added).

In other words, the issue before the Supreme Court was whether denying a defendant the right to have firearms was additional punishment for a prior conviction. As to that issue, the Court concluded that the General Assembly had a "nonpunitive intent" in enacting the amended statute "to protect the public." *Id.* at 409, 700 S.E.2d at 218.

Ultimately, the Court concluded that "the General Assembly's purpose in enacting" the ban on felons possessing firearms "was to establish a civil regulatory measure, and because the amended statute's effect does not render it punitive in nature, the amended N.C.G.S. § 14–415.1 is not an unconstitutional ex post facto law." *Id.* at 411, 700 S.E.2d at 220.

Although *Whitaker* holds that the statute depriving felons of the right to possess firearms is a civil regulatory measure not intended to further punish people previously convicted, nothing in *Whitaker* suggests that a violation of that statutory prohibition is not a crime. Defendant has cited no authority that a legislature may not make it a crime to violate a statute that was enacted for a "civil regulatory" purpose.

Indeed, the *Whitaker* Court referred to the defendant felon's act of possessing a firearm as an "offense" that was deemed "criminal" by the relevant statutory amendment. *Id.* at 408, 700 S.E.2d at 218. Further, contrary to defendant's argument, N.C. Gen. Stat. § 14-415.1(a) provides that "[e]very person violating the provisions of this section shall be punished *as a Class G felon*." (Emphasis added.) *See also Johnston v. State*, 224 N.C. App. 282, 307, 735 S.E.2d 859, 876 (2012) (explaining that in N.C. Gen. Stat. § 14-415.1, "[o]ur legislature mandated that any felon found in possession of a firearm is subject to *criminal liability*" (emphasis added)), *aff'd per curiam*, 367 N.C. 164, 749 S.E.2d 278 (2013); *State v. Johnson*, 169 N.C. App. 301, 306, 610 S.E.2d 739, 743 (2005) (holding, in rejecting *ex post facto* argument, that "*the crime* for which defendant is being punished is his violation of N.C. Gen. Stat. 14–415.1" (emphasis added)).

In sum, given the statutory language designating possession of a firearm by a felon as a crime, our Supreme Court's reference to a violation of N.C. Gen. Stat. § 14-415.1 as a "criminal" "offense" in *Whitaker*, and this Court's similar language in *Johnson* and *Johnston*, we conclude that possession of a firearm by a felon is a criminal offense that was properly joined for trial with another criminal offense, robbery with a dangerous weapon. Since there was no error in the joinder decision, defense counsel's failure to object to the joinder did not constitute deficient performance, and defendant has failed to show he received IAC.

II

[3] Defendant also contends that he received IAC when his trial counsel failed to prevent the jury from hearing the prejudicial information that defendant had a prior felony conviction by using the procedure set out in N.C. Gen. Stat. § 15A-928 (2013). According to defendant, under N.C. Gen. Stat. § 15A-928, he could have stipulated to the prior conviction and

thereby precluded the State from introducing evidence regarding that conviction. We disagree.

Defendant's argument fails to recognize that N.C. Gen. Stat. § 15A-928(a) limits the statute's applicability as follows: "When the fact that the defendant has been previously convicted of an offense raises an offense of lower grade to one of higher grade and thereby becomes an element of the latter, an indictment or information for the higher offense may not allege the previous conviction." When those circumstances apply, then N.C. Gen. Stat. § 15A-928(c)(1) provides that "[i]f the defendant admits the previous conviction, that element of the offense charged in the indictment or information is established, no evidence in support thereof may be adduced by the State, and the judge must submit the case to the jury without reference thereto and as if the fact of such previous conviction were not an element of the offense. The court may not submit to the jury any lesser included offense which is distinguished from the offense charged solely by the fact that a previous conviction is not an element thereof."

This Court has previously held that N.C. Gen. Stat. § 15A-928 does not apply to the offense of possession of a firearm by a felon. *State v. Jeffers*, 48 N.C. App. 663, 665-66, 269 S.E.2d 731, 733-34 (1980). The Court in *Jeffers* reasoned:

> Since the trial judge allowed the stipulation as to the previous conviction to be introduced and since he made reference to the stipulation in his charge to the jury, defendant claims that G.S. 15A-928(c)(1) was violated, and that defendant was deprived of his right to a fair trial as a result. G.S. 15A-928, however, is not applicable in this case. The statute applies solely to cases in which the fact that the accused had a prior conviction raises an offense of "lower grade" to one of "higher grade." G.S. 15A-928(a). Thus, the prior conviction serves to increase the punishment available for the offense above what it would ordinarily be. *See State v. Moore*, [27 N.C. App. 245, 218 S.E.2d 496 (1975).] The offense charged in the instant case, however, does not have this characteristic. A previous conviction for one of a group of enumerated felonies is an essential element of the offense of possession of a firearm by a felon, and thus in the absence of a prior conviction, there is no offense at all. G.S. 14-415.1; *State v. Cobb*, 284 N.C. 573, 201 S.E.2d 878 (1974). Also, the statute contains nothing as to certain convictions being more intolerable

> than others, G.S. 14-415.1(a) and (b), and thus no "lower grade"–"higher grade" dichotomy can be ascertained.

Id.

Jeffers controls in this case. We, therefore, conclude that defendant has failed to show IAC for failure to raise N.C. Gen. Stat. § 15A–928 at trial because that statute did not apply to his trial for possession of a firearm by a felon. *See also State v. Jackson*, 306 N.C. 642, 652, 295 S.E.2d 383, 389 (1982) (holding that N.C. Gen. Stat. § 15A–928 did not apply to offense at issue because "[t]he statute applies solely to cases in which the fact that the accused 'has been previously convicted of an offense raises an offense of lower grade to one of higher grade and thereby becomes an element of the latter' " (quoting N.C. Gen. Stat. § 15A–928(a))).

III

[4] Defendant next argues that the trial court violated his Sixth Amendment right to cross-examination when it did not permit him to cross-examine two of the State's witnesses, Moore and Jarrell, about criminal charges pending against them in counties in different prosecutorial districts than the district in which defendant was tried. We disagree.

During voir dire, Jarrell stated that she had a pending charge in Randolph County for assault with a deadly weapon with intent to kill. Jarrell testified on cross-examination that she did not believe that by cooperating with the State in this case she could "gain anything in any other proceedings" in other counties. Since Jarrell stated she did not believe that testifying in this case would help her with matters in other counties, the trial court did not permit defendant to further cross-examine Jarrell about pending charges in other counties.

Moore testified on voir dire that he had "a few" felony breaking and entering charges and one felony larceny charge pending in Guilford County, three felony breaking and entering charges and one felony larceny charge pending in Moore County, and a probation violation report pending in Randolph County. Moore also testified on voir dire that he did not believe testifying for the State in this case would benefit him with respect to the matters in other counties. Given this voir dire testimony, the court ruled that defendant could only ask Moore on cross-examination whether he believed he would receive any benefit in other counties for his cooperation in this case. The court further ruled, however, that defendant could cross-examine Moore about unrelated pending charges in Chatham County and about the pending probation

violation report in Randolph County since that probation matter was included as part of Moore's original plea agreement with the State.

The Sixth Amendment right to confrontation generally protects the right of a criminal defendant to cross-examine a State's witness about the existence of pending charges in the same prosecutorial district as the trial in order to show bias in favor of the State, since the jury may understand that pending charges may be used by the State as a "weapon to control the witness." *State v. Prevatte*, 346 N.C. 162, 164, 484 S.E.2d 377, 378 (1997). However, " 'trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.' " *State v. McNeil*, 350 N.C. 657, 677, 518 S.E.2d 486, 499 (1999) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 89 L. Ed. 2d 674, 683, 106 S. Ct. 1431, 1435 (1986)).

Given this wide latitude afforded trial courts, we review a trial court's limitation of cross-examination for an abuse of discretion. *Id.* " 'A trial court abuses its discretion if its determination is manifestly unsupported by reason and is so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Garcell*, 363 N.C. 10, 27, 678 S.E.2d 618, 630 (2009) (quoting *State v. Cummings*, 361 N.C. 438, 447, 648 S.E.2d 788, 794 (2007)).

In *State v. Murrell*, 362 N.C. 375, 403, 665 S.E.2d 61, 80 (2008), a case out of Forsyth County, the defendant filed a motion for appropriate relief arguing that "the prosecution allowed State's witness . . . to perjure himself concerning his prior convictions, current charges, and discussions with the Durham County District Attorney's office." Regarding the defendant's argument that the witness falsely testified he had no pending charges in Durham County, the Supreme Court held the witness' testimony was in fact true since the record showed that the witness' Durham County charges had been dismissed, although they were subject to reinstatement, at the time of the challenged testimony. *Id.* at 404, 665 S.E.2d at 80.

The Court further held that, even assuming arguendo that the testimony was false and that the defendant was able to prove the prosecution knew it was false, "[the witness'] testimony on this peripheral issue concerning charges dismissed in another district attorney's jurisdiction was simply not material." *Id.* The *Murrell* Court reasoned that unlike *Prevatte*, 346 N.C. at 163–64, 484 S.E.2d at 378, "in which the State's

witness faced pending charges within the *same* jurisdiction in which he testified, any charges pending against [the witness] were being handled in a different jurisdiction, and defendant provides no supporting documentation of any discussion between the two district attorneys' offices to demonstrate that [the witness'] testimony was biased in this respect." 362 N.C. at 404, 665 S.E.2d at 80.

Here, at the outset, we take judicial notice that Guilford, Randolph, and Moore Counties are each located in different prosecutorial districts than Chatham County, where this case was tried. As in *Murrell*, defendant has failed to provide any evidence of discussions between the district attorney's office in Chatham County and district attorneys' offices in the other counties where Jarrell and Moore had pending charges. In addition, Jarrell testified on cross-examination and Moore testified on voir dire that each did not believe testifying in this case could help them in any way with proceedings in other counties. Under these circumstances, we follow the reasoning of *Murrell* and conclude that, in this case, testimony regarding the witnesses' pending charges in other counties was, at best, marginally relevant to defendant's trial.

Moreover, both Jarrell and Moore were thoroughly impeached on a number of other bases separate from their pending charges in other counties. Jarrell acknowledged that she was testifying pursuant to a plea agreement in which her pending charges for robbery with a dangerous weapon and accessory after the fact to robbery with a dangerous weapon in Chatham County would be dismissed and she would plead guilty to obstruction of justice. Pursuant to the agreement, the State agreed to recommend that Jarrell be placed on probation rather than serve active time. At the time of her testimony, Jarrell was currently in prison for misdemeanor assault with a deadly weapon and driving while impaired. Jarrell also testified to her prior convictions for "possessing or manufacturing a fraudulent ID," driving after consuming alcohol, and resisting a public officer.

Jarrell further testified that she made false statements about the events surrounding the robbery to an investigating officer on the night of the robbery in order to avoid being charged with a crime. She admitted lying at the hospital about the source of the money in her underwear that was, in fact, the cash proceeds from the robbery. Jarrell also testified that, on the night of the robbery, she was drunk and she had taken Xanax without a prescription and smoked marijuana. Jarrell, 20 years old at the time of trial, additionally stated that she had regularly smoked marijuana since she was 14 years old and, as a result, sometimes her memory was "off."

At the time he testified, Moore was on probation for convictions on "a number of felonies" in Randolph County and, if he violated his probation, he faced 69 to 84 months imprisonment. Moore testified that he had previously pled guilty, pursuant to a plea agreement, to robbery with a dangerous weapon and possession of a firearm by a felon stemming from the robbery in this case. He was awaiting his sentence on those charges, which could have been up to 201 months imprisonment. Moore stated that, pursuant to that same agreement, he pled guilty to unrelated charges for obtaining property by false pretenses and for two counts of identity theft, all felonies. Pursuant to that agreement, the State would recommend Moore be sentenced at the bottom of the mitigated range, and his sentence on those felonies would run concurrently with a suspended prison sentence from Randolph County for which Moore had been on probation. Also pursuant to that plea agreement, the State dismissed charges against Moore for larceny, financial card fraud, possession of stolen goods, driving while license revoked, resisting a public officer, obtaining property by false pretenses, and two counts of breaking and entering. Moore testified that his written plea agreement with the State was his only agreement with the State.

Moore additionally testified that at the time of trial he understood that if he withdrew his guilty pleas, the State could reinstate all the dismissed charges and could also recommend to the sentencing court that the sentences on the charges to which he had pled guilty run consecutively. Further, Moore recognized that if he withdrew his plea, there was a possibility that he would be sentenced in the aggravated rather than the mitigated range. Moore also testified that he understood he had voided his plea agreement with the State by twice absconding from North Carolina. With respect to the latter issue, Moore had been charged with two counts of felony failure to appear. Also at the time of trial, Moore had two misdemeanor charges pending in Chatham County for resisting a public officer and communicating threats.

In addition, Moore, who was 23 years old at the time of trial, testified that he had three prior convictions of possession of cocaine, three prior convictions of possession with intent to sell and deliver cocaine, two prior convictions of felony larceny, two prior convictions of unauthorized use of a motor vehicle, two prior convictions of breaking and entering, three prior convictions of misdemeanor larceny, and prior convictions of possession of a firearm by a felon, possession of stolen goods, hit and run with property damage, and fleeing to elude arrest.

In sum, the trial court allowed defendant extensive cross-examination of both Jarrell and Moore, revealing their bias to testify favorably

for the State in order to curry favor regarding their pending charges and sentences, respectively, for the robbery in this case and, for Moore, numerous other pending charges. Defendant was also permitted to cross-examine the witnesses on a host of other matters relating to their credibility. Based on this thorough cross-examination and the marginal relevance, if any, of cross-examination regarding Jarrell and Moore's pending charges in other counties, we hold that the trial court was not unreasonable in barring defendant from further cross-examining the witnesses regarding their pending charges in other counties.

IV

[5] Defendant's final argument is that the prosecutor's remarks during the sentencing hearing that defendant was trying to derail the prosecution violated defendant's Sixth Amendment right to confrontation and his Fourteenth Amendment right to due process. The prosecutor's remarks referred, in part, to an incident of alleged juror misconduct during trial.

During trial and outside the presence of the jury, a trial spectator, Michael Stanley, presented himself to the court and stated that the previous evening he had been in the parking lot outside the courthouse attempting to jump start his car and, while doing so, spoke with a woman he recognized as a juror. In the course of the conversation, the juror told Mr. Stanley that she and a friend "felt like [defendant] was guilty." Mr. Stanley was never placed under oath.

The jury then entered the courtroom, and the trial court instructed the jurors to raise their hand if they had spoken to Mr. Stanley about the case. In response, juror number six stated that Mr. Stanley's truck hood was up, and he asked her "something about jumper cables." She told him that she did not have any, but there was a nearby fire department where he might find help. She reported to the court that she "didn't say anything to him about the case." Juror number six was not sworn prior to making these statements. No other juror indicated they had spoken with Mr. Stanley.

During a subsequent break in the trial, the trial court brought up the issue of the juror's alleged comment to Mr. Stanley and stated it was satisfied by juror number six's response. Defense counsel stated that if the juror denied any misconduct, he had nothing else to offer. The court then determined that the matter was settled.

Later the same day, after the jury had been given its final charge and was deliberating, the trial court announced that it had learned

that a deputy had observed Mr. Stanley the previous day and that it was "appropriate to put on the record what the deputy saw." Deputy Raymond Barrios was then sworn and testified that the previous evening, the deputy went outside to the court parking lot at about 5:20 p.m. and saw Mr. Stanley on his cell phone standing by the lot. As Deputy Barrios got near, Mr. Stanley walked away, still on his phone, towards a court "overflow" parking lot across the street.

Deputy Barrios further testified that as Mr. Stanley walked across the street, the deputy noticed a car parked at the farthest end of the parking lot "flashing [its] lights like a signal." The deputy then reentered the courthouse, and when he later left the courthouse to walk to his car, he saw Mr. Stanley "talking to the defendant in the parking lot further up the road" for about five minutes. Defendant declined the opportunity to question Deputy Barrios.

Defendant now challenges the prosecutor's sentencing argument regarding the interaction between Mr. Stanley and the juror. The prosecutor argued the following at sentencing:

> In addition, we had this unusual situation where we had one of [defendant's] old -- apparently -- cell mates who was also convicted of armed robbery come and watch the trial this week and make a statement to the Court implying the jury had already reached a decision -- or at least a jury member had already reached a decision in the case. We feel that that was, again, orchestrated by [defendant] based on the sworn testimony of deputy Barrios [sic] who said that he observed the defendant and this person, Mr. Stanley, interacting outside of the court signaling to -- the defendant signaling to Mr. Stanley after court. And it appears to me that that was a blatant attempt to derail or obstruct justice in this case by creating an atmosphere where we might have to grant a mistrial if his statement was to be believed. Of course the Court addressed that, talked to the jury. It was clear that none of them had had any conversation of that type with Mr. Stanley.
>
> And that's just the continuing kind of thing that we have seen over the last couple of years. [Defendant] never does anything overtly threatening, and we don't have any evidence that money has changed hands, but certainly we have evidence and information through what's been happening in court and out of court that he has persistently tried to work to derail this prosecution.

. . . .

> . . . I have never experienced such a situation as -- as this where we have so many external factors attempting to derail justice in this case. And I think all of those were driven by [defendant].

The State then asked the court to sentence defendant "to the top of the aggravated range for a Class D felony," which amounted to 160 to 201 months imprisonment.

Following the parties' sentencing arguments, the trial court briefly found the existence of two aggravating factors admitted by defendant, found the existence of one mitigating factor, and determined that the aggravating factors outweighed the mitigating factor. The court then, without any discussion of defendant's "derail[ing]" justice, sentenced defendant to an aggravated-range term of 152 to 191 months imprisonment.[2] After sentencing, the trial court stated to defendant: "I do think this is probably an event that could have been avoided at many points along the way; and, [defendant], I think that you bear some responsibility for that. I'm not saying you are the only one who does, but you do."

Defendant now argues that his right to confrontation under the Sixth Amendment was violated because he was not given the opportunity to question Mr. Stanley and juror number six. Defendant did not, however, object to the process during which Mr. Stanley and juror number six gave unsworn statements, did not request that those individuals be sworn, and did not request the opportunity to question them. Consequently, defendant has not preserved his confrontation argument for appeal. *See* N.C.R. App. P. 10(a)(1); *State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473 (2002) (holding defendant waived constitutional confrontation argument by failing to object on confrontation grounds below since, generally, "[c]onstitutional issues not raised and passed upon at trial will not be considered for the first time on appeal").

Defendant further contends that the challenged arguments by the prosecutor regarding defendant's attempts to derail justice in this case by having Mr. Stanley tamper with juror number six were "unsubstantiated" and "speculative" and thereby violated his right to due process under the Fourteenth Amendment. We disagree.

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2. The trial court later entered an amended judgment to correct a clerical error, and in the amended judgment the court sentenced defendant to an aggravated-range term of 152 to 192 months imprisonment.

At trial, Jarrell testified that, prior to trial, defendant told her not to say anything to investigators because defendant had talked to the victims Sifuentes and Taylor and the victims, being drug dealers, were unlikely to testify against defendant and Jarrell. Defendant also told Jarrell that he and Jarrell should try to pay the victims to keep them from testifying. Finally, Jarrell testified that, prior to trial, defendant had attempted to facilitate getting Jarrell's mother out of jail, leading to the inference that defendant was trying to curry favor with Jarrell to keep her from testifying against him.

Moore testified that prior to trial he felt threatened or coerced not to testify, although "not directly from [defendant]." Moore stated that prior to trial he was released from prison and was on house arrest for 120 days. During this time, he took a plea deal with the State requiring him to testify against defendant. Just before Moore was set to be released from house arrest, however, he fled to Florida because he was concerned for his safety after receiving information from people in the community. Moore was subsequently arrested and brought back to North Carolina, where he was released on bond. However, based on a phone call shortly after he was released, Moore again fled, this time to South Carolina. From this evidence, the prosecutor was entitled to argue the inference that defendant was indirectly threatening Moore to keep Moore from testifying.

Sifuentes testified that he saw defendant come to Sifuentes' father's place of business and interact with Sifuentes' father. Later, defendant went to Sifuentes' father's house while Sifuentes was there, and defendant spoke to Sifuentes' father outside the house before leaving. Seeing defendant at his father's house made Sifuentes nervous.

The record additionally contains unsworn statements by Mr. Stanley and juror number six about whether a juror improperly discussed the case with Mr. Stanley and, apart from the truth or falsity of either person's statement, the important, uncontested fact is that the trial court was addressed by a spectator, Mr. Stanley, about a juror improperly discussing the merits of the case. This fact, coupled with Deputy Barrios' sworn testimony that he witnessed Mr. Stanley communicate with someone in a car in the parking lot on the same day that Mr. Stanley reported juror misconduct and, later the same evening, saw defendant talking with Mr. Stanley in the parking lot for about five minutes, raises the inference that defendant was involved in Mr. Stanley's report of juror misconduct to the trial court.

The record, therefore, supports the great majority of the prosecutor's sentencing argument about defendant's attempts to derail justice in this case. We have found no record support, however, for the prosecutor's

assertion that Mr. Stanley was defendant's old cell mate who had also been convicted of armed robbery.

Even assuming, without deciding, that defendant has shown that the sole unsubstantiated statement by the prosecutor at sentencing amounted to a denial of due process, any constitutional error is harmless beyond a reasonable doubt. See N.C. Gen. Stat. § 15A-1443(b) (2013). The vast majority of the prosecutor's sentencing argument that defendant was attempting to derail justice in this case is supported by the record. Moreover, the prosecutor properly argued to the court the two admitted aggravating factors, defendant's three prior robbery with a dangerous weapon and one attempted robbery with a dangerous weapon convictions, defendant's four prior felony drug-related convictions, and defendant's refusal to call off the robbery even when he realized the scene of the robbery was his relative's house. The trial court's comments to defendant after sentencing suggest that the court placed emphasis on defendant's failure to call off the robbery despite having the opportunity to do so.

The trial court gave no indication that, when sentencing defendant, it considered the isolated unsupported statement about Mr. Stanley being defendant's former cell mate with a prior conviction of armed robbery. Rather, the court simply stated that it found the existence of the two aggravating factors admitted by defendant and that those factors outweighed the single mitigating factor. The only other circumstance specifically referred to by the court was defendant's failure to call off the robbery when he had the opportunity to do so.

Under these circumstances, and given the weight of the State's proper sentencing arguments, we hold that any error in the court's consideration of the single unsupported statement was harmless beyond a reasonable doubt. *See State v. Jackson*, 91 N.C. App. 124, 126, 370 S.E.2d 687, 688 (1988) (holding that any error in trial court's consideration of murder victim's two sisters' impact statements describing sisters' thoughts about sentencing, including that defendant acted in cold blood and deserved maximum sentence available, was harmless since "the court certainly knew before then, as every reasonably knowledgeable person knows, that almost invariably relatives and friends of murder victims are shocked and saddened by their killing and are of the opinion that murderers should be severely punished"). Consequently, we conclude defendant received a trial free from prejudicial error.

No error.

Judges STEPHENS and ERVIN concur.

STATE OF NORTH CAROLINA
v.
JOANNA LEIGH BECK

No. COA13-764

Filed 1 April 2014

Motor Vehicles—driving while impaired—jury instruction—pattern—no impermissible mandatory presumption created

The trial court did not err in a driving while impaired case by denying defendant's request for a special jury instruction regarding the jury's ability to determine the weight to be accorded to the results of a chemical analysis. The trial court's use of the pattern jury instruction informed the jury, in substance, that it was not compelled to return a guilty verdict based simply on the chemical analysis results showing a .10 alcohol concentration. Furthermore, the Court of Appeals has already determined that the language in the pattern jury instruction does not create an impermissible mandatory presumption of a person's alcohol concentration.

Appeal by defendant from judgment entered 26 November 2012 by Judge Christopher W. Bragg in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 November 2013.

Roy Cooper, *Attorney General*, *by Joseph L. Hyde*, *Assistant Attorney General*, *for the State.*

Rudolf Widenhouse & Fialko, *by M. Gordon Widenhouse*, *Jr.*, *for defendant-appellant.*

DAVIS, Judge.

Joanna Leigh Beck ("Defendant") appeals from a judgment entered upon a jury verdict finding her guilty of driving while impaired. Defendant's sole argument on appeal is that the trial court erred in denying her request for a special jury instruction regarding the jury's ability to determine the weight to be accorded to the results of a chemical analysis. After careful review, we conclude that Defendant received a fair trial free from error.

Factual Background

Defendant was arrested on 12 December 2009 at a checkpoint and charged with driving while impaired. Defendant was convicted in

Mecklenburg County District Court, and she appealed to the superior court for a trial *de novo*.

At trial, the State's evidence tended to show the following: On 12 December 2009, at approximately 1:00 a.m., Officer Matthew Pressley ("Officer Pressley") of the Charlotte-Mecklenburg Police Department was assisting with an impaired driving checkpoint on Park Road near Archdale Drive. Officer Pressley approached Defendant's vehicle and asked for her license. As he spoke to Defendant, he observed that her eyes were "glossy and bloodshot" and that there was "a strong odor of alcoholic beverage about her breath." Officer Pressley asked Defendant if she had been drinking that evening, and she responded that she had consumed two mixed vodka drinks. Officer Pressley then asked Defendant to step out of her vehicle.

Officer Pressley administered three field sobriety tests: (1) the horizontal gaze nystagmus test; (2) the walk-and-turn test; and (3) the one-leg stand test. Based on Defendant's performance on these three tests, Officer Pressley believed that she was impaired. He arrested Defendant and then administered a "breath test," using the Intoxilyzer EC/IR II machine. The machine registered that Defendant's breath sample had an alcohol concentration of .10.

Defendant presented evidence at trial, including expert testimony from Julian Douglas Scott ("Scott"), who was accepted by the trial court as an expert witness in the detection of impaired driving and in the administration of standardized field sobriety tests. Scott disagreed with several of Officer Pressley's conclusions regarding how many signs of impairment could be gleaned from Defendant's performance on the tests Officer Pressley had administered. Scott also opined that Officer Pressley should have conducted several additional field sobriety tests before concluding that Defendant was impaired.

At the charge conference, Defendant objected to the use of the pattern jury instruction for the offense of driving while impaired and proposed adding one of two alternative special instructions emphasizing to the jury that it was not *compelled* to find that Defendant's blood alcohol concentration was .08 or above based on the results of a chemical analysis indicating that Defendant's blood alcohol concentration was .08 or above. The trial court declined to give either of the requested instructions and instead used Pattern Instruction 270.20A to instruct the jury as to the driving while impaired charge.

The jury found Defendant guilty of driving while impaired, and the trial court entered judgment on the verdict. The trial court sentenced

Defendant to 60 days imprisonment, suspended the sentence, and placed her on 12 months of unsupervised probation. Defendant gave timely notice of appeal.

Analysis

Defendant argues that the trial court erred in denying her request for a special jury instruction because the pattern instruction used by the trial court misled the jury. We disagree.

The trial court — using Pattern Jury Instruction 270.20A — charged the jury in pertinent part as follows:

> The defendant has been charged with impaired driving. For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt:
>
> First, that the defendant was driving . . . . a vehicle.
>
> Second, that the defendant was driving that vehicle upon a street within the state.
>
> And, third, that at the time the defendant was driving that vehicle, the defendant: One, was under the influence of an impairing substance. Alcohol is an impairing substance. The defendant is under the influence of an impairing substance when the defendant has consumed a sufficient quantity of that impairing substance to cause the defendant to lose the normal control of the defendant's bodily or mental faculties or both to an extent that there has been appreciable impairment of either or both of these faculties; or, two, had consumed sufficient alcohol that at any relevant time after the driving the defendant had an alcohol concentration of 0.08 or more grams of alcohol per 210 liters of breath. A relevant time is anytime after the driving that the driver still has in the body alcohol consumed before or during the driving.
>
> The results of a chemical analysis are deemed sufficient evidence to prove a person's alcohol concentration. If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant drove a vehicle on a street in this state and that when doing so the defendant was under the influence of an impairing substance or had consumed sufficient alcohol that at any relevant time after the driving the defendant had an alcohol

> concentration of 0.08 or more, 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.

The special instructions requested by Defendant would have informed the jury that (1) the results of the chemical analysis did not create a presumption that Defendant was impaired or that Defendant had an alcohol concentration of .08 or greater; (2) the jury was permitted to find that Defendant had an alcohol concentration of .08 or greater based on the results of the chemical analysis but was not required to do so; and (3) the jury was allowed to consider the credibility and weight to be accorded to the results of the chemical analysis.

When a defendant requests a special jury instruction, "the trial court is not required to give [the] requested instruction in the exact language of the request. However, when the request is correct in law and supported by the evidence in the case, the court must give the instruction in substance." *State v. Monk*, 291 N.C. 37, 54, 229 S.E.2d 163, 174 (1976). Thus, in order for a defendant to establish error, she "must show that the requested instructions were not given in substance and that substantial evidence supported the omitted instructions." *State v. Garvick*, 98 N.C. App. 556, 568, 392 S.E.2d 115, 122, *aff'd per curiam*, 327 N.C. 627, 398 S.E.2d 330 (1990). The defendant also bears the burden of showing that the jury was misled or misinformed by the instructions given. *State v. Blizzard*, 169 N.C. App. 285, 297, 610 S.E.2d 245, 253 (2005).

In *Garvick*, the defendant requested a similar instruction relating to the results of a chemical analysis in connection with a driving while impaired charge. *Garvick*, 98 N.C. App. at 567-68, 392 S.E.2d at 122. The requested instruction stated as follows: "[N]o legal presumption attaches to the results of a breathalyzer test. You, members of the jury, are still at liberty to acquit the defendant if you find that his alcohol concentration was not proven to be [.08] or more . . . beyond a reasonable doubt." *Id.* at 567, 392 S.E.2d at 122. We concluded that the language of the pattern jury instruction contained the defendant's requested instruction in substance because it explained to the jury that it must be convinced beyond a reasonable doubt that the defendant's alcohol concentration was above the legal limit. *Id.* at 568, 392 S.E.2d at 122.

Likewise, in the present case, the trial court's use of the pattern jury instruction informed the jury that in order to return a verdict of guilty, it must be convinced beyond a reasonable doubt that Defendant's alcohol concentration was .08 or more. This instruction informed the jury, in

substance, that it was not compelled to return a guilty verdict based simply on the chemical analysis results showing a .10 alcohol concentration.

Furthermore, as Defendant acknowledges, this Court has already determined that the language in the pattern jury instruction stating that the "results of a chemical analysis are deemed sufficient evidence to prove a person's alcohol concentration" does not create an impermissible mandatory presumption. *State v. Narron*, 193 N.C. App. 76, 85, 666 S.E.2d 860, 866 (2008), *disc. review denied*, 363 N.C. 135, 674 S.E.2d 140, *cert. denied*, 558 U.S. 818, 175 L.Ed.2d 26 (2009). Rather, as we explained in *Narron*, this quoted language — which is used in both the driving while impaired statute (N.C. Gen. Stat. § 20-138.1) and the pattern jury instruction — "simply authorizes the jury to find that the report is what it purports to be — the results of a chemical analysis showing the defendant's alcohol concentration." *Id.* at 84, 666 S.E.2d at 866.

Defendant argues that this language in the trial court's instructions likely misled the jury and caused it to erroneously believe that "it could not consider [the] positive evidence of [Defendant's] non-impairment in deciding whether the results of the chemical analysis were credible and what weight to give it." Accordingly, she argues, the requested instruction was necessary to inform the jury that it had the ability to conclude that the results of the chemical analysis were not credible.

However, Defendant's argument ignores the fact that the trial court expressly instructed the jury that (1) it was the "sole judge[] of the weight to be given [to] any evidence"; (2) it was the jury's "duty to decide from [the] evidence what the facts are"; (3) the jury "should weigh all the evidence in the case"; and (4) the jury "should consider all of the evidence."

These instructions informed the jury that it possessed the authority to determine the weight of any evidence offered to show that Defendant was — or was not — impaired. *See State v. Nicholson*, 355 N.C. 1, 60, 558 S.E.2d 109, 148, *cert. denied*, 537 U.S. 845, 154 L.Ed.2d 71 (2002) ("We presume that jurors pay close attention to the particular language of the judge's instructions in a criminal case and that they undertake to understand, comprehend, and follow the instructions as given." (citation and internal quotation marks omitted)); *State v. Holden*, 346 N.C. 404, 438-39, 488 S.E.2d 514, 533 (1997) ("In determining the propriety of the trial judge's charge to the jury, the reviewing court must consider the instructions in their entirety, and not in detached fragments." (citation, quotation marks, and brackets omitted)), *cert. denied*, 522 U.S. 1126, 140 L.Ed.2d 132 (1998).

We therefore conclude that the trial court did not err in declining to give either of the special instructions requested by Defendant. Accordingly, Defendant's argument is overruled.

Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial free from error.

NO ERROR.

Judges ELMORE and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
DEVON ARMOND GAYLES, DEFENDANT

No. COA13-1005

Filed 1 April 2014

1. Evidence—cross-examination of defendant—details of prior convictions—defendant opened door to questions

The trial court did not err in a second-degree murder and possession of a firearm by a felon case by permitting the prosecutor to cross-examine defendant on the details of his prior convictions. By minimizing his criminal record on direct examination and then denying that he had been convicted of carrying a concealed weapon when asked on cross-examination, defendant opened the door to the prosecutor's questions concerning the type of weapon involved with his prior crimes.

2. Evidence—defendant impeached—prior convictions—defendant testified

The trial court did not err in a second-degree murder and possession of a firearm by a felon case by allowing the State to impeach defendant using prior convictions when he had stipulated that he was a convicted felon for purposes of the possession of a firearm by a felon charge. Because defendant testified, he was subject to impeachment on the basis of his prior convictions, even though he had already stipulated to being a convicted felon for purposes of the firearm possession charge.

3. Evidence—testimony—gang culture—gang membership—not known to defendant at time of offense—irrelevant to claim of self-defense

The trial court did not err in a second-degree murder and possession of a firearm case by a felon case by excluding evidence about gang culture and the decedent's gang membership that defendant asserts was relevant to his claim of self-defense. What the witnesses knew about gangs and gang culture, and the significance of the victim's tattoos — of which defendant never claimed to be aware at the time of the killing — had no relevance to defendant's reasonable apprehension of great bodily harm.

4. Evidence—cross-examination—statements defendant denied making—egregious disregard for trial court's ruling—curative instruction—no prejudice

The trial court erred in a second-degree murder and possession of a firearm prosecution by allowing the State to cross-examine defendant on the basis of statements he denied making that were contained in a police report. Although the prosecutor showed a marked and egregious disregard for the trial court's ruling that the police report was inadmissible by continuing to ask questions about the contents of that report, the instruction given by the trial court not to consider the prosecutor's questions cured any prejudice to defendant.

Appeal by defendant from Judgments entered on or about 13 March 2013 by Judge Mark E. Powell in Superior Court, Buncombe County. Heard in the Court of Appeals 23 January 2014.

Attorney General Roy A. Cooper III, by Special Deputy Attorney General Kay Linn Miller Hobart, for the State.

Appellate Defender Staples Hughes by Assistant Appellate Defender Charlesena Elliott Walker, for defendant-appellant.

STROUD, Judge.

Devon Gayles ("defendant") appeals from judgments entered on or about 13 March 2013 after a Buncombe County jury found him guilty of one count of second degree murder and one count of possession of a firearm by a felon. After the jury's verdict defendant also pled guilty to having attained habitual felon status. We conclude that defendant has failed to show prejudicial error at his trial.

I. Background

On or about 9 July 2012, defendant was indicted in Buncombe County for the murder of Anthony Byron Carter, possession of a firearm by a felon, and having obtained habitual felon status. Defendant pled not guilty and proceeded to jury trial.

At trial, the State's evidence tended to show the following facts. In the early morning of 24 December 2011, Anthony Carter and some friends went to an Asheville nightclub called "Hole-N-Da-Wall." Defendant was also at the club that night. Slightly before 2 a.m., Mr. Carter and defendant got into a fight. The two men were "fussing and cussing at each other" in an apparent dispute over whether Mr. Carter had spilled beer on defendant. Mr. Carter shoved defendant and defendant shoved back. Darnelle Logan, a "bouncer" for the nightclub, stepped in to break up the fight. He told defendant to leave the club, but instructed Mr. Carter not to follow until after defendant had left. Despite Mr. Logan's instructions, Mr. Carter followed defendant toward the entrance of the nightclub and began hitting defendant again in the head.

At this point the witnesses' stories diverged slightly. One witness testified that she saw defendant pull a gun out of his vest and shoot Mr. Carter. Stacey Taylor, one of Mr. Carter's friends, testified that defendant dropped the gun when Mr. Carter hit him. Mr. Taylor testified that he tried to step on the gun, but that defendant gained control of it, stood up, and fired one shot at Mr. Carter. A third witness testified that she saw defendant with the gun in his hand and heard the shot, but did not see where the weapon came from. After being shot, Mr. Carter stumbled through the front door of the club and collapsed on the concrete stairs in view of several Alcohol Law Enforcement Special Agents. Mr. Carter died of a single gunshot wound to the chest.

After shooting Mr. Carter, defendant ran out of the club and fled to Cincinnati, Ohio, where he was apprehended nearly two months later. A detective from the Asheville Police Department interviewed defendant while he was jailed in Cincinnati. The detective informed him that he was under arrest for murder. Defendant gave no statement, but asked, "Who did I kill?"

Defendant presented evidence in his defense and testified on his own behalf. Defendant's testimony largely matched that of the other witnesses. He testified that he was in the club with a business associate named "Frog." Defendant was trying to light up his "joint" when someone bumped into him, then punched him three or four times in the mouth before a bouncer intervened. Defendant saw that it was Mr. Carter.

Defendant testified that he knew Mr. Carter as a gang member who "ran the west side," and who kidnapped and robbed people. Defendant then tried to leave the club, but someone "out of nowhere" punched him several more times, causing him to fall forward. Defendant testified that when he opened his eyes he saw a gun on the floor and a foot on the gun, so he grabbed for it. Defendant gained control of the weapon and stood back up. Mr. Carter punched him one more time in the face, so defendant raised the gun and fired one shot at him. Defendant then left the club and threw the gun into a nearby trash can. Defendant testified that after the shooting he received threatening messages, so he decided to flee Asheville and go to Cincinnati.

The jury found defendant guilty of murder in the second degree and possession of a firearm by a felon. The trial court sentenced defendant to 219-275 months imprisonment and a consecutive term of 88-118 months imprisonment. Defendant gave notice of appeal in open court.

II. Cross-examination on Prior Convictions

[1] Defendant first argues that the trial court erred in permitting the prosecutor to cross-examine him on the details of his prior convictions. We disagree.

A. Standard of Review

The State contends that defendant's arguments concerning the prosecutor's cross-examination of defendant on the details of his prior convictions were not properly preserved. Although defendant did not object when the prosecutor asked twice if he had been convicted of carrying a concealed .22 caliber revolver, neither of those questions elicited evidence. The question to which defendant did object was the one which produced the evidence he challenges on appeal. The prosecutor's questions were not evidence and "[o]rdinarily, the asking of the question alone will not result in prejudice to the defendant." *State v. Campbell*, 296 N.C. 394, 399, 250 S.E.2d 228, 231 (1979). Because defendant did object to the question which produced the challenged evidence, we hold that defendant's objection to the evidence that he had been convicted of carrying a concealed .22 caliber revolver was properly preserved.

> The standard of review for admission of evidence over objection is whether it was admissible as a matter of law, and if so, whether the trial court abused its discretion in admitting the evidence. 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. James, ___ N.C. App. ___, ___, 735 S.E.2d 627, 629 (2012) (citations and quotation marks omitted).

B. Analysis

> It is the rule in North Carolina that for purposes of impeachment, a witness, including the accused, may be cross-examined with respect to prior convictions. . . . [W]here, for purposes of impeachment, the witness has admitted a prior conviction, the time and place of the conviction and the punishment imposed may be inquired into upon cross-examination. . . . A showing that the witness has been convicted of an offense is a prerequisite to the *right* to cross-examine him relative to the punishment imposed.

State v. Finch, 293 N.C. 132, 141, 235 S.E.2d 819, 824 (1977).

First, defendant contends that the State failed to establish his prior conviction before asking him about that conviction. That is not what the law requires. As stated in *Finch*, the State may only inquire into the time, place, and level of punishment imposed relative to an established conviction. *Id.* But the State is not required to somehow establish the conviction before asking the defendant about the existence of such a conviction. As with any other witness, the State is free to ask the defendant whether he has been convicted of a crime other than a Class 3 misdemeanor consistent with N.C. Gen. Stat. § 8C-1, Rule 609, assuming that there is a good faith basis for such questioning. *See State v. Alkano*, 119 N.C. App. 256, 263, 458 S.E.2d 258, 263 ("Questions asked on cross-examination must be asked in good faith."), *app. dismissed*, 341 N.C. 653, 465 S.E.2d 533 (1995). The State did not inquire further into the details of defendant's prior convictions until after he admitted them.

Generally, "inquiry into prior convictions which exceeds the limitations established in *Finch* is reversible error." *State v. Rathbone*, 78 N.C. App. 58, 64, 336 S.E.2d 702, 705 (1985), *disc. rev. denied*, 316 N.C. 200, 341 S.E.2d 582 (1986). Nevertheless, "when the defendant 'opens the door' by misstating his criminal record or the facts of the crimes or actions, or when he has used his criminal record to create an inference favorable to himself, the prosecutor is free to cross-examine him about details of those prior crimes or actions." *State v. Bishop*, 346 N.C. 365, 389, 488 S.E.2d 769, 782 (1997) (citation and quotation marks omitted).

Here, defendant testified on his own behalf and attempted to minimize his criminal record both on direct and cross-examination. On direct examination, defendant's trial counsel asked him what he had

been convicted of. Defendant responded, "Just maybe eleven years ago what the judge talked about earlier." The prior stipulation that the trial court read to the jury simply stated that "The State and the defendant stipulate or agree that the defendant was a convicted felon on or about December 24, 2011 . . . ."

The State, on cross-examination, then inquired about his prior convictions:

> [PROSECUTOR]: Isn't it true you were convicted on April the 29th of 2002 of felonious carrying a concealed weapon, that being a .22-caliber revolver out of Berrien County, Michigan?
>
> [DEFENDANT]: When?
>
> [PROSECUTOR]: April the 29th, 2002 you were convicted of felonious carrying a concealed weapon, a .22-caliber, out of Berrien County, Michigan?
>
> [DEFENDANT]: No.

The State then showed defendant a court record from Michigan which listed a conviction for carrying a concealed weapon and asked defendant, over defendant's objection, again what type of weapon was listed on the judgment. Defendant responded "A .22 caliber revolver." Defendant admitted that he had been convicted of that charge. The State then asked about a conviction for possession of a firearm by a felon, also in Michigan. Defendant attempted to explain what happened that lead to each conviction, stating that someone else was driving his car with a gun in it, which led to the first conviction, and that the second firearm was found in his home.

In *State v. Braxton*, 352 N.C. 158, 531 S.E.2d 428 (2000), *cert. denied*, 531 U.S. 1130, 148 L.Ed. 2d 797 (2001), our Supreme Court addressed similar circumstances. In that case, the defendant, on direct examination, described a series of prior convictions, including an assault he described as "getting into some trouble." *Braxton*, 352 N.C. at 193, 531 S.E.2d at 448 (brackets omitted). The Court described the State's cross-examination as follows:

> On cross-examination the prosecutor questioned defendant about the misdemeanors and in an effort to jog defendant's memory, mentioned factual details. The prosecutor also asked if the assault on the officer at Polk Youth Center was what defendant meant by "getting into trouble" and

> whether this was the incident that caused defendant to be transferred from Polk Youth Center to Blanch, a more restrictive facility which defendant had described on direct examination. In response to a question by the prosecutor concerning when he started the cycle of being continuously in and out of prison, defendant volunteered information about stealing a car; and the prosecutor then asked him who the victim was and if he was charged with stealing a car. Defendant responded that he stole a cab and that he was charged with larceny of a motor vehicle and robbery. The prosecutor asked what kind of robbery it was in order to clarify that it was armed robbery and then asked what type of weapon defendant used. The prosecutor also cross-examined defendant about the sequence and timing of the other murders that defendant had committed.

Id. at 193, 531 S.E.2d at 449. The Supreme Court held that "the prosecutor did not exceed the proper scope of examination" because the defendant tried to minimize his criminal history on direct examination, and the prosecutor only asked about "the factual elements of the crimes," not "tangential circumstances of the crimes." *Id.* at 193-94, 531 S.E.2d at 449 (brackets omitted).

Similarly, here, defendant tried to minimize his criminal record on direct examination and then denied that he had been convicted of carrying a concealed weapon when asked on cross-examination. Most of the details concerning tangential circumstances of the crimes were offered by defendant without prompting by the prosecutor. As in *Braxton*, the prosecutor's questions on the type of gun used were part of the prosecutor's effort to jog defendant's memory about a prior conviction he denied and to counter defendant's attempts to minimize his criminal record. *See id.* at 194, 531 S.E.2d at 449. Therefore, we conclude that defendant opened the door to the prosecutor's questions concerning the type of weapon involved with his prior crimes.

III. Impeachment by Prior Conviction

[2] Defendant next asserts that the trial court erred by allowing the State to impeach him using prior convictions when he had stipulated that he was a convicted felon for purposes of the possession of a firearm by a felon charge. We disagree.

Defendant did not object on this basis at trial, but he asks us to review this asserted error for plain error. "[B]efore a ruling can be plain error, it must be error." *State v. Lopez*, ___ N.C. App. ___, ___, 723 S.E.2d

164, 168 (2012) (citation and quotation marks omitted). Even assuming we were to adopt the reasoning of *Old Chief v. United States*, 519 U.S. 172, 136 L.Ed. 2d 574 (1997), which defendant principally relies on, it would not have been error for the trial court to permit the State to impeach defendant with his prior convictions.[1] In *Old Chief*, the U.S. Supreme Court specifically noted that "[w]hile it is true that prior-offense evidence may in a proper case be admissible for impeachment, even if for no other purpose, Fed. Rule Evid. 609, [Old Chief] did not testify at trial." *Old Chief*, 519 U.S. at 176 n.2, 136 L.Ed. 2d at 585 n.2. Even in the North Carolina cases applying *Old Chief*, we have never held that such a rule applies where the defendant elects to testify. *See generally*, *State v. Fortney*, 201 N.C. App. 662, 687 S.E.2d 518 (2010), *State v. Little*, 191 N.C. App. 655, 664 S.E.2d 432, *disc. rev. denied*, 362 N.C. 685, 671 S.E.2d 326 (2008), *and State v. Faison*, 128 N.C. App. 745, 497 S.E.2d 111 (1998); *but see State v. Tice*, 191 N.C. App. 506, 511, 664 S.E.2d 368, 372 (2008) (in a case where the defendant did testify, deciding that defendant failed to show ineffective assistance by failing to raise such an argument under *Old Chief*).

Here, where defendant did testify, he was subject to impeachment on the basis of his prior convictions, even though he had already stipulated to being a convicted felon for purposes of the firearm possession charge. *See United States v. Kemp*, 546 F.3d 759, 763 (6th Cir. 2008) (holding that the protection afforded by Old Chief "can recede when a criminal defendant chooses to testify at trial"). The trial court did not err in permitting the State to impeach defendant on that basis.

IV. Gang Evidence

[3] Defendant next argues that the trial court erred in excluding various evidence about gang culture and evidence from other witnesses about the decedent's gang membership that defendant asserts was relevant to his claim of self-defense. We disagree.

Defendant proffered the testimony of Gregory Hestor, a former officer in the Charlotte-Mecklenburg Police Department's Gangs and Firearms Unit, Asheville Police Department detective Mandy Buchanan, and Sergeant Louis Tomasetti, an Asheville Police Department gang investigator. Mr. Hestor would have testified about gang culture, the meanings of gang tattoos, and their mindset. Detective Buchanan would

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1. *Old Chief* concerned the interpretation of the Federal Rules of Evidence; it does not control our interpretation of the North Carolina Rules of Evidence. *State v. Faison*, 128 N.C. App. 745, 747, 497 S.E.2d 111, 112 (1998).

have testified that one of the tattoos on Mr. Carter's chest was a gang symbol. Sergeant Tomasetti would have testified about Mr. Carter's tattoos, what they symbolize, and how one determines whether someone is a gang member. The trial court excluded all three witnesses' testimony as irrelevant. Additionally, the trial court prevented defendant from questioning Mr. Taylor about Mr. Carter's gang membership. The trial court did permit defendant to testify that he had been informed that Mr. Carter was a gang member who had robbed and kidnapped people.

Evidence is relevant if it has "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). Although "a trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal." *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991), *disc. rev. denied and app. dismissed*, 331 N.C. 290, 416 S.E.2d 398, *cert. denied*, 506 U.S. 915, 121 L.Ed. 2d 241 (1992).

> The law in North Carolina is well-established that, although it may not be necessary to kill to avoid death or great bodily harm, a person may kill if he believes it to be necessary, and he has reasonable grounds for believing it necessary, to save himself from death or great bodily harm. The reasonableness of his belief is to be determined by the jury from the facts and circumstances as they appeared to the defendant at the time of the killing.

State v. Jones, 56 N.C. App. 259, 269, 289 S.E.2d 383, 390 (citations omitted), *disc. rev. denied and app. dismissed*, 305 N.C. 762, 292 S.E.2d 578 (1982).

Defendant asserts that the proffered testimony was relevant to his reasonable apprehension of great bodily harm. However, none of the proffered evidence related to what the defendant knew about Mr. Carter's gang membership or character for violence. The relevant question is what defendant knew or thought about defendant and his history of violence, i.e. "the facts and circumstances as they appeared to defendant at the time of the killing." *Id.*; *see State v. Shoemaker*, 80 N.C. App. 95, 101, 341 S.E.2d 603, 607 ("In self-defense cases, the character of the victim for violence is relevant only as it bears upon the reasonableness of defendant's apprehension and use of force, which are essential elements of the defense of self-defense. Thus, the conduct becomes

relevant only if defendant knew about it at the time of the shooting." (citations omitted)), *disc. rev. denied and app. dismissed*, 317 N.C. 340, 346 S.E.2d 145 (1986); *State v. Brown*, 120 N.C. App. 276, 277-78, 462 S.E.2d 655, 656 (1995) ("In self-defense cases, the victim's violent character is relevant only as it relates to the reasonableness of defendant's apprehension and use of force . . . ."), *disc. rev. denied*, 342 N.C. 896, 467 S.E.2d 906 (1996). What three police officers and other witnesses knew about gangs and gang culture, and the significance of Mr. Carter's tattoos—of which defendant has never claimed to be aware at the time of the killing—has no relevance to defendant's reasonable apprehension of great bodily harm. Therefore, we hold that the trial court did not err in excluding the proffered testimony as irrelevant.

V. Impeachment by Prior Inconsistent Statement

[4] Finally, defendant asserts that the trial court erred in allowing the State to cross-examine him on the basis of statements he denied making that were contained in a police report. We hold that although the prosecutor's questions were inappropriate, especially in light of the trial court's instructions not to ask such questions, defendant has failed to show prejudice.

> The credibility of a witness may be impeached on cross-examination by questioning the witness regarding evidence that appears to be inconsistent with the testimony of the witness. However, contradiction of collateral facts by other evidence is not permitted, as its only effect would be to show that the witness is capable of error on immaterial points, and to allow it would confuse the issues and unduly prolong the trial.

State v. Kimble, 140 N.C. App. 153, 167, 535 S.E.2d 882, 891 (2000) (citations and quotation marks omitted), *cert. denied*, 360 N.C. 178, 626 S.E.2d 833 (2005).

While the denial of a conviction may be contradicted by extrinsic evidence from a public record, the facts surrounding prior convictions will normally be collateral, and extrinsic evidence is inadmissible if used solely to contradict the witness' denial of such collateral matters. *See State v. Dalton*, 96 N.C. App. 65, 70, 384 S.E.2d 573, 576 (1989) (holding that a defendant's denial of a conviction may be contradicted by introducing public records which prove such a conviction); *State v. Monk*, 286 N.C. 509, 517, 212 S.E.2d 125, 132 (1975) (noting that the prosecutor may cross-examine a defendant "concerning *collateral matters* relating to his criminal and degrading conduct." (emphasis added)); *Kimble*, 140

N.C. App. at 167, 535 S.E.2d at 891 (stating that "contradiction of collateral facts by other evidence is not permitted.").

Defendant, on cross-examination, claimed that he was charged with carrying a concealed weapon because he had sold his car to someone else, who had the gun in the trunk, but was charged nonetheless because the car was still registered in his name. The State attempted to impeach defendant by introducing a police report which stated that defendant had admitted placing the gun in the trunk. The trial court excluded the report, but permitted the State to ask defendant whether he had made a prior inconsistent statement to Michigan police, given that defendant had attempted to explain away his prior convictions. The prosecutor then persisted in asking questions while quoting the exhibit that the trial court specifically ruled inadmissible:

> [PROSECUTOR]: Mr. Gayles, I'm going to show you what's been marked for identification purposes as State's Exhibit 42. It reads "Berrien Township Police Department." Isn't that correct, sir?
>
> [DEFENSE COUNSEL]: Objection.
>
> COURT: Sustained.
>
> [PROSECUTOR]: And on this document it has your name listed, "Devon Armond Gayles;" correct?
>
> [DEFENDANT:] Yeah.
>
> [PROSECUTOR]: Date of birth, 11-7-1975?
>
> [DEFENSE COUNSEL]: Objection.
>
> COURT: Sustained.
>
> [PROSECUTOR]: Social Security number 384 --
>
> [DEFENSE COUNSEL]: Objection.
>
> COURT: Sustained.
>
> [PROSECUTOR]: S o your name's on here; true?
>
> [DEFENDANT]: Yeah, I see it.
>
> [PROSECUTOR]: And on the second page of 42 it talks about a .22-caliber revolver?
>
> [DEFENSE COUNSEL]: Objection.

COURT: Sustained.

[PROSECUTOR]: And on this document, the fourth page says "interview with Devon Gayles."

[DEFENSE COUNSEL]: Objection.

COURT: Sustained.

[PROSECUTOR]: Isn't it true the incident you're saying that that gun belonged to somebody else; that's your testimony?

[DEFENDANT]: Correct.

. . . .

[PROSECUTOR]: So you never told him that [the gun was yours]?

[DEFENDANT]: No.

. . . .

[PROSECUTOR]: Did you deny making that statement?

[DEFENDANT]: I didn't make it.

[PROSECUTOR]: So the highlighted portion I'm reading is incorrect?

[DEFENSE COUNSEL]: Objection.

COURT: Sustained.

[PROSECUTOR]: And then after "for protection" –

[DEFENSE COUNSEL]: Move to strike, your Honor.

COURT: Allowed.

[PROSECUTOR]: And after the quotes, because it's got quotes "for protection because a week ago somebody had tried to rob him."

[DEFENSE COUNSEL]: Objection.

COURT: Overruled.

[PROSECUTOR]: Do you admit or deny saying that?

[DEFENDANT]: I didn't.

> [PROSECUTOR]: You did not say that?
>
> [DEFENDANT]: No.
>
> . . . .
>
> [DEFENSE COUNSEL]: I would ask for a limiting instruction that [the prosecutor's] questions are not evidence. They're not to be considered by the jury as they are not evidence in themselves.
>
> COURT: I would think the jury understands that the questions themselves aren't evidence. I want to caution you, also, and I'll talk about convictions at the end of the trial. This document that was shown to [defense counsel] is not in evidence. There's no evidence as to where it came from. Keep that in mind; okay? Mr. [Prosecutor], please go on.

After the trial court issued its limiting instruction, the prosecutor continued asking defendant about his Michigan convictions and the details thereof. Defendant continued to explain what led to the convictions and minimize his culpability.

The prosecutor here showed a marked and egregious disregard for the trial court's ruling that the Michigan police report was inadmissible by continuing to ask questions about the contents of that report. If the prosecutor wanted to make an offer of proof as to the defendant's responses to his questions by asking his questions on the record, he should have done so out of the presence of the jury. Nevertheless, we hold that the prosecutor's misconduct was not prejudicial. The trial court instructed the jury that the prosecutor's questions were not evidence and warned the jury not to consider the document that the prosecutor was reading from as it was not in evidence. "Generally, when a trial court properly instructs jurors to disregard incompetent or objectionable evidence, any error in the admission of the evidence is cured." *State v. Diehl*, 147 N.C. App. 646, 650, 557 S.E.2d 152, 155 (2001), *cert. denied*, 356 N.C. 170, 568 S.E.2d 624 (2002). Further, when a trial court sustains a party's objection to an inappropriate question "no prejudice [ordinarily] exists, for when the trial court sustains an objection to a question the jury is put on notice that it is not to consider that question." *State v. Banks*, 210 N.C. App. 30, 43-44, 706 S.E.2d 807, 817 (2011) (citation and quotation marks omitted). Although the instruction perhaps could have been clearer, we hold that the instruction given by the trial court not to consider the prosecutor's questions cured any prejudice to defendant. "If defendant desired a different, more limiting instruction, he should have

requested it at that time." *State v. Hopper*, 292 N.C. 580, 589, 234 S.E.2d 580, 585 (1977). We do wish to emphasize, however, that such blatant disregard of a trial court's ruling as that shown here by the prosecutor is highly inappropriate.

VI. Conclusion

For the foregoing reasons, we conclude that there was no prejudicial error at defendant's trial.

NO PREJUDICIAL ERROR.

Judges HUNTER, JR., Robert N. and DILLON concur.

STATE OF NORTH CAROLINA
v.
ROMY VERDAE GEISSLERCRAIN

No. COA13-887

Filed 1 April 2014

1. Motor Vehicles—reckless driving—substantial evidence

The trial court did not err by denying defendant's motion to dismiss the charge of reckless driving where there was substantial evidence to support the elements of the offense and more than a mere failure to keep a reasonable lookout, as defendant contended.

2. Sentencing—aggravating factor—found by court—improper

The trial court improperly found an aggravating factor in a prosecution for reckless driving by making the finding itself instead of submitting the aggravating factor to the jury. That aggravating factor increased the penalty for the crime beyond the prescribed maximum.

3. Sentencing—discretion—reckless driving—no aggravating factors

The trial court had no discretion in the sentence given in a reckless driving case where no aggravating factors were properly found. The rationale in *State v. Green*, 209 N.C. App. 669, did not apply.

4. Sentencing—aggravating factors—notice

The State's failure to provide proper notice that it intended to seek aggravating factors in a prosecution for reckless driving, as

required by N.C.G.S. § 20-179(a1)(1), was error, and the State's contention that the error was harmless because defendant received a "presumptive" sentence failed because the sentence given was not appropriate.

5. Appeal and Error—sentence—vacated elsewhere—argument moot

Defendant's argument concerning the enhancement of his sentence was moot where his sentence had already been vacated and remanded.

Appeal by Defendant from judgments entered 10 April 2013 by Judge Marvin P. Pope, Jr., in Yancey County Superior Court. Heard in the Court of Appeals 12 December 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Hal F. Askins, for the State.

Charlotte Gail Blake, for Defendant.

DILLON, Judge.

Romy Verdae Geisslercrain ("Defendant") appeals from judgments convicting her of impaired driving and reckless driving to endanger, alleging errors in her sentencing and challenging the trial court's denial of her motion to dismiss for insufficiency of the evidence. We find no error, in part, and we vacate and remand, in part.

I. Background

The evidence of record tends to show the following: On the evening of 16 July 2010, Defendant was involved in a single vehicle accident on Highway 19 near Burnsville. After Defendant had been transported to the hospital, State Trooper Jeremy Carver arrived at the scene where he found Defendant's damaged Ford Ranger truck in the middle of the highway. Trooper Carver believed that Defendant had likely driven off the right side of the road, after which she tried to jerk her truck back onto the road too quickly, resulting in the truck rolling several times and sustaining approximately $7,000.00 in damage. Trooper Carver thought the truck may have been going too fast for a curve in the road.

Trooper Carver went to the hospital to speak with Defendant, who told him she had taken medications either the day of the incident or the day before – including Methadone, Clonazepam, and Adderall. She

also admitted to Trooper Carver that she had been drinking alcohol. Trooper Carver believed that Defendant had consumed a sufficient quantity of impairing substances to appreciably impair her mental and physical faculties.

Defendant was indicted on charges of impaired driving and reckless driving to endanger. After her conviction in District Court, Defendant appealed to Superior Court, where a jury found her guilty of both charges.

During sentencing, the trial court determined, without submitting the question to a jury, that an aggravating factor existed, specifically, that "[t]he negligent driving of [D]efendant led to an accident causing property damage of $1,000.00 or more[.]" The trial court further determined that a mitigating factor existed, specifically, that "[D]efendant has a safe driving record[.]" The trial court determined that the aggravating factor was substantially counterbalanced by the mitigating factor, and, therefore, declared that "a Level Four punishment shall be imposed."

The trial court entered two written judgments, one for each conviction. The written judgment for the impaired driving conviction reflects that the trial court was sentencing Defendant as a Level Four offender, but then actually sentenced her to a minimum and maximum sentence of twelve months incarceration, which is above the range of Level Four punishments. Nonetheless, as reflected on the written judgment, the trial court suspended the active sentence on the condition that she be placed on twelve months supervised probation.

The trial court also entered a written judgment on Defendant's reckless driving to endanger conviction, sentencing her to ten days incarceration, which the trial court suspended on the condition that she be placed on twelve months supervised probation, to be served concurrently with the sentence for her impaired driving conviction. Defendant appeals from both judgments.

II. Analysis

Defendant argues on appeal that the trial court erred in denying her motion to dismiss her impaired driving conviction and also committed errors with regard to her sentence. We address each argument below.

A: Motion to Dismiss

[1] Defendant argues that the trial court erred by denying her motion to dismiss the charge of reckless driving. We disagree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000) (citation and quotation marks omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

N.C. Gen. Stat. § 20-140(a) and (b) provide two definitions of reckless driving. A person may violate N.C. Gen. Stat. § 20-140 by either of the courses of conduct defined in subsection (a) and (b), or in both respects. *State v. Dupree*, 264 N.C. 463, 142 S.E.2d 5 (1965). Most pertinent to this case, subsection (b) provides the following: "Any person who drives any vehicle upon a highway or any public vehicular area without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property shall be guilty of reckless driving." *Id.*

On appeal, Defendant specifically argues the trial court erroneously denied her motion to dismiss because the evidence shows that she merely failed to keep a reasonable lookout. "Mere failure to keep a reasonable lookout does not constitute reckless driving[;] [t]o this must be added dangerous speed or perilous operation." *State v. Dupree*, 264 N.C. 463, 466, 142 S.E.2d 5, 7 (1965). We disagree and believe that there was substantial evidence in this case to support the elements of reckless driving, and, when viewed in the light most favorable to the State, that there was more than a mere failure to keep a reasonable lookout. Specifically, the State presented evidence that Defendant was intoxicated; that all four tires of Defendant's vehicle had gone off the road; that distinctive "yaw" marks were left on the road indicating that Defendant had lost control of the vehicle; that Defendant's vehicle overturned twice; and that the vehicle traveled 131 feet from the point it went off the road before it flipped, and another 108 feet after it flipped.

Therefore, the trial court did not err by denying Defendant's motion. *See, e.g.*, *State v. Coffey*, 189 N.C. App. 382, 387, 658 S.E.2d 73, 77 (2008); *see generally Bank v. Lindsey*, 264 N.C. 585, 587, 142 S.E.2d 357, 360 (1965) (stating that "operation of [a vehicle] in a drunken condition constituted a driving of it upon the public highway without due caution and circumspection and in a manner so as to endanger persons or property, and was reckless driving within the intent and meaning of G.S. § 20-140(b)"). Accordingly, Defendant's argument is overruled.

B: Sentencing

Defendant contends that there were reversible errors regarding the sentencing on her impaired driving conviction as a Level Four offender. Specifically, Defendant argues that (1) the trial court erred in determining the existence of an aggravating factor, rather than submitting this issue to the jury; (2) she did not receive proper notice that the State would be seeking aggravating factors; and (3) her sentence was outside (above) the Level Four punishment range. We address each argument below.

i. Trial Court's Finding of Aggravating Factor

[2] Defendant argues the trial court committed reversible error by determining, *itself*, that an aggravating factor existed, rather than submitting the aggravating factor to the jury for determination, citing the United States Supreme Court decision *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004) in which that Court applied the rule it stated in *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 455 (2000) — that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed maximum must be submitted to the jury and proved beyond a reasonable doubt" — to aggravating factors. *Blakely*, 542 U.S. at 301, 159 L. Ed. 2d at 412. We agree.

Sentencing defendants convicted of impaired driving is governed by N.C. Gen. Stat. § 20-179 (2011). Under G.S. § 20-179, there are six sentencing ranges. Like the sentencing scheme found in the Structured Sentencing Act, codified at N.C. Gen. Stat. § 15A-1340.16 (2011), a defendant's sentencing range under N.C. Gen. Stat. § 20-179 is determined by the existence and balancing of aggravating and mitigating factors. However, the trial court is afforded much less discretion in sentencing under N.C. Gen. Stat. § 20-179 than under the Structured Sentencing Act. *See State v. Weaver*, 91 N.C. App. 413, 415-16, 371 S.E.2d 759, 760 (1988) (stating that the sentencing scheme found in N.C. Gen. Stat. § 20-179 is "quite systematic and tiered, thus leaving little room to exercise discretion").

The three most severe punishment levels under N.C. Gen. Stat. § 20-179, which are Aggravated Level One, Level One, and Level Two, are imposed only where a "grossly aggravating factor" is found to exist. Where there are no grossly aggravating factors present, a defendant convicted of impaired driving must be sentenced in one of the three remaining ranges, namely, either under Level Three, Level Four, or Level Five. *See id.*

In the present case, no grossly aggravating factors were found to exist, so the trial court was required to determine whether a Level Three, Level Four, or Level Five punishment was appropriate by weighing those factors pursuant to N.C. Gen. Stat. § 20-179(f). Under N.C. Gen. Stat. § 20-179(f)(1), if the trial court determines that "[t]he aggravating factors substantially outweigh any mitigating factors," the trial court *must* impose a Level Three punishment. We also believe that if there are only aggravating factors present — and no mitigating factors present — then the aggravating factors "substantially outweigh" the mitigating factors (as there are none) as a matter of law, and the trial court *must* impose a Level Three punishment. *See id.*

Likewise, if the trial court determines that "[t]he mitigating factors substantially outweigh any aggravating factors," the trial court *must* impose a Level Five punishment. N.C. Gen. Stat. § 20-179(f)(3). And if there are only mitigating factors present — and no aggravating factors present — the trial court *must* impose a Level Five punishment. *See id.*

If there are no aggravating or mitigating factors present or, alternatively, if the aggravating and mitigating factors are "substantially counterbalanced," then the trial court *must* impose a Level Four punishment. N.C. Gen. Stat. § 20-179(f)(2).

In this case, the trial court sentenced Defendant to a Level Four punishment, concluding that the single aggravating factor, which the trial court, and not the jury, found, was substantially counterbalanced by the single mitigating factor. If the aggravating factor had not been considered by the trial court, then there would have been only the single mitigating factor present; and the trial court would have been *required* to sentence Defendant to a Level Five punishment. *See* N.C. Gen. Stat. § 20-179(f)(3). Accordingly, the aggravating factor in this case, which was improperly found by the judge, "increase[d] the penalty for [the] crime beyond the prescribed maximum," *Blakely*, *supra*, and Defendant's Level Four punishment must be vacated.

The State, however, argues that no *Blakely* error occurred because a Level Four punishment is similar to a defendant being sentenced

within the presumptive range under the Structured Sentencing Act. Our Supreme Court has held that, in the context of a defendant sentenced under the Structured Sentencing Act, *Blakely* is not implicated when a trial court improperly finds aggravating factors, rather than submitting those factors to the jury, so long as the defendant is sentenced within the presumptive range, reasoning that a trial judge "does not exceed his proper authority until he inflicts [enhanced] punishment . . . the jury's verdict alone does not allow." *State v. Norris*, 360 N.C. 507, 514, 517, 630 S.E.2d 915, 919, 921, *cert. denied*, 549 U.S. 1064, 166 L. Ed. 2d 535 (2006) (holding that "[t]he trial court did not violate defendant's Sixth Amendment right to a jury trial when it found a statutory aggravating factor but sentenced defendant within the presumptive range")(citation and quotation marks omitted).

Norris is not applicable to the present case. Under the Structured Sentencing Act the trial court has the discretion to sentence a defendant within the presumptive range even where only mitigating factors are properly found. However, in the context of the sentencing scheme in N.C. Gen. Stat. § 20-179, the trial court does not have the discretion to sentence a defendant to a Level Four punishment where only mitigating factors are properly found, but rather, it is required to sentence the defendant to a Level Five punishment. In other words, where a defendant is sentenced under the Structured Sentencing Act within the presumptive range where mitigating factors are present, *Blakely* is not implicated if the trial court *itself* — and not the jury — finds aggravating factors to exist as well. This is because the trial court had the authority to sentence the defendant within the presumptive range even without finding aggravating factors to counterbalance the mitigating factors. However, under G.S. § 20-179, the trial court has no discretion to sentence a defendant to a Level Four punishment where only mitigating factors are properly found to exist. Therefore, in this case, *Blakely* has been implicated because, without the presence of an aggravating factor, the trial court was required to sentence Defendant to a Level Five punishment, a sentence which could not have been enhanced to a Level Four punishment without the jury finding the aggravating factor — which had been improperly found by the trial court — beyond a reasonable doubt.

[3] The State also argues that we are bound by our decision in *State v. Green*, 209 N.C. App. 669, 707 S.E.2d 715 (2011). *Green* involved a prosecution for impaired driving where two aggravating factors and two mitigating factors were found to exist, and the defendant was sentenced to a Level Four punishment. *Id.* at 681, 707 S.E.2d at 723-24. On appeal, the defendant argued that the trial court had inappropriately found one

of the two aggravating factors instead of submitting that factor to the jury. *Id.* The defendant made no argument that the trial court inappropriately found the other aggravating factor, which involved the defendant's driving record[1]. *Id.* Accordingly, the defendant was effectively arguing that there was only one valid aggravating factor, instead of two, which, by itself, did not substantially counterbalance the two mitigating factors. *Id.* at 681-82, 707 S.E.2d at 723-24. This Court, specifically relying on the rationale in *Norris*, expressly held that the "level four punishment imposed by the trial court [under G.S. § 20-179] was tantamount to a sentence within the presumptive range [in a structured sentencing case], so that the trial court did not enhance defendant's sentence even after finding aggravating factors [and, therefore,] *Blakely* is not implicated." *Id.* at 681-82, 707 S.E.2d at 724.

We hold *Green* is distinguishable from the present case. In *Green*, even with the error, there remained one valid aggravating factor to counterbalance the two mitigating factors. *See id.* Even where only one aggravating factor, rather than two, is found along with two mitigating factors, the trial court still has the discretion to sentence the defendant to a Level Four punishment since it could have determined, within its discretion, that the one aggravating factor "substantially counterbalanced" the two mitigating factors. However, in the present case, without any aggravating factors properly found, the trial court had no discretion but to sentence Defendant to a Level Five punishment. Accordingly, we believe that this Court's rationale in *Green* does not apply.

ii. Notice

[4] Defendant contends the State failed to provide notice that it intended to seek aggravating factors as required by N.C. Gen. Stat. § 20-179(a1)(1). We agree that the State's failure to provide the required notice was error.

N.C. Gen. Stat. § 20-179(a1)(1) provides the following with regard to notice of aggravating factors:

> If the defendant appeals to superior court, and the State intends to use one or more aggravating factors under subsections (c) or (d) of this section, the State must provide the defendant with notice of its intent. The notice shall be provided no later than 10 days prior to trial and shall

1. We note that *Blakely* is not implicated where the fact found by the trial court, and not the jury, which is used to enhance a defendant's punishment is the existence of a prior conviction.

> contain a plain and concise factual statement indicating the factor or factors it intends to use under the authority of subsections (c) and (d) of this section. The notice must list all the aggravating factors that the State seeks to establish.

On appeal, the State does not dispute that it failed to provide proper notice; but rather, since Defendant was sentenced to a Level Four punishment, which the State argues is a "presumptive" sentence, the State's failure to provide notice was harmless error. However, because we have concluded that a Level Four punishment in this case was inappropriate, the State's argument must fail.

Generally, when the State has failed to provide proper notice pursuant to N.C. Gen. Stat. § 20-179(a1)(1), this Court has vacated Defendant's sentence and remanded for resentencing. *State v. Reeves*, __ N.C. __, 721 S.E.2d 317 (2012). In *Reeves*, this Court stated, "[i]t is evident that the State failed to provide Defendant with the statutorily required notice of its intention to use an aggravating factor under N.C.G.S. § 20-179(d). We must therefore vacate Defendant's sentence as to the DWI charge and remand to the trial court for resentencing." *Id.* at __, 721 S.E.2d at 322.

Following our rationale in *Reeves* and other decisions of this Court, we believe the proper resolution in the present case is to remand the matter to the trial court, directing it to resentence Defendant to a Level Five punishment.

iii. Sentence Outside the Level Four Punishment Range

[5] Defendant argues that the trial court improperly sentenced her to a punishment outside the Level Four range. However, having concluded that Defendant's punishment must be vacated and this matter remanded for resentencing in the Level Five range, we conclude that Defendant's argument is moot and, therefore, do not address its merits.

III. Conclusion

Based on the foregoing, the trial court erred by sentencing Defendant to a Level Four punishment on her conviction of impaired driving. Accordingly, we vacate and remand the judgment on this charge only, directing the trial court to resentence Defendant to a Level Five punishment. Otherwise, we find no error.

NO ERROR, in part; VACATED and REMANDED, in part.

Judge STROUD and Judge HUNTER, JR. concur.

STATE v. MARION

[233 N.C. App. 195 (2014)]

STATE OF NORTH CAROLINA
v.
TIFFANY LEIGH MARION

No. COA13-200

Filed 1 April 2014

1. Evidence—written notes of conversation with defendant—not confession—statement by party-opponent—acknowledgement or adoption not required

The trial court did not commit plain error in a first-degree murder trial by admitting into evidence notes prepared by a detective memorializing a conversation with defendant and allowing the State to impeach defendant's testimony with those notes. A defendant's statement that is not purported to be a written confession is admissible under the exception to the hearsay rule for statements by a party-opponent and does not require the defendant's acknowledgement or adoption. In this case, defendant's statements to the detective were never characterized as defendant's confession.

2. Sentencing—failure to arrest judgment—felony murder—underlying felonies

The trial court erred in a first-degree murder case by failing to arrest judgment on one of defendant's felony convictions because defendant's first-degree murder convictions were exclusively premised on a felony murder theory. As multiple felonies supported a felony murder conviction, the merger rule only required the trial court to arrest judgment on at least one of the underlying felony convictions. The matter was remanded with instructions that the trial court arrest judgment with respect to at least one of defendant's felony convictions in such a manner that would not subject defendant to a greater punishment.

3. Sentencing—attempted first-degree felony murder—crime non-existent

The trial court erred in a first-degree murder case by entering judgment on the jury's guilty verdict of attempted murder. The trial court's instruction concerning the attempted murder offense was based solely upon a theory of attempted felony murder and the offense of attempted first-degree felony murder does not exist under our law.

4. Homicide—first-degree murder—felony murder—acting in concert—aiding and abetting—sufficient evidence

Defendant's argument that all of her convictions must be vacated because the State failed to present substantial evidence concerning her involvement in the crimes charged under either the theory of (1) acting in concert or (2) aiding and abetting was without merit. The evidence offered at trial, taken in the light most favorable to the State, was sufficient to support defendant's convictions under both theories of criminal liability.

5. Constitutional Law—effective assistance of counsel—failure to move to dismiss charges—no prejudice

Defendant did not receive ineffective assistance of counsel in a first-degree murder case where her trial counsel did not move to dismiss the charges. As the State presented sufficient evidence to withstand a motion to dismiss the charges against defendant under acting in concert and aiding and abetting theories of criminal liability, defendant was not prejudiced by her counsel's failure to make a proper motion to dismiss the charges.

Appeal by defendant from judgments entered 19 March 2012 by Judge Marvin Pope in Swain County Superior Court. Heard in the Court of Appeals 26 September 2013.

Roy Cooper, Attorney General, by Mary Carla Hollis, Assistant Attorney General, for the State.

Staples Hughes, Appellate Defender, by Daniel R. Pollitt and Paul M. Green, Assistant Appellate Defenders, for defendant-appellant.

DAVIS, Judge.

Tiffany Leigh Marion ("Defendant") appeals from her convictions for two counts of first-degree murder, one count of attempted murder, two counts of robbery with a dangerous weapon, and one count of first-degree burglary. Defendant's primary argument on appeal is that there was insufficient evidence presented at trial to support her convictions under either an acting in concert theory or an aiding and abetting theory. After careful review, we vacate in part and remand in part as set out below.

Factual Background

The State's evidence tended to establish the following facts: On 5 August 2008, Defendant traveled from Atlanta, Georgia to Cherokee,

North Carolina to visit Harrah's casino. Defendant was accompanied by Jada McCutcheon ("McCutcheon") — a friend from the massage therapy school Defendant attended — and three men, Jeffrey Miles ("Miles"), Jason Johnson ("Johnson"), and a man known as "Freak." The group used ecstasy and smoked marijuana during the car trip and during their entire stay in North Carolina. Some of the ecstasy they used during their trip was mixed with other controlled substances, including heroin and cocaine. Once they arrived, part of the group gambled for several hours at the casino. Afterwards, Miles checked into a hotel room and listed Defendant as his guest. The group congregated in Miles' room over the next several days to "chill" and use drugs.

On 7 August 2008, Miles, Johnson, and "Freak" went to the local Wal-Mart, where they met two local residents, Mark Goolsby ("Goolsby") and Dean Mangold ("Mangold"). Miles asked Goolsby and Mangold if they wanted to take ecstasy and go to the casino with them, and the two replied affirmatively. Miles eventually brought them back to his hotel room and showed them an AR-15 firearm that he was interested in selling. Mangold suggested trying to sell the gun to a man named Scott Wiggins ("Wiggins") and offered to take them up to see Wiggins. Mangold also told Miles that Wiggins "had drugs." During this conversation, Defendant was lying on the bed and seemed "messed up."

Goolsby, Mangold, Miles, Johnson, McCutcheon, and Defendant got into their van and drove to Wiggins' home. During the drive, Mangold told Miles that Wiggins owed him money and that Wiggins had "all this stuff" and "a lot of money." Miles was driving the van and parked it on a gravel logging road where it could not be seen from Wiggins' house. Everyone exited the vehicle, and Miles told everyone that they were "fixin' to hit a lick," meaning that they were about to rob someone. Defendant stayed by the van and told McCutcheon that she "didn't want to go up there."

Johnson kicked in the door of the residence and proceeded to hold Wiggins and another person present in Wiggins' home, Michael Heath Compton ("Compton"), at gunpoint while the others began gathering valuables. While the group was searching for valuables, another person, Timothy Dale Waldroup ("Waldroup"), drove up to the house and was escorted into the residence at gunpoint. Miles shot Wiggins, Compton, and Waldroup during the course of the burglary, and only Waldroup survived. Goolsby and Mangold heard the gunshots, "got scared," and left the scene. Defendant then left the area by the van where she had been waiting, walked towards the house, found Johnson, and informed him that Goolsby and Mangold had left. She then returned to the van.

Johnson, Miles and McCutcheon proceeded to load the stolen items into Wiggins' pickup truck. Defendant attempted to drive the van but was unable to release the parking brake so McCutcheon drove the vehicle. Defendant and the others traveled back to Georgia and moved the stolen items into Miles' apartment.

On 18 August 2008, the Swain County grand jury returned bills of indictment charging Defendant with two counts of first-degree murder, one count of attempted murder, one count of first-degree burglary, two counts of robbery with a dangerous weapon, and three counts of first-degree kidnapping. The matter came on for a jury trial during the February and March 2012 Criminal Sessions of Swain County Superior Court.

Defendant offered evidence at trial and testified in her defense. She testified that she was using drugs during the entire trip and did not learn what had happened at Wiggins' house until she returned to Georgia on 11 August 2008. She further stated that she never heard or was a part of any conversations regarding a plan to rob Wiggins and explained that she "had no idea what was going on" when the group went to Wiggins' house, "had nothing to do with it," and "would never, ever be a part of anything like this."

The jury found Defendant guilty of two counts of first-degree murder, one count of attempted murder, one count of first-degree burglary, and two counts of robbery with a dangerous weapon. Defendant was found not guilty of the three kidnapping charges. The trial court entered judgments based on the jury's verdicts, sentencing Defendant to two consecutive terms of life imprisonment without parole for the first-degree murder charges, a presumptive-range term of 125 to 159 months for the attempted murder conviction, and presumptive-range terms of 51 to 71 months imprisonment for each of the remaining charges. Defendant gave timely written notice of appeal.

Analysis

Defendant raises a number of arguments on appeal. We address each in turn.

I. Defendant's Statement to Detective Posey

[1] Defendant first argues that the trial court erred by allowing the State to impeach her trial testimony through the use of a "written instrument[] the prosecutor improperly characterized, described, and referred to in court as 'defendant's written statement.' " Defendant acknowledges that she did not object to the use of this evidence at trial and therefore seeks review under the plain error doctrine. Under plain error review,

Defendant bears the burden of showing that the alleged 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).

Relying on *State v. Walker*, 269 N.C. 135, 152 S.E.2d 133 (1967), Defendant contends that the trial court committed plain error by admitting into evidence notes prepared by Detective Carolyn Posey ("Detective Posey") memorializing a conversation with Defendant and allowing the State to impeach Defendant's testimony with those notes.

In *Walker*, our Supreme Court held as follows:

> If a statement purporting to be a confession is given by [the] accused, and is reduced to writing by another person, before the written instrument will be deemed admissible as the written confession of [the] accused, he must in some manner have indicated his acquiescence in the correctness of the writing itself. If the transcribed statement is not read by or to [the] accused, and is not signed by [the] accused, or in some other manner approved, or its correctness acknowledged, the instrument is not legally, or *per se*, the confession of [the] accused; and it is not admissible in evidence as the written confession of [the] accused.

Id. at 139, 152 S.E.2d at 137 (citation and quotation marks omitted).

Our Supreme Court has explained, however, that the authentication requirements outlined in *Walker*, and later reiterated in *State v. Wagner*, 343 N.C. 250, 470 S.E.2d 33 (1996), do not apply to statements made by a defendant that are not confessions. *See State v. Moody*, 345 N.C. 563, 579, 481 S.E.2d 629, 637 (holding that "the requirements outlined in *Wagner* do not apply" because "[a]t no time was [the law enforcement officer's] record of his interview with defendant characterized as defendant's written confession"), *cert. denied*, 522 U.S. 871, 139 L.Ed.2d 125 (1997).

Here, Detective Posey testified that she took notes while she and Deputy Scott Cody transported Defendant from Georgia to North Carolina on 20 August 2008. Detective Posey explained that the notes were taken in shorthand, and they were "not exactly word for word." She replied affirmatively when asked if what she wrote was "as best [as] you can recall . . . what [Defendant] said while she was in the car."

After reviewing the transcript and record, we have found no indication that Defendant's statements to Detective Posey were ever characterized as Defendant's confession. A confession is "an acknowledgment

in express words, by the accused in a criminal case, of the truth of the guilty fact charged or of some essential part of it." *State v. Jones*, 294 N.C. 642, 659, 243 S.E.2d 118, 128 (1978) (citation and quotation marks omitted). Defendant's statements to Detective Posey, conversely, did not admit her guilt or participation in the crimes. Rather, the notes memorializing the conversation reflected Defendant's assertions that she did not know "anything about robbing anybody"; "did not even know anyone had passed"; that "nobody said anything to [her] about guns"; and that she only knew what had happened afterwards because McCutcheon told her.

A defendant's statement that is not purported to be a written confession is admissible under the exception to the hearsay rule for statements by a party-opponent and does not require the defendant's acknowledgement or adoption. *Moody*, 345 N.C. at 579, 481 S.E.2d at 637; *see State v. Randolph*, ___ N.C. App. ___, ___, 735 S.E.2d 845, 852 (2012) ("[S]o long as oral statements are not obtained in violation of the constitutional protections against self-incrimination or due process, a defendant's own statement is admissible when offered against him at trial as an exception to the hearsay rule." (citation and quotation marks omitted)), *appeal dismissed*, 366 N.C. 562, 738 S.E.2d 392 (2013). Accordingly, we hold that the trial court did not commit error, much less plain error, by allowing the State to impeach Defendant with her prior statements to Detective Posey.

II. Failure to Arrest Judgment on a Felony Conviction

[2] Defendant's second argument on appeal is that the trial court erred by failing to arrest judgment with respect to any of her felony convictions. Defendant asserts that because she was convicted of two counts of first-degree felony murder, the trial court was required to arrest judgment on at least two of her felony convictions pursuant to the felony murder merger doctrine. The State concedes that failing to arrest judgment on any of Defendant's felony offenses was error but argues that judgment need be arrested on only *one* of the felonies.

"The felony murder merger doctrine provides that when a defendant is convicted of felony murder only, the underlying felony constitutes an element of first-degree murder and merges into the murder conviction." *State v. Rush*, 196 N.C. App. 307, 313-14, 674 S.E.2d 764, 770 (citation, quotation marks, and brackets omitted), *disc. review denied*, 363 N.C. 587, 683 S.E.2d 706 (2009). Thus, if the defendant's conviction for first-degree murder is based solely upon the theory of felony murder, he or

she "cannot be sentenced on the underlying felony in addition to the sentence for first-degree murder." *Id.* at 314, 674 S.E.2d at 770 (citation and quotation marks omitted). In this case, because Defendant's first-degree murder convictions were exclusively premised on a felony murder theory, the trial court erred in entering judgment on all of Defendant's felonies.

However, we are not persuaded by Defendant's contention that judgment must be arrested with respect to *all* of her felony convictions. Defendant asserts that because the trial court's instructions were disjunctive and permitted the jury to find Defendant guilty of felony murder if it found that she committed "the felony of robbery with a firearm, burglary, and/or kidnapping," the trial court should have arrested judgment on all of the felony convictions on the theory that they all could have served as the basis for the felony murder convictions.

Our Court rejected this same argument in *State v. Coleman*, 161 N.C. App. 224, 587 S.E.2d 889 (2003). We explained that the disjunctive instruction was not error — and did not require the trial court to arrest judgment with respect to all of the defendant's felony convictions — because the defendant's right to a unanimous verdict was not violated and the instruction merely allowed the jury to convict the defendant of a single wrong by alternative acts. *Id.* at 234-35, 587 S.E.2d at 896.

Indeed, this Court has explicitly held that if multiple felonies support a felony murder conviction, the merger rule only "requires the trial court to arrest judgment on at least one of the underlying felony convictions . . . ." *State v. Dudley*, 151 N.C. App. 711, 716, 566 S.E.2d 843, 847 (2002), *appeal dismissed and disc. review denied*, 356 N.C. 684, 578 S.E.2d 314 (2003). In cases where the jury does not specifically determine which conviction serves as the underlying felony, we have held that the trial court may, in its discretion, select the felony judgment to arrest. *See Coleman*, 161 N.C. App. at 236, 587 S.E.2d at 897 ("[W]here no specific underlying felony was noted in the jury instructions on felony murder, and where there are multiple felony convictions which could serve as the underlying felony for purposes of the felony murder conviction, it is in the discretion of the trial court as to which felony will serve as the underlying felony for purposes of sentencing."). We therefore remand with instructions that the trial court arrest judgment with respect to at least one of Defendant's felony convictions "in such a manner that would not subject [D]efendant to a greater punishment." *Dudley*, 151 N.C. App. at 716, 566 S.E.2d at 847.

III. Attempted Murder

[3] Defendant also argues that the trial court erred by entering judgment on the jury's guilty verdict of attempted murder. The State concedes error on this issue as well.

The trial court's instruction concerning the attempted murder offense was based solely upon a theory of attempted felony murder. This Court has held that "the offense of 'attempted first degree felony murder' does not exist under our law." *State v. Lea*, 126 N.C. App. 440, 449, 485 S.E.2d 874, 879 (1997) (cited with approval by *State v. Coble*, 351 N.C. 448, 452, 527 S.E.2d 45, 48 (2000)). In so holding, we reasoned that the offense of felony murder "does not require that the defendant intend the killing, only that he or she intend to commit the underlying felony. *Lea*, 126 N.C. App. at 449, 485 S.E.2d at 880. Attempt, on the other hand, requires the State to establish that the defendant specifically intended to commit the crime charged. *Id.* Thus, "a charge of 'attempted felony murder' is a logical impossibility in that it would require the defendant to intend what is by definition an unintentional result." *Id.* at 450, 485 S.E.2d at 880.

Because attempted first-degree felony murder does not exist under the laws of North Carolina, we vacate Defendant's conviction with respect to this charge.

IV. Sufficiency of the Evidence of Acting in Concert or Aiding and Abetting

[4] Defendant next asserts that all of her convictions must be vacated because the State failed to present substantial evidence concerning her involvement in the crimes under either the theory of (1) acting in concert; or (2) aiding and abetting. Defendant's counsel did not make a motion to dismiss the charges at the close of all of the evidence, thereby failing to preserve this issue for appellate review. *See* N.C.R. App. P.10(a)(3) ("[I]f a defendant fails to move to dismiss the action . . . at the close of all the evidence, defendant may not challenge on appeal the sufficiency of the evidence to prove the crime charged."). However, because Defendant also brings forward an ineffective assistance of counsel claim based on her counsel's failure to make the motion to dismiss, we elect to review Defendant's sufficiency of the evidence argument pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure. *See State v. Gayton-Barbosa*, 197 N.C. App. 129, 140, 676 S.E.2d 586, 593 (2009) ("[P]ursuant to N.C.R. App. P.2, we will hear the merits of defendant's claim despite the rule violation because defendant also argues ineffective assistance

of counsel based on counsel's failure to make the proper motion to dismiss.").

Here, the State relied on two theories to establish Defendant's criminal responsibility for the murder, burglary, and robbery with a dangerous weapon offenses: (1) acting in concert, and (2) aiding and abetting. Under a theory of acting in concert, a defendant may be found guilty of an offense if she "is present at the scene of the crime and . . . [s]he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." *State v. Barnes*, 91 N.C. App. 484, 487, 372 S.E.2d 352, 353 (1988) (citation and quotation marks omitted), *aff'd as modified*, 324 N.C. 539, 380 S.E.2d 118 (1989).

Under a theory of aiding and abetting, the State must present evidence "(1) that the crime was committed by another; (2) that the defendant knowingly advised, instigated, encouraged, procured, or aided the other person; and (3) that the defendant's actions or statements caused or contributed to the commission of the crime by the other person." *State v. Bond*, 345 N.C. 1, 24, 478 S.E.2d 163, 175 (1996), *cert. denied*, 521 U.S. 1124, 138 L.Ed.2d 1022 (1997).

> A person may be guilty as an aider and abettor if that person . . . accompanies the actual perpetrator to the vicinity of the offense and, with the knowledge of the actual perpetrator, remains in that vicinity for the purpose of aiding and abetting in the offense and sufficiently close to the scene of the offense to render aid in its commission, if needed, or to provide a means by which the actual perpetrator may get away from the scene upon the completion of the offense.

State v. Pryor, 59 N.C. App. 1, 7, 295 S.E.2d 610, 615 (1982) (citation and quotation marks omitted).

When determining whether there is substantial evidence to sustain a conviction,

> all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion. The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom[.]

State v. Spencer, 192 N.C. App. 143, 147, 664 S.E.2d 601, 604 (2008) (internal citation and quotation marks omitted), *disc. review denied*, 363 N.C. 380, 680 S.E.2d 208 (2009).

Evidence offered by the defendant is disregarded when considering a motion to dismiss unless the evidence is "favorable to the State or does not conflict with the State's evidence." *State v. Scott*, 356 N.C. 591, 596, 573 S.E.2d 866, 869 (2002). Finally, our Supreme Court has made clear that "[c]ircumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 455 (citation and quotation marks omitted), *cert. denied*, 531 U.S. 890, 148 L.Ed.2d 150 (2000).

We conclude that the evidence offered at trial, taken in the light most favorable to the State, was sufficient to support Defendant's convictions under both theories of criminal liability. Although Defendant argues that she never said anything to the other participants to indicate that she had a common plan or an intent to aid them in their crimes, neither acting in concert nor aiding and abetting require a defendant to expressly vocalize her assent to the criminal conduct. *See State v. Hill*, 182 N.C. App. 88, 93, 641 S.E.2d 380, 385 (2007) ("The theory of acting in concert does not require an express agreement between the parties. All that is necessary is an implied mutual understanding or agreement to do the crimes." (citation and quotation marks omitted)); *State v. Allen*, 127 N.C. App. 182, 185, 488 S.E.2d 294, 296 (1997) ("Communication of intent [to aid or abet] to the perpetrator may be inferred from the defendant's actions and from his relation to the perpetrator. . . . [A defendant's] presence alone may be sufficient when the [defendant] is a friend of the perpetrator and the perpetrator knows the friend's presence will be regarded as encouragement and protection.").

The State offered evidence, through the testimony of several of the other participants,[1] that Defendant (1) was present for the discussions and aware of the group's plan to rob Wiggins; (2) noticed Mangold's gun because it was similar to the one "she had got shot with prior in her life;" (3) was sitting next to Miles in the van when he loaded his shotgun; (4) told the group that she did not want to go up to the house but remained outside the van; (5) walked toward the house to inform the others that Mangold and Goolsby had fled; (6) told McCutcheon and Johnson "y'all

1. McCutcheon died before Defendant's trial, but her interview with law enforcement officers on 17 September 2008 was introduced at trial under Rule 804 of the North Carolina Rules of Evidence.

need to come on;" (7) attempted to start the van when McCutcheon returned but could not release the parking brake; and (8) assisted in unloading the goods stolen from Wiggins' house into Miles' apartment once they returned to Georgia.

This evidence — and the reasonable inferences that may be drawn from it — is relevant evidence that a reasonable juror could conclude was adequate to support the conclusion that Defendant remained in the vicinity of the crime scene, was willing to render assistance, and did, in fact, aid in the perpetration of the offenses by informing the others that Goolsby and Mangold "ran off" and encouraging everyone to hurry up and leave. Defendant's testimony that she was not aware of what was happening and did not act pursuant to a common plan or intend to offer assistance is not considered when ruling on the sufficiency of the evidence and did not warrant a dismissal of the charges. *See State v. Agustin*, ___ N.C. App. ___, ___, 747 S.E.2d 316, 318 (2013) ("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." (citation and quotation marks omitted)). Thus, the determination of whether Defendant was criminally responsible for these offenses under either an aiding and abetting theory or an acting in concert theory was a question for the jury.

V. Ineffective Assistance of Counsel

[5] Finally, Defendant contends that her trial counsel's failure to make a motion to dismiss at the close of all of the evidence deprived her of her constitutional right to effective assistance of counsel. We disagree.

In order to establish ineffective assistance of counsel, "[a] defendant must first show that [her] defense counsel's performance was deficient and, second, that counsel's deficient performance prejudiced [her] defense." *State v. Thompson*, 359 N.C. 77, 115, 604 S.E.2d 850, 876 (2004), *cert. denied*, 546 U.S. 830, 163 L.Ed.2d 80 (2005).

> 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 (internal citations and quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L.Ed.2d 116 (2006).

However, "if a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 249 (1985).

As discussed above, the State presented sufficient evidence to withstand a motion to dismiss the charges against Defendant under the acting in concert and aiding and abetting theories of criminal liability. As such, we cannot conclude that Defendant was prejudiced by her counsel's failure to make a proper motion to dismiss the charges. Therefore, Defendant's argument is overruled.

Conclusion

For the reasons stated above, we vacate Defendant's conviction for attempted murder and remand to the trial court so that it may arrest judgment with respect to at least one of Defendant's felony convictions pursuant to the merger doctrine.

NO ERROR IN PART; VACATED IN PART; REMANDED IN PART.

Judges HUNTER, JR. and ERVIN concur.

STATE v. YOUNG

[233 N.C. App. 207 (2014)]

STATE OF NORTH CAROLINA
v.
JASON LYNN YOUNG

No. COA13-586

Filed 1 April 2014

1. Evidence—first-degree murder—civil pleadings and judgment—proof of fact alleged—danger of unfair prejudice—outweighed probative value

The trial court violated N.C.G.S. § 1-149, abused its discretion, and committed plain error in a first-degree murder trial by admitting into evidence a default judgment in a wrongful death suit, the complaint in that suit, and a complaint in a child custody suit which stated that defendant killed the victim. The evidence was incompetent under N.C.G.S. § 1-149 because it was used against defendant as proof of a fact alleged in it; specifically, that defendant killed the victim. It was the duty of the trial court to exclude the evidence, regardless of whether defendant objected to it on that basis at trial. Furthermore, admitting the evidence was an abuse of discretion because defendant's presumption of innocence was irreparably diminished by the evidence from the civil actions, especially when the presiding judge in the murder trial was the presiding judge in the wrongful death suit, and the danger of unfair prejudice vastly outweighed the probative value in this case. Additionally, the trial court abused its discretion by admitting the evidence under a misapprehension of the law where the trial court failed to conduct an inquiry concerning N.C.G.S. § 1-149.l.

2. Evidence—hearsay statements—child—six days after event—excited utterance

The trial court did not err in a first-degree murder trial by allowing into evidence statements made by a two-and-a-half-year old child to daycare workers that were admitted via the workers' testimony. The statements were relevant to show that the child may have witnessed the murder of her mother. Furthermore, even though the statements were made six days after the incident, the statements merited the application of the excited utterance exception to the hearsay rule.

3. Constitutional Law—right to remain silent—pre-arrest silence—does not extend to failure to speak with non-officers

The trial court did not commit plain error in a first-degree murder case by instructing the jury that it could consider defendant's failure to speak with friends and family about his wife's murder as substantive evidence of his guilt. A defendant's silence to non-officers may provide substantive evidence of guilt because statements or silence to questioning from non-police officers are not granted the same protections under the Fifth Amendment and are probative of a defendant's mental processes. Furthermore, defendant's pre-arrest silence coupled with evidence that whoever killed the victim did so with premeditation and deliberation and the limited referral to defendant's silence about the murder to friends and family did not rise to the level of plain error having a probable impact on the verdict.

Appeal by Defendant from judgment entered 5 March 2012 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 12 December 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Robert C. Montgomery, Assistant Attorney General Amy Kunstling Irene, and Assistant Attorney General Daniel P. O'Brien, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Barbara S. Blackman, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Jason Lynn Young ("Defendant") appeals a jury verdict finding him guilty of first-degree murder of his wife, Michelle Fisher Young ("Michelle"). Defendant argues that the trial court erred by admitting evidence of the entry of a default judgment in a wrongful death action and a child custody complaint against Defendant in his subsequent criminal trial. We agree, vacate the judgment, and remand for a new trial.

I. Facts & Procedural History

The Wake County Grand Jury indicted Defendant for first-degree murder on 14 December 2009. Defendant's case was tried in Wake County Superior Court on 31 May 2011 with Judge Donald W. Stephens

presiding. On 27 June 2011, a mistrial was declared when the jury deadlocked eight to four to acquit Defendant.

Defendant's retrial began at the 17 January 2012 session of Wake County Superior Court, with Judge Stephens again presiding. On 5 March 2012, the jury found Defendant guilty of first-degree murder and sentenced Defendant to life imprisonment without parole. Notice of appeal was given in open court. The testimony presented at trial tended to show the following facts.

A. State's Evidence

Michelle Young was found at her home by her sister, Meredith Fisher ("Meredith"), around 1:00 p.m. on 3 November 2006. Meredith found Michelle after Defendant called Meredith, asking her to retrieve some printouts of eBay searches for Coach purses. Defendant was out of town on a business trip and left a voicemail for Meredith stating his plan to purchase these purses as a belated anniversary present. Defendant did not want Michelle to find out beforehand.

Meredith complied with Defendant's requests and entered the Youngs' home through the garage door, which was broken, and then through the unlocked kitchen door to the home's mudroom. Meredith noticed her sister's car was in the garage and that her keys and purse were visible near the kitchen counter. After entering, Meredith called out Michelle's name and heard no response. Meredith heard the Youngs' dog, "Mr. G.," whimpering, but she did not see him. The house was cold.

As Meredith ascended the home's stairs, she saw what she thought was dark red hair dye at the top of the staircase in the bathroom of the Youngs' two-and-a-half-year-old daughter, Emily.[1] Meredith first thought that Emily had smeared hair dye around the home and that Michelle would be angry about the mess. When Meredith reached the top of the stairs and looked to the left, she saw Michelle lying on the floor, surrounded by a large amount of blood.

Meredith called 911, and as she did, Meredith said "[Emily] lifted up the covers and just kind of stared at me and I just kind of stared back at her and then she just kind of got on me and clung to me as I called 911." During the call, Emily continually asked for band-aids and said that her mother "has boo-boos everywhere." The 911 operator asked Meredith if Michelle had any personal problems, to which Meredith replied

1. The pseudonym "Emily" is used to protect the identity of the child involved in this case.

"[u]m not really. You know her and her husband fight a little bit, but nothing too ridiculous." Meredith also told the 911 operator that her "niece is very smart for her age" and that she thought Emily was saying "there was somebody in the house." Paramedics and the Wake County Sheriff's Office responded to Meredith's call.

Emily was not injured and appeared "clean" when Meredith arrived, except for some dried blood on Emily's toenails and on the bottom of her pajama pants. Meredith said she did not clean Emily. Emily was wearing fleece pajamas, was not wearing underpants or footwear, and did not urinate or defecate on herself or the bed. Emily clung to Meredith's hip until they both were taken away by emergency personnel. Later, Meredith called her mother Linda Fisher ("Linda") in New York to tell her of Michelle's passing and later told Defendant's mother Pat Young ("Pat") of Michelle's death.

Sheriff's officers found Michelle with a large amount of coagulated, dried blood around her body and with blood splattering against the walls of her bedroom. Michelle's body was discolored, cold, and stiff. She was not wearing shoes and was dressed in sweatpants and a zip-up sweatshirt. Blood was observed on the opposite side of the bed from where Meredith found Emily. Defendant's DNA and fingerprints were present in the bedroom, although none of his fingerprints contained blood.

Michelle was lying face-down just outside of a closet labeled "his closet." A child's doll was near Michelle's head. Blood was also found on the exterior of this closet, and inside of the closet door. The only blood found outside of the second floor of the Youngs' home was found on the doorknob leading from the kitchen to the garage, and its DNA markers were consistent with Michelle's DNA. No blood was found in or on Defendant's vehicle, his clothes, or in the hotel room where he stayed on 2 November 2006.

The medical examiner who conducted the autopsy, Dr. Thomas Clark ("Dr. Clark"), opined that Michelle experienced blunt force trauma to her head and body. The trauma included a broken jaw, skull fracturing, brain hemorrhaging, lacerations, abrasions, and dislodged teeth. Dr. Clark stated that there were likely at least thirty blows delivered to Michelle, and the medical examiner testified that he thought the blows were inflicted by "a heavy blunt object" with a rounded surface that produced crescent-shaped skull fractures. Dr. Clark said the autopsy did not produce evidence of a sexual assault against Michelle. Michelle was approximately twenty weeks pregnant when she passed away.

Small footprints in blood, consistent with a child's footprints, were found around the bedroom and at the top of the stairwell landing. Investigators testified that blood was smeared on the walls at a child's level in Emily's bathroom. Investigators said the blood smearing could indicate that Emily was in her bathroom with the door closed. Investigators did not find blood in the sink or bathtub of either the master bathroom or Emily's bathroom.

Several other pieces of evidence were presented by federal, state, and county investigators. Michael Smith of the Federal Bureau of Investigation, Andy Parker of the Wake/Raleigh City and County Bureau of Investigation ("CCBI"), and Karen Morrow of the State Bureau of Investigation testified at trial. Smith, Parker, and Morrow testified that footwear impressions in blood were made by two distinct shoe types on pillows found near Michelle. These included impressions that corresponded with size 12 Hush Puppy Orbital, Sealy, and Belleville shoes which all had the same outsole design. Smith, Morrow, and Parker also testified that there were additional impressions made by a different shoe type, consistent with a size 10 Air Fit or Franklin athletic shoe. Karen Morrow and Greg Tart of the State Bureau of Investigation testified that Defendant at one time owned size 12 Hush Puppy Orbitals, which were purchased on 4 July 2005. The State never produced shoes matching either of the impressions. The State also never produced a murder weapon.

A jewelry box in the master bedroom had two drawers removed, and DNA testing showed four markers that did not include Defendant or Michelle's DNA. Meredith testified that Michelle "didn't really have a lot of fancy jewelry" except her wedding and engagement rings, and that she "always wore" her wedding and engagement rings. Michelle's wedding and engagement rings were both missing from her body when she was found and the rings were not recovered. Additional unidentified fingerprints were found in the house. Investigators found no signs of forced entry.

Printouts from eBay concerning purses were found on an office printer with three fingerprints; one matched Defendant and two others remain unidentified. Forensic analyst Beth Whitney of the CCBI ("Ms. Whitney") also said Internet searches for purses were made between 7:05 p.m. and 7:23 p.m. on 2 November 2006. Ms. Whitney testified that MapQuest inquiries for directions between Raleigh and Clintwood, Virginia, were also made that evening, as well as e-mail logins to Defendant's personal email account. Ms. Whitney also found that, at an undetermined time, Internet searches were made on the Youngs' home

computer for "anatomy of a knockout," "head trauma blackout," "head blow knockout," and "head trauma."

i. Evening of 2 November 2006

Michelle's sorority sister and close friend, Ms. Shelly Schaad ("Ms. Schaad"), arrived at the Youngs' home around 6:30 p.m. on 2 November 2006. Ms. Schaad arrived to have dinner and to watch Grey's Anatomy on television with Michelle. Ms. Schaad said she was surprised Defendant was still home. Ms. Schaad picked up dinner on the way to the Youngs' house and invited Defendant to eat. Defendant said he planned to stop at the Cracker Barrel in Greensboro to have dinner, drive three hours to Galax to spend the evening, and then drive two hours the next morning to a 10:30 meeting. As Defendant left for the evening, Ms. Schaad asked Defendant if he would return for the N.C. State football game on 4 November 2006. Defendant said it depended on whether his father-in-law, Alan Fisher, would come for the weekend. Defendant expected his father-in-law to visit, and Defendant had spent the afternoon cleaning the yard in anticipation of his arrival. Defendant's father-in-law called and cancelled his visit that evening. After he left, Defendant called the Young residence seven times that evening.

Michelle and Ms. Schaad had dinner, bathed Emily, diapered her, and dressed her in pajamas. Michelle and Ms. Schaad talked about an argument between the Youngs over Defendant's mother-in-law, Linda, staying at their home for the majority of the time between Thanksgiving and Christmas. Defendant was upset with the length of her potential stay.

Ms. Schaad testified that she had an "eerie feeling" that evening. Ms. Schaad asked Michelle if she was scared to be alone. Ms. Schaad testified that Michelle

> proceeded to say, you know, Jason's heard a lot of noises lately around the house, you know, but her thoughts were, you know, if -- and her exact words to me, if someone's going to break in and their intention is to kill you, then that's what they're going to do, and it was very unsettling.

Ms. Schaad said she felt like the two were being watched and asked Michelle to walk her to her vehicle before she left that evening.

ii. Defendant's Location on 2 and 3 November 2006

Defendant purchased gasoline in Raleigh at approximately 7:30 p.m. on 2 November 2006 and then went to a Cracker Barrel restaurant in Greensboro. Defendant called his mother Pat, who lived in Brevard,

while at the Raleigh gas station. Defendant paid for his meal at the Cracker Barrel at 9:25 p.m. and checked into a room at the Hampton Inn in Hillsville, Virginia at 10:54 p.m. Data from the keycards used to gain access to the hotel rooms showed that Defendant entered his room at 10:56 p.m. and did not use his keycard to re-enter his hotel room for the remainder of his stay.

Security camera footage tended to show that Defendant wore a light shirt, jeans, and brown slip-on shoes at the Cracker Barrel and upon entering the Hampton Inn. Two pairs of brown slip-on shoes were found in Defendant's vehicle when police later seized it on 3 November 2006.

Defendant was also captured on video at the hotel just before midnight at the front desk and walking down a hallway that lead to stairs and an exit door, wearing what appeared to be a darker colored shirt with a light-colored horizontal stripe across the chest. Defendant was not shown on surveillance footage for the remainder of the evening.

The night-clerk at the Hampton Inn distributed check-out receipts and hung copies of the USA Today on door handles between 3:00 a.m. and 5:00 a.m. or later. Both the receipt for Defendant's stay as well as a weekend edition of the USA Today were found in Defendant's Ford Explorer on 3 November 2006, when police seized it.

Early in the morning on 3 November 2006, Hampton Inn Clerk Mr. Keith Hicks ("Mr. Hicks") noticed that the emergency door on the first floor at the western end of the hotel was propped open with a small red rock. Mr. Hicks removed the rock and shut the door. Immediately next to the door was a glass door that could only be accessed via keycard between 11:00 p.m. and 6:00 a.m. A sign next to the door listed the hours the door was locked; at all other times the glass door was unlocked.

When Mr. Hicks returned to the front desk and reviewed the hotel's surveillance cameras, he noticed that the camera was malfunctioning in the same stairwell where the door was left ajar. Mr. Hicks later determined that the camera was unplugged, and Mr. Hicks asked a maintenance worker, Elmer Goad ("Mr. Goad"), to plug the camera in again. Mr. Goad testified that if someone were six feet tall, they would be able to easily reach the camera's plug. The last image from the camera was at 11:19:59 p.m. on 2 November 2006, and no images were recorded until 5:50 a.m. on 3 November 2006, when Mr. Goad got a stepladder and plugged the camera in again.

The camera worked properly from 5:50 a.m. until 6:34 a.m., but at 6:35 a.m., the camera was pointed at the ceiling. Mr. Goad put the

camera back in position and focused it on the bottom of the stairs at 6:38 a.m. The hotel said the camera was never unplugged previously and that the only other time that camera was tampered with was several years prior, when some guests snuck in and out of the exit door. CCBI investigator Andy Parker performed a fingerprint analysis on the camera and testified that the State did not find Defendant's fingerprints on the security camera. Investigator Eddie McCormick ("Investigator McCormick") also testified that tests conducted by the State did not show that any fibers were transferred from the Hampton Inn where Defendant stayed on 2 November 2006 to the Youngs' home at 5108 Birchleaf Drive.

The hotel had no record of when Defendant left on 3 November 2006. The State's first evidence showing his location was from a call he made to his mother Pat around thirty miles from the hotel near Wythville, Virginia at 7:40 a.m. Defendant made several calls to his mother and others while driving to Clintwood, with several lasting ten seconds or less. Investigator McCormick testified it was possible the large number of short calls could be from dropped phone calls, but he also said that "knowing what I know about telephonic investigations," the call frequency reflected a person who was panicked.

Defendant was thirty minutes late to his 10:00 a.m. sales call in Clintwood, Virginia. Defendant purchased gas in Duffield at 12:06 p.m. and then left a voicemail for Meredith.

Detective Richard Spivey of the Wake County Sheriff's Office ("Detective Spivey") testified that his deputy drove between Raleigh and Hillsville, Virginia in two hours and twenty-five minutes without traffic. Three gas receipts were found in Defendant's vehicle, one from Raleigh on 2 November 2006, Duffield on 3 November 2006, and Burlington at 8:32 p.m. on 3 November 2006. Officers also canvassed gas stations between Hillsville and Raleigh. Ms. Gracie Calhoun ("Ms. Calhoun"), who worked at the Four Brothers BP in King, North Carolina, said she saw a man drive to a pump and attempt to pump gas in the early morning hours of 3 November 2006. The State's investigators said that the Four Brothers BP was along the most direct route between Raleigh and Hillsville and was the only gas station open at that particular exit.

Ms. Calhoun was shown a photograph of Defendant's white Ford Explorer on 5 November 2006 and asked if she saw the car on 3 November 2006. When Ms. Calhoun was shown Defendant's photograph, she identified him as the vehicle's driver. Ms. Calhoun was not asked to provide a physical description prior to seeing Defendant's photo, and stated that the Defendant was "just a little bit taller than me," although Ms. Calhoun

is five feet tall and Defendant is six-foot-one. Ms. Calhoun stated that she had not seen any news reports about the case when she was asked about the vehicle. Ms. Calhoun said she remembered Defendant specifically because he cursed at her, and that it left an impression because only one other person had ever cursed at her during her tenure at the Four Brothers BP. It is around a forty to forty-five minute drive from the Hillsville Hampton Inn to the Four Brothers BP.

Ms. Calhoun testified that Defendant came into the store and cursed at her because the pumps were not on, threw $20 at her, pumped $15 of gas and drove off without returning for change. Store records showed several gas and in-store purchases between 5:00 a.m. and 5:40 a.m., including a $15 gas purchase at 5:27 a.m. and a $20 gas purchase at 5:36 a.m.

After the first trial concluded, Defendant's counsel learned that Ms. Calhoun had received disability benefits since she was a child. Ms. Calhoun stated that when she was six-years-old, she was hit by a truck. This accident caused her brain to be dislodged from her skull and to fall onto the street. Doctors reinserted her brain and Ms. Calhoun stated that she has had memory problems her entire life as a result of the accident.

The State presented evidence that a newspaper delivery person passed by the Youngs' home between 3:30 a.m. and 4 a.m. and noticed that the interior, exterior, and driveway lights were on, which she considered unusual at that hour. The delivery person testified that she saw a light colored SUV in front of the home and that a minivan was across the street.

After Defendant arrived and learned from his mother of Michelle's passing, he spoke with Meredith over the phone. Meredith told Defendant to come to her home because the Youngs' home was a crime scene. When speaking to Meredith, he asked about Emily, what had happened, and seemed upset over the phone.

Officers began to question Meredith and friends of the Youngs about possible marital problems. After the questioning, Defendant's friends Josh Dalton and Ryan Schaad suggested he not speak to police until he retained counsel. On counsel's advice, Defendant never answered any questions from law enforcement or spoke about Michelle's death with friends or family.

Defendant arrived at Meredith's home along with his mother, sister, and brother-in-law around 9 or 10 p.m. on 3 November 2006. Defendant hugged Meredith and went to see Emily. Meredith said Defendant was wearing "dress pants, dress shoes, a thermal cut crew neck shirt, a

couple buttons here, and a dress shirt over that open." Police arrived at the home and Defendant refused to speak with them. Later in the evening, Defendant and Linda were alone in the home, watching Emily, and Linda said Defendant told her that his lawyer said he could not talk to anyone and that he was "going to take a hit on the house."

iii. Marital Difficulties

The State produced several witnesses who testified that the Youngs experienced difficulties in their marriage, including Meredith, Ms. Schaad, and Defendant's friend Josh Dalton. Ms. Schaad described the Youngs' relationship as "volatile."

Meredith also noted marital problems between Michelle and Defendant and suggested divorce to Defendant and Michelle. Meredith said the Youngs "would get in screaming matches. They'd fight in public." Meredith testified that on 1 November 2006, Michelle told Meredith that she had fought with Defendant and that he threw a remote at her. Meredith averred that before her death, Michelle became "withdrawn," "depressed" and "miserable."

On 12 September 2006, Defendant sent an e-mail to the work address of his former fiancée, Genevieve Cargol ("Ms. Cargol") professing his love for her. Defendant and Ms. Cargol did not have contact for several years before this e-mail, which Ms. Cargol did not receive at the time. Ms. Cargol testified that Defendant was violent at several points during their relationship, once punching and breaking Ms. Cargol's car windshield, punching a hole in a wall, and forcibly removing the engagement ring from her finger.

Defendant had extra-marital affairs with two other women while married to Michelle. Defendant communicated with one of these women, Michelle Money ("Ms. Money") regularly and engaged in sexual intercourse in Orlando, Florida on 7 October 2006. Defendant's friend Josh Dalton stated that Defendant said "he felt like he was in love with" Ms. Money. Defendant and Ms. Money discussed meeting on 3 through 5 November 2006, although Ms. Money said Defendant did not want to meet that weekend as he had a business meeting as well as friends and family staying at his home. Defendant and Ms. Money also contacted each other several times by phone on 2–3 November 2006. Ms. Money said Defendant sounded normal during the calls and that he also mentioned having left printouts in his office for a Coach purse he planned to buy for Michelle. Defendant also had a sexual relationship with a different woman in the Youngs' home while Michelle was out of town on another occasion.

On 27 October 2006, Michelle saw a counselor by herself, Ms. Kimberly Sargent. Ms. Sargent testified that Michelle "cried the entire session." Ms. Sargent said her "assessment of the situation was that [Michelle] was being verbally abused."

iv. Emily's Statements at Daycare

Emily returned to daycare the Monday after Michelle's death. The State introduced testimony of Emily's daycare teacher, Brooke Bass ("Ms. Bass"). Defendant objected to admitting this testimony and was overruled.

Ms. Bass testified that Emily kept to herself more than usual that week. Ms. Bass said Emily asked for a "mommy" doll and was given a bucket of dolls to play with. Ms. Bass saw Emily select a female doll with long brown hair that Emily called the "mommy doll," and a second female doll with short hair. Ms. Bass stated that Emily began hitting the two dolls together. Another daycare teacher, Ashley Palmatier ("Ms. Palmatier") asked Emily what she was doing and said Emily hit the dolls together and said "mommy's getting a spanking for biting." Emily then laid the doll face-down on a dollhouse bed, saying "mommy had booboos all over, mommy has red stuff all over." Emily's teachers told police what she said at daycare. Ms. Bass testified that Emily did not return to the daycare after these statements were made. These statements were not introduced at Defendant's first trial.

v. Introduction of Civil Suits

Evidence of two separate civil suits was introduced at Defendant's second trial over Defendant's objection. The State introduced evidence showing Linda, on behalf of the estate, filed a wrongful death action and a request for a slayer declaration against Defendant on 29 October 2008. Defendant did not respond to the suit, and on 5 December 2008, Judge Stephens heard Plaintiff Linda's motion for entry of a default judgment. Judge Stephens reviewed the affidavits and entered a judgment that Defendant "unlawfully killed" Michelle. Defendant was the beneficiary of Michelle's $4 million life insurance policy, but did not make a claim on the policy. Defendant's assets were seized as a result of the $15 million judgment for Linda.

After Michelle's death, Defendant took Emily to Brevard, and the Fisher family was allowed to see Emily at several visits. Defendant later did not want the Fishers to have contact with Emily. Defendant refused to agree to a visitation schedule, and the Fishers filed suit.

The Fishers filed a child custody complaint against Defendant on 17 December 2008. The complaint said Defendant "brutally murdered Michelle Marie Fisher Young . . . at their residence. Michelle was pregnant with [Defendant's] son at the time of her murder. Upon information and belief [Emily] was in the residence at the time [Defendant] murdered her mother." The lawsuit requested a psychological evaluation of Defendant, and would have required discovery and depositions. Defendant agreed to a consent order and transferred primary physical custody of Emily to Meredith. The consent order required that no discovery or depositions be taken.

vi. Defendant's Mistrial Testimony

Defendant testified at his first trial, and the State introduced his testimony at the retrial. Defendant denied killing his wife, denied being present when she was killed, and denied having any knowledge of who killed Michelle. Defendant said that he loved Michelle, that he did not plan to divorce Michelle, and that he did not plan to leave Michelle for any of the other women he had sexual relationships with. Defendant testified that after Emily was born, Michelle had a miscarriage. Defendant said he and Michelle began trying to conceive another child as soon as Michelle received medical clearance to bear another child. Defendant said he was "ecstatic" that he would soon have a son.

Defendant testified that he thought he and Michelle didn't fight much more than other couples, but that the couple "fought more openly than other couples." Defendant said he encouraged his sister-in-law Meredith to mediate disputes between Michelle and Defendant. Defendant testified that his disputes with Michelle never turned physical. Defendant also testified that he had "a lot of guilt" for spending his anniversary weekend with Ms. Money, rather than his wife Michelle, and so he planned to purchase a Coach handbag to "make up for a lot in a big way." Defendant called Meredith several times to retrieve the papers from the family printer because he "really wanted it to be a surprise." Defendant thought that the gift had special significance because it was a leather purse for his and Michelle's third anniversary, which is commonly known as the "leather anniversary."

Defendant said he had just begun a new job with an electronic health records company, and a schedule was set for him to make a sales call in Clintwood, Virginia. Defendant's sales call was at 10:00 a.m. on 3 November 2006, so Defendant said he planned to "break the trip up" by staying at a hotel about half-way between Clintwood and Raleigh. Defendant said he did not make a hotel reservation prior to staying at

the Hampton Inn in Hillsville. After checking into the hotel, Defendant said he called Michelle and Ms. Money.

Defendant said he was nervous about the sales call, as it was his first solo sales call. Defendant said he wanted to review the software on his computer and forgot his charging cable for his computer in his car. Defendant said he left the hotel room door slightly ajar so he could re-enter without disturbing his neighbors. As he left to go to his vehicle, Defendant said he went out the exit door, noticed it was a type of door which would not allow re-entry, broke off a piece of shrubbery to prop the door, retrieved his charger and re-entered the room.

Defendant said he finished on his computer around 11:53 p.m. and said he wanted to smoke a cigar and catch up on some sports news. Defendant said he then picked up a newspaper from the front desk, walked down the hallway, inserted a stick in the door, went outside and smoked. Defendant said he later re-entered and went to sleep. Defendant also said he arrived thirty minutes late for his appointment the next morning because he had gotten lost. Defendant said he tried to call his appointment to let them know he would be late, but that the cell phone service was "nil to one bar."

After his sales meeting, Defendant drove south toward Brevard, arrived at his mother's house, and his stepfather told him that Michelle was dead. Defendant said he "just broke" and cried. Defendant said some friends called and told him he needed "to get a lawyer before" talking to anyone. Defendant's sister left a message for an attorney she previously employed, and Defendant eventually met with a lawyer, who advised him to not speak with police.

Defendant also said he purchased a pair of brown Hush Puppy Orbital shoes, and that they were donated to Goodwill by Michelle prior to 2 November 2006. Defendant also introduced a photograph of himself in 2007 at Emily's third birthday party, showing Defendant wearing a dark pullover with a stripe on it. Defendant also said he could not afford a lawyer for a custody fight between Defendant and Michelle's family. Defendant also made internet searches on his home computer for head trauma and anatomy of a knockout, which he said he made after being the "first responder" to a car accident where a person was knocked out.

The State offered several pieces of evidence to rebut Defendant's testimony. The State noted that prior to trial, Defendant received copies of all the State's investigative files, which included field and interview notes. The State's analysis of Defendant's computer activities did not show Defendant completed work-related activities on his computer that

evening. The State produced testimony from Meredith and other friends of the Youngs that Defendant did not like smoking and that he disliked the smell of smoke. The State also introduced evidence showing that on 2 November 2006 at 11:40 p.m. it was cold and windy where Defendant said he smoked the cigar. Detective Spivey testified that no "substantial outerwear" besides a suit jacket was found in Defendant's luggage.

The State rested its case on 24 February 2012. Defendant moved to dismiss the case at that time. The trial court denied Defendant's motion, and Defendant began presenting his case on 27 February 2012.

B. Defendant's Evidence

Defendant's mother Pat said Defendant called her the evening of 2 November 2006 and discussed bringing home a wash stand and an antique dresser when Defendant's family visited at Thanksgiving. Defendant said he would call Michelle to see if he could spend the evening at their home and pick the furniture up, as he was nearby in southern Virginia. Pat said Defendant noted that he would have to leave early on Saturday to get home for his guests who were attending the N.C. State football game.

Defendant was thirty minutes late to his meeting at Dickinson Hospital with Jennifer Sproles; he said he was lost and was not able to call because of poor cell phone service. Defendant called Pat in the morning on 3 November 2006 to tell her he would pick up a wash stand at her home in Brevard. Defendant introduced testimony from an AT&T analyst who said the large number of short phone calls were consistent with dropped phone calls. Defendant later called Pat asking her to call Meredith about the eBay printouts, which Pat did.

Before Defendant arrived at her home on 3 November 2006, Pat received a call from Linda stating that Michelle was deceased. Pat decided not to tell Defendant over the phone. When Defendant arrived at her home, Defendant's stepfather told Defendant of Michelle's death, and Defendant fell to the ground and began crying.

Defendant's sister Heather McCracken ("Heather") and his brother-in-law, Joe McCracken ("Joe"), came to the home to see Defendant, who was pale, crying, and laying with a blanket draped over himself in a recliner. Joe drove Defendant, Pat, and Heather in his Ford Explorer to Meredith's home in Fuquay-Varina. During the ride, Defendant said he would lose his home and that there was no way he could afford the home. Defendant's luggage remained in his vehicle and Pat said nothing was

removed between his arrival in Brevard and their arrival at Meredith's home in Fuquay-Varina.

Pat and Defendant's family later packed up the Youngs' home two months after Michelle's death and found a cigar humidor that said "Quick Set" on the exterior. Defendant previously sold Quick Set locks. A credit card purchase was made on a credit card in Michelle's name at a Tampa, Florida store called "Cigars by Antonio."

Defendant introduced testimony of a newspaper deliveryman who drove by the Youngs' home at 5108 Birchleaf Drive around 3:50 a.m., noticed that nothing seemed unusual, and did not see a vehicle.

A neighbor, Cynthia Beaver ("Ms. Beaver"), testified that she passed by the Youngs' home between 5:20 and 5:30 a.m. and saw that the home's lights and driveway lights were on, and that there was a light-colored "soccer-mom car" with its lights on and placed at the edge of the driveway. Ms. Beaver said a white male was in the driver's seat and another person was in the passenger's seat, who may have been a female. Another neighbor, Fay Hinsley, said she saw an empty S.U.V. at the edge of the driveway between 6 and 6:30 a.m.

Unlike the first trial, Defendant did not testify at his second trial. Defendant rested his case on 29 February 2012. The jury returned a unanimous verdict finding Defendant guilty of first-degree murder of Michelle. The trial court then entered a life without parole sentence as required by law.

II. Jurisdiction

Defendant's appeal from the superior court's final judgment lies of right to this Court pursuant to N.C. Gen. Stat. §§ 7A–27(b), 15A–1444(a) (2013).

III. Analysis

a. Introduction of Civil Judgment and Pleadings

[1] Defendant argues that introduction of a default judgment and complaint in a wrongful death suit, which stated that Defendant killed Michelle, is reversible error. We agree. Defendant also argues that introducing the child custody complaint into evidence against Defendant was reversible error. We agree.[2]

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2. Because we grant Defendant a new trial based on the trial court's improper admission of evidence under N.C. Gen. Stat. § 1-149, we do not address Defendant's motion for appropriate relief because it is moot.

Introduction of the complaints and default judgment concern whether the trial court erred by violating N.C. Gen. Stat. § 1-149 (2013). Introduction of this evidence is reviewed *de novo*. *State v. Young*, 324 N.C. 489, 494, 380 S.E.2d 94, 97 (1989) (holding that a violation of a statutory mandates is reviewable de novo without objection).

The State argues that *State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985) precludes *de novo* review of these issues because Defendant cited only Rule 403 of the Rules of Civil Procedure when objecting to introduction of the default judgment and complaint. We disagree. *Ashe* recognizes that "when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial." *Id.* at 39, 331 S.E.2d at 659. Further, "'where evidence is rendered incompetent by statute, it is the *duty of the trial judge to exclude it*, and his failure to do so is reversible error, whether objection is interposed and exception noted or not.'" *Christensen v. Christensen*, 101 N.C. App. 47, 54–55, 398 S.E.2d 634, 638 (1990) (quoting *State v. McCall*, 289 N.C. 570, 577, 223 S.E.2d 334, 338 (1976)) (emphasis added), *superseded by statute as stated in Offerman v. Offerman*, 137 N.C. App. 289, 527 S.E.2d 684 (2000).

Under *de novo* review, we examine the case with new eyes. "[*D*]*e novo* means fresh or anew; for a second time, and an appeal *de novo* is an appeal in which the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court's rulings." *Parker v. Glosson*, 182 N.C. App. 229, 231, 641 S.E.2d 735, 737 (2007) (quotation marks and citations omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (quotation marks and citation omitted).

The first issue concerning admitting evidence of the default judgment may also be reviewed as an evidentiary matter *de novo*, for an abuse of discretion, and under plain error. *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986); *State v. Martinez*, 212 N.C. App. 661, 664, 711 S.E.2d 787, 789 (2011); *State v. Johnson*, 209 N.C. App. 682, 692, 706 S.E.2d 790, 797 (2011).

"When discretionary rulings are made under a misapprehension of the law, this may constitute an abuse of discretion." *Gailey v. Triangle Billiards & Blues Club, Inc.*, 179 N.C. App. 848, 851, 635 S.E.2d 482, 484 (2006).

Plain error is explained in *State v. Lawrence*, 365 N.C 506, 723 S.E.2d 326 (2012):

> 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.

Id. at 518, 723 S.E.2d at 334 (quotation marks and citations omitted).

N.C. Gen. Stat. § 1-149 provides that "[n]o pleading can be used in a criminal prosecution against the party as *proof of a fact admitted or alleged in it*." *Id.* (emphasis added).[3] Further:

> [A] judgment in a civil action is not admissible in a subsequent criminal prosecution although exactly the same questions are in dispute in both cases, for the reason that the parties are not the same, and different rules as to the weight of the evidence prevail.

State v. Dula, 204 N.C. 535, 536, 168 S.E. 836, 836–37 (1933) (quotation marks and citation omitted).

Dula is a criminal embezzlement case where a civil complaint showing a contract for the sale of thirteen pianos was admitted by the defendant's answer. The defendant alleged in his answer that he had paid the full price of the pianos described in the complaint and had settled the contract with plaintiff's agent. *Dula*, 204 N.C. at 535, 168 S.E. at 836. At the defendant's criminal trial, evidence from the civil pleadings was introduced to show that the pianos involved in the civil dispute were the identical pianos at issue in the criminal dispute, thus seeking to prove a fact from the pleadings in a criminal case. *Id.* at 536, 168 S.E. at 836. The trial court was reversed for allowing this evidence at the defendant's criminal trial. *Id.* at 537, 168 S.E. at 837. Thus, *Dula* provides an example of N.C. Gen. Stat. § 1-149 as applied and illustrates the second portion

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3. We note that N.C. Gen. Stat. § 1-149 was not brought to the trial court's attention by the State or Defendant's counsel. In our review, we did not uncover mention of N.C. Gen. Stat. § 1-149 in common references, such as the Trial Judges' Bench Book.

of the statute, namely that civil judgments and/or pleadings may not be used to prove a fact contained therein at a subsequent criminal trial.

In *State v. Wilson*, 217 N.C. 123, 7 S.E.2d 11 (1940), our Supreme Court recognized that reading "certain allegations of fact contained in the complaint in a civil action against [the defendant]" and asking the defendant "if he had not failed to deny them by any answer" would infringe upon the statutory guarantee against using pleadings in "'a criminal prosecution against the party as proof of a fact admitted or alleged.'" *Id.* at 126–27, 7 S.E.2d at 13 (quoting *State v. Ray*, 206 N.C. 736, 737, 175 S.E. 109, 110 (1934)).

Wilson was also a criminal embezzlement case where a civil court's order finding the defendant had "made loans to himself of his wards' funds [and] mismanaged the funds belonging to the estate of his wards." *Id.* at 126, 7 S.E.2d at 13. The court didn't question "[t]he propriety of the action of Judge Sink in making the orders referred to," but did find it was "prejudicial to the defendant on this trial, charged with a felony, to have the weighty effect of those statements, opinions and court orders, relative to the matter then being inquired into, laid before the impaneled jury." *Id.* at 126, 7 S.E.2d at 12. The Supreme Court said it would be proper to cross-examine the defendant at length about his transactions as administrator of the estate for impeachment purposes, "but it would not have been competent for the State to offer affirmative evidence of these collateral matters" unless they were so connected with the indicted charge as to illuminate the question of "fraudulent intent or to rebut special defenses." *Id.* at 127, 7 S.E.2d at 13.

The State cites several cases where civil pleadings and judgments were admitted in a subsequent criminal trial. *State v. Rowell*, 244 N.C. 280, 93 S.E.2d 201 (1956); *State v. Phillips*, 227 N.C. 277, 41 S.E.2d 766 (1947); *State v. McNair*, 226 N.C. 462, 38 S.E.2d 514 (1946); *State v. Fred D. Wilson*, 57 N.C. App. 444, 291 S.E.2d 830, *disc. rev. denied*, 306 N.C. 563, 294 S.E.2d 375 (1982). None of these cases involve default judgments against a defendant, wrongful death judgments against a defendant, or non-testifying defendants. Additionally, these cases involve admitting pleadings and/or judgments in a civil case at a subsequent criminal trial for a different purpose than as proof of a fact alleged in the criminal trial.

In *Rowell*, the defendant was charged criminally for involuntary manslaughter, as he caused his passenger's death after colliding with a large truck operated by Mr. Wiley Goins. 244 N.C. at 280, 93 S.E.2d at 201. The decedent's estate filed a wrongful death action against Mr. Goins,

which was pending at the time of the defendant's trial. *Id.* Mr. Goins testified on behalf of the State, and on cross-examination, the defendant's counsel asked Mr. Goins whether he was facing a wrongful death suit from the decedent's estate. *Id.* The trial court refused to allow Mr. Goins to be cross-examined on the pending lawsuit. *Id.* The Supreme Court reversed the defendant's conviction, holding that cross-examination of the pending civil action would show the bias of the witness and that the witness had an interest in the outcome of the criminal prosecution of defendant. *Id.*

In *Phillips*, the defendant's relationship with his wife deteriorated when his first wife discovered that he had entered into a bigamous marriage with another woman from Raleigh ("second wife"). 227 N.C. at 278–79, 41 S.E.2d at 767. The defendant was charged with murdering his first wife. *Id.* The second wife testified and the Court held that her testimony "was a proper link in the chain of circumstances tending to show motive." *Id.* at 279, 41 S.E.2d at 766. A complaint filed by the second wife to annul the bigamous marriage was also introduced, but the Court held that the complaint was only used to corroborate the testimony of the second wife and that the error was harmless. *Id.* Thus, the complaint showing a bigamous contract of marriage was not used to show "proof of a fact alleged" by the second wife, but was only used for corroborative purposes. *Id.*

In *McNair*, the defendant was prosecuted for larceny of an automobile. 226 N.C. at 462, 38 S.E.2d at 515. The defendant had filed a civil complaint concerning the ownership of a vehicle and then testified at his criminal trial in a contrary manner from his complaint. *Id.* at 463–64, 38 S.E.2d at 516. The State *explicitly* announced that they were introducing the complaint to impeach the defendant's contrary testimony at trial. *Id.* Thus, the court said "no impingement upon the statute was intended or resulted from the cross-examination." *Id.* at 464, 28 S.E.2d at 516.

In *Fred D. Wilson*, the defendant was prosecuted for obtaining property via false pretenses in a real-estate scheme, and the State presented several outstanding civil judgments against the defendant. 57 N.C. App. at 449–50, 291 S.E.2d at 833. This Court distinguished the case from *Dula*, saying that in *Dula* "pleadings and a civil judgment entered against defendant were erroneously admitted to prove the same facts necessary to obtain a criminal conviction against the defendant." *Id.* at 450, 291 S.E.2d at 834. This Court held that rather than attempting to prove the truth of the facts underlying the civil judgment, the State was attempting to show the defendant's financial motive for committing his crimes in

Fred D. Wilson, as he had defaulted on several judgments due to insufficient funds. *Id.*

This Court addresses a different set of facts than *Fred D. Wilson*, *McNair*, *Phillips*, and *Rowell*. Before the re-trial, Defendant's counsel learned that the State planned to introduce evidence about the civil actions against Defendant. Defendant's counsel did not research whether this evidence was admissible, nor did counsel move prior to trial to exclude the evidence on any ground. Rather, Defendant's counsel requested discovery of the civil attorney's files. The State replied that it planned to produce all public records in the civil case, have a witness explain the documents, and cross-examine Defendant if he testified. The trial court held that the evidence could be inquired into at trial, if relevant.

During the trial, Wake County Clerk Lorrin Freeman ("Ms. Freeman") testified that on 29 October 2008, Linda filed a wrongful death lawsuit against Defendant on behalf of the estate. Ms. Freeman introduced Linda's request for Defendant's disqualification under the slayer statute. Ms. Freeman explained that a wrongful death action is a monetary claim for relief filed against a party who is alleged to have directly caused a decedent's death. The prosecutor requested Ms. Freeman to read the sixth paragraph of the complaint aloud in court in front of the empaneled jury, which said "[i]n the early morning hours of November 3rd, 2006 Jason Young brutally murdered Michelle Young."

Ms. Freeman testified that the file showed no attorney on Defendant's behalf, and she also stated that Defendant did not respond to the suit. Ms. Freeman explained that by failing to answer, Defendant's action had "the legal implication or the legal result of the defendant having admitted the allegations as set forth in the complaint." Ms. Freeman entered a default on 2 December 2008 and thereafter, Linda moved for a default judgment and slayer declaration.

Judge Stephens heard the motion on 5 December 2008. Ms. Freeman testified, over Defendant's objection, that Judge Stephens reviewed the evidence and attachments to the motion and entered a judgment declaring that Defendant killed Michelle. Ms. Freeman also testified that Defendant could have presented evidence in the civil action, and Defendant levied a Rule 403 objection.

In sum, Ms. Freeman read aloud a civil judgment that declared Defendant had killed his wife. Ms. Freeman read aloud that Judge Stephens, the presiding judge in Defendant's criminal trial, entered

judgment against Defendant after reviewing the evidence. Ms. Freeman read aloud that Defendant did not respond to the complaint and informed the jury that his action was legally operative as an admission under a civil standard. Additionally, the trial court admitted a "Child Custody Complaint Motion for Psychological Evaluation" into evidence without any restrictions which also included statements that Defendant had killed his wife Michelle.

The State did not offer an explicit purpose at trial for offering evidence of the default judgment nor did the State offer a purpose for admitting the child custody complaint. The State now articulates an impeachment purpose on appeal, asserting that the civil pleadings and judgment were used to show Defendant's unusual reaction to civil suits and to show Defendant's silence in not responding to the lawsuits cast doubt on his subsequent testimony at his first trial. The State also argues the purpose of introducing the evidence contained in the civil filings was to "show that [Defendant] had great incentives to answer the civil matters and explain the evidence." This stated purpose demonstrates the State's intention of introducing these civil pleadings and judgments: to show proof of Defendant's guilt, in violation of N.C. Gen. Stat. § 1-149.

Further, the State's argument that the civil suits were used to cast doubt on Defendant's 22 June 2011 testimony concerns testimony that the State actually introduced at the second trial. This purpose was not stated at trial, and the impeachment value of introducing these civil suits remains unclear, as Defendant did not file a custody complaint, nor did he testify at the second trial. Essentially, the State is requesting to impeach evidence it offered.

Secondly, the State cannot articulate a corroborative purpose for this evidence. These civil complaints would only be useful in corroborating the opinions of guilt made by Michelle's mother, Linda Fisher. Linda's opinions are themselves inadmissible, leaving no proper corroborative purpose. *State v. Kim*, 318 N.C. 614, 621, 350 S.E.2d 347, 351 (1986). No *res judicata* effect was applicable. *Dula*, 204 N.C. at 536, 168 S.E. at 837.

The jury instructions did not explicitly prohibit the jury from using the default judgment or the child custody complaint filed against Defendant as proof of Defendant's guilt in the criminal case. The trial court ruled that the civil matters "might be relevant to any number of matters that the jury has already heard and will hear." However, the transcript shows the trial court did not articulate a clear basis for admitting either item or the limited purposes for which the jury could use these judgments:

If a civil complaint is filed by plaintiff and the parties in a civil action are designated plaintiff, the person bringing the complaint, and the defendant, the person or entity being sued, if a civil complaint is filed by a plaintiff with the clerk of Superior Court, Lorrin Freeman and her office, and if a civil summons is issued by an officer of the court commanding the defendant named in the complaint to respond and otherwise answer to the allegations of the complaint within the time required by law and if the defendant named in the complaint is properly served with this complaint and this summons and if the defendant is an adult and is not otherwise incapacitated or in the military and if the defendant fails to file an answer to that civil complaint or otherwise respond to the allegations within the time required by law and if the plaintiff filing the complaint moves that the court to enter judgment in the plaintiff's favor by reason of that failure to respond or answer, then under the rules of civil law in civil cases and under the rules of the court a judgment can be entered in favor of the plaintiff bringing the lawsuit. Both failure for the defendant named to respond or otherwise answer the allegations, for purposes of the civil case that's been filed the allegations of the complaint under those circumstances, whether actually true or not, which have not been denied by the named defendant are deemed in the civil law to have been admitted for the purpose of allowing the plaintiff to have judgment entered in the plaintiff's favor. The entry of a civil judgment is not a determination of guilt by any court that the named defendant has committed any criminal offense.

. . . .

I further instruct you there is evidence that tends to show that a civil complaint was filed in the Civil Superior Court of Wake County against the defendant by Linda Fisher on behalf of the Estate of Michelle Young and that a civil summons was issued by the clerk of the court commanding the defendant to answer or otherwise respond to the allegations of that civil complaint within the time required by law. There is further evidence that tends to show that the defendant was timely served with these documents and that he did not file an answer or otherwise respond to the

> complaint and that a default judgment was entered against him by reason of that failure.
>
> As I previously instructed you, when a defendant in a civil action has been properly served with the civil summons and the civil complaint and fails to timely respond, upon motion of the plaintiff the Court is authorized to enter a civil judgment against the defaulting defendant. For purpose of the civil law, the allegations of the complaint which have not been denied, whether actually true or not, are deemed to be admitted for the purpose of allowing the plaintiff to have a civil judgment entered against the defendant. The burden of proof in a civil case requires only that the plaintiff satisfy the Court or the jury by the greater weight of the evidence that the plaintiff's claims are valid. This means that the plaintiff must prove that the facts are more likely than not to exist in the plaintiff's favor. When there is a default, that burden of proof is deemed in law to be met.
>
> The entry of a civil default judgment is not a determination of guilt by the Court that the named defendant has committed any criminal offense.

Still further, the State does not point to an instance where a trial court has attempted to gain admission of a default judgment and a slayer determination in a homicide prosecution. Defendant points our attention to *In re J.S.B.*, 183 N.C. App. 192, 202, 644 S.E.2d 580, 586, *writ denied*, *review denied*, 361 N.C. 693, 652 S.E.2d 645 (2007), as an example where this Court held that a voluntary manslaughter finding from a termination of parental rights proceeding could not be used if the State commenced a subsequent criminal prosecution against that defendant.

Admitting the wrongful death judgment, the complaint in that case, and the complaint in the child custody case were also abuses of discretion. "When the intrinsic nature of the evidence itself is such that its probative value is always necessarily outweighed by the danger of unfair prejudice, the evidence becomes inadmissible under [Rule 403] as a matter of law." *State v. Scott*, 331 N.C. 39, 43, 413 S.E.2d 787, 789 (1992). Defendant's presumption of innocence was irreparably diminished by the admission of these civil actions. This is similar to the prejudice that a jury has when it learns a defendant is previously convicted of a charged offense. *State v. Lewis*, 365 N.C. 488, 498, 724 S.E.2d 492, 499 (2012). Criminal judgments are clearly admissible in slayer actions.

Quick v. United Benefit Life Ins. Co., 287 N.C. 47, 57, 213 S.E.2d 563, 569 (1975). However, as Defendant states, the converse is typically not true because admitting such evidence creates great prejudice against the Defendant's innocence and increases the chance that an unreliable guilty verdict may be rendered. Even greater still is the prejudice to Defendant when a juror is told that the presiding judge in the case reviewed the evidence before the jury and entered a default judgment against a defendant. The danger of unfair prejudice vastly outweighed the probative value in this case and admission of the evidence was abuse of discretion in Defendant's trial. It is also an abuse of discretion to make a ruling under a misapprehension of the law as occurred here, where the trial court conducted no inquiry concerning N.C. Gen. Stat. § 1-149.

Because the trial court disregarded a statute, we hold the trial court erred in admitting evidence of both the entry of default judgment against Defendant and the child custody complaint against Defendant, and because entry of both items was prejudicial to Defendant, we hold that Defendant must receive a new trial. Because we hold that the trial court violated § 1-149 in admitting these civil matters, we do not address Defendant's arguments concerning judicial opinions or Defendant's argument that insufficient evidence existed to deny a motion to dismiss. We continue to address the admissibility of Emily's statements and evidence of Defendant's silence. We address these issues because they are likely to recur at Defendant's re-trial.

b. Admission of Emily's Statements at Daycare

[2] Defendant argues that statements made by Emily to daycare workers that were admitted via the workers' testimony were hearsay outside the scope of any exception and/or overwhelmingly prejudicial. Defendant objected to this evidence at trial. This issue is an evidentiary issue that is reviewed *de novo*. "When the admissibility of evidence by the trial court is preserved for review by an objection, we review the trial court's decision *de novo*." *Martinez*, 212 N.C. App. at 664, 711 S.E.2d at 789. "When preserved by an objection, a trial court's decision with regard to the admission of evidence alleged to be hearsay is reviewed *de novo*." *Johnson*, 209 N.C. App. at 692, 706 S.E.2d at 797.

The State argues that Defendant did not preserve this issue for appellate review. We disagree. After the prosecution advised the court outside the jury's presence that it would put forth two witnesses that would relate Emily's statements at daycare, the following dialogue occurred between Defendant's counsel and the trial court:

> THE COURT: Okay. I know you've objected to the testimony of the witness. We heard Ms. Palmatier Friday afternoon. I take it you object to this line of testimony and evidence in its entirety.
>
> [DEFENSE COUNSEL]: We would, your Honor, on grounds previously stated.
>
> THE COURT: As I understand, your position is that the statement of the child is hearsay and not otherwise admissible, as well as it's not a foundation to show that the capacity of the child to fully understand and appreciate and relate her observations due to her age and that her conduct is also ambiguous.
>
> [DEFENSE COUNSEL]: That is correct, your Honor, as well as confrontation/cross-examination grounds and due process and 403.
>
> THE COURT: And as I understand it, you object to any testimony with regard to the child herself because you contend the testimony with regard to the child is not relevant to any issue in these proceedings.
>
> [DEFENSE COUNSEL]: That is correct.
>
> THE COURT: I mean, the learning and her schooling and observations about the folks at school and things like that.
>
> [DEFENSE COUNSEL]: That is correct, your Honor.
>
> THE COURT: All right. Well, I do believe it is relevant and I have overruled your previous objections and your objections are preserved for the record and the objection goes to the testimony of every witness on this subject as I understand it.

This portion of the trial transcript demonstrates the trial court's granting of a line or continuing objection pursuant to N.C. Gen. Stat. § 15A-1446(d)(10) (2013); *State v. Crawford*, 344 N.C. 65, 76, 472 S.E.2d 920, 927 (1996). While Defendant's counsel objected to a question on redirect asking the first daycare worker to compare the size of the dolls to Defendant and Michelle, this was a properly lodged objection as it exceeded the scope of the granted line objection, although the objection was sustained. Defendant's second objection when the second daycare worker took the stand and began to relate hearsay statements was a

simple reaffirmation of the originally granted line objection. Therefore *de novo* review of this issue is appropriate.

The State presented the testimony of Emily's daycare worker, Ms. Palmatier. Ms. Palmatier testified during *voir dire* that on 9 November 2006 she told a Wake County detective that Emily hit two female dolls together with a dollhouse chair and said, "[M]ommy's getting a spanking for biting. . . . [M]ommy has boo-boos all over." Ms. Palmatier then testified that, after a nap, Emily said "[Mommy] fell on the floor. Now she's on the bed with animals, animals were in the barn, they were asleep. There was a cow. Daddy bought me new fruit snacks." The State argued that this was evidence Emily saw the murder, and that it was probative of Defendant's identity as she was later found unharmed.

Defendant's counsel objected to this evidence, citing hearsay, due process, lack of competency, relevance, and undue prejudice. The trial court ruled that (1) the statements met the present sense impression, excited utterance, and residual hearsay exceptions; (2) the evidence was relevant to determine the killer's identity; and (3) the evidence was more probative than prejudicial.

The court *sua sponte* excluded Emily's post-nap statements and granted the defense a continuing objection to Emily's testimony. The trial court instructed the jury that evidence was being introduced of Emily's observations, made when she "may have had some memory" of Michelle's death. The trial court instructed the jury that it could use Emily's statements to determine whether Emily witnessed a portion of the assault on Michelle.

Emily's daycare teacher then testified that on 9 November 2006, Emily asked her for "the mommy doll." The teacher gave Emily a bucket of dolls. Emily picked two dolls, one female with long hair and one with short hair, and hit them together. Ms. Palmatier testified that she saw Emily strike a "mommy doll" against another doll and a dollhouse chair while saying, "[M]ommy has boo-boos all over" and "[M]ommy's getting a spanking for biting. . . . [M]ommy has boo-boos all over, mommy has red stuff all over."

Defendant first argues that the evidence was not relevant. Relevant evidence is evidence that has "any tendency to make the existence of any fact that is of consequence to the determination more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401. "A trial court's rulings on relevancy are technically not discretionary, though we accord them great deference on appeal." *State v. Lane*, 365 N.C. 7, 27, 707 S.E.2d 210, 223 (2011). We agree with

the State that the evidence clearly related to the identity of Michelle's assailant. The evidence was probative that Emily observed her mother's assault, and that the assailant cared for Emily in some way, as he or she left Emily unharmed after the assault.

Secondly, Defendant argues that the statements made at daycare were inadmissible hearsay and do not fit within any hearsay exception. We hold the statements are hearsay, but that they fit within the excited utterance exception pursuant to this Court's decisions in *State v. Rogers*, 109 N.C. App. 491, 501, 428 S.E.2d 220, 226, *cert. denied*, 334 N.C. 625, 435 S.E.2d 348 (1993), cert. denied, 511 U.S. 1008 (1994), and *State v. Thomas*, 119 N.C. App. 708, 712–14, 460 S.E.2d 349, 352–53, *disc. review denied*, 342 N.C. 196, 463 S.E.2d 248 (1995).

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c). A "statement" is an oral or written assertion or "nonverbal conduct of a person . . . intended by him as an assertion." N.C. Gen. Stat. § 8C-1, Rule 801(a).

Emily's statements consisted of striking the "mommy" doll while saying, "[M]ommy's getting a spanking for biting" and "[M]ommy has boo-boos all over, mommy has red stuff all over." The trial court found that these were statements made by Emily, and that they were offered for the truth of the matter asserted. We agree, and note that the trial court also found that these phrases spoken by Emily were to describe past events via the words and actions of a two and a half year old child. The age of Emily at the time of the statements likely meant she could express herself in a limited way as to her observations. Fact-finders may find that an alternate meaning exists when considering the words of young children who lack the verbal clarity often present in adults. *See, e.g.*, *State v. Smith*, 315 N.C. 76, 80, 337 S.E.2d 833, 837 (1985) (considering statements of a young child that used figurative language to describe a sex act).

However, if a statement is hearsay, it may still be admitted if it falls within one of the exceptions to the hearsay rule. The primary exception at issue in this case is the excited utterance exception. N.C. Gen. Stat. § 8C-1, Rule 803(2). For the excited utterance exception to apply, "there must be (1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication." *Smith*, 315 N.C. at 86, 337 S.E.2d at 841. "The rationale underlying the admissibility of an excited utterance is its inherent trustworthiness." *State v. Guice*, 141 N.C. App. 177, 200, 541 S.E.2d 474,

489 (2000), *opinion adhered to as modified on reconsideration*, 151 N.C. App. 293, 564 S.E.2d 925 (2002).

Excited utterances are often made and admitted into evidence because they fall within a timeframe that is close in proximity to the startling event. *See*, *e.g.*, *id.* at 201, 541 S.E.2d at 489 (finding a statement made to an officer within "several minutes" of the defendant dragging the victim from the home and while struggling to breathe fell within the requisite time frame). However, this Court has held that "the stress and spontaneity upon which the exception is based [are] often present for longer periods of time in young children than in adults." *Rogers*, 109 N.C. App. at 501, 428 S.E.2d at 226 (quotation marks and citation omitted); *see also Smith*, 315 N.C. at 87–88, 337 S.E.2d at 841 ("This ascertainment of prolonged stress is born of three observations. First, a child is apt to repress the incident. Second, it is often unlikely that a child will report this kind of incident to anyone but the mother. Third, the characteristics of young children work to produce declarations 'free of conscious fabrication' for a longer period after the incident than with adults." (citation and quotation marks omitted)).

Our State's appellate courts have thus extended the length of time that the excited utterance exception may apply. *See Smith*, 315 N.C. at 79, 86–90, 337 S.E.2d at 836, 841–43 (four and five-year-olds' statements made two to three days after being sexually abused were admissible); *Thomas*, 119 N.C. App. at 712–14, 460 S.E.2d at 352–53 (five-year-old's statements made four to five days after sexual abuse were admissible); *Rogers*, 109 N.C. App. at 501, 428 S.E.2d at 226 (five-year-old's statements made three days after sexual abuse admissible).

Thus, the outer time limit at present is four to five days from the event a child has made statements about. Emily was also younger than the other children discussed above in prior cases this Court has considered. Emily's statements were made six days after her mother was killed and were made while she played with dolls, without prompting or questioning from adults. We hold that the attendant circumstances in this case merit application of the excited utterance exception and that the trial court did not err in admitting Emily's statements. Because we hold Emily's statements were admitted properly under the excited utterance exception to the hearsay rule, we do not address whether the present sense impression or residual exception apply to this case.

c. Defendant's Silence as Substantive Evidence

[3] The trial court offered the following jury instructions as they relate to Defendant's refusal to speak with police and his family members:

> Ladies and gentlemen, the Fifth Amendment to the United States Constitution protects a citizen's right to refuse to answer questions of the police during a criminal investigation. The exercise of that Constitutional right may not be used as evidence against that citizen later at trial to create an inference of guilt. Therefore, the defendant's decision not to answer questions by law enforcement officers during the criminal investigation may not be considered against him as evidence of guilt to the pending charge. However, that same Fifth Amendment does permit the jury to consider the defendant's refusal to answer police questions to the extent that the evidence surrounding that refusal bears upon the defendant's truthfulness if the defendant elects to testify or made a statement at a later time. The evidence presented in this case tends to show that the defendant elected to testify at a prior trial.
>
> Therefore, I instruct you that you may consider evidence of the defendant's refusal to answer police questions during this investigation for one purpose only. If, in considering the nature of that evidence, you believe that such evidence bears upon the defendant's truthfulness as a witness at his prior trial, then you may consider it for that purpose only. Except as it relates to the defendant's truthfulness, you may not consider the defendant's refusal to answer police questions as evidence of guilt in this case.
>
> I also instruct you that this Fifth Amendment protection applies only to police questioning. It does not apply to questions asked by civilians, including friends and family of the defendant and friends and family of the victim.

Defendant argues that the trial court committed plain error by instructing the jury that it could consider Defendant's failure to speak with friends and family as substantive evidence of guilt. We disagree and find that the instruction was proper.

The Fifth Amendment's protection against self-incrimination does not extend to questions asked by civilians. *Oregon v. Elstad*, 470 U.S. 298, 304-05 (1985) ("The Fifth Amendment, of course, is not concerned with nontestimonial evidence. *Nor is it concerned with moral and psychological pressures to confess emanating from sources other than official coercion.*" (citations and quotation marks omitted) (emphasis added)).

Defendant argues that Defendant's silence in response to questions from non-officers should be offered for impeachment purposes only. Defendant cites *State v. Mack*, 282 N.C. 334, 339–40, 193 S.E.2d 71, 75–76 (1972), and *State v. Hunt*, 72 N.C. App. 59, 61, 323 S.E.2d 490, 492 (1984), *aff'd without precedential value*, 313 N.C. 593, 330 S.E.2d 205 (1985), for the proposition that pre-arrest silence may only be used to impeach a defendant's pre-trial statement or trial testimony. *Mack* held that "[p]rior statements of a witness which are inconsistent with his present testimony are not admissible as substantive evidence because of their hearsay nature." 282 N.C. at 339, 193 S.E.2d at 75; *see also State v. Black*, ___ N.C. App. ___, ___, 735 S.E.2d 195, 202 (2012) (citing *Mack*, 282 N.C. at 339–40, 193 S.E.2d at 75)), *appeal dismissed*, *review denied*, ___ N.C. ___, 738 S.E.2d 391 (2013). However, *Mack* concerned the substantive use of silence within the context of a testifying non-party witness making statements to a police officer. 282 N.C. at 339, 193 S.E.2d at 75. *Hunt* was affirmed without precedential value by the North Carolina Supreme Court, 313 N.C. at 593, 330 S.E.2d at 205, but also involved silence with respect to police questioning. 72 N.C. App. at 61–62, 323 S.E.2d at 492.

Defendant's friends and family asked him about Michelle's murder on several occasions and Defendant did not offer statements to his friends and family about the evening's events. The State contends that Defendant's later version of events offered at his first trial were inconsistent with his earlier silence and that the discrepancy "tend[s] to reflect the mental processes of a person possessed of a guilty conscience seeking to divert suspicion and to exculpate [himself]." *State v. Redfern*, 246 N.C. 293, 298, 98 S.E.2d 322, 326 (1957) (holding that conflicting statements amount to "substantive evidence of substantial probative force, tending to show consciousness of guilt"). Defendant's silence to non-officers may provide substantive evidence of guilt because statements or silence to questioning from non-police officers are not granted the same protections under the Fifth Amendment and are probative of Defendant's mental processes. Thus, the evidence was proper for substantive consideration by the jury.

Defendant also argues that the trial court committed plain error in offering its jury instruction. Defendant argues that the trial court should have instructed the jury that the evidence did not create a presumption of guilt, was insufficient alone to establish guilt, and that the evidence could not be considered as to premeditation and deliberation. *State v. Myers*, 309 N.C. 78, 88, 305 S.E.2d 506, 512 (1983). Defendant argues that a new trial was required because the case was "entirely circumstantial." *Id.*

In *Myers*, the defendant objected to the instruction, the witnesses relied upon by the State had severe credibility issues, and the trial court placed an "emphasis upon the negative aspect of defendant's statements." *Id.* Here, there was minimal mention by the State that Defendant was silent to his friends and family. We hold that Defendant's pre-arrest silence coupled with evidence that whoever killed Michelle did so with premeditation and deliberation and the limited referral to Defendant's silence about the murder to friends and family did not rise to the level of plain error having a probable impact on the verdict. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

IV. Conclusion

The introduction into evidence of the civil complaints and judgment was in error and violated N.C. Gen. Stat. § 1-149, as the evidence was used to prove a fact — namely, that Defendant had killed Michelle — Defendant is deemed to have admitted in the wrongful death civil action and which had been alleged in the child custody proceeding. This evidence also severely impacted Defendant's ability to receive a fair trial. As such, we order a

NEW TRIAL.

Judges STROUD and DILLON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 1 APRIL 2014)

ALLSBROOK v. ILL. TOOL WORKS/ WILSONART No. 13-651	N.C. Industrial Commission (W13767)	Affirmed
ARMSTRONG v. VELASQUEZ No. 13-652	Wayne (10CVD1815)	Reversed and Remanded
CURRIE v. POTEAT No. 13-814	Caswell (04CVS336)	Affirmed
DALE v. ALCURT CARRBORO, LLC No. 13-1095	Orange (12CVS1883)	Dismissed
EXUM v. EXUM No. 13-704	Wake (11CVS3353)	Dismissed in Part; Affirmed in Part
IN RE A.A.P. No. 13-1051	Onslow (10JB109)	Affirmed
IN RE G.A.A. No. 13-1113	New Hanover (12JT171)	Reversed
IN RE JOHNSON No. 13-962	Wake (13SPC1148)	Reversed and Remanded
IN RE J.T.M. No. 13-961	Mecklenburg (10JB694)	Dismissed
IN RE T.W.C. No. 13-1097	Chatham (12JA40-42)	Affirmed in part; Reversed and remanded in part.
LAWSON v. LAWSON No. 13-1119	Forsyth (12CVS8369)	Dismissed
MARSHALL v. MARSHALL No. 13-689	Mecklenburg (10CVD24330)	Affirmed in part; Vacated in part
MARSHALL v. MARSHALL No. 13-692	Mecklenburg (10CVD24330)	Affirmed in part; vacated in part
METTS v. PARKINSON No. 13-1243	Durham (10CVS5717)	Affirmed
N.C. DEPT. OF CORR. v. PARKER No. 13-1008	Wake (12CVS2136)	Affirmed

RUTHERFORD PLANTATION, LLC v. CHALLENGE GOLF GRP. No. 12-1305	Rutherford (11CVS594)	Vacated and Remanded
RUTHERFORD PLANTATION, LLC v. CHALLENGE GOLF GRP. No. 12-1308	Rutherford (11CVS594)	Vacated and Remanded
SAWYER v. RUIZ No. 13-1060	Perquimans (07CVS25)	Affirmed
SIMMONS v. CITY OF GREENSBORO No. 13-1065	Guilford (12CVS10339)	Affirmed
STATE v. ANDREWS No. 13-1013	Mecklenburg (09CRS86046)	No Error
STATE v. BURNETTE No. 13-976	Forsyth (12CRS58053-54) (12CRS58353-56)	No Error
STATE v. GRIFFIN No. 13-1093	Cabarrus (10CRS4678) (10CRS51075)	No error in part; no prejudicial error in part; dismissed in part
STATE v. HARLING No. 13-575	Mecklenburg (11CRS243001)	No Error
STATE v. JONES No. 13-1244	Columbus (11CRS52691) (11CRS52692) (11CRS52694) (11CRS52695)	No Error
STATE v. LOFTIS No. 13-1002	Haywood (11CRS54179-80) (11CRS54236) (11CRS54238)	No Error In Part, Vacated and Remanded for New Trial In Part
STATE v. PARKER No. 13-1054	Pitt (09CRS12865) (09CRS61279)	Affirmed in Part, Reversed in Part and Remanded
STATE v. SPARKS No. 13-659	Rockingham (10CRS50917-18) (12CRS1601)	No Error

STATE v. STOUGH No. 13-762	Jackson (11CRS1787) (11CRS1789-95)	NO ERROR in part, REVERSED AND REMANDED in part.
STATE v. TABRON No. 13-634	Edgecombe (11CRS53248)	No prejudicial error
STATE v. WILLIAMS No. 13-871	Wake (11CRS206744)	Affirmed ; no error
STATE v. YORK No. 13-1147	Alamance (12CRS52478)	Vacated
STEIN v. BRASINGTON No. 13-460	Wake (09CVD7126)	Affirmed in part; Vacated in part; Remanded in part.
TATUM v. CUMBERLAND CNTY. SCH. No. 13-1090	N.C. Industrial Commission (W48687)	Affirmed
VANEK v. GLOBAL SUPPLY & LOGISTICS, INC. No. 13-1135	Mecklenburg (12CVS557)	Affirmed
WELLS FARGO BANK, N.A. v. HUNDLEY No. 13-1038	Rockingham (12CVS1522)	Reversed

BRISSETT v. FIRST MT. VERNON INDUS. LOAN ASS'N

[233 N.C. App. 241 (2014)]

COURTNAY T. BRISSETT, AND HUSBAND, LADWIN BRISSETT, AND BRISSETT RENTAL PROPERTIES, LLC, PLAINTIFFS

v.

FIRST MOUNT VERNON INDUSTRIAL LOAN ASSOCIATION, DALE E. DUNCAN AND KATHLEEN NEARY AS TRUSTEES FOR FIRST MOUNT VERNON INDUSTRIAL LOAN ASSOCIATION, PRODEV XVI LLC, AND JOHN F. GONZALES, JASON MATTHEW A. GOLD, THE SHOAF LAW FIRM, P.A., JAMES BOSTIC, KIM RICHARDSON, AND LABRADOR FINANCIAL SERVICES, INC., DEFENDANTS

No. COA13-685

Filed 1 April 2014

1. Evidence—hearsay—exceptions—failure to address admission—abuse of discretion

The trial court erred by excluding the transcript of a deceased attorney defendant's testimony in Virginia State Bar proceedings from the evidence admitted at trial under the hearsay exceptions argued by plaintiffs. Failure to address the admission of the evidence under N.C.G.S. § 8C-1, Rule 804(b)(5) was arbitrary and an abuse of discretion.

2. Fraud—misrepresentation—directed verdicts—expiration of statute of limitations

The trial court did not err by directing verdicts on plaintiffs' fraud and misrepresentation claims. The three-year statute of limitations began to run in 2006 and expired prior to the commencement of this action on 7 June 2010.

3. Fraud—constructive fraud—directed verdict

The trial court did not err by directing verdict on plaintiff's constructive fraud claim. There was no fiduciary duty owed to plaintiffs by defendant First Mount Vernon Industrial Loan Association.

4. Damages and Remedies—punitive damages—net worth—revenues—similar past conduct

The trial court did not abuse its discretion by allegedly denying plaintiffs the opportunity to present evidence to the jury of defendant First Mount Vernon Industrial Loan Association's (FMV) net worth, revenues, and similar past conduct in order to prove punitive damages. Plaintiffs mischaracterized the portions of the evidence they claimed were excluded in error. Further, any alleged error was harmless given that directed verdicts were entered in favor of FMV on the fraud claims and the jury never found FMV liable, thereby precluding any contemplation of damages.

5. Equity—clean hands doctrine—motion for judgment notwithstanding verdict

The trial court erred by granting defendant First Mount Vernon Industrial Loan Association's motion for judgment notwithstanding the verdict on the issue of unclean hands. It was unclear from the record on which basis the trial court entered the directed verdicts. Further, fraud was not required to preclude equitable relief on the basis of unclean hands. The judgment was reversed and the case was remanded on this issue.

Appeal by plaintiffs from judgment filed 13 September 2012 by Judge Paul L. Jones in Craven County Superior Court. Heard in the Court of Appeals 20 November 2013.

Watsi M. Sutton, Attorney At Law, P.A., by Jacinta D. Jones and Watsi M. Sutton, for plaintiffs-appellants.

Ward and Smith, P.A., by Ryal W. Tayloe and Allen N. Trask, III, for defendants-appellees.

McCULLOUGH, Judge.

Courtnay T. Brissett ("C. Brissett"), Ladwin Brissett ("L. Brissett") (together "plaintiffs"), and Brissett Rental Properties, LLC (the "rental company"), appeal from judgment filed 13 September 2012. For the following reasons, we find no error in part and reverse in part.

I. Background

In late 2004 and early 2005, plaintiffs purchased a number of distressed residential properties in New Bern, North Carolina as rental properties. Thereafter, at the advice of a CPA, plaintiffs had an attorney set up the rental company to hold the properties.

In late 2005, plaintiffs decided to begin rehabilitating the properties and began looking for financing. After several unsuccessful attempts to obtain financing from banks, plaintiffs, with the assistance of defendants Kim Richardson and James Bostic of defendant Labrador Financial Services, entered a loan agreement with defendant First Mount Vernon Industrial Loan Association ("FMV") to acquire funds to rehabilitate six of the properties. Defendant Jason A. Gold, of defendant The Shoaf Law Firm, conducted the closing of the transactions on 9 January 2006. Plaintiffs had no relationship and did not communicate with FMV until after the closing.

As required by the closing instructions, plaintiffs signed documents at the closing deeding the six properties to ProDev XVI, LLC ("ProDev"), an entity established for the sole purpose of facilitating the loan. C. Brissett also signed the ProDev Operating Agreement and ProDev Organizational Agreement, which established C. Brissett as the 40% member and manager of ProDev and John Gonzales, a board member of FMV, as the controlling 60% member of ProDev. These ProDev documents also provided that C. Brissett would be conveyed Gonzales' 60% interest in ProDev upon payoff of the loan. The purpose of FMV requiring the conveyance of the properties to ProDev as a condition precedent to making the loan was to ease the collection process upon default and to protect FMV's interests from bankruptcy.

Plaintiffs executed all documents at the closing without reading them and without asking any questions. As a result, plaintiffs were not aware of the nature of the transaction.

Plaintiffs did not come to understand the terms of the documents executed at the closing until they encountered problems while attempting to refinance one of the completed properties later in 2006, at which point plaintiffs learned ProDev owned the property. By that time, plaintiffs had received approximately $131,500 in loan disbursements from FMV to rehabilitate the properties. The loan went into default in early 2007 and no further disbursements were made. Furthermore, upon default Gonzales exercised his right as the controlling member of ProDev to remove C. Brissett from her role as the managing member of ProDev.

On 7 June 2010, plaintiffs commenced this civil action with the filing of summonses, complaint, and notice of *lis pendens* in Craven County Superior Court. In the complaint, plaintiffs asserted numerous claims against the named defendants, including claims against FMV to quiet title, breach of contract and rescission, misrepresentation, *lis pendens*, unfair and deceptive trade practices, fraud in the inducement, constructive fraud, and civil conspiracy and conspiracy in facilitation of fraud.[1]

1. The only claims to reach trial were those claims against FMV and its trustees. Upon motion and affidavit for entry of default, on 25 January 2011, the trial court entered default against ProDev, Bostic, Richardson, Labrador Financial Services, and The Shoaf Law Firm. Thereafter, following Gonzales' death and the substitution of Gonzales' Estate as allowed by the trial court's 12 October 2011 order, plaintiffs voluntarily dismissed their claims against Gonzales' Estate and Gold by notices filed 27 August 2012 and 4 September 2012, respectively.

FMV and its trustees, defendants Dale E. Duncan and Kathleen Neary, filed an answer to plaintiffs' complaint on 10 August 2010. The answer included various affirmative defenses, a counterclaim for reformation of certain deeds to correct typographical and other mistakes, and crossclaims against ProDev, Gold, The Shoaf Law Firm, Bostic, Richardson, and Labrador Financial Services. Plaintiffs replied on 6 October 2010.

FMV and its trustees later filed an amended answer, counterclaims, and cross-claims on 24 October 2011. In addition to the original counterclaim for reformation of deeds, FMV and its trustees asserted counterclaims for guaranty, unjust enrichment, and an equitable lien or constructive trust. Plaintiffs replied on 25 April 2012.

On 4 September 2012, the case was called for trial in Craven County Superior Court, the Honorable Paul Jones, Judge presiding. Prior to impaneling a jury, the court heard arguments on motions *in limine*. In regard to FMV's and its trustees' motion to exclude all evidence of Virginia State Bar proceedings against Duncan and Gonzales, the trial court ordered the transcripts of the proceedings to be excluded.

The following morning, 5 September 2012, a final pretrial order with stipulations as to undisputed facts was filed and the jury trial began.

On 6 September 2012, prior to testimony resuming for a second day, FMV and its trustees informed the trial court that they would move for a directed verdict at the close of plaintiffs' evidence and submitted a trial brief for the court's consideration. Thereafter, at the close of plaintiffs' evidence on 7 September 2012, FMV and its trustees moved for a directed verdict pursuant to N.C. Gen. Stat. § 1A-1, Rule 50. Following a weekend recess, on 10 September 2012, plaintiffs responded with a trial brief opposing the motion for a directed verdict and the trial court heard arguments on the matter. The trial court then granted the motion for a directed verdict as to the following claims for relief against various parties: (3) Misrepresentation, (5) Unfair and Deceptive Trade Practices, (9) Fraud in the Inducement, (10) Constructive Fraud, (11) Unfair and Deceptive Trade Practices, (12) Constructive Trust, (16) Constructive Fraud, and (17) Civil Conspiracy and Conspiracy in Facilitation of Fraud.

FMV put on only documentary evidence and subsequent to a charge conference, the trial court instructed the jury on the following six issues:

> (1) Did the deeds from [C. Brissett] and [L. Brissett] and [the rental company] to [ProDev] meet the requirements of the law for conveying valid title?

(2) Was the consideration given to [C. Brissett] and [L. Brissett] and [the rental company] for executing the deeds from [C. Brissett] and [L. Brissett] and [the rental company] to [ProDev] grossly inadequate under the circumstances?

(3) Did the deed of trust from [C. Brissett] and [L. Brissett] and [the rental company] to [ProDev] meet the requirements of the law for creating a valid debt?

(4) Is [FMV] entitled to have a lien on the five properties?

(5) What is the amount of [FMV's] lien which does not include interest on said amount if any?

(6) Did [FMV] act with "unclean hands" in its conduct, or in the conduct of its agents, relating to the loan transaction of January 9, 2006?

After deliberating, the jury reached a unanimous decision on all issues except for issues two and six, to which the jury was deadlocked eleven to one. As to issues one and three, the jury determined the deeds did not meet the requirements of the law for conveying valid title or creating a valid debt. As to issues four and five, the jury determined FMV was entitled to a lien on the five properties in the amount of $131,500.

The case was held open until 12 September 2012 when the trial court considered post-trial arguments. At that time, FMV moved for a judgment notwithstanding the verdict ("JNOV") pursuant to N.C. Gen. Stat. § 1A-1, Rule 50(b)(1); essentially asking the court to decide the undecided issues as a matter of law. Plaintiffs responded with their own motions for a JNOV and a new trial.

At the conclusion of the arguments, the trial court denied plaintiffs' motions and granted FMV's motion, deciding issues two and six in favor of FMV.

On 13 September 2012, the trial court filed a judgment reforming the deed of trust so that FMV has a lien on the properties in the amount of $131,500 with a right to foreclose on the lien by power of sale. The judgment further dismissed all claims by plaintiff against FMV and its trustees and ordered the *lis pendens* filed in the action to be of no further force and effect and to be canceled by the Craven County Clerk of Superior Court.

Plaintiffs filed notice of appeal from the 13 September 2012 judgment on 11 October 2012.

II. Discussion

Plaintiffs raise the following five issues on appeal: whether the trial court erred by (1) granting FMV's motion to exclude the transcript of Gonzales' testimony during Virginia State Bar proceedings; (2) directing a verdict in favor of FMV on plaintiffs' fraud and misrepresentation claims; (3) directing a verdict in favor of FMV on plaintiffs' constructive fraud claim; (4) denying plaintiffs the opportunity to present evidence of FMV's net worth, revenues, and similar past conduct; and (5) entering a judgment notwithstanding the verdict on the issue of unclean hands.

1. Exclusion of Evidence

[1] Plaintiffs first argue the trial court erred in excluding the transcript of Gonzales' testimony in Virginia State Bar proceedings from the evidence admitted at trial.

"Admission of evidence is 'addressed to the sound discretion of the trial court and may be disturbed on appeal only where an abuse of such discretion is clearly shown.' " *Gibbs v. Mayo*, 162 N.C. App. 549, 561, 591 S.E.2d 905, 913 (2004) (quoting *Sloan v. Miller Building Corp.*, 128 N.C. App. 37, 45, 493 S.E.2d 460, 465 (1997)). An abuse of discretion warranting reversal results " 'only upon a showing that [the trial court's decision] was so arbitrary that it could not have been the result of a reasoned decision.' " *Id.* (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)). "The burden is on the appellant to not only show error, but also to show that he was prejudiced and a different result would have likely ensued had the error not occurred." *Suarez v. Wotring*, 155 N.C. App. 20, 30, 573 S.E.2d 746, 752 (2002). Relevancy is a question of law reviewed *de novo*. *State v. Kirby*, 206 N.C. App. 446, 456, 697 S.E.2d 496, 503 (2010). Evidence is relevant when it has a "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 (2013).

Apart from the present case, plaintiffs filed complaints against Duncan and Gonzales with the Virginia State Bar. In proceedings stemming from those complaints, Duncan and Gonzales testified before the Virginia State Bar about their involvement with FMV, ProDev, and the financing scheme giving rise to this case. At the conclusion of the proceedings, Duncan and Gonzales each had their license to practice law in Virginia revoked for a period of time.

Subsequent to the Virginia State Bar proceedings and Gonzales' death, FMV filed a motion *in limine* in this case "for an order precluding

[p]laintiffs . . . from offering any testimony or other evidence, as well as referencing in any manner the proceedings in those Virginia State Bar proceedings entitled *Virginia State Bar v. John Francis Gonzales, Esquire*, Case No. CL 09003666 and *Virginia State Bar v. Dale E. Duncan*, Case No. 09003613[.]" Specifically concerning the transcripts of the proceedings, FMV contended the transcripts were irrelevant, immaterial, and otherwise inadmissible as hearsay. In response, plaintiffs contended the transcripts were relevant, material, and admissible as an exception to the hearsay rule under N.C. Gen. Stat. § 8C-1, Rules 804(b)(1), (3), and (5).

FMV's motion came on for hearing on 4 September 2012. After initially reserving judgment, the trial court concluded that plaintiffs could cross-examine defendants regarding their unethical conduct but determined the transcripts were immaterial and inadmissible hearsay.

At the outset, we address the trial court's mistaken statement that the transcripts were immaterial. Although the memorandum orders containing the results and conclusions of the Virginia State Bar proceedings may be irrelevant and immaterial in the present case because the standards in ethical proceedings differ from those in legal proceedings, Gonzales' testimony in the Virginia State Bar proceedings, as recorded in the transcript, is both relevant and material in the present case as it details the conduct that forms the basis of plaintiffs' claims.

Nevertheless, relevant and material evidence may be excluded if it is hearsay. The North Carolina Rules of Evidence provide that hearsay, "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted[,]" N.C. Gen. Stat. § 8C-1, Rule 801(c) (2013), "is not admissible except as provided by statute or by [the] rules." N.C. Gen. Stat. § 8C-1, Rule 802 (2013). There are exceptions to rule against hearsay, however, when a declarant is unavailable. *See* N.C. Gen. Stat. § 8C-1, Rule 804 (2013).

Now on appeal, plaintiffs argue the trial court erred in excluding the transcript of Gonzales' testimony without issuing specific findings of fact and conclusions of law regarding the admissibility of the transcript under N.C. Gen. Stat. § 8C-1, Rules 804(b)(3) and (5). In support of their argument, plaintiffs cite *State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985), and *State v. Triplett*, 316 N.C. 1, 340 S.E.2d 736 (1986).

In *Smith*, our Supreme Court addressed the admissibility of hearsay under N.C. Gen. Stat. § 8C-1, Rule 803(24), the residual exception for hearsay when the availability of a declarant is immaterial. *Smith*, 315 N.C. at 90-99, 337 S.E.2d at 843-48. In its discussion, the Court stated,

> [u]pon being notified that the proponent is seeking to admit the statement pursuant to that exception, the trial judge must have the record reflect that he is considering the admissibility of the statement pursuant to Rule 803(24). Only then should the trial judge proceed to analyze the admissibility by undertaking the six-part inquiry required of him by the rule. The trial judge must engage in this inquiry prior to admitting or denying proffered hearsay evidence pursuant to Rule 803(24).

Id. at 92, 337 S.E.2d at 844. Upon outlining the six-part inquiry, the Court in *Smith* then held that,

> before allowing the admission of hearsay evidence to be presented under Rule 803(24) (other exceptions), the trial judge must enter appropriate statements, rationale, or findings of fact and conclusions of law, as set forth herein, in the record to support his discretionary decision that such evidence is admissible under that rule. If the record does not comply with these requirements and it is clear that the evidence was admitted pursuant to Rule 803(24), its admission must be held to be error.

Id. at 97, 337 S.E.2d at 847. Thereafter, our Supreme Court adopted "parallel guidelines" for the admission of hearsay under N.C. Gen. Stat. § 8C-1, Rule 804(b)(5) in *Triplett*, noting "Rule 804(b)(5) and Rule 803(24) are substantively nearly identical[.]" *Triplett*, 316 N.C. at 7, 340 S.E.2d at 740.

> Under either of the two residual exceptions to the hearsay rule, the trial court must determine the following: (1) whether proper notice has been given, (2) whether the hearsay is not specifically covered elsewhere, (3) whether the statement is trustworthy, (4) whether the statement is material, (5) whether the statement is more probative on the issue than any other evidence which the proponent can procure through reasonable efforts, and (6) whether the interests of justice will be best served by admission.

State v. Valentine, 357 N.C. 512, 518, 591 S.E.2d 846, 852 (2003).

Under the law espoused in *Smith* and *Triplett*, the trial court is only required to issue findings of fact and conclusions of law to support a decision to admit evidence pursuant to N.C. Gen. Stat. § 8C-1, Rule 804(b)(5). There is no requirement that the trial court issue findings of

fact or conclusions of law regarding the admissibility of evidence pursuant to any other N.C. Gen. Stat. § 8C-1, Rule 804 exception. Furthermore, the trial court did not admit the hearsay evidence at issue in the present case. As this Court has stated, "[t]he six-part inquiry is very useful when an appellate court reviews the admission of hearsay under Rule 804(b)(5) or 803(24). However, its utility is diminished when an appellate court reviews the exclusion of hearsay." *Phillips & Jordan Inv. Corp. v. Ashblue Co.*, 86 N.C. App. 186, 191, 357 S.E.2d 1, 3-4 (1987).

Nevertheless, *Smith* and *Triplett* require the trial court, upon being notified that a party is seeking to admit evidence pursuant to a residual hearsay exception, to ensure the record reflects it is considering the exception and engage in the six-part inquiry "prior to admitting or denying proffered hearsay evidence[.]" *Smith*, 315 N.C. at 92, 337 S.E.2d at 844.

Although plaintiffs argued for admission of the transcript of Gonzales' testimony under the residual exception in both its memorandum and argument, the trial court gave no indication that it considered admission under N.C. Gen. Stat. § 8C-1, Rule 804(b)(5) or engaged in the required six-part inquiry when the trial court denied the admission of the transcript. We hold this failure to address the admission of the evidence under N.C. Gen. Stat. § 8C-1, Rule 804(b)(5) was arbitrary and an abuse of discretion. Moreover, given that Gonzales is now deceased, plaintiffs provided notice of their intent to admit the transcript, the trial court denied admission of the transcript after plaintiffs argued for its admission under the only other applicable hearsay exceptions, the Virginia Bar proceedings have sufficient circumstantial guarantees of trustworthiness, Gonzales' testimony was material, and Gonzales was the best source of evidence regarding his role with FMV and ProDev, we believe the transcript of Gonzales' testimony would likely be admitted under N.C. Gen. Stat. § 8C-1, Rule 804(b)(5) if properly considered.

In addition to determining the trial court erred, we hold plaintiffs were prejudiced by the error. Although directed verdicts were entered on plaintiffs' fraud, misrepresentation, and constructive fraud claims, and some evidence of Gonzales' role with FMV and ProDev was introduced through stipulations and testimony from FMV president, Arthur Bennett, we find the exclusion of the transcript of Gonzales' testimony was not harmless where Gonzales' testimony is significant to the issue of unclean hands, on which the jury was deadlocked at trial.

2. and 3. Directed Verdicts

As mentioned in the background, at the close of plaintiffs' evidence, FMV and its trustees moved for a directed verdict on all issues pursuant

to N.C. Gen. Stat. § 1A-1, Rule 50. Upon consideration of the trial briefs and arguments by both sides, the trial court granted FMV's motion for a directed verdict on plaintiffs' claims of fraud, misrepresentation, and constructive fraud, among others.

Now, in plaintiffs' second and third issues on appeal, plaintiffs argue the trial court erred in directing verdicts in favor of FMV on the fraud, misrepresentation, and constructive fraud claims. "The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991) (citing *Kelly v. Int'l Harvester Co.*, 278 N.C. 153, 179 S.E.2d 396 (1971)). Thus, our review is *de novo*. *See Maxwell v. Michael P. Doyle, Inc.*, 164 N.C. App. 319, 323, 595 S.E.2d 759, 761 (2004) ("Because the trial court's ruling on a motion for a directed verdict addressing the sufficiency of the evidence presents a question of law, it is reviewed *de novo*.").

Fraud and Misrepresentation

[2] Regarding plaintiffs' fraud and misrepresentation claims, plaintiffs contend the trial court erred in directing a verdict in favor of FMV because there was sufficient evidence for the jury to infer that the statute of limitations had not run. We disagree.

N.C. Gen. Stat. § 1-52(9) provides that actions for "relief on the ground of fraud or mistake" must be brought within three years. N.C. Gen. Stat. § 1-52(9)(2013). Yet, "the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." *Id.* Our Supreme Court has "previously construed this provision to 'set accrual at the time of discovery *regardless* of the length of time between the fraudulent act or mistake and plaintiff's discovery of it.'" *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 386 (2007) (quoting *Feibus & Co. v. Godley Constr. Co.*, 301 N.C. 294, 304, 271 S.E.2d 385, 392 (1980)). "For purposes of N.C.G.S. § 1-52(9), 'discovery' means either actual discovery or when the fraud should have been discovered in the exercise of 'reasonable diligence under the circumstances.'" *Id.* (quoting *Bennett v. Anson Bank & Trust Co.*, 265 N.C. 148, 154, 143 S.E.2d 312, 317 (1965)).

As noted above, plaintiffs argue there was sufficient evidence from which the jury could infer the statute of limitations had not expired prior to 7 June 2010, the date plaintiffs commenced this action. In support of their argument, plaintiffs quote *Huss v. Huss*, 31 N.C. App. 463, 468, 230 S.E.2d 159, 163 (1976), for the proposition that "[w]hether the plaintiff in

the exercise of due diligence should have discovered the facts [regarding the existence of potential fraud] more than three years prior to the institution of the action is ordinarily for the jury when the evidence is not conclusive or conflicting." *Id.* at 468, 230 S.E.2d at 163.

Plaintiffs' argument lacks merit. Considering the evidence in this case, we find no issues for the jury to determine.

Both at trial and in their brief on appeal, plaintiffs acknowledge that they began to become suspicious about the loan when they were unable to refinance one of the properties in August or September of 2006. As L. Brissett testified, it was around this time that they learned of Gonzales' role in the transaction. L. Brissett further testified that he could not locate his copy of the closing documents and demanded Gold send him copies. Upon receipt of the copies of the closing documents in October 2006, plaintiffs noticed some of C. Brissett's signatures did not look like her own. C. Brissett subsequently documented plaintiffs' realization that they were being defrauded in a 29 December 2006 letter.

We find this evidence conclusive that plaintiffs were aware of the fraud in 2006. Therefore, the three-year statute of limitations began to run in 2006 and expired prior to the commencement of this action on 7 June 2010.

Despite evidence the fraud was discovered in 2006, plaintiffs argue that "[a]lthough [they] may have suspected that [FMV] was involved with the transfer of their properties to [ProDev], and even potentially involved with the forgery of [C. Brissett's] signature on several documents, the plaintiffs did not reasonably discover [FMV's] actual ties to the fraudulent scheme until 2007 or 2008." We are not convinced; discovery includes "when the fraud should have been discovered in the exercise of reasonable diligence under the circumstances." *Forbis*, 361 N.C. at 524, 649 S.E.2d at 386 (quotation marks omitted).[2]

Constructive Fraud

[3] Regarding plaintiffs' constructive fraud claim, plaintiffs argue the trial court erred in directing a verdict in favor of FMV because there was sufficient evidence to establish a presumption of a breach of fiduciary

2. Although plaintiffs do not mention it on appeal, we note that FMV also argued for a directed verdict on the fraud and misrepresentation claims on the ground that essential elements of those claims were missing. The trial court, however, did not explain the basis for its ruling. Because we find the directed verdict was proper because the statute of limitations had expired, we do not address the elements of the fraud and misrepresentation claims.

duty where FMV required plaintiffs to convey title to the properties to ProDev, a company controlled by Gonzales and formed for the sole purpose of holding title to the properties. We disagree.

"In order to maintain a claim for constructive fraud, plaintiffs must show that they and defendants were in a 'relation of trust and confidence . . . [which] led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff.'" *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 666, 488 S.E.2d 215, 224 (1997) (quoting *Rhodes v. Jones*, 232 N.C. 547, 549, 61 S.E.2d 725, 726 (1950)). "Put simply, a plaintiff must show (1) the existence of a fiduciary duty, and (2) a breach of that duty." *Keener Lumber Co., Inc. v. Perry*, 149 N.C. App. 19, 28, 560 S.E.2d 817, 823 (2002).

As this Court has recently explained,

> [a] fiduciary relationship "may exist under a variety of circumstances; it exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931). Beyond the usual occurrence, such as that found between a lawyer and client, the relationship "extends to any possible case in which a fiduciary relation exists in fact, and in which there is confidence reposed on one side, and resulting domination and influence on the other." *Id.* (citation omitted) (internal quotation marks omitted).

Dallaire v. Bank of America, N.A., __ N.C. App. __, __, 738 S.E.2d 731, 735 (2012). This Court, however, has acknowledged that an ordinary debtor-creditor relationship does not generally give rise to a fiduciary relationship. *Branch Banking and Trust Co. v. Thompson*, 107 N.C. App. 53, 61, 418 S.E.2d 694, 699 (1992).

Although plaintiffs admit that an ordinary creditor-debtor relationship does not create fiduciary duties, plaintiffs contend a fiduciary relationship exists between a mortgagee and mortgagor when the mortgagee uses a "straw man" to divest the mortgagor of his equity of redemption. In support of their argument, plaintiffs cite *Hinton v. West*, 207 N.C. 708, 178 S.E. 356 (1935).

The defendant in *Hinton*, in exchange for various items of value, made out a note and took a mortgage on 48 acres of land owned by the

plaintiff. *Id.* at 709, 178 S.E. at 356. Upon default and a looming threat of foreclosure, the plaintiff, at the insistence of the defendant, relinquished his equity of redemption by conveying 42 acres of the land by deed to the defendant, as trustee for defendant's brother, to satisfy the debt and avoid foreclosure. *Id.* at 710, 178 S.E. at 357. Yet, following the transfer, defendant took control and made improvements on the acreage. *Id.* In reviewing the transaction, our Supreme Court noted that the [defendant] was the only party with whom the [plaintiff] dealt and was acting in a "dual capacity as trustee and agent for [his brother], and was the primary party to the purchase." *Id.* at 714, 178 S.E. at 359. The Court then reversed the trial court's judgment of a nonsuit holding, that where the defendant, as trustee, acted for himself to acquire the plaintiff's equity of redemption for inadequate consideration, "there was sufficient evidence to be submitted to a jury, and a presumption arose from the evidence, if believed by them, which would require the defendant[] to show that the transaction was fair and free from oppression." *Id.*

Plaintiffs argue the same result is warranted in the present case because FMV, through Gonzales, stood on both sides of the transaction and failed to disclose Gonzales' affiliation with FMV. We disagree and find the present case distinguishable.

Although the result of plaintiffs' default, where Gonzales takes control of ProDev and the subject properties to the benefit of FMV, is similar to a foreclosure under a deed of trust, the relationship between plaintiffs and FMV is not a mortgagor-mortgagee relationship. As stipulated by the parties, "[n]one of the [p]roperties [were] the personal residence of the [plaintiffs] on the date of closing, and the loan was in all respects a commercial loan for the [plaintiffs] to use [to] rehabilitate the [p]roperties." Moreover, there was no prior relationship between FMV and plaintiffs to establish a fiduciary relationship. In fact, it was stipulated that "[FMV] had no contact or communication with the [plaintiffs] until after the loan was closed." Based on these facts, we distinguish this case from *Hinton* and the cases where fiduciary duties have been imposed based on the special relationships between debtors and creditors and hold there was no fiduciary duty owed to plaintiffs by FMV. Thus, the trial court did not err in entering a directed verdict on plaintiffs' constructive fraud claim.

4. Evidence for Punitive Damages

[4] In the fourth issue raised by plaintiffs on appeal, plaintiffs argue the trial court erred in denying them the opportunity to present evidence to the jury of FMV's net worth, revenues, and similar past conduct. Plaintiffs contend this evidence was admissible to prove punitive damages pursuant to N.C. Gen. Stat. §§ 1D-15 and 1D-35.

N.C. Gen. Stat. § 1D-15 provides "[p]unitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded: (1) Fraud. (2) Malice. (3) Willful or wanton conduct." N.C. Gen. Stat. § 1D-15(a) (2013). N.C. Gen. Stat. § 1D-35 then lists the types of evidence that the trier of fact may consider in determining the amount of punitive damages, if any, to be awarded. N.C. Gen. Stat. § 1D-35 (2013). The list of evidence includes evidence related to "[t]he existence and frequency of any similar past conduct by the defendant[,]" N.C. Gen. Stat. § 1D-35(2)(g), and "[t]he defendant's ability to pay punitive damages, as evidenced by its revenues or net worth." N.C. Gen. Stat. § 1D-35(2)(i).

At the outset of our analysis on the issue, we note that plaintiffs mischaracterize the portions of the evidence they claim were excluded in error. Regarding FMV's ability to pay punitive damages, plaintiffs questioned Bennett regarding the total value of the loans by FMV in North Carolina in 2006. FMV objected on relevance grounds and the trial court sustained the objection. The trial court, however, allowed plaintiff to question Bennett as to the largest and smallest amount of loans, in terms of value, made by FMV in any year since Bennett became president. Regarding FMV's past similar conduct, plaintiffs did not merely inquire into FMV's past similar conduct, but instead questioned Bennett about the number of times FMV had been sued as a result of similar lending schemes. FMV objected and the trial court sustained the objection. Upon review of the testimony, we hold the trial court did not abuse its discretion in sustaining either of FMV's objections.

Nevertheless, assuming arguendo the trial court erred in limiting the testimony, the error was harmless given that directed verdicts were entered in favor of FMV on the fraud claims and the jury never found FMV liable, thereby precluding any contemplation of damages. *See* N.C. Gen. Stat. § 1D-15(a) (conditioning the award of punitive damages on the award of compensatory damages).

5. Judgment Notwithstanding the Verdict ("JNOV")

[5] As detailed in the background, the jury was deadlocked on the issues of adequate consideration and unclean hands. As a result, on 12 September 2012, FMV filed a motion for a JNOV pursuant to N.C. Gen. Stat. § 1A-1, Rule 50(b)(1). In the motion, FMV argued it was entitled to judgment as a matter of law because there was overwhelming evidence that plaintiffs received consideration for executing the deeds

conveying title to ProDev, as shown by the jury's determination that FMV is entitled to a lien on the properties, and "the [trial court,] having concluded that [FMV] was entitled to [d]irected verdict[s] on [p]laintiffs' claims for fraud, civil conspiracy, constructive fraud, and unfair or deceptive trade practices, . . . essentially ruled that [FMV] did not act with 'unclean hands.' " On the same day, plaintiffs filed their own motion for a JNOV and a new trial arguing there was overwhelming evidence of inadequate consideration and unclean hands. In response to FMV's argument regarding unclean hands, plaintiffs argued "[t]he elements in each of [the fraud] claims are not identical to what the [c]ourt must find to determine the issue of . . . 'unclean hands[]' " and, therefore, the directed verdicts did not foreclose a determination of unclean hands.

After hearing arguments echoing those in the motions, the trial court granted FMV's motion for a JNOV and denied plaintiffs' motions.

In the plaintiffs' final issue on appeal, plaintiffs argue the trial court erred in granting FMV's motion for a JNOV on the issue of unclean hands.[3] We agree.

"A motion for judgment notwithstanding the verdict (JNOV) 'is essentially a directed verdict granted after the jury verdict.' " *Tomika Invs., Inc. v. Macedonia True Vine Pentecostal Holiness Church of God, Inc.*, 136 N.C. App. 493, 498, 524 S.E.2d 591, 595 (2000). Thus, "[o]n appeal the standard of review for a JNOV is the same as that for a directed verdict, that is whether the evidence was sufficient to go to the jury." *Id.* at 498-99, 524 S.E.2d at 595.

"The doctrine of clean hands is an equitable defense which prevents recovery where the party seeking relief comes into court with unclean hands." *Ray v. Norris*, 78 N.C. App. 379, 384, 337 S.E.2d 137, 141 (1985). More specifically, this Court has stated "[t]he clean hands doctrine denies equitable relief only to litigants who have acted in bad faith, or whose conduct has been dishonest, deceitful, fraudulent, unfair, or overreaching in regard to the transaction in controversy." *Collins v. Davis*, 68 N.C. App. 588, 592, 315 S.E.2d 759, 762, *affirmed*, 312 N.C. 324, 321 S.E.2d 892 (1984). In this case, a finding that FMV acted with unclean hands would prevent FMV from obtaining a lien on the subject properties.

In entering the JNOV on the issue of unclean hands, it appears the trial court agreed with FMV's argument that the trial court had already

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3. Plaintiffs do not challenge the JNOV in favor of FMV on the issue of adequate consideration because the issue is of little consequence following the jury's determination that the deeds were inadequate under the law to convey valid title and create a valid debt.

decided the issue when it directed verdicts on plaintiffs' claims for fraud, civil conspiracy, constructive fraud, and unfair or deceptive trade practices. We find this was error for two reasons. First, FMV argued for a directed verdict on the fraud claims based on the statute of limitations and lack of reasonable reliance. It is unclear from the record on which basis the trial court entered the directed verdicts. Second, for a finding of unclean hands, "[t]he inequitable action need not rise to the level of fraud[.]" *S.T. Wooten Corp. v. Front Street Const., LLC*, _ N.C. App. _, _, 719 S.E.2d 249, 252 (2011) (citing *Stelling v. Wachovia Bank and Trust Co.*, 213 N.C. 324, 327, 197 S.E. 754, 756 (1938)). Thus, fraud is not required to preclude equitable relief on the basis of unclean hands.

Upon review of the evidence, even without considering the transcript of Gonzales' testimony in the Virginia State Bar proceedings, we hold there was sufficient evidence to present the jury with the issue of whether FMV acted with unclean hands. As a result, we hold the trial court erred in granting FMV's motion for a JNOV following the jury's impasse.

III. Conclusion

Based on the forgoing discussion, we hold the trial court did not err in directing verdicts on plaintiffs' fraud, misrepresentation, and constructive fraud claims. Nor did the trial court improperly exclude evidence relating to punitive damages. The trial court did, however, err in failing to consider the admission of the transcript of Gonzales' testimony in the Virginia State Bar proceedings under all the hearsay exceptions argued by plaintiffs and by granting FMV's motion for a JNOV on the issue of unclean hands. Therefore, the judgment is reversed and the case is remanded on the issue of unclean hands.

No error in part and reversed in part.

Judges ELMORE and DAVIS concur.

BROWN v. TOWN OF CHAPEL HILL

[233 N.C. App. 257 (2014)]

CHARLES D. BROWN, PLAINTIFF
v.
TOWN OF CHAPEL HILL, CHAPEL HILL POLICE OFFICER D. FUNK, IN HIS OFFICIAL AND INDIVIDUAL CAPACITY, AND OTHER CHAPEL HILL POLICE OFFICERS, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES, TO BE NAMED WHEN THEIR IDENTITIES AND LEVEL OF PARTICIPATION BECOMES KNOWN, DEFENDANTS

No. COA13-323

Filed 1 April 2014

1. Appeal and Error—interlocutory orders and appeals—public official immunity

A public official's right to be immune from suit is a substantial right justifying an interlocutory appeal and the appeal of a police officer from the denial of his motion for summary judgment based on public official immunity was properly before the Court of Appeals. However, the Court of Appeals declined to exercise its discretion to consider non-immunity issues in the interests of judicial economy.

2. Immunity—public official immunity—malice exception—evidence not sufficient

In a civil action that arose from a police officer's stop of plaintiff after a mistaken identification, plaintiff argued on appeal only the malice exception to public official immunity. But plaintiff did not forecast any evidence that the officer acted contrary to his duty and did not forecast any evidence that the officer did not use due diligence in ascertaining plaintiff's true identity. The trial court erred by denying the officer's motion to dismiss.

Judge GEER dissenting.

Appeal by defendants from order entered 18 September 2012 by Judge Carl R. Fox in Orange County Superior Court. Heard in the Court of Appeals 28 August 2013.

McSurely and Turner, PLLC, by Alan McSurely, for plaintiff-appellee.

Cranfill Sumner & Hartzog LLP, by Dan M. Hartzog and Dan M. Hartzog, Jr., for defendants-appellants.

HUNTER, Robert C., Judge.

Officer D. Funk ("defendant" or "Officer Funk") and the Town of Chapel Hill ("the Town") (collectively "defendants") appeal from an order denying in part their motion for summary judgment as to the claim of plaintiff Charles D. Brown for false imprisonment. Only Officer Funk's appeal from the trial court's denial of his motion for summary judgment based on public official immunity is properly before us. Because plaintiff failed to forecast evidence that Officer Funk acted with malice, we reverse.

Background

This lawsuit arises out of the stop and detention of plaintiff by Officer Funk and other officers of the Chapel Hill Police Department ("CHPD") on the night of 1 June 2009. Plaintiff, a black male, is the owner of Precise Cuts & Styles Barber Shop located at 136 E. Rosemary Street in Chapel Hill, North Carolina.

According to plaintiff's verified complaint and deposition, on 1 June 2009, after closing his shop at 10:00 p.m., plaintiff stayed late to do some cleaning and remodeling. When plaintiff was finished, around 11:25 p.m., he locked the shop's front door and walked west on Rosemary Street towards his fiancé's house in Carrboro.

At around 11:35 p.m., plaintiff was walking along the north side of West Rosemary Street when he saw two officers in police cars parked in the convenience store lot on the south side of the street across from Breadman's Restaurant. One of the officers pulled out on Rosemary Street and into an empty lot on the south side of the street. As he walked past the officer, plaintiff raised his right arm across his face, scratching the left side of his face with his right hand. Plaintiff continued walking on the north side of the street past the Breadman's parking lot, and heard someone say, "Stop." Not realizing that the person was talking to him, plaintiff continued walking.

Plaintiff then heard the same voice again, this time directly behind him, saying, "I said stop!" Plaintiff turned and saw Officer Funk with his hand on his weapon about five feet away. Plaintiff asked, "Stop for what? What did I do?" Officer Funk responded, "[Y]ou are under arrest, Mr. Farrington [sic]" as he grabbed plaintiff's hand, spun him around, pushed him against the back of a second police car that had just pulled in front of plaintiff. Officer Funk pulled plaintiff's other arm behind his back and tightly fastened the handcuffs on plaintiff's wrists, inflicting pain.

Plaintiff informed the officers that he was not Cuman Fearrington ("Mr. Fearrington") and that his actual name was Charles Brown. When

plaintiff did not receive any response from the officers, he asked, "[A]re you sure you want to do this? My name is not Mr. Farrington [sic]." Again, the officers did not respond. Instead, Officer Funk pushed plaintiff against the trunk of the police car and patted plaintiff down, checking for weapons. Plaintiff told Officer Funk to look in his pants pocket for his ID cards. Defendant pulled out a set of cards held together with a rubber band, flipped through them, and threw them on the trunk of the police car.

When Officer Funk asked plaintiff from where he was walking, plaintiff told him that he had just left work. Officer Funk questioned plaintiff: "From work at this time of night?" Plaintiff explained that he owned a barber shop on Rosemary Street. Officer Funk replied in a sarcastic and incredulous tone: "Oh? You own a business?" Plaintiff responded, "If I was white, this would not be happening." Officer Funk then asked whether plaintiff would "feel better" if he called a black officer. Because plaintiff again thought Officer Funk was being sarcastic, he replied, "No."

In the meantime, five police cars gathered, and several cars and pedestrians slowed or stopped to observe what was happening. A black police officer, Officer D. Williams, asked plaintiff, "If I had pulled you, would you feel better?" Plaintiff then heard Officer Williams say to the other officers, "I hate the ones like him."

At 12:14 a.m., Officer Funk's partner, Officer Castro, called Orange County Communications to verify the information on plaintiff's identification card. When the operator confirmed plaintiff's identification, Officer Castro asked, "[D]oes he have anything on the NCIC? Or anything on other surrounding indices?" The operator replied, "I don't show anything in NCIC but I'm going to check surrounding . . . I'll have to send a message . . . it will take a few . . . ." Eventually the operator responded that there was "no positive response," and the 16-minute call ended at 12:30 a.m. A few minutes later, Officer Funk removed plaintiff's handcuffs, and he and the other officers drove off without apologizing or saying anything else to plaintiff.

The following day, plaintiff and his fiancé drove to the CHPD to file a complaint and ask for a photograph and description of Mr. Fearrington. They met with Lieutenant Bradley who told them he did not have time to look up the requested information and that Officer Funk was in training and could not meet with them either. Because of what plaintiff and his fiancé perceived as a discriminatory and disrespectful attitude from Lt. Bradley, they did not file a complaint that day, fearing it would be dismissed with the same attitude.

Instead, on 16 June 2009, plaintiff reported the incident to the local NAACP, who asked the CHPD for the incident report of plaintiff's arrest. Plaintiff was provided the incident report on 24 June 2009. Defendants admitted that the report was not created until requested by the NAACP, two weeks after the incident. The report is unsigned by Officer Funk and states that at 12:17 a.m. on 2 June 2009 the "State of North Carolina" was the victim of a "Suspicious Person" on the 300 Block of West Rosemary Street.

The report lists Officers Castro and Sabanosh as "others involved" in the incident. Officer Sabanosh does not, however, appear anywhere on the radio log from that night. Although the radio log indicates that Officer Taylor was present at the scene of the incident, the incident report does not mention him. Officer Williams, the black officer, is not mentioned in either the radio log or on the incident report.

On 2 June 2011, plaintiff filed suit against the Town and Officer Funk in his official and individual capacity for assault, false imprisonment, and violation of plaintiff's constitutional rights under Article I, Section 20, and Article I, Section 19, of the North Carolina Constitution. Plaintiff pled that the Town had waived sovereign immunity by the purchase of liability insurance. In its response, the Town admitted that it "participates in a local government risk pool, which provides certain coverage to the Town with respect to Plaintiff's claims."

On 13 August 2012, defendants filed a motion for summary judgment, arguing that (1) plaintiff had not and could not establish facts to support any of his causes of action, (2) Officer Funk was entitled to public official immunity in his individual capacity, (3) the claims against Officer Funk in his official capacity are duplicative of the claims against the Town, and (4) the claims directly under the North Carolina Constitution should be dismissed because plaintiff had adequate state remedies available. In support of the motion for summary judgment, defendants submitted an affidavit from Officer Funk.

According to Officer Funk's affidavit, he did not see plaintiff until 12:14 a.m.—he drove to the Keys Food Mart, where plaintiff first saw the two officers parked, after responding to a loud music complaint on Church Street at 12:04 a.m. Officer Funk first saw plaintiff walking west on the *south* side of the road as defendant was turning right onto Rosemary. As he made his turn, Officer Funk saw plaintiff look up in his direction and immediately put his right hand in front of his face. Plaintiff continued to cover his face with his hand, moving his hand slowly across his face as Officer Funk drove by to keep his face from view. After plaintiff passed Officer Funk, plaintiff crossed from the south side

to the north side of the street just before reaching Officer Castro's patrol car in the Keys Food Mart lot. As he crossed the street, he switched from using his right hand to cover his face to using his left hand so that Officer Castro could not see his face. Officer Funk claimed that plaintiff hid his face continuously.

Based on Officer Funk's belief that plaintiff was intentionally hiding his face and it being after midnight in a high call volume area of town, Officer Funk decided to investigate further. He turned his vehicle around to get a closer look at plaintiff, and, when he got close enough, "the individual resembled a subject [he] knew had active local arrest warrants—Cuman Fearrington." In addition to the arrest warrants, Officer Funk noted that Mr. Fearrington had evaded arrest in the "Central Business District" of Chapel Hill earlier that day. Officer Funk, believing that plaintiff was Mr. Fearrington, thought that plaintiff was intentionally covering his face based on those outstanding arrest warrants.

According to Officer Funk, he got out of his police car and asked plaintiff if he could speak to him, but plaintiff ignored him and increased his pace. Officer Funk denied placing his hand on his weapon or threatening force. Officer Funk then told plaintiff to stop, repeating his order several times before plaintiff turned around and asked, "Why do I have to stop, just because you say so?" At that point, Officer Castro had pulled his vehicle in front of plaintiff, and it appeared to Officer Funk that plaintiff was attempting to walk around Officer Castro's vehicle. Defendant also claimed that he believed that plaintiff might run away into an open alley nearby. Concerned that plaintiff may attempt to run, Officer Funk placed his hands on plaintiff's left arm, and plaintiff jerked his arm away. Officer Funk placed plaintiff in handcuffs with the assistance of another officer; he claimed plaintiff continued to struggle during the encounter.

Officer Funk's account of what happened after he handcuffed plaintiff also differs from plaintiff's account. Officer Funk stated that while he was patting plaintiff down for weapons, he asked plaintiff for his identification, and plaintiff told him he did not have any. Officer Funk claims that he asked plaintiff more than three times for his identification and that each time plaintiff gave the correct name but the wrong date of birth, all while denying that he had identification on his person. Officer Funk also denies that any of the comments he made to plaintiff regarding plaintiff working late and owning a business were intended to express skepticism or to disparage plaintiff.

Officer Funk attributes the delay in the verification of plaintiff's identification to the fact that communications originally ran an incorrect birth date into the database. As soon as communications ran the correct

date of birth, they were able to confirm plaintiff's identity. Officer Funk claims that plaintiff was only in investigative detention for 16 minutes, from 12:14 a.m. to 12:30 a.m.

Attached to Officer Funk's affidavit was the radio log for that night, which shows the self-reported status of the CHPD officers. The log stated that Officer Funk was dispatched to 500 Umstead Road at 11:32 p.m., and he arrived there at 11:42 p.m. At 11:50 p.m., Officer Funk radioed dispatch that he was available. At 11:54, he was dispatched to a loud noise complaint at Church Street and radioed that he was again available at 12:04 a.m. The log does not show that Officer Funk ever radioed that he had arrived on the scene at Church street, as it shows for the other locations to which he was dispatched that night. Finally, the log shows that Officer Funk arrived at Breadman's at 12:15 a.m. and radioed that he was available at 12:32 a.m. Defendants also provided documentation of the call between Officer Castro and Orange County Communications, which shows that the call began at 12:14 a.m. and ended at 12:30 a.m.

Judge Carl Fox heard defendants' motion for summary judgment and, on 18 September 2012, Judge Fox entered an order allowing defendants' motion as to plaintiff's constitutional claims and his claim for assault. Judge Fox denied the motion as to plaintiff's claim for false imprisonment as to all defendants. Defendants appealed to this Court.

Grounds for Appeal

[1] Preliminarily, we note that Judge Fox's order is interlocutory and, generally, an order denying a motion for summary judgment is not immediately appealable. *Schmidt v. Breeden*, 134 N.C. App. 248, 251, 517 S.E.2d 171, 174 (1999). "An interlocutory appeal is ordinarily permissible only if (1) the trial court certified the order under Rule 54(b) of the Rules of Civil Procedure, or (2) the order affects a substantial right that would be lost without immediate review." *Boyd v. Robeson Cnty.*, 169 N.C. App. 460, 464, 621 S.E.2d 1, 4 (2005).

Officer Funk contends that the trial court erred in denying his motion for summary judgment based on public official immunity. This Court has held that a public official's right to be immune from suit is a substantial right justifying an interlocutory appeal. *See Free Spirit Aviation, Inc. v. Rutherford Airport Auth.*, 191 N.C. App. 581, 583, 664 S.E.2d 8, 10 (2008). Therefore, defendant's appeal of the denial of the motion for summary judgment based on public official immunity is properly before us.

Additionally, both defendant and the Town have sought immediate review of the denial of their motion for summary judgment on several

non-immunity related grounds. Defendants argue that "it is well established that this Court will, in the interests of judicial economy, entertain the entirety of an appeal involving an issue which affects a substantial right, though the remaining issues on appeal do not, in and of themselves, affect such a right."

Defendants cite *Block v. Cnty. of Person*, 141 N.C. App. 273, 277, 540 S.E.2d 415, 419 (2000) (addressing the defendants' argument that the complaint was insufficient to sue the defendants in their individual capacity); *Houpe v. City of Statesville*, 128 N.C. App. 334, 340, 497 S.E.2d 82, 87 (1998) (addressing "in our discretion" the defendant's non-immunity related arguments "where it would be in the interests of judicial economy to do so"); *Smith v. Phillips*, 117 N.C. App. 378, 384, 451 S.E.2d 309, 314 (1994) (holding that "in the interest of judicial economy, we exercise our discretionary power to suspend the rules pertaining to interlocutory appeals and address the remainder of [the] defendants' appeal").

However, this Court has noted that in cases where we have exercised our discretion to also review non-immunity issues, the Court has neither held "that non-immunity-related issues would always be considered on the merits in the course of deciding an immunity-related interlocutory appeal" nor "recognize[d] the existence of a substantial right to have multiple issues addressed in the course of an immunity-related appeal. On the contrary, in most immunity-related interlocutory appeals, we have declined requests that we consider additional non-immunity-related issues on the merits." *See Bynum v. Wilson Cnty.*, ___ N.C. App. ___, ___, 746 S.E.2d 296, 300, *disc. review dismissed*, ___ N.C. ___, 748 S.E.2d 559 (2013). In this case, after considering all of the circumstances, we decline to exercise our discretion to consider the merits of defendants' non-immunity issues on appeal and dismiss defendants' appeal with respect to those issues as interlocutory.

Arguments

[2] The sole issue properly before us is whether Judge Fox erred by denying Officer Funk's motion for summary judgment based on public official immunity.

Summary judgment shall be granted "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 (2013). When deciding the motion, " 'the trial judge must view the presented evidence in a light most favorable to the nonmoving party.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d

572, 576 (2008) (quoting *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001)). Additionally, " '[a]ll facts asserted by the [nonmoving] party are taken as true and their inferences must be viewed in the light most favorable to that party.' " *Woods v. Mangum*, 200 N.C. App. 1, 5, 682 S.E.2d 435, 438 (2009) (quoting *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000)), *aff'd per curiam*, 363 N.C. 827, 689 S.E.2d 858 (2010). This Court reviews an appeal from summary judgment *de novo*. *Id.* In applying Rule 56, this Court has held that "[s]ummary judgment is appropriate . . . if the non-moving party is unable to overcome an affirmative defense offered by the moving party." *Free Spirit Aviation*, 191 N.C. App. at 583, 664 S.E.2d at 10 (quoting *Griffith v. Glen Wood Co., Inc.*, 184 N.C. App. 206, 210, 646 S.E.2d 550, 554 (2007)).

I. Public Official Immunity – Malice Exception

> As long as a public officer lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption, he is protected from liability. Thus, a public official is immune from suit unless the challenged action was (1) outside the scope of official authority, (2) done with malice, or (3) corrupt.

Wilcox v. City of Asheville, __ N.C. App. __, __, 730 S.E.2d 226, 230 (2012) (internal citations omitted), *disc. review denied*, 366 N.C. 574, 738 S.E.2d 363 (2013). Here, the only exception to public official immunity plaintiff argued on appeal is the malice exception. Specifically, plaintiff has not cited any authority separately addressing the corruption exception to the public official immunity doctrine or provided any analysis as to this in his brief. Therefore, we will only address the malice exception. *See Wilkerson v. Duke Univ.*, __ N.C. App. __, __, 748 S.E.2d 154, 161 (2013) (noting that arguments not raised on appeal are "deemed abandoned").

This Court has noted, with regard to the malice exception, that:

> As for the first question, the most commonly-cited definition of malice in this context is from our Supreme Court's decision in *In re Grad v. Kaasa*, which states that "[a] defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another." 312 N.C. 310, 313, 321 S.E.2d 888, 890 (1984). Thus, elementally, a malicious act is an act (1) done wantonly, (2) contrary to the actor's duty, and (3) intended to be injurious to another.

Wilcox, __ N.C. App. at __, 730 S.E.2d at 230. Thus, the only issue is whether plaintiff sufficiently forecasted evidence for each element of malice. *See Schlossberg v. Goins*, 141 N.C. App. 436, 446, 540 S.E.2d 49, 56 (2000) ("[T]o survive [a] police officer['s] motion for summary judgment on the issue of their individual liability, [plaintiff] must have alleged and forecasted evidence demonstrating the officers acted corruptly or with malice."). If so, there is a genuine issue of material fact as to whether Officer Funk is entitled to the defense of public official immunity, and the trial court did not err in denying summary judgment. However, if not, then Officer Funk would be immune from civil liability.

A. Contrary to Duty

The first element of malice is whether Officer Funk acted contrary to his duty when he detained plaintiff. To determine this issue, we must decide whether plaintiff's seizure constituted an investigatory stop or an arrest. *See State v. Carrouthers*, 200 N.C. App. 415, 419, 683 S.E.2d 781, 784 (2009) ("Generally, a person can be 'seized' in two ways for the purposes of a Fourth Amendment analysis: by arrest or by investigatory stop."). Although police officers are authorized during an investigatory stop to take measures to protect their personal safety and maintain status quo, *State v. Campbell*, 188 N.C. App. 701, 708-709, 656 S.E.2d 721, 727 (2008), this Court has noted that "[w]here the duration or nature of the intrusion exceeds the permissible scope, a court may determine that the seizure may evolve into a *de facto* arrest . . . even in the absence of a formal arrest," *State v. Milien*, 144 N.C. App. 335, 340, 548 S.E.2d 768, 772 (2001).

Here, it is undisputed that Officer Funk immediately handcuffed plaintiff once he reached him without asking plaintiff to identify himself or providing any explanation for why plaintiff was being stopped. Furthermore, plaintiff claimed that Officer Funk immediately told him that he was under arrest. While Officer Funk claims that he handcuffed plaintiff during an investigatory stop to keep him from fleeing, Officer Funk admitted that he mistakenly believed that plaintiff was Mr. Fearrington, a person whom arrest warrants had been issued against. However, once plaintiff's true identity was established, Officer Funk released plaintiff. For purposes of this appeal, because "[r]easonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence[,]" *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) (internal quotation marks omitted), we conclude that plaintiff's seizure constituted a *de facto* arrest and not, as defendants contend, an investigatory stop. Thus, Officer Funk must have had probable cause; otherwise,

he would be acting contrary to duty. *See Milien*, 144 N.C. App. at 339, 548 S.E.2d at 771 (noting that "a *de facto* arrest . . . must be justified by probable cause").

In the present case, it is undisputed that Officer Funk had probable cause to arrest Mr. Fearrington. "[W]hen the police have probable cause to arrest one party, and when they reasonably mistake a second party for the first party, then the arrest of the second party is a valid arrest." *Hill v. California*, 401 U.S. 797, 802, 28 L. Ed. 2d 484, 489 (1971). Thus, the issue is whether Officer Funk's mistake was reasonable based on the totality of the circumstances. Subjective good-faith belief is not sufficient on its own; instead, the Supreme Court noted that "sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment." *Id.* at 804, 28 L. Ed. 2d at 490. Along these lines, this Court, in *Robinson v. City of Winston-Salem*, 34 N.C. App. 401, 406-07, 238 S.E.2d 628, 631 (1977), noted that with regard to civil claims for false imprisonment against police officers who arrest the wrong person: "liability for false imprisonment will be imposed only when the arresting officer has failed to use reasonable diligence to determine that the party arrested was actually the person described in the warrant." This concept was reinforced by this Court in *State v. Lynch*, 94 N.C. App. 330, 333, 380 S.E.2d 397, 399 (1989), which noted, relying on *Robinson*, that: even though a police officer reasonably mistakenly arrests the wrong person, the officer must still take "reasonable steps to confirm the identity of the individual under suspicion."

With regard to the reasonableness analysis required by *Hill*, the Fourth Circuit has noted that

> the qualified immunity reasonableness determination is based on evidence reasonably available to the police officer and in light of any exigencies present. And importantly, this inquiry must not result in a second-guessing of the officer's actions with the benefit of 20/20 hindsight. This is so because officers executing a warrant are not required to investigate independently every claim of innocence, or to be absolutely certain that the person arrested is the person identified in the warrant. Instead, sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment. Mistaken identity errors, of course, will inevitably occur from time to time, but the law sensibly recognizes that not every mix-up in the issuance of an arrest warrant, even though it leads to the arrest of the wrong person . . . automatically constitutes

> a constitutional violation for which a remedy may be sought under . . . [section] 1983. In sum officers who mistakenly arrest the wrong person are immune from § 1983 liability unless they act in an objectively unreasonable manner in the circumstances, as for example, in failing to investigate readily available exculpatory evidence.

Brown v. Wiita, 7 F. App'x 275, 278-79 (4th Cir. 2001) (alteration in original) (internal quotation marks and citations omitted).

Here, under *Hill* and *Robinson*, the evidence taken in a light most favorable to plaintiff establishes that Officer Funk's mistaken belief that plaintiff was Mr. Fearrington was reasonable and that Officer Funk used reasonable diligence to determine whether plaintiff was who he claimed to be. With regard to Officer Funk's mistaken belief, the undisputed evidence, as established by Officer Funk's affidavit attached to the motion for summary judgment, shows that Officer Funk knew Mr. Fearrington had active local arrest warrants out on him and that Mr. Fearrington had evaded arrest earlier that day in Chapel Hill. After telling plaintiff to stop, plaintiff continued to walk away from Officer Funk. Once plaintiff stopped, according to his own complaint, Officer Funk stated: "You are under arrest, Mr. Fearrington." Photos of both Mr. Fearrington and plaintiff were attached to the affidavit, and the individuals appear similar.

Under the totality of the circumstances, Officer Funk's mistaken belief was reasonable. Plaintiff admitted in his complaint that he did not stop the first time Officer Funk told him to. Once he did, Officer Funk approached him and called him "Mr. Fearrington"; thus, even though Officer Funk was only a few feet away, he still held on to his mistaken belief that plaintiff was Mr. Fearrington. Furthermore, even though there are some differences in the appearance of plaintiff and Mr. Fearrington, the encounter took place late at night. Thus, under the totality of the circumstances, plaintiff has failed to forecast evidence that Officer Funk's mistake was unreasonable. Finally, although plaintiff immediately told Officer Funk that he was not Mr. Fearrington, "aliases and false identifications are not uncommon," *Hill*, 401 U.S. at 803, 28 L. Ed. 2d at 489. Accordingly, it was reasonable for Officer Funk to not believe plaintiff's claim until he saw plaintiff's identification and was able to verify it through NCIC.

We find *Lynch* provides guidance. In *Lynch*, a police officer mistakenly stopped the defendant, believing the defendant was someone for whom arrest warrants had been issued. *Id.* at 333, 380 S.E.2d at 399.

Relying on *Hill*, this Court held that because "[p]ictures of [the] defendant and the other individual show that they are sufficiently similar in appearance that the officer's mistake was not unreasonable," the officer had "a reasonable basis to stop [the] defendant and require him to identify himself." *Id.* Then, after the defendant attempted to flee, officers were then authorized to arrest the defendant in order to "ascertain his identity." *Id.*

Initially, we note that since *Lynch* involved an investigatory stop that transformed into a formal arrest and in the present case plaintiff's seizure constituted a *de facto* arrest, *Lynch*'s guidance is limited to showing how the Court determines the "reasonableness" of a mistaken belief. Like *Lynch*, pictures introduced at summary judgment show that plaintiff and Mr. Fearrington are sufficiently similar in appearance. Based on the circumstances noted above in addition to the similar photographs, Officer Funk's misidentification was understandable and reasonable.

Furthermore, plaintiff has failed to forecast any evidence that Officer Funk did not use due diligence in ascertaining plaintiff's true identity. While it is undeniable that there was some delay given the mix-up in plaintiff's birthdate, the call log indicates that Officer Funk was dispatched to the location at 12:14 a.m. and that he was available at approximately 12:32 a.m. Thus, from the time Officer Funk noticed plaintiff until the time he was released was approximately 18 minutes. Given the mix-up in plaintiff's birthdate, the evidence shows that Officer Funk used reasonable diligence to ascertain plaintiff's identity. Plaintiff has offered no evidence to the contrary as to the length of this detention nor any evidence that Officer Funk did not act diligently. Accordingly, under *Robinson*, plaintiff has failed to forecast evidence to refute Officer Funk's claim that he diligently attempted to verify plaintiff's identity.

While the dissent contends that the rule of law in *Robinson* requires that an officer use reasonable diligence to ascertain the person's identity before arresting him, given the differences between how the plaintiff in *Robinson* and how plaintiff in the present case were arrested, we do not believe that the rule of law in *Robinson* would not be satisfied in the present case. In *Robinson*, the police officers went to a house to serve a warrant on the plaintiff. *Id.* at 403, 238 S.E.2d at 630. Here, Officer Funk was not specifically dispatched to arrest plaintiff; instead, he saw plaintiff walking on the street and believed him to be Mr. Fearrington, a man whom Officer Funk "knew" and who had evaded arrest earlier that same day. Thus, Officer Funk thought that plaintiff was on the verge of running. Consequently, he did not have the same type of time prior to arresting plaintiff to exercise due diligence as the officers did

in *Robinson*. However, in totality, Officer Funk exercised due diligence by asking plaintiff to stop, which plaintiff refused to do, and immediately running plaintiff's name through NCIC to see if he was, in fact, who he claimed to be. Consequently, Officer Funk "use[d] reasonable diligence[,]" *Robinson*, 34 N.C. App. at 406-407, 238 S.E.2d at 631, to determine whether plaintiff was Mr. Fearrington under these circumstances.

In summary, under *Hill* and *Robinson*, plaintiff has failed to forecast any evidence, besides mere unsupported allegations, that Officer Funk acted contrary to his duty; specifically, plaintiff offered no evidence showing that Officer Funk's mistaken belief that plaintiff was Mr. Fearrington was unreasonable, as set out in *Lynch*, or that Officer Funk did not act diligently in determining plaintiff's true identity.

B. Wantonness and Intent to Injure

"An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others." *Yancey v. Lea*, 354 N.C. 48, 52, 550 S.E.2d 155, 157 (2001). In order to establish that Officer Funk acted with intent to injure, this Court has noted that:

> a plaintiff may not satisfy her burden of proving that an official's acts were malicious through allegations and evidence of mere reckless indifference. Rather, as discussed supra, the plaintiff must show at least that the officer's actions were so reckless or so manifestly indifferent to the consequences . . . as to justify a finding of [willfulness] and wantonness equivalent in spirit to an actual intent

Wilcox, __ N.C. App. at __, 730 S.E.2d at 232 (internal citations and quotation marks omitted).

According to plaintiff's complaint, Officer Funk "roughly pulled" plaintiff's arm behind his back in an attempt to "inflict great pain" while he was handcuffing plaintiff. After plaintiff claimed that he was not Mr. Fearrington, Officer Funk kept plaintiff in handcuffs while his fellow officers checked plaintiff's identification card. At one point, Officer Funk sarcastically asked plaintiff: "Oh? You own a business?" When plaintiff told Officer Funk that this would not be happening if he were white, Officer Funk asked plaintiff if it would make him feel better if he called a black officer. After NCIC verified plaintiff's identity, Officer Funk released plaintiff without apologizing. At the hearing, plaintiff's counsel attempted to cast the situation as a result of "race discrimination" based on the history and "general situation" of how black people are treated by Chapel Hill police.

Viewing these allegations in a light most favorable to plaintiff, the evidence tends to show that Officer Funk may have acted disrespectfully and unprofessionally while attempting to verify plaintiff's identity or even refusing to apologize after the incident. However, once plaintiff's identity was confirmed through NCIC, Officer Funk released plaintiff. Furthermore, there is nothing that establishes a reckless indifference to plaintiff's rights during the encounter. As discussed, Officer Funk's *de facto* arrest of plaintiff was based on his mistaken, yet reasonable, belief that he was Mr. Fearrington; accordingly, under *Hill*, his *de facto* arrest was "valid." In order to verify plaintiff's claim that he was not Mr. Fearrington, Officer Funk, along with other Chapel Hill police officers, ran plaintiff's name through central command. As with routine traffic stops, an officer "may request a driver's license and vehicle registration, run a computer check, and issue a citation." *United States v. Green*, 740 F.3d 275, 280 (4th Cir. 2014); *see also State v. McClendon*, 350 N.C. 630, 636, 517 S.E.2d 128, 132 (1999) ("After a lawful stop, an officer may ask the detainee questions in order to obtain information confirming or dispelling the officer's suspicions."). Here, since the basis for the initial *de facto* arrest of plaintiff was valid and it was not unreasonable to continue detaining plaintiff under the circumstances after his identity was verified, Officer Funk was entitled to run plaintiff's name to determine whether he had any outstanding warrants.

Moreover, although plaintiff alleges that Officer Funk "roughly" put him in handcuffs and tried to inflict great pain, plaintiff has failed to allege any facts that Officer Funk's conduct was wanton or done with a reckless indifference to plaintiff's rights as compared to what a reasonable police officer would do in Officer Funk's position. Believing plaintiff was someone else who had arrest warrants issued against him and had evaded police earlier that day, Officer Funk seized plaintiff while confirming his belief. It is undeniable that the act of being handcuffed could hardly be characterized as anything but uncomfortable and, likely, painful. However, plaintiff has failed to plead any facts to suggest that Officer Funk took additional steps while handcuffing plaintiff to make the experience any more painful, besides unsupported allegations that Officer Funk "intended" to inflict pain. Without more, plaintiff's bare contention that the handcuffs were painful is not enough to rise to the level of wanton or show an intent to injure.

Consequently, plaintiff has failed to produce any evidence showing that Officer Funk acted with a reckless indifference to plaintiff's rights. Besides vague allegations that Officer Funk spoke to plaintiff sarcastically and treated him disrespectfully—what plaintiff's counsel classified

as "arrogant and chauvinist talk" at the motion hearing—and unsupported claims that Officer Funk handcuffed him in such a way as to cause him "great pain," plaintiff has failed to forecast any evidence that Officer Funk acted wantonly or with an intent to injure.

In summary, while the initial burden was on Officer Funk to show the absence of any genuine issue of material fact that he did not act with malice, we believe that he met this burden, and he was entitled to the affirmative defense of public official immunity. Specifically, the foregoing evidence, taken in the light most favorable to plaintiff, is insufficient to raise a genuine issue of fact as to the existence of the elements of malice, i.e., that Officer Funk's actions were contrary to his duty, wanton, and so reckless as to justify a finding of intent to injure. While we do not disagree that the evidence may show that Officer Funk acted with reckless indifference prior to arresting plaintiff and during his interactions with him, plaintiff has failed to establish Officer Funk acted with malice, even with all discrepancies resolved in his favor, which is a required showing to overcome the public official immunity doctrine. *See Griffith v. Glen Wood Co., Inc.*, 184 N.C. App. 206, 210, 646 S.E.2d 550, 554 (2007) ("Summary judgment is appropriate if . . . the non-moving party is unable to overcome an affirmative defense offered by the moving party."). Therefore, the trial court erred in denying his motion for summary judgment on this basis.

Conclusion

Based on the foregoing reasons, taking the evidence in a light most favorable to plaintiff, plaintiff has failed to forecast evidence that Officer Funk acted with malice. Therefore, Officer Funk was entitled to the affirmative defense of public official immunity, and the trial court erred in denying his motion for summary judgment on this basis.

REVERSED.

Judge McCULLOUGH concurs.

GEER, Judge dissenting.

The sole issue on appeal is whether there exists a genuine issue of material fact regarding whether Officer Funk acted with malice and, therefore, is not entitled to public official immunity. I believe that the majority opinion has shown only that no issue of genuine fact exists regarding whether Officer Funk had reasonable suspicion to stop plaintiff. Yet, because Officer Funk arrested plaintiff, he was required to have

more than a suspicion; he could not arrest plaintiff without probable cause. The majority -- which concludes that Officer Funk in fact arrested plaintiff -- bases its holding that Officer Funk did not act improperly in arresting plaintiff almost entirely on an investigatory stop case, *State v. Lynch*, 94 N.C. App. 330, 380 S.E.2d 397 (1989), that concluded only that the officer had reasonable suspicion. The majority holds that it is permissible, when an officer suspects that an individual is another person, to *arrest* that person and then seek identification. That holding is an extraordinary undermining of the protections of the Fourth Amendment.

In addition, I believe that the majority improperly applies the applicable standard of review by (1) failing to require defendant Officer Funk to meet his initial burden of showing an absence of any genuine issue of material fact and (2) failing to view the evidence, including that presented by Officer Funk, in the light most favorable to plaintiff, the non-moving party. Because the majority failed to properly apply the standard of review and, at most, merely determined that Officer Funk had a reasonable suspicion sufficient to stop plaintiff, I respectfully dissent.

Discussion

It is well established that:

> [r]egardless of who has the burden of proof at trial, upon a motion for summary judgment the burden is on the moving party to establish that there is no genuine issue of fact remaining for trial and that he is entitled to judgment as a matter of law. Thus, a defendant moving for summary judgment assumes the burden of producing evidence of the necessary certitude which negatives the plaintiff's claim. *Until the moving party makes a conclusive showing*, the non-moving party has no burden to produce evidence.

Marlowe v. Piner, 119 N.C. App. 125, 127-28, 458 S.E.2d 220, 222 (1995) (emphasis added) (internal citations omitted). Generally, "summary judgment is not appropriate when there are conflicting versions of the events giving rise to the action, or when there is no conflict about the events that occurred, but the legal significance of those events is determined by a reasonable person test." *Griffith v. Glen Wood Co.*, 184 N.C. App. 206, 210, 646 S.E.2d 550, 554 (2007).

With respect to malice, the exception to public official immunity at issue in this case, our Supreme Court has held: "A defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be

prejudicial or injurious to another." *In re Grad v. Kaasa*, 312 N.C. 310, 313, 321 S.E.2d 888, 890 (1984). This Court has recently interpreted this definition to mean that "a malicious act is an act (1) done wantonly, (2) contrary to the actor's duty, and (3) intended to be injurious to another." *Wilcox v. City of Asheville*, 222 N.C. App. 285, 289, 730 S.E.2d 226, 230 (2012), *appeal dismissed and disc. review denied*, 366 N.C. 574, 738 S.E.2d 363, 401 (2013).

Regarding whether Officer Funk acted contrary to his duty, the majority concludes that under the totality of the circumstances, Officer Funk's mistaken belief that plaintiff was Mr. Fearrington was reasonable and, therefore, plaintiff's arrest was not contrary to Officer Funk's duty. I disagree.

Whether a police officer has acted contrary to his duty when arresting an individual is determined by whether the officer has complied with N.C. Gen. Stat. § 15A-401 (2013) and the Fourth Amendment. *See Bailey v. Kennedy*, 349 F.3d 731, 746 (4th Cir. 2003) (holding officer not entitled to public official immunity for false arrest claim when arrest not in accordance with N.C. Gen. Stat. § 15A-401 and "contrary to [officer's] duty"); *Glenn-Robinson v. Acker*, 140 N.C. App. 606, 615, 538 S.E.2d 601, 609 (2000) (" 'The Fourth Amendment prohibits a police officer from arresting a citizen except upon probable cause.' " (quoting *Rogers v. Powell*, 120 F.3d 446, 452 (3d Cir. 1997))); N.C. Gen. Stat. § 15A-401(b)(2) (providing in pertinent part that officer may make warrantless arrest if he has probable cause to believe individual has committed felony or committed misdemeanor and will not be apprehended or may cause physical injury to self or others or property damage if not immediately arrested). As this Court explained in *Glenn-Robinson*, " '[a] false arrest is an arrest without legal authority and is one means of committing a false imprisonment.' " 140 N.C. App. at 624, 538 S.E.2d at 615 (quoting *Marlowe*, 119 N.C. App. at 129, 458 S.E.2d at 223).

As this Court has explained, "there are generally two ways in which a person can be 'seized' for Fourth Amendment purposes: (1) by arrest, which requires a showing of probable cause; or (2) by investigatory detention, which must rest on a reasonable, articulable suspicion of criminal activity." *State v. Carrouthers*, 213 N.C. App. 384, 388, 714 S.E.2d 460, 463 (2011).

In this case, the parties disagreed on whether Officer Funk arrested plaintiff or whether Officer Funk merely conducted an investigatory stop. I agree with the majority that the evidence is sufficient to allow a jury to find that Officer Funk arrested plaintiff and that plaintiff's seizure was

not just an investigatory stop. Nevertheless, I believe that the majority, despite holding that Officer Funk arrested plaintiff, essentially applies the standards for an investigatory stop in deciding that Officer Funk did not act contrary to his duty. Because of its failure to recognize the differences between the two types of seizures, the majority erroneously concludes that the evidence necessary to support a stop based on mistaken identity is sufficient to support an arrest based on mistaken identity.

"An investigatory stop is a 'brief stop of a suspicious individual[] in order to determine his identity or to maintain the status quo momentarily while obtaining more information.' " *State v. White*, 214 N.C. App. 471, 476, 712 S.E.2d 921, 925 (2011) (quoting *Adams v. Williams*, 407 U.S. 143, 146, 32 L. Ed. 2d 612, 617, 92 S. Ct. 1921, 1923 (1972)). When, however, "the duration or nature of the intrusion exceeds the permissible scope [of an investigatory stop], a court may determine that the seizure constituted a *de facto* arrest that must be justified by probable cause, even in the absence of a formal arrest." *State v. Milien*, 144 N.C. App. 335, 340, 548 S.E.2d 768, 772 (2001). The distinction between an investigatory stop and an arrest reveals that an officer cannot justify an arrest by the need to obtain more information -- probable cause necessarily must mean more than a need to obtain additional information to confirm or dispel an officer's belief or concern.

With respect to the issue whether plaintiff presented sufficient evidence to raise an issue of fact regarding whether Officer Funk had probable cause to arrest him, this Court has noted:

> "The existence or nonexistence of probable cause is a mixed question of law and fact. If the facts are admitted or established, it is a question of law for the court. Conversely, when the facts are in dispute the question of probable cause is one of fact for the jury."

Glenn-Robinson, 140 N.C. App. at 619, 538 S.E.2d at 612 (quoting *Pitts v. Pizza, Inc.*, 296 N.C. 81, 87, 249 S.E.2d 375, 379 (1978)). Where the parties present substantially different versions of the facts relating to probable cause, as is true in this case, summary judgment is inappropriate and instead the issue must go to the jury who, as "[t]he trier of fact[,] must determine exactly what transpired and, based on those facts, determine if probable cause existed." *Id.* at 621, 538 S.E.2d at 612.

" 'The test for whether probable cause exists is an objective one -- whether the facts and circumstances, *known at the time*, were such as to induce a reasonable police officer to arrest, imprison, and/or prosecute another.' " *Thomas v. Sellers*, 142 N.C. App. 310, 315, 542 S.E.2d 283,

287 (2001) (emphasis added) (quoting *Moore v. Evans*, 124 N.C. App. 35, 43, 476 S.E.2d 415, 422 (1996)). The majority, however, fails to consider the facts and circumstances *as known to Officer Funk at the time of the detention*. Instead, the majority, in effect, determines *post hoc* what Officer Funk could have concluded given the information before this Court. Furthermore, contrary to the approach adopted by the majority, we must, on a motion for summary judgment, determine what Officer Funk knew by viewing the evidence in a light most favorable to plaintiff. We do not take Officer Funk's assertions at face value when the record contains evidence drawing those assertions into doubt.

Officer Funk justifies his arrest of plaintiff on his claim that he mistakenly believed plaintiff was a man named Mr. Fearrington. In cases of an arrest based upon mistaken identity, if " 'the police have probable cause to arrest one party, and [if] they reasonably mistake a second party for the first party, then the arrest of the second party is a valid arrest.' " *Hill v. California*, 401 U.S. 797, 802, 28 L. Ed. 2d 484, 489, 91 S. Ct. 1106, 1110 (1971) (quoting *Hill v. California*, 96 Cal. 2d 550, 553, 72 Cal. Rptr. 641, 643, 446 P.2d 521, 523 (1968)). Under the reasonable mistake test, an officer's "subjective good-faith belief alone is insufficient to validate the arrest." *United States v. Glover*, 725 F.2d 120, 122 (D.C. Cir. 1984). Rather, the Court must determine whether the arrest was objectively reasonable in light of the totality of the circumstances. *Id.*

Here, the majority relies almost exclusively on the photographs of plaintiff and Mr. Fearrington in the record which establish, in the majority's opinion, that the two men are similar in appearance. Based on the photographs, the majority concludes that it would be objectively reasonable for Officer Funk to confuse one for the other. By relying on these photographs, the majority has not required that Officer Funk meet his initial burden as the moving party. Officer Funk did not, in arguing that he mistakenly believed plaintiff was Mr. Fearrington, come forward with evidence that no issue of fact existed as to his opportunity to see plaintiff's face and that he had a reasonable basis for believing plaintiff was, in fact, Mr. Fearrington.

In considering the totality of the circumstances, a variety of factors may be relevant. For example, in *Hill*, *Glover*, and *State v. Frazier*, 318 N.W.2d 42 (Minn. 1982) (relied upon by the court in *Glover*), the courts looked at (1) the basis and specificity of the officer's knowledge of the suspect's appearance, (2) how clearly the officer was able to observe the individual, (3) the discrepancies between the description of the suspect and the individual the officer observed, (4) the officer's reasons for believing the subject would be present in the location arrested, including

proximity in time and distance of suspect's last known location, and (5) the individual's behavior.

Here, Officer Funk presented no evidence regarding the basis for his knowledge of Mr. Fearrington's appearance. While the majority asserts that Officer Funk "knew" Mr. Fearrington, nothing in Officer Funk's affidavit supports the majority's claim. Officer Funk stated only that he knew that Mr. Fearrington had outstanding warrants and that he had evaded arrest earlier in the day. Officer Funk provides no explanation of how he knew what Mr. Fearrington looked like.

Moreover, Officer Funk provided no specific explanation of what about plaintiff resembled Mr. Fearrington. He merely asserted that plaintiff and Mr. Fearrington both "have similar facial features," citing photographs attached to his affidavit, without expressly indicating whether he had that knowledge at the time of the arrest or what facial features he considered similar. Significantly, the photographs did not come into existence until several months after the arrest. As indicated by the URLs at the bottom of the photographs of both plaintiff and Mr. Fearrington, these photographs came from an article published in the periodical *The Independent Weekly*. In other words, the only basis presented by Officer Funk in support of his claim that plaintiff and Mr. Fearrington resembled each other was a newspaper article published three months after the arrest. Because Officer Funk bore the initial burden of establishing a lack of any issue of fact and because, in any event, we must view the evidence in a light most favorable to plaintiff, we may not infer, as the majority implicitly does, that Officer Funk was familiar with Mr. Fearrington's appearance or knew of the similarities at the time of the arrest.

As for Officer Funk's opportunity to observe plaintiff's facial features, the evidence, when viewed in the light most favorable to plaintiff, gives rise to a genuine issue of fact to be resolved by the jury. Officer Funk's own evidence indicates that plaintiff's hand obscured plaintiff's face and that Officer Funk decided to follow plaintiff from his patrol car because "[w]ithout seeing his face I could not be certain that this subject was not the same individual who had been avoiding arrest all day." According to Officer Funk, after stepping out of his patrol car and approaching plaintiff *from behind*, he "had still not been able to verify if this was in fact Cuman Fearrington."

Indeed, the majority specifically notes that Officer Funk claimed that plaintiff concealed his face continuously and that Officer Funk acknowledged that without seeing plaintiff's face, he could not be certain that

plaintiff was Mr. Fearrington. I believe a jury could infer from this evidence that Officer Funk did not get a clear view of plaintiff's face until after he had proceeded with the arrest. A jury could find Officer Funk's claim that he reasonably mistook plaintiff for Mr. Fearrington not credible when Officer Funk claimed both that he could not see plaintiff's face and that the two men had similar facial features.

Also pertinent in this case is whether Officer Funk had reason to believe that Mr. Fearrington would be present in the location where plaintiff was arrested, including the proximity in time and distance of Mr. Fearrington's last known location to the time and place of plaintiff's arrest. Here, Officer Funk indicated only that Mr. Fearrington had evaded arrest in the "Central Business District" of Chapel Hill earlier that day. The jury could decide that the fact that Mr. Fearrington was trying to avoid being arrested somewhere in downtown Chapel Hill during the day did not make it reasonably likely that he was the African-American male walking down a main street in front of a convenience store and restaurant that night.

In addition, if an officer has any doubt as to whether the individual is the suspect in the arrest warrant, "the officer must make immediate reasonable efforts to confirm the suspect's identity." *Glover*, 725 F.2d at 123. *See also Lynch*, 94 N.C. App. at 333, 380 S.E.2d at 399 ("When an officer is unsure of the identity of a suspect, he must take reasonable steps to confirm the identity of the individual under suspicion.").

Here, while Officer Funk admitted to uncertainty as to plaintiff's identity, he proceeded with the arrest before making any efforts to confirm plaintiff's identity. He did not ask plaintiff to identify himself until after he had placed him in handcuffs, and when plaintiff told him that he was not Mr. Fearrington and Officer Funk viewed his identification, he disregarded it. A reasonable juror could find that it was unreasonable to disregard the identification and that the "verification" of plaintiff's identity -- and the subsequent search of NCIC for outstanding warrants -- was really an attempt to cover up the officers' mistake in hopes of manufacturing probable cause to detain plaintiff.

While the majority opinion states that "it was not unreasonable for Officer Funk to not believe plaintiff's claim [that he was not Mr. Fearrington] until he saw identification," that fact at most might justify Officer Funk's stopping plaintiff and asking for identification. The majority cites no authority -- and I have found none -- that authorizes an officer, with doubts about the identity of a suspect, to arrest the individual and ask questions later.

I believe that the totality of the circumstances in this case -- based on the evidence viewed in the light most favorable to plaintiff -- would permit a jury to find that Officer Funk had not acted reasonably when mistakenly arresting plaintiff. Defendant, however, contends that the United States Supreme Court's decision in *Hill* requires a different result.

In *Hill*, the United States Supreme Court held that a mistaken arrest was valid when the officers went to *the address of the suspect* and, in that apartment, which had a locked door, found a person matching the description of the suspect. 401 U.S. at 803, 28 L. Ed. 2d at 489, 91 S. Ct. at 1110. Although the person claimed to be someone else, the Supreme Court noted that "aliases and false identifications are not uncommon" and that the person in the apartment did not have a convincing explanation regarding how he entered the apartment if he was not the suspect. *Id.* Further, the person denied knowing about any firearms being in the house, although a pistol was sitting in plain view. *Id.* Based on this evidence -- a man matching the suspect's description at the suspect's known address -- the Court concluded that "the officers' mistake was understandable and the arrest a reasonable response to the situation facing them at the time." *Id.* at 804, 28 L. Ed. 2d at 490, 91 S. Ct. at 1111.

Here, in contrast, the arrest did not take place at a location where Mr. Fearrington was known to be, the evidence is not specific regarding the degree to which plaintiff matched Mr. Fearrington's description as known to Officer Funk, and plaintiff's explanation for why he was walking up Rosemary Street at that particular time was not lacking in credibility. Moreover, plaintiff's evidence indicated that he did not act suspiciously.

I find this case more analogous to *Frazier*, 318 N.W.2d at 44, in which the Minnesota Supreme Court concluded that a mistaken arrest was unreasonable. In *Frazier*, the officers saw the defendant at night outside a bar where the actual suspect had been seen within the previous three days. The officers viewed her from 500 feet away in a dimly lit area, decided that it was the suspect, and arrested her. The Minnesota Supreme Court concluded that "[g]iven the hastiness of the deputies in concluding that defendant was [the intended arrestee], given the evidence of the defendant's differing appearance, and given the fact that the arrest did not occur at [the intended arrestee's] residence or even at a place which police reliably knew she frequented, we conclude that the deputies acted unreasonably in believing that defendant was [the intended arrestee]." *Id.*

The Minnesota Supreme Court, therefore, concluded "the arrest was illegal." *Id.* I find *Frazier* persuasive and supportive of a conclusion that

plaintiff, in this case, has presented sufficient evidence to raise an issue of fact regarding whether his arrest was valid.

While I have not found -- and the parties have not cited -- any North Carolina case specifically addressing the issue in this case, this Court's decision in *State v. Cooper*, 186 N.C. App. 100, 649 S.E.2d 664 (2007), supports my conclusion that plaintiff's evidence shows that Officer Funk lacked probable cause to arrest plaintiff. The issue in *Cooper* was whether a police officer had reasonable suspicion to stop an individual he suspected of robbing a convenience store.

In *Cooper*, the officer heard a report that there was a convenience store robbery committed by a black male. *Id.* at 101, 649 S.E.2d at 665. The officer knew that there was a path running from the convenience store to Lake Ridge Drive, and five to 10 minutes after the robbery, the officer found the defendant, a black male, walking down Lake Ridge Drive near the path. *Id.* at 102, 649 S.E.2d at 665-66. The officer stopped and frisked the defendant. *Id.*, 649 S.E.2d at 666.

This Court found that due to the vague description of the suspect as a "black male," lack of information that the robber had fled in the direction of the path, and the fact that the defendant did not engage in suspicious behavior and fully cooperated with the officer, the officer did not have reasonable suspicion to believe that the individual he saw was the robber. *Id.* at 107, 649 S.E.2d at 669. The Court explained that to hold otherwise would be to hold that "police, in the time frame immediately following a robbery committed by a black male, could stop any black male found within a quarter of a mile of the robbery." *Id.*

Similarly, here, a jury could reasonably infer from the lack of evidence presented by Officer Funk regarding his knowledge of Mr. Fearrington's appearance that Officer Funk suspected plaintiff could be Mr. Fearrington merely because he was a black man walking in the vicinity of the general area where Mr. Fearrington had evaded arrest earlier in the day. As established by *Cooper*, these facts would be insufficient to show reasonable suspicion to justify an investigatory stop, much less an arrest. *Id. See State v. Peele*, 196 N.C. App. 668, 670, 675 S.E.2d 682, 685 (2009) ("Reasonable suspicion is a 'less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence.' " (quoting *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008))).

Officer Funk and the majority, however, claim that plaintiff was intentionally hiding his face, ignored Officer Funk's repeated requests to stop, increased his pace of walking, and had unspecified similar facial

features to Mr. Fearrington. In making this argument, the majority and defendant are viewing the evidence in the light most favorable to Officer Funk, contrary to the proper standard of review for summary judgment. We are required to accept as true plaintiff's account that he did not hide his face, but merely scratched his head; that he never increased his walking pace; and that he stopped as soon as he realized that Officer Funk was talking to him.

The majority, nonetheless, points to *Lynch* as establishing that photographs suggesting that two men looked similar is sufficient for a mistaken arrest, especially if the officer then attempts to verify the arrestee's identity after the arrest. This Court, however, specifically noted in *Lynch* that it was *not* providing any guidance as to how the Court should determine the reasonableness of a mistaken identity *arrest*: "Under the facts of this case, we need not decide whether the officer's initial mistake justified an arrest; it was at least sufficient to establish a reasonable basis to stop defendant and require him to identify himself." 94 N.C. App. at 333, 380 S.E.2d at 399. The Court proceeded to say, with respect to an investigatory stop, that "[w]hen an officer is unsure of the identity of a suspect, he must take reasonable steps to confirm the identity of the individual under suspicion." *Id.*

Contrary to the majority opinion's assertion, nothing in *Lynch* suggests that a mistaken identity arrest is reasonable so long as the officers use diligence to confirm the identity of the individual after initiating the arrest. The majority misreads *Lynch* when it states that "after the defendant attempted to flee, officers were then authorized to arrest the defendant in order to 'ascertain his identity.' " (Quoting *Lynch*, 94 N.C. App. at 333, 380 S.E.2d at 399.) In *Lynch*, after upholding the stop of the defendant as constitutional, the Court then concluded that the arrest was permitted -- not to discover the defendant's identity -- but because the defendant actually fled: "Because defendant had not identified himself [when stopped], the officers had no choice but to apprehend him in order to ascertain his identity." *Lynch*, 94 N.C. at 333, 380 S.E.2d at 399. Nothing in *Lynch* suggests that it is appropriate to arrest someone who has not fled and who has not yet been asked to identify himself.

The majority's holding, in effect, allows police officers to proceed with an arrest based upon less than probable cause and arrest first, investigate later. I believe that this is an improper interpretation of the rule adopted by this Court in *Robinson v. City of Winston-Salem*, 34 N.C. App. 401, 238 S.E.2d 628 (1977).

Robinson addressed the question "whether in an action for false arrest or false imprisonment the officer who arrests the wrong person

is strictly liable or is liable only in the absence of reasonable diligence." *Id.* at 406, 238 S.E.2d at 631. The Court in *Robinson* acknowledged that the rule adopted by the majority of courts is that "the officer will not be liable for false imprisonment for mistaking the identity of the person named in a warrant if he exercises reasonable diligence to ascertain the identity correctly *before he serves the warrant.*" *Id.* (emphasis added). Noting that the alternative strict liability approach "imposes an unreasonable burden upon the officer who is both careful and diligent," *Robinson* adopted the majority rule. *Id.*

The majority in this case asserts that "*when* the officer must use reasonable diligence is not specifically enunciated in *Robinson*." (Emphasis added.) In support of this assertion, the majority opinion plucks an isolated quotation from *Robinson*, disregarding the Court's primary articulation of the majority rule quoted above and disregarding the cases relied upon by the Court as support for the rule. The majority rule as initially articulated in *Robinson*, expressly and unambiguously states that an officer must exercise reasonable diligence "before he serves the warrant." *Id.*

The Court then, "[f]or examples of cases following this rule" refers to three decisions from other jurisdictions. Each of those decisions expressly holds that the officer must exercise due diligence *prior* to effecting the arrest. *See Miller v. Fano*, 134 Cal. 103, 109, 66 P. 183, 185 (1901) (noting an officer "owes a duty to the public and to the *party about to be arrested*" and "should use prudence and diligence to find out if the party arrested is the party described in [the] warrant" (emphasis added)), *disapproved of by Hagberg v. California Fed. Bank FSB*, 32 Cal. 4th 350, 81 P.3d 244 (2004); *Wallner v. Fid. & Deposit Co. of Maryland*, 253 Wis. 66, 70, 33 N.W.2d 215, 217 (1948) ("The officer is liable if he fails to take proper precaution to ascertain the right person, or if he refuses information offered that would have disclosed his mistake, or if he detains the person an undue length of time without taking proper steps to establish his identity."); *State ex rel. Anderson v. Evatt*, 63 Tenn. App. 322, 328, 471 S.W.2d 949, 952 (1971) (finding evidence sufficient to support jury's finding officers guilty of "gross negligence in failing to make an additional investigation or inquiry as to the true identity of plaintiff *before placing him under arrest*" (emphasis added)).

In concluding that issues of fact precluded summary judgment regarding whether the defendant police officers had exercised due care in arresting the plaintiff, the Court specifically pointed to evidence -- including contradictions in the defendants' evidence and omissions on key factors in the defendants' affidavits -- regarding the lack of efforts to determine whether the plaintiff was the individual named in the warrant

prior to arresting the plaintiff. *Robinson*, 34 N.C. App. at 407-08, 238 S.E.2d at 632. The Court did not discuss what the officers could have done post-arrest. Instead, the Court noted as additional evidence of liability that "even after the officers knew that they had arrested the wrong person, plaintiff was still held in jail overnight before he was allowed to go free." *Id.* at 408, 238 S.E.2d at 632. In other words, the defendants could be held liable for further detaining the plaintiff after they knew of the mistaken arrest.

Nothing in *Robinson* suggests that an officer may -- as occurred here -- arrest and then conduct the due diligence after the fact. The Court's purpose in adopting the due diligence rule in *Robinson* was to ensure that officers who are both "careful and diligent" will not be held civilly liable for an unlawful arrest. *Id.* at 406, 238 S.E.2d at 631. The majority's interpretation of *Robinson* would allow an officer who was not "careful and diligent" in ascertaining the arrestee's identity prior to initiating an arrest to avoid liability so long as he later uses "due diligence" to confirm the identity afterwards. *See id.* I do not believe that the majority opinion is consistent with either the express holding in *Robinson* or its reasoning.

Here, while Officer Funk admitted to uncertainty as to plaintiff's identity, he proceeded with the arrest before making any efforts to confirm plaintiff's identity. He did not ask plaintiff to identify himself until after he had placed him in handcuffs and declared plaintiff was under arrest, and when plaintiff told him that he was not Mr. Fearrington and Officer Funk viewed his identification, he disregarded it. While Officer Funk may have had reasonable suspicion to stop plaintiff and ask him to identify himself based on what he knew and should have then conducted due diligence before arresting plaintiff, *Lynch* and *Robinson* do not support the majority's assumption that the same level of knowledge -- without any due diligence in verifying plaintiff's identity -- is sufficient to support both an arrest and an investigatory stop.

The majority claims that *Robinson* is distinguishable on the facts. The "facts" on which the majority relies are, however, either unsupported by the record or represent Officer Funk's version of what occurred. Contrary to the majority opinion's assertion, there is no evidence that Officer Funk "knew" Mr. Fearrington, plaintiff's evidence indicated that he was not about to flee, and according to plaintiff, Officer Funk did not have to order him to stop "several times," as the majority states, but rather he stopped immediately after he realized Officer Funk was talking to him. Further, the majority's purported distinction of *Robinson* does not explain why Officer Funk, in this case, could not have stopped plaintiff and asked for his identification prior to arresting him.

Moreover, the majority's reasoning cannot be reconciled with this State's choice not to enact a "stop and identify" statute. The United States Supreme Court in *Hiibel v. Sixth Judicial Dist. Court of Nevada*, 542 U.S. 177, 187, 159 L. Ed. 2d 292, 303, 124 S. Ct. 2451, 2459 (2004), recognized that under the Fourth Amendment, an individual is not required to answer an officer's questions or identify himself during an investigative stop. Nevertheless, a State "stop and identify" statute "requiring a suspect to disclose his name in the course of a valid Terry stop is consistent with Fourth Amendment prohibitions against unreasonable searches and seizures." *Id.* at 188, 159 L. Ed. 2d. at 304, 124 S. Ct. at 2459.

North Carolina, however, does not have a "stop and identify" statute. Therefore, although Officer Funk could have *asked* plaintiff to identify himself, he could not have compelled plaintiff to do so. *See In re D.B.*, 214 N.C. App. 489, 495-96, 714 S.E.2d 522, 526-527 (2011) (noting North Carolina does not have a "stop and identify" statute and holding that during a *Terry* stop, an officer is not permitted to search for a person's identification in order to protect himself or to seize an identification card, but may *ask* for identification). The majority, however, holds that it is within the scope of an officer's duty to arrest a person and then demand identification.

Further, Officer Funk should not have been allowed to extend a mistaken arrest to investigate plaintiff, without reasonable suspicion of any criminal activity, to see if he could justify the arrest after the fact. As the United States Supreme Court has explained:

> The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case. This much, however, is clear: an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time.

Florida v. Royer, 460 U.S. 491, 500, 75 L. Ed. 2d 229, 238 103 S. Ct. 1319, 1325-26 (1983). Certainly, if an investigative stop must end as soon as its purpose is completed, then an arrest should cease as soon as the officers learn that it was mistaken. Since I know of no authority that would allow a mistakenly arrested person, not subject to a traffic stop, to be detained to conduct a database search for other charges, Officer Funk should have released plaintiff as soon as he knew he had made a mistake.

In sum, I would hold that the evidence is sufficient to support the conclusion that defendant acted contrary to his duty by arresting plaintiff without probable cause. Plaintiff must also show, however, that defendant acted wantonly and with intent to injure. "[E]vidence of constructive intent to injure may be allowed to support the malice exception to [public official] immunity." *Wilcox*, 222 N.C. App. at 291, 730 S.E.2d at 232. "[A] showing of mere reckless indifference is insufficient, and a plaintiff seeking to prove malice based on constructive intent to injure must show that the level of recklessness of the officer's action was so great as to warrant a finding equivalent in spirit to actual intent." *Id.* Such a showing would necessarily also satisfy the first requirement that the defendant act wantonly. *See In re Grad*, 312 N.C. App. at 313, 321 S.E.2d at 890-91 (" 'An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others.' " (quoting *Givens v. Sellars*, 273 N.C. 44, 50, 159 S.E.2d 530, 535 (1968))).

With regard to the intent to injure prong of malice, the Fourth Circuit has noted that "North Carolina courts have found summary judgment inappropriate where there is a genuine issue of fact as to an officer's state of mind when engaging in allegedly tortious conduct." *Russ v. Causey*, 468 F. App'x 267, 276 (4th Cir. 2012) (finding that officer's conduct in executing an arrest warrant at funeral demonstrates an intent to injure). Additionally, in the context of a civil suit for malicious prosecution, our Supreme Court has noted that it is "well settled that malice may be inferred from want of probable cause, *e.g.*, as where there was a reckless disregard of the rights of others in proceeding without probable cause." *Cook v. Lanier*, 267 N.C. 166, 170, 147 S.E.2d 910, 914 (1966).

I would find that there are further questions of fact regarding whether defendant acted wantonly and with intent to injure plaintiff. The injury in this case is an injury to plaintiff's Fourth Amendment right to be free from unreasonable search and seizure. I believe that the evidence is sufficient to allow a jury to find that Officer Funk acted with an actual intent to unlawfully detain plaintiff while Officer Funk attempted to manufacture after-the-fact justification for the arrest.

The majority dismisses any claim of an intent to injure, reasoning: "Believing plaintiff was someone else who had arrest warrants issued against him and had evaded police earlier that day, Officer Funk seized plaintiff while confirming his belief." This assertion underscores the majority's merging of investigatory stops and arrests. Controlling authority required Officer Funk to attempt to "confirm[] his belief" that plaintiff was Mr. Fearrington prior to arresting him.

In addition, according to plaintiff's verified complaint and deposition, Officer Funk spoke to plaintiff sarcastically and disrespectfully in response to plaintiff's assertion that he was a business owner. The evidence also shows that after plaintiff told Officer Funk that he was not Mr. Fearrington and Officer Funk viewed plaintiff's identification, Officer Funk continued to keep plaintiff in handcuffs while his partner contacted communications to "verify" his identification and gather further information that might justify an arrest. When communications verified plaintiff's identification and could not find any outstanding warrants that would justify the stop, Officer Funk removed the handcuffs and left without apologizing to plaintiff.

Under these circumstances, a reasonable juror could infer that Officer Funk acted with a level of recklessness toward plaintiff's rights equivalent in spirit to an actual intent to injure, as required by *Wilcox*. *See Walker v. Briley*, 140 F. Supp.2d 1249, 1263 (N.D. Ala. 2001) (plaintiff made sufficient showing of malice to survive motion for summary judgment on immunity grounds where "[t]he evidence, viewed most favorably to [plaintiff], suggest[ed] that [police officer] had no grounds to believe [plaintiff] had committed any offense whatsoever but rather simply did not like [plaintiff] questioning his authority or suggesting racist motivations").

Unlike the doctrine of qualified immunity in federal cases, which requires the court to examine the objective reasonableness of an official's action, "[i]mmunity of public officials to state law claims . . . involves a determination of the subjective state of mind of the governmental actor, *i.e.*, whether his actions were corrupt or malicious." *Andrews v. Crump*, 144 N.C. App. 68, 76, 547 S.E.2d 117, 123 (2001). We must "determine the defendants' actual knowledge or intentions regarding the violation of plaintiffs' rights." *Id.* at 77, 547 S.E.2d at 123. In *Andrews*, plaintiff's allegation that the defendants acted with the knowledge that the act was unlawful and in violation of plaintiff's rights was sufficient to create an issue of fact regarding whether the official acted with malice. *Id.* (observing that "defendants knew [plaintiff] had no involvement in criminal activity, yet proceeded to file the liens against him anyway").

There are discrepancies in Officer Funk's affidavit, the radio log from that night, and the incident report prepared two weeks later, only after an inquiry by the NAACP, and unsigned by Officer Funk. These discrepancies, among other things, attempt to shorten the time period that plaintiff was detained. If the jury chooses to believe plaintiff's testimony regarding the length of the detention, it could find that Officer Funk's attempt to hide how long the detention lasted was evidence

that the continued detention was without legitimate justification and in bad faith.

Further, the African-American officer who arrived at the scene of plaintiff's arrest after plaintiff questioned whether he was stopped because of his race does not appear on either the radio log or in the incident report as being present. Plaintiff has also presented evidence of comments suggestive of racial bias.

This evidence could lead a reasonable juror to conclude that Officer Funk did not act in good faith and acted for improper motives when he continued to detain plaintiff in handcuffs after seeing plaintiff's identification. I would hold that because the evidence supports a finding that Officer Funk not only acted without probable cause, but additionally that he did so knowingly, this creates a genuine issue of fact as to whether he acted with intent to injure plaintiff. *See also Glenn-Robinson*, 140 N.C. App. at 626, 538 S.E.2d at 616 (evidence that officer arrested plaintiff without probable cause, appeared angry, and grabbed plaintiff's arm sufficient evidence that officer acted with malice and was not entitled to summary judgment on the basis of public official immunity).

I, therefore, would affirm the trial court's denial of Officer Funk's motion for summary judgment based on public official immunity. Accordingly, I respectfully dissent.

VINCENT BURLEY, Employee, Plaintiff
v.
U.S. FOODS, INC., EMPLOYER, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Carrier and GALLAGHER BASSETT SERVICES, INC., Third Party Administrator, Defendants

No. COA13-860

Filed 1 April 2014

Workers' Compensation—subject matter jurisdiction—contract modification—last act analysis

The Industrial Commission erred in a workers' compensation case by concluding that it did not have subject matter jurisdiction. A modification to plaintiff employee's contract was approved by defendant U.S. Foods Inc. in Charlotte. N.C.G.S. § 97–36 extended subject matter jurisdiction to plaintiff's claim since the final binding act occurred in North Carolina.

Judge DILLON dissenting.

Appeal by plaintiff from opinion and award entered 28 June 2013 by the North Carolina Industrial Commission. Heard in the Court of Appeals 12 December 2013.

The Sumwalt Law Firm, by Vernon Sumwalt, Mark T. Sumwalt, and Lauren Hester, for Plaintiff-Appellant.

McAngus, Goudelock & Courie, P.L.L.C., by Raymond J. Williams, III, for Defendants-Appellees.

HUNTER, JR., Robert N., Judge.

Vincent Burley ("Plaintiff") appeals from the 28 June 2013 opinion and award of the Full Commission of the North Carolina Industrial Commission (the "Commission"), which concluded that the Commission did not have subject matter jurisdiction to hear Plaintiff's claim. Plaintiff argues the Commission had subject matter jurisdiction because a modification to his contract was approved by defendant U.S. Foods Inc. ("U.S. Foods") in Charlotte. We agree and reverse the Commission's opinion and award.

I. Facts & Procedural History

On 8 July 2011, Plaintiff filed a claim for benefits with the Commission seeking compensation for a back injury suffered while working for U.S. Foods as a truck driver. U.S. Foods denied that North Carolina has jurisdiction over Plaintiff's claim, but admitted liability under the Georgia Workers' Compensation Act and is currently paying Plaintiff disability compensation under Georgia law. The matter came on for a hearing before Deputy Commissioner Philip A. Baddour, III ("Dep. Comm. Baddour") on 17 April 2012 and a written order was filed on 13 December 2012. The evidence presented at the hearing tended to show the following facts.

Plaintiff is a resident of Augusta, Georgia and was a 39-year-old truck driver at the time of his 13 December 2012 hearing before the Commission. In 1993, Plaintiff graduated from truck driving school in Charleston, South Carolina, and obtained his commercial driving license from this course of study. Plaintiff has been a truck driver since graduating from this program.

U.S. Foods supplies and delivers food to restaurants, schools, sports venues, hotels, and many other types of businesses. U.S. Foods operates many distribution centers nationwide to supply "hundreds of thousands of customers" with its food products.

Plaintiff testified that U.S. Foods hired him as a delivery truck driver in May 2000. Plaintiff completed his initial hiring paperwork, including a driver's application, medical exam, and written driving exam, in Fort Mill, South Carolina. Plaintiff completed additional pre-hiring paperwork, including a road-test in Columbia, South Carolina and a drug-screening in Georgia. After completing his initial paperwork, U.S. Foods offered Plaintiff employment, and Plaintiff accepted the written offer. Plaintiff signed this paperwork in Fort Mill, South Carolina and was employed at-will.

Plaintiff drove a planned route as part of his employment. The route was concentrated around the Augusta area, with stops in Georgia and South Carolina. Plaintiff's truck and trailer were stowed every day at a drop yard in Augusta. Plaintiff's route did not involve travel in North Carolina nor was his truck ever dropped in North Carolina.

U.S. Foods merged with another company, PYA Monarch, and the Columbia drop yard, where Plaintiff was assigned, was dissolved in 2002. Plaintiff testified that U.S. Foods offered to transfer supervision of his employment to either their Charlotte division or their Lexington, South Carolina division after the merger. Plaintiff chose to work for the Charlotte division because U.S. Foods arranged for his loaded delivery truck to be delivered near his Augusta home. Had Plaintiff chosen the Lexington division, he would have been required to drive his personal vehicle to retrieve his loaded truck in Lexington. Plaintiff's transfer to the Charlotte division was thereafter approved by U.S. Foods's human resources department in Charlotte.

Plaintiff's job title and responsibilities did not change after he was transferred to the Charlotte division from the Columbia division. Plaintiff stated that he was working the "same job, just a different division," although Plaintiff made deliveries to different customers and drove a different route. Plaintiff was also switched from an hourly weight-based pay system to a component pay system. As a result, Plaintiff saw his pay increase from $400 to $500 a week under the weight-based system to between $900 and $1,400 per week under the component system. Plaintiff worked continuously for U.S. Foods for nine years, was never terminated or laid off, and never completed re-hiring paperwork during this period.

Plaintiff injured his back on 23 September 2009 while lifting a case of liquid milk during a delivery to a Sonic Drive-In in Evans, Georgia. U.S. Foods terminated Plaintiff's employment on 1 October 2009.

U.S. Foods's Charlotte division Transportation Manager Alton Abernathy ("Mr. Abernathy") also testified at the 17 April 2012 hearing. Mr. Abernathy stated that upon the merger of U.S. Foods and PYA Monarch, U.S. Foods "went to all the drivers [in the Columbia drop yard] that were being displaced . . . and offered them jobs" if they transferred branches. If Plaintiff rejected the transfer, he would have received a severance package. Mr. Abernathy further described the different pay systems between the Charlotte and Columbia divisions: Plaintiff's component pay system paid his commission on "pieces and stops and miles with a base and safety pay" rather than Plaintiff's prior pay system, which was based on weight carried. Mr. Abernathy also described the Charlotte division's accommodations for its drivers, noting that the branch delivered drivers' loads to fifteen different sites, including Plaintiff's drop site in Augusta.

Plaintiff's transfer was approved and signed by three individuals: Doug Jolly, U.S. Foods's Transportation Manager at its Fort Mill division; Kim Dahl, a human resources officer at U.S. Foods; and Mel Smith, who provided final approval from the human resources department. U.S. Food's human resources department has been located in Charlotte since 4 December 2000, and both Kim Dahl and Mel Smith worked in the Charlotte office.

Lastly, U.S. Foods's Human Resources Coordinator, Rebecca Reed ("Ms. Reed"), testified at the hearing. Ms. Reed discussed the terms of Plaintiff's initial hiring contract, noting that U.S. Foods could modify the terms of Plaintiff's employment under the contract.

After hearing the foregoing evidence, Dep. Comm. Baddour concluded that the a modified contract does not constitute a contract "made" in North Carolina for purposes of the relevant jurisdiction granting statute, N.C. Gen. Stat. § 97-36 (2013). Dep. Comm. Baddour also concluded that the final act to create Plaintiff's employment contract did not occur in North Carolina. Accordingly, Dep. Comm. Baddour ordered that Plaintiff's claim be denied for lack of subject matter jurisdiction. Plaintiff appealed to the Commission on 13 December 2012. The Commission heard the case on 22 May 2013 and issued an opinion and order on 28 June 2013 affirming Dep. Comm. Baddour's order. Plaintiff timely filed written notice of appeal with this Court on 2 July 2013.

II. Jurisdiction & Standard of Review

Plaintiff's appeal from the Commission's opinion and award lies of right to this Court pursuant to N.C. Gen. Stat. § 7A–29(a) (2013). *Accord* N.C. Gen. Stat. § 97–86 (2013).

The only issue on appeal is whether the Industrial Commission had subject matter jurisdiction over Plaintiff's claim. At present, whether the Commission has subject matter jurisdiction over Plaintiff's case depends on whether a contract for employment was consummated in North Carolina pursuant to N.C. Gen. Stat. § 97–36. *See Parker v. Thompson–Arthur Paving Co.*, 100 N.C. App. 367, 369, 396 S.E.2d 626, 628 (1990) ("The jurisdiction of the Industrial Commission is limited by statute."). Plaintiff argues that (i) because U.S. Foods's Charlotte division approved Plaintiff's transfer to oversight by the Charlotte division from the Columbia division, Plaintiff's contract was modified and (ii) because the "last act" of approving the modification occurred in Charlotte, the contract of employment was made in North Carolina.

"Appellate review of an award from the Industrial Commission is generally limited to two issues: (i) whether the findings of fact are supported by competent evidence, and (ii) whether the conclusions of law are justified by the findings of fact." *Chambers v. Transit Mgmt.*, 360 N.C. 609, 611, 636 S.E.2d 553, 555 (2006). "However, as to a jurisdictional question, this Court is not bound by the findings of fact of the lower tribunal. This Court has the duty to make its own independent facts as to jurisdiction." *Lentz v. Phil's Toy Store*, ___ N.C. App. ___, ___, 747 S.E.2d 127, 130 (2013); *see also Lucas v. Li'l Gen. Stores*, 289 N.C. 212, 218, 221 S.E.2d 257, 261 (1976).

The Commission concluded as a matter of law that Plaintiff's contract was not modified and that the last act necessary to create Plaintiff's original contract was made out of state, depriving the Industrial Commission of subject matter jurisdiction to hear Plaintiff's case. "Conclusions of law by the Industrial Commission are reviewable *de novo* by this Court." *Bond v. Foster Masonry, Inc.*, 139 N.C. App. 123, 127, 532 S.E.2d 583, 585 (2000). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (quotation marks and citation omitted).

III. Analysis

a. Contract Modification Under Section 97-36

A contract modification is not explicitly referenced in Section 97-36, which grants the Commission subject matter jurisdiction over certain accidents that occur out of state. N.C. Gen. § 97-36 provides

> [w]here an accident happens while the employee is employed elsewhere than in this State and the accident is one which would entitle him or his dependents or next of kin to compensation if it had happened in this State, then the employee or his dependents or next of kin shall be entitled to compensation (i) if the contract of employment was made in this State.[1]

Plaintiff argues that common law rules concerning modifications of contract apply. *See Lineberry v. Town of Mebane*, 219 N.C. 257, 258, 13 S.E.2d 429, 430 (1941) ("The common law, to the extent therein provided, is modified. Except as so modified it still prevails."); N.C. Gen. Stat. § 4-1 (2013) (declaring portions of the common law not in conflict with the general statutes remain in full force).

We agree with Plaintiff and have consistently applied common law rules of contract to claims filed under the Workers' Compensation Act. *See*, *e.g.*, *Hollowell v. N.C. Dep't of Conservation & Devel.*, 206 N.C. 206, 208, 173 S.E. 603, 604 (1934); *Hojnacki v. Last Rebel Trucking, Inc.*, 201 N.C. App. 726, 689 S.E.2d 601, 2010 WL 10963 at *3–4 (2010) (unpublished) (applying common law principles of contract law, such as offer and acceptance, to a claim filed under the Workers' Compensation Act).

This Court has held that a lapse in employment and subsequent rehiring via a "last act" made in North Carolina created a contract that was "made" in North Carolina for jurisdictional purposes under Section 97-36. *Baker v. Chizek Transp., Inc.*, 210 N.C. App. 490, 711 S.E.2d 207, 2011 WL 904271 at *4–5 (2011) (unpublished). Similarly, under the common law of contracts, a modification to the terms of a contract may create a new underlying contract that was "made" in North Carolina. *See*, *e.g.*, *Spartan Leasing Inc. v. Pollard*, 101 N.C. App. 450, 457, 400 S.E.2d

1. Plaintiff does not raise the other two provisions of the jurisdiction-granting statute, namely that U.S. Foods's principal place of business is in North Carolina or that Plaintiff's principal place of employment is in North Carolina.

476, 480 (1991) (holding that an addendum letter was a new contract because it modified a prior lease agreement).

Section 97-36 also employs the phrase "employment contract," which encompasses a broader scope of employment than "contract of hire," a phrase that covers only the initial hiring of an individual. *Compare* N.C. Gen. Stat. § 97-36 *with* N.C. Gen. Stat. § 97-2(2) (2013) (using "contract of hire"). This broader expanse includes a contract modification, providing a basis for a contract being "made" in North Carolina under Section 97-36.

The dissent cites *Larson's Workers' Compensation Law* § 143.03(4) (2011) for the proposition that when "a contract has achieved an identifiable situs, that situs is not changed merely because the contract is modified in another state." While we acknowledge that *Larson's* is a learned treatise in this field, we must construe Section 97-36 using the long-standing canons of construction in this state which require a plain language approach to interpreting Section 97-36.

This Court's precedent identifies that a modified contract containing the required formation elements is a new contract. *See, e.g.*, *NRC Golf Course, LLC v. JMR Golf, LLC*, ___ N.C. App. ___, ___, 731 S.E.2d 474, 480 (2012) ("Parties to a contract may agree to change its terms; but the *new agreement*, to be effective, must contain the elements necessary to the formation of a contract." (emphasis added)). Like other newly formed contracts, a modified contract may be made in this state.

The General Assembly crafted Section 97-36 with a full view that the phrase "employment contract" contemplated both contracts of hire as well as modifications of existing contracts which, by long-standing precedent, are new agreements. *See id.; compare* N.C. Gen. Stat. § 97-36 *with* N.C. Gen. Stat. § 97-2(2) (using "contract of hire"). As such, we do not interject our own view of the legislature's intended meaning and instead apply existing precedent and the plain language of Section 97-36 to this question of first impression. *See Correll v. Div. of Soc. Servs.*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992) ("The legislative purpose of a statute is first ascertained by examining the statute's plain language.").

Further, while the *Larson's* passage cites other state court decisions for the notion that a situs is not changed by contract modification, other jurisdictions have recognized explicitly that a contract modified within state borders confers jurisdiction. *See, e.g.*, *Kilburn v. Grande Corp.*, 287 F.2d 371, 373–74 (5th Cir. 1961) (holding that Louisiana had jurisdiction over a modified contract of employment where the original employment contract was formed in Texas, but additional consideration for employment was negotiated in Louisiana); *Kuzel v. Aetna Ins. Co.*,

650 S.W.2d 193, 195–96 (Tex. App. 1983) (holding Maryland had jurisdiction where the original contract of hire was formed in Texas, but a later contract modification was agreed to in Maryland).

The Commission held that modification of an existing contract does not fall within the scope of a contract "made" in Section 97-36. The lack of a bar against such use, this Court's precedents recognizing common law contract principles, and use of the phrase "employment contract" in Section 97-36 require a different result. Accordingly, a modification of an employment contract may be a proper basis to find a contract is "made" within North Carolina under Section 97-36.

b. Whether Plaintiff's Contract was Modified

Our next inquiry is whether Plaintiff's contract was actually modified under common law contract principles. The same tests for formation of contract apply to whether a modified contract is enforceable. *NRC Golf Course*, ___ N.C. App. at ___, 731 S.E.2d at 480 ("Parties to a contract may agree to change its terms; but the new agreement, to be effective, must contain the elements necessary to the formation of a contract." (quotation marks and citation omitted)); *Corbin v. Langdon*, 23 N.C. App. 21, 26, 208 S.E.2d 251, 254 (1974). The three requisite elements to form an enforceable contract are offer, acceptance, and consideration. *Cap Care Grp., Inc. v. McDonald*, 149 N.C. App. 817, 822, 561 S.E.2d 578, 582 (2002). Consequently, we must consider whether each element exists to determine whether a modified employment contract was formed between Plaintiff and U.S. Foods.

"It is essential to the formation of any contract that there be mutual assent of both parties to the terms of the agreement so as to establish a meeting of the minds." *Harrison v. Wal-Mart Stores, Inc.*, 170 N.C. App. 545, 550, 613 S.E.2d 322, 327 (2005) (quotation marks and citation omitted); *see also Wooten v. S.R. Biggs Drug Co.*, 169 N.C. 64, 68, 85 S.E. 140, 142 (1915) (holding that "the one thing without which a contract cannot be made . . . is the assent of the parties to the agreement, the meeting of the minds upon a definite proposition"). As such, a contract modification must also have an offer of modified terms and acceptance on those terms. *Corbin*, 23 N.C. App. at 26, 208 S.E.2d at 255. At-will contracts may also be modified by the parties to form a new contract. *Arndt v. First Union Nat. Bank*, 170 N.C. App. 518, 526, 613 S.E.2d 274, 280 (2005) ("The employer, in an at will relationship, can modify, unilaterally the future compensation to be paid to an employee. If the employer modifies the terms of an [employee] at will; and, the employee knows of

the change, the employee is deemed to have *acquiesced* to the modified terms, if he continues the employment relationship.").

Here, Mr. Abernathy testified that the company met with displaced drivers after its merger with PYA Monarch. Mr. Abernathy said the company offered its displaced drivers jobs with the subsuming branches. U.S. Foods extended its offer for its employees to transfer branches at a company safety meeting in Charlotte. The alternative to transferring branches was to receive a severance package from U.S. Foods. Thus, Plaintiff had a choice: he could accept a transfer or he could cease employment and receive a severance package. This fundamental choice qualifies as a new offer under the traditional definition of a contract.

Plaintiff accepted the offer. At the Charlotte meeting where his new terms of employment were proposed, Plaintiff negotiated the details of his transfer with his supervisor. Specifically, Plaintiff requested that his trailers be dropped near his home in Augusta. Plaintiff also completed paperwork at the Charlotte safety meeting to accept the transfer, although U.S. Foods's Charlotte human resources department had to approve the transfer before it was "official." From the foregoing, it is clear Plaintiff accepted a new offer modifying his existing at-will employment agreement.

Finally, there must also be consideration in support of the modified contract. *Clifford v. River Bend Plantation, Inc.*, 312 N.C. 460, 466, 323 S.E.2d 23, 27 (1984) ("It is established law that an agreement to modify the terms of a contract must be based on new consideration or on evidence that one party intentionally induced the other party's detrimental reliance." (citation and quotation marks omitted)). "Consideration sufficient enough to support a contract consists of any benefit, right, or interest bestowed upon the promisor, or any forbearance, detriment, or loss undertaken by the promisee." *Fairfield Harbour Prop. Owners Ass'n, Inc. v. Midsouth Golf, LLC*, 215 N.C. App. 66, 75, 715 S.E.2d 273, 282 (2011) (quotation marks and citation omitted). This Court does not typically consider the adequacy of consideration, as "inadequate consideration, as opposed to the lack of consideration, is not sufficient grounds to invalidate a contract. In order to defeat a contract for failure of consideration, the failure of consideration must be complete and total." *Harllee v. Harllee*, 151 N.C. App. 40, 49, 565 S.E.2d 678, 683 (2002) (citations omitted). Paying wages for labor constitutes consideration, and a change in the form of payment has been found to be sufficient consideration to form a contract. *Clyde Rudd & Associates, Inc. v. Taylor*, 29 N.C. App. 679, 682, 225 S.E.2d 602, 604 (1976) (holding that a change

in the method of compensation met the consideration requirement of contract formation).

Here, when Plaintiff transferred to the Charlotte division, he transferred from a weight-based compensation system to a component pay system. This was a change in the method of compensation and ultimately netted Plaintiff an increase in pay. After transferring, Plaintiff's earnings increased. As such, a valuable benefit was conferred between both sides: U.S. Foods retained Plaintiff as an employee, Plaintiff retained a position driving trucks for U.S. Foods, and Plaintiff received increased pay as a result of the transfer.

As all three elements existed, a valid contract was formed between the parties via the modification of their previous employment contract. As a result, we must now consider whether the contract was "made" in North Carolina for purposes of Section 97-36. For that inquiry, we turn to the "Last Act" analysis.

c. "Last Act" Analysis

Section 97-36 ultimately grants the Commission jurisdiction only if the contract was "made" in North Carolina. To determine where a contract for employment was made, the Commission and North Carolina courts apply the "last act" test. *Murray v. Ahlstrom Indus. Holdings, Inc.*, 131 N.C. App. 294, 296, 506 S.E.2d 724, 726 (1998). The "last act" test provides that "for a contract to be made in North Carolina, the final act necessary to make it a binding obligation must be done here." *Id.* (citation and quotation marks omitted).

In *Murray*, the plaintiff was initially hired at a plant in Tennessee, was laid off, and then was called at his North Carolina residence with an offer to work in Mississippi. *Id.* at 295, 506 S.E.2d at 725. Negotiations took place via telephone and the plaintiff accepted the offer while in North Carolina. *Id.* This Court held the last requisite act to form the binding employment contract occurred while the plaintiff was in North Carolina and that the Commission had jurisdiction to hear the plaintiff's workers' compensation claim. *Id.* at 297, 506 S.E.2d at 726.

Similar facts exist here. Plaintiff was offered and accepted a transfer with a different pay structure. Plaintiff filled out paperwork to that effect at a safety meeting in Charlotte. The transfer was explicitly described as not "final" or "official" unless approved by U.S. Foods's human resources department in Charlotte. Two signatures from human resources officers were provided in Charlotte to approve the transfer. As such, the last act to make the transfer binding occurred in Charlotte, where Plaintiff

completed his transfer paperwork and where final approval by U.S. Foods's human resources department was provided.

IV. Conclusion

Because we hold that Plaintiff and U.S. Foods modified Plaintiff's contract and that the final binding act occurred in North Carolina, we hold that Section 97–36 extends subject matter jurisdiction to Plaintiff's claim. As such, the opinion and award of the Industrial Commission is

Reversed and remanded for rehearing.

Judge STROUD concurs.

DILLON, Judge, dissenting.

In 2000, Plaintiff Vincent Burley ("Employee"), a Georgia resident, entered into a contract of employment in South Carolina with Defendant U.S. Foods, Inc., ("Employer"), an Illinois-based company, to work as a truck driver. Employee was injured as the result of a work-related accident which occurred in Georgia in 2009. Employee filed this action seeking workers' compensation benefits in North Carolina; however, the Commission denied the claim, determining that it lacked jurisdiction to make an award. The sole statutory basis which Employee argues on appeal gives the Commission jurisdiction over his claim is N.C. Gen. Stat. § 97-36(i), which provides jurisdiction for out-of-state accidents where "the contract of employment was made in this State[.]" Specifically, Employee argues he agreed to a modification to his contract of employment while attending a business meeting in Charlotte in 2002, and that this modification constituted a "contract of employment . . . made in this State[.]" *See id.* However, I disagree that this modification was sufficient to change the contract's situs from South Carolina to North Carolina; and, therefore, I would affirm the Commission's conclusion that it lacked jurisdiction in this matter. Accordingly, I respectfully dissent.

Employee was initially assigned to Employer's Columbia, South Carolina drop-yard. In 2002, Employer merged with another company, which resulted in the closing of Employer's Columbia drop-yard. However, Employee's employment was never severed. Rather, the parties came to an agreement during a meeting in Charlotte whereby oversight of his job was transferred to Employer's Charlotte division and his compensation was increased. As the majority points out, though, Employee's "job title and responsibilities did not change."

As the majority notes, whether an out-of-state employment contract modified in this State constitutes a "contract of employment . . . *made* in this State" for purposes of conferring jurisdiction in the Commission under N.C. Gen. Stat. § 97-36(i) for an out-of-state accident has never been directly addressed by a North Carolina appellate court. (Emphasis added.) I believe that, for purposes of conferring jurisdiction for an out-of-state accident based on where the contract of employment was "made[,]" the General Assembly intended that only one state be considered an employment contract's situs, namely, where the contract "was made[,]" and not also be every state where the contract might have been "modified" over the course of an employee's tenure.[1] I believe that if the General Assembly had intended to include states where contracts of employment were also modified, and not simply made, within the jurisdictional reach of the Commission, it could have so provided by including the phrase "or modified" in the language of N.C. Gen. Stat. § 97-36(i). "Once a contract has achieved an identifiable situs, that situs is not changed merely because the contract is modified in another state[.]" *Larson's Workers' Compensation Law* § 143.03[4] (2013) (citing *Crawford v. Trans World Airline*, 27 N.J. Super. 567, 99 A.2d 673 (1953); *Tobin v. Rouse*, 118 Vt. 40, 99 A.2d 617 (1953); *United Airlines v. Industrial Commission*, 96 Ill. 2d 126, 449 N.E.2d 119 (1983)).[2]

Following the majority's reasoning, the Commission gains jurisdiction over an out-of-state contract of employment if the modification of any contract term is agreed to by one of the parties while that party happens to be in North Carolina; and, further, the Commission *loses* jurisdiction over a contract of employment made in North Carolina if the

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1. The scope of my dissent is based on the facts of this case. I recognize that there could be situations where a modification may be so significant that it could be deemed that a new contract of employment was "made[,]" thereby changing the situs of the employment contract. For example, in this case had Employee accepted an offer to move to Employer's Illinois headquarters to manage one of its divisions, it might be said that – for purposes of conferring jurisdiction under N.C. Gen. Stat. § 97-36(i) - the parties "made" a new contract of employment. However, I do not believe the changes that were actually made at the Charlotte meeting to Employee's contract – where he remained employed and his role did not fundamentally change – rise to the level of making of new contract of employment.

2. Though an opinion stated in *Larson's* is not binding authority on this Court, this treatise has been cited with approval by our courts on a number of occasions, *see, e.g.*, *Shaw v. U.S. Airways*, 362 N.C. 457, 461, 665 S.E.2d 449, 452 (2008); *Gore v. Myrtle/Mueller*, 362 N.C. 27, 36, 683 S.E.2d 404, 406-07 (2007); *Taft v. Brinley's*, __ N.C. App. __, __, 738 S.E.2d 741, 744-45 (2013); and I find the above-quoted statement contained in *Larson's* concerning the issue in this case to be persuasive.

modification of any term of that North Carolina contract is agreed to by one of the parties while that party happens to be in another state. I disagree with this reasoning and do not believe that our General Assembly intended that — for purposes of conferring jurisdiction based on contracts of employment "made" — a contract of employment is deemed made, *not* where the employer-employee relationship is established, but rather where *any* term of the employment agreement is last modified. Accordingly, I would vote to affirm the decision of the Commission that it lacked jurisdiction to award benefits to Employee.

FEDERAL POINT YACHT CLUB ASSOCIATION, INC.,
A NORTH CAROLINA CORPORATION, PLAINTIFF
v.
GREGORY MOORE, DEFENDANT

No. COA13-681

Filed 1 April 2014

1. Associations—standing—separate from individual claims

The trial court did not err by denying defendant's motion to dismiss pursuant to N.C. R. Civ. P. 12(b)(1) and (b)(6) for Federal Point Yacht Club's (FPYC's) lack of representational standing. FPYC had standing as its own corporate entity to bring suit, regardless of the claims by fourteen individual members.

2. Collateral Estoppel and Res Judicata—claims by yacht club—separate from claims of individual members

Claims by the Federal Point Yacht Club (FPYC) arising from use of the facilities were not barred by *res judicata* after fourteen individual members dismissed no-contact orders with prejudice. FPYC was neither the same party nor privy to the fourteen individual members of FPYC who filed no-contact orders against defendant.

3. Parties—necessary—joinder not timely

The trial court did not err by dismissing defendant's counterclaim with prejudice pursuant to N.C. R. Civ. P. 12(b)(7) where an earlier dismissal for failure to join necessary parties had not specified a time for refiling. Defendant therefore had the statutory period of one year to refile and his complaint was properly dismissed when he did not do so.

4. Injunctions—behavior of club member—specificity of prohibitions

The trial court correctly granted summary judgment for the Federal Point Yacht Club (FPYC) and an injunction against defendant where the trial court made findings of fact regarding defendant's behavior and conduct towards FPYC and its members and concluded that defendant's behavior and conduct was violative of FPYC's rules and regulations. However, some of the of the behavior was banned in vague or unspecified terms as to persons, times, and geographic scope.

5. Injunctions—behavior of club member—unclean hands

The trial court did not err by granting the Federal Point Yacht Club's (FPYC's) motion for summary judgment and an injunction in an action arising from the behavior of a member. The evidence showed there were no genuine issues of fact that defendant's behavior and conduct had continued unabated against FPYC. Although defendant further argued that summary judgment was inappropriate because FPYC acted with unclean hands, defendant's own behavior and conduct was equally inappropriate.

Appeal by defendant from orders entered 18 September and 18 October 2012 by Judge W. Allen Cobb, Jr., in New Hanover County Superior Court. Heard in the Court of Appeals 5 November 2013.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Steven M. Sartorio, and the Law Offices of G. Grady Richardson, Jr., P.C., by G. Grady Richardson, Jr., for plaintiff-appellee.

Chleborowicz Law Firm, PLLC, by Christopher A. Chleborowicz, for defendant-appellant.

BRYANT, Judge.

An association has representational standing to bring a lawsuit provided at least one of its members has suffered imminent harm. Where a defendant fails to join necessary parties to his action, a dismissal of his claim pursuant to N.C. R. Civ. P. 12(b)(7) is appropriate. Where a restrictive covenant must be enforced, a permanent injunction is the proper remedy. A trial court has discretion to award injunctive relief upon its weighing and balancing of the parties' equities. However, a permanent injunction that prohibits contact between defendant and others without

establishing specific boundaries as to when, where, and how the injunction applies is overly broad.

Plaintiff Federal Point Yacht Club Association ("FPYC") is a residential water-access community with appurtenant marina facilities located in Carolina Beach. FPYC has eighteen residential lots, a clubhouse, pool, and marina with 110 boat slips. FPYC is governed by a recorded Declaration of Covenants, which is enforced by a board comprised of community members. Defendant Gregory Moore owns a residence and two boat slips within FPYC.

On 12 August 2010, Moore filed a complaint against FPYC, members of FPYC's board, and FPYC's dockmaster Randy Simon ("Simon"). Moore's complaint alleged that FPYC fined him excessively, FPYC and Simon engaged in unfair and deceptive trade practices, Simon abused legal process, and FPYC and its board were negligent in hiring Simon as dockmaster. Moore sought compensatory, treble, and punitive damages. FPYC filed a motion to dismiss for failure to join all necessary parties pursuant to North Carolina Rules of Civil Procedure, Rule 12(b)(7). On 11 October 2010, this motion was granted by Judge W. Allen Cobb, Jr., dismissing Moore's complaint without prejudice.

On 4 March 2011, FPYC's board conducted a hearing regarding Moore's violations of FPYC's rules. In a final decision issued 22 April 2011, FPYC's board found that Moore had damaged water faucets on one of FPYC's docks; damaged the bathrooms in the clubhouse; allowed his dog to run without a leash on FPYC property; committed acts of harassment and intimidation against FPYC board members, residents, and guests; impermissibly moved a concrete parking bumper; and did not follow FPYC's rules when parking and storing a boat trailer. Moore was assessed a fine of $496.80 which was paid.

On 5 November 2011, FPYC's board conducted a second hearing regarding Moore's continued violation of FPYC rules. In the second hearing, the FPYC board found that Moore continued to violate association rules despite having agreed to comply with the board's decision of 22 April. Specifically, the FPYC board found that Moore violated FPYC's rules regarding threatening and/or offensive conduct, signage, property damage, dockage, parking, bike riding on docks, and keeping his dog on a leash. Moore was assessed total fines of $550.00 and his FPYC membership rights were suspended for a period of sixty days.

On 17 January 2012, FPYC filed an action against Moore (hereafter "defendant") seeking a temporary restraining order, a preliminary injunction and a permanent injunction restraining him from continuing

to violate FPYC's rules.[1] On 25 January, defendant filed an answer and counterclaims for unfair and deceptive trade practices; abuse of process; negligent hiring, retention, and supervision of dockmaster; negligent infliction of emotional distress; intentional infliction of emotional distress; and punitive damages. On 26 March 2012, FPYC filed a response to defendant's counterclaims, including a motion to dismiss for failure to join all necessary parties pursuant to N.C. R. Civ. P. 12(b)(7), as well as for *res judicata* and collateral estoppel. Defendant filed a motion to dismiss FPYC's claims pursuant to Rules 12(b)(1), 12(b)(6), 12(b)(7), and 12(c) on 25 July 2012.

On 18 September 2012, Judge Cobb granted FPYC's motion and dismissed defendant's counterclaim with prejudice based on defendant's failure to join necessary parties. That same day, Judge Cobb entered a second order denying defendant's motions to dismiss FPYC's complaint pursuant to N.C. R. Civ. P. 12(b)(1), (6), (7), and 12(c), and for FPYC's lack of standing to sue on behalf of its members.

On 28 September 2012, defendant filed a new motion to dismiss pursuant to N.C. R. Civ. P. 12(b)(6) on grounds that FPYC already had an adequate remedy at law and thus, an injunction was unnecessary. On 5 October 2012, FPYC filed motions for summary judgment and for permanent injunction against defendant. On 15 October 2012, Judge Cobb heard FPYC's motions for summary judgment and permanent injunction and defendant's second motion to dismiss. On 18 October 2012, Judge Cobb issued an order granting FPYC's motions for summary judgment and permanent injunction and denying defendant's motion to dismiss. Defendant appeals.

On appeal, defendant raises the following issues: whether the trial court erred (I) in its first 18 September 2012 order denying defendant's motion to dismiss; (II) in its second 18 September 2012 order dismissing defendant's counterclaim; (III) in its 18 October 2012 order denying defendant's motion to dismiss and granting FPYC's motions for summary judgment and permanent injunction; (IV) in its 18 October 2012 order granting FPYC's motions for summary judgment and permanent

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1. FPYC alleged that defendant violated FPYC's rules by spraying ketchup on the fence and home of the FPYC board president, shining a spotlight into the home of the board president, repeatedly using profane language towards members of the FPYC board, and sending threatening messages to board members. Other allegations of rule violations against defendant included defendant riding his bike along the marina's docks, defendant's dog running loose without a leash, and defendant defacing the FPYC clubhouse bathrooms with feces.

injunction where the permanent injunction applied to undefined persons and places; and (V) in its 18 October 2012 order granting FPYC's motion for summary judgment.

I.

Defendant argues the trial court erred in its 18 September 2012 order denying defendant's motion to dismiss pursuant to N.C. R. Civ. P. 12(b)(1), (b)(6) and (b)(7). We disagree.

A motion to dismiss under Rule 12(b)(1) for lack of jurisdiction is reviewed by this Court *de novo*. *Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001). "For a motion to dismiss based upon Rule 12(b)(6), the standard of review is whether, construing the complaint liberally, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." *Strates Shows, Inc. v. Amusements of Am., Inc.*, 184 N.C. App. 455, 460, 646 S.E.2d 418, 423 (2007) (citation and quotation omitted).

In its first 18 September 2012 order, the trial court observed that defendant filed the following motions:

> 1. A Motion to Dismiss [FPYC]'s Complaint filed pursuant to Rules 12(b)(1) and 12(c) of the North Carolina Rules of Civil Procedure because [FPYC] . . . lacked standing to bring the claim(s) set forth in its Complaint because (a) the FPYC does not have standing to seek permanent injunctions on behalf of an individual, (b) even if the FPYC, as a non-profit corporation, has standing to bring an action as set forth and described in its Complaint, each and every member on whose behalf such relief is sought must also have standing to seek the same relief and that those individual members had previously given up their rights to seek the remedies set forth in the Complaint, and (c) the relief sought by [FPYC] in its Complaint has been, at least in part, rendered moot.
>
> 2. A Motion to Dismiss [FPYC]'s Complaint filed pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure because the basis that [FPYC] (a) did not affirmatively plead conditions precedent to the filing of its Complaint and (b) [FPYC] lacked standing to bring the claims set forth in its Complaint.

3. A Motion to Dismiss [FPYC]'s Complaint filed pursuant to Rule 12(b)(7) of the North Carolina Rules of Civil Procedure because [FPYC] failed to join necessary and indispensable parties to the action.

The trial court then held "that Defendant's Motions to Dismiss the remaining claims set forth in [FPYC's] Complaint filed pursuant to Rules 12(b)(1), 12(b)(6), 12(b)(7) and 12(c) are hereby DENIED."

[1] Defendant contends that the trial court erred in denying his motions to dismiss under Rules 12(b)(1) and (b)(6) because FPYC lacked standing to represent its members. "A lack of standing may be challenged by motion to dismiss for failure to state a claim upon which relief may be granted." *Energy Investors Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 337, 525 S.E.2d 441, 445 (2000) (citation omitted). "Standing refers to whether a party has a sufficient stake in an otherwise justiciable controversy such that he or she may properly seek adjudication of the matter." *Am. Woodland Indus. v. Tolson*, 155 N.C. App. 624, 626—27, 574 S.E.2d 55, 57 (2002) (citations omitted). To have standing, a party must be a "real party in interest." *Energy Investors Fund*, 351 N.C. at 337, 525 S.E.2d at 445.

Defendant specifically argues that FPYC lacked standing because fourteen members of FPYC dismissed their no-contact claims against him with prejudice. An association like FPYC has representational standing for its members if: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 130, 388 S.E.2d 538, 555 (1990) (citation omitted). "The clear language of *River Birch* . . . does not require a threat of immediate injury to each and every individual member of the association in order for the association to have standing." *State Emps. Ass'n of N.C. v. State*, 154 N.C. App. 207, 219, 573 S.E.2d 525, 533 (2002) (Tyson, J., dissenting), *overruled on other grounds by State Emps. Ass'n of N.C. v. State*, 357 N.C. 239, 580 S.E.2d 693 (2003).

Here, defendant contends that FPYC lacked representational standing because by voluntarily dismissing their no-contact orders with prejudice, fourteen of FPYC's members forfeited their individual standing because they no longer suffered from an immediate harm caused by defendant. Defendant's argument lacks merit for, as previously discussed, FPYC had standing as its own corporate entity to bring suit,

regardless of the claims brought by its fourteen individual members. *See Warth v. Seldin*, 422 U.S. 490, 511 (1975) ("An association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy."). Furthermore, our Supreme Court has held that not every member of an association must have suffered an immediate harm in order for the association to have standing to seek relief from such harm. *See River Birch*, 326 N.C. at 130, 388 S.E.2d at 555. Accordingly, the trial court did not err in its first 18 September 2012 order denying defendant's motion to dismiss pursuant to N.C. R. Civ. P. 12(b)(1) and (b)(6) for FPYC's lack of representational standing.

[2] Defendant further argues that FPYC lacked standing because the dismissal with prejudice of fourteen no-contact orders by FPYC members against him served as *res judicata* to bar any claims by FPYC against him. On 13 January 2012, fourteen individual members of FPYC, including FPYC's board of directors and their respective spouses as well as FPYC's dockmaster and his wife, filed no-contact orders for stalking or nonconsensual sexual conduct against defendant. These no-contact complaints stated that:

> Defendant has repeatedly tormented, terrorized, or terrified the Plaintiff, a member of the Board of Directors ("Board") of [FPYC] or a spouse thereof, with the intent of placing the Plaintiff in reasonable fear for the Plaintiff's safety or the safety of the Plaintiff's immediate family or close personal associates by engaging in hostile, threatening behavior directed toward the Board, FPYC's Dockmaster, and/or the spouses of the same. By way of example and not limitation, Defendant has (i) trespassed upon the land of . . . the president of the Board, and sprayed a blood-like substance all over the fence, gate, and steps of his home (1/2/12); (ii) used a weapon or other dangerous instrument to slash the tires of the spouse of FPYC's Dockmaster (12/31/11); (iii) threatened physical violence and/or bodily injury against FPYC's Dockmaster (10/18/11); and, (iv) threatened to kill FPYC's Dockmaster (7/10/10). There are many more examples. All of Defendant's conduct, regardless of to whom it was immediately directed, was intended to place and did place the Board's members and their spouses in reasonable fear for their safety and/or the safety of their family and/or close personal associates, as it was in apparent retaliation for the Board's

> censuring and fining Defendant for his repeated violations of the Rules and Regulations and Declarations of FPYC. Defendant's acts of aggression are escalating, and, given Defendant's frequent apparent intoxication and/or inability to control himself, Plaintiff fears for the Plaintiff's safety and the safety of the Plaintiff's immediate family and close personal associates.

All fourteen no-contact orders were voluntarily dismissed with prejudice on 23 July 2012.

Meanwhile, on 17 January 2012, five days after fourteen FPYC members filed no-contact orders against defendant, FPYC filed as a corporation a complaint against defendant alleging that:

> 14. [Defendant], while a member of [FPYC], has repeatedly violated various provisions of the Declaration, By-Laws, and/or Rules and Regulations of [FPYC].
>
> 15. [Defendant] has been notified of his potential violations of the Declaration, By-Laws, and/or Rules and Regulations of [FPYC] and has on two occasions in the past year had hearings before the Board of Directors of [FPYC] to review and consider those potential violations.
>
> 16. Most recently, the Board of Directors of [FPYC], in a decision dated 1 December 2011, determined [defendant] had violated the Declaration, By-Laws, and/or Rules and Regulations of [FPYC] through, *inter alia*, (a) his intimidating, threatening, harassing, profanity-laden, and nuisance-creating actions, and his disorderly conduct directed at the Board of Directors and [FPYC]'s Dockmaster, including but not limited to his offensive, verbal assault on [FPYC]'s Dockmaster which was captured on videotape on 18 October 2011; (b) his destruction of property by, on information and belief, urinating, defecating, and/or placing soiled toilet paper on signs hung by [FPYC] in the men's bathroom of the FPYC clubhouse; and, (c) continuing to violate [FPYC]'s Declaration, By-Laws, and/or Rules and Regulations.
>
> 17. Pursuant to the Board of Directors' hearing decision dated 1 December 2011 ("Hearing Decision"), [defendant] and his wife were assessed fines, and [defendant's] membership rights in [FPYC] were suspended for sixty (60) days beginning 4 December 2011 and ending 3 February 2012.

> 18. During the period of [defendant's] suspension of his membership rights in [FPYC], he has no right to access or use the common areas of [FPYC].
>
> 19. Since 4 December 2011, [defendant] has repeatedly violated the terms of the suspension of his membership rights by, *inter alia*, (a) purposefully accessing the common areas by the docks and clubhouse of [FPYC]; (b) on information and belief, entering the parking lot of the clubhouse on 31 December 2011 and using a weapon or other dangerous instrument to slash the tires of the wife of [FPYC's] Dockmaster (she and her husband, the Dockmaster, both members of [FPYC]), which event was captured on videotape; and, (c) on 2 January 2012, accessing the common areas by the docks and smearing, placing, and applying a dark red substance, which had the appearance of blood but which turned out to be ketchup, on the fencing, gate and steps of the home of [FPYC's] President, with, on information and belief, the intent and purpose to further intimidate, threaten, stalk, annoy, harass and terrorize [FPYC's] President, the President's spouse, all of the other members of [FPYC's] Board of Directors and their respective spouses, and all other members of [FPYC], which event, too, was captured on videotape.
>
> 20. [Defendant's] past behavior and present violent outbursts are in retaliation against the Board of Directors for their enforcement of the Declaration, By-Laws, and/or Rules and Regulations of [FPYC].
>
> 21. [FPYC] fears for the safety of its Board of Directors, its Dockmaster, its other members, and its property due to the violent, unpredictable, and uncontrollable behavior of [defendant].

Defendant contends that because the allegations in the no-contact orders differ from those in FPYC's complaint only to the extent that the no-contact orders were brought by individual members of FPYC while FPYC's complaint was brought by the corporation itself, *res judicata* should act as a bar against FPYC's complaint.

"Under the doctrine of res judicata or 'claim preclusion,' a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880

(2004) (citations omitted). "A dismissal with prejudice is an adjudication on the merits and has res judicata implications." *Caswell Realty Assocs., I, L.P. v. Andrews Co.*, 128 N.C. App. 716, 720, 496 S.E.2d 607, 610 (1998) (citations omitted).

FPYC's complaint was brought by FPYC acting as "a corporation organized and existing under the laws of the State of North Carolina doing business in New Hanover County, North Carolina." As such, FPYC was not the same party or privy to the fourteen individual members of FPYC who filed no-contact orders against defendant. *See Troy Lumber Co. v. Hunt*, 251 N.C. 624, 627, 112 S.E.2d 132, 135 (1960) (holding that although a person may be a shareholder or an officer of a corporation, that is not sufficient to establish privity for purposes of *res judicata* between the shareholder or officer and the corporation).

Defendant further contends that FPYC is barred by *res judicata* under this Court's reasoning in *Caswell Realty*. In *Caswell Realty*, the plaintiff filed an initial lawsuit which was settled and dismissed with prejudice. The plaintiff then filed two additional lawsuits based upon the same allegations as alleged in the first lawsuit. The defendants moved for summary judgment, which was granted by the trial court. The trial court held that because the allegations and parties were the same in all three claims raised by the plaintiff, the second and third claims were barred by *res judicata*. *Caswell Realty*, 128 N.C. App. 716, 496 S.E.2d 607.

Here, as already discussed, the no-contact orders did not involve the same parties or privies as FPYC's complaint. As such, *Caswell Realty* is not applicable to the instant case. *See also Smoky Mountain Enters., Inc. v. Rose*, 283 N.C. 373, 196 S.E.2d 189 (1973) (*res judicata* barred a new action by a corporation's president against the defendant where the corporation's president had brought a prior action against the same defendant for the same relief); *Thompson v. Lassiter*, 246 N.C. 34, 97 S.E.2d 492 (1957) (holding that a person who is not a party to an action can be bound by the adjudication of a litigated matter only when that person controls an action, individually or in cooperation with others).

II.

[3] Defendant next argues that the trial court erred in its second 18 September 2012 order dismissing defendant's counterclaim with prejudice pursuant to N.C. R. Civ. P. 12(b)(7). We disagree.

North Carolina General Statutes, section 1A-1, Rule 12(b)(7), holds that "[e]very defense, in law or fact, to a claim for relief in any pleading, whether a claim [or] counterclaim . . . may at the option of the pleader be

made by motion [for] [f]ailure to join a necessary party." N.C. Gen. Stat. § 1A-1, Rule 12(b)(7) (2013).

> When faced with a motion under Rule 12(b)(7), the court will decide if the absent party should be joined as a party. If it decides in the affirmative, the court will order him brought into the action. However, if the absentee cannot be joined, the court must then determine, by balancing the guiding factors set forth in Rule 19(b), whether to proceed without him or to dismiss the action. . . . A dismissal under Rule 12(b)(7) is not considered to be on the merits and is without prejudice.

Crosrol Carding Dev., Inc. v. Gunter & Cooke, Inc., 12 N.C. App. 448, 453—54, 183 S.E.2d 834, 838 (1971) (citation omitted).

On 12 August 2010, defendant filed a complaint against FPYC. On 11 October 2010, the trial court issued an order dismissing defendant's complaint without prejudice pursuant to N.C. R. Civ. P. 12(b)(7) for failure to join necessary parties. Defendant did not appeal from this order.

On 25 January 2012, defendant filed a counterclaim against FPYC; on 29 March 2012, FPYC moved to dismiss the counterclaim pursuant to Rule 12(b)(7) for failure join necessary parties. A hearing was held on 9 August 2012, and in an order dated 18 September 2012, the trial court granted FPYC's motion to dismiss dismissing defendant's counterclaims with prejudice. In its order, the trial court noted that:

> 5. The allegations of the Counterclaim filed by [defendant] in this action are based upon the same factual allegations that formed the basis of the Complaint filed by [defendant] in Civil Action Number 10 CVS 3796.[2] In addition, all of the claims that are now set forth in [defendant's] Counterclaim were included as part of the claims set forth in the Complaint [defendant] filed in Civil Action Number 10 CVS 3796. The claims as set forth in [defendant's] Counterclaim are a restatement of the same claims he asserted against FPYC in his Complaint. In addition, [defendant] makes the same request for damages against the FPYC in his Counterclaim that he made in his "original" Complaint.

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2. Defendant's complaint, filed 12 August 2010, was docketed under 10 CVS 3796. This complaint was dismissed by the trial court on 11 October 2010 without prejudice.

The trial court concluded that:

> BASED UPON THE FOREGOING, and as with the Motion to Dismiss filed by the FPYC to the Complaint filed by [defendant] in Civil Action Number 10 CVS 3796, this Court determines as a matter of law that Plaintiff FPYC's Motion to Dismiss [defendant's] Counterclaim for failure to join necessary and indispensable parties should be and is hereby ALLOWED.

Here, defendant's first complaint was dismissed without prejudice by the trial court under Rule 12(b)(7) for failure to join necessary parties. Under Rule 41(b),

> [f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim therein against him. . . . *Unless the court in its order for dismissal otherwise specifies, a dismissal under this section . . . operates as an adjudication upon the merits.* If the court specifies that the dismissal of an action commenced within the time prescribed therefor, or any claim therein, is without prejudice, it may also specify in its order that a new action based on the same claim may be commenced within one year or less after such dismissal.

N.C. Gen. Stat. § 1A-1, Rule 41(b) (2013) (emphasis added).

In its 11 October 2010 order dismissing defendant's complaint, the trial court did not specify a period of time for defendant to refile his complaint; as such, defendant had a statutory period of one year from the date of that order to refile his complaint. When defendant failed to refile his complaint or appeal the trial court's order of 11 October 2010, defendant's counterclaim filed 25 January 2012 was properly dismissed. *See id.*; *see also id.* §1A-1, Rule 41(c) ("The provisions of this rule apply to the dismissal of any counterclaim, crossclaim, or third-party claim.").

III. & IV.

[4] In his third and fourth arguments on appeal, defendant contends that the trial court erred in its 18 October 2012 order denying defendant's motion to dismiss and granting FPYC's motions for summary judgment and permanent injunction where there were adequate remedies at law and the injunction was overly broad.

"A mandatory injunction is the proper remedy to enforce a restrictive covenant [] and to restore the status quo." *Wrightsville Winds Townhouses Homeowners' Ass'n. v. Miller*, 100 N.C. App. 531, 536, 397 S.E.2d 345, 347 (1990) (citations omitted). "Whether injunctive relief will be granted to restrain the violation of such restrictions is a matter within the sound discretion of the trial court . . . and the appellate court will not interfere unless such discretion is manifestly abused." *Buie v. High Point Assocs. Ltd. P'ship*, 119 N.C. App. 155, 161, 458 S.E.2d 212, 216 (1995) (citation omitted).

North Carolina Rules of Civil Procedure, Rule 65 requires that "[e]very order granting an injunction . . . shall be specific in terms [and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts enjoined or restrained." N.C. Gen. Stat. § 1A-1, Rule 65(d) (2013). This Court has characterized the specificity inquiry to be conducted under Rule 65 as a determination of "whether the party enjoined can know from the language of the order itself, and without having to resort to other documents, exactly what the court is ordering it to do." *Auto. Dealer Res., Inc. v. Occidental Life Ins. Co.*, 15 N.C. App. 634, 642, 190 S.E.2d 729, 734 (1972).

Defendant argues that the trial court erred in granting FPYC's motion for permanent injunction because FPYC had an adequate remedy at law. Specifically, defendant contends that because individual members of FPYC could seek no-contact orders against him, FPYC had adequate remedies at law. As already discussed in *Issue I*, FPYC had standing to pursue a claim against defendant, independent of any claims FPYC's members could bring against defendant. Moreover, as a corporate entity FPYC had representational standing to bring a claim against defendant on behalf of FPYC's full membership. *See Warth*, 422 U.S. at 511; *Troy Lumber*, 251 N.C. at 627, 112 S.E.2d at 135.

Here, FPYC's complaint indicated that defendant continued to violate FPYC's rules and regulations repeatedly, even after defendant agreed to no-contact orders issued for fourteen individual members of FPYC:

> 23. Based upon the allegations contained in this Verified Complaint, [FPYC] is entitled to an adjudication that [defendant] has violated the Declaration, By-Laws, and/or Rules and Regulations of the [FPYC]; has violated [FPYC]'s suspension of his membership rights; and, should be permanently enjoined from further violations of [FPYC]'s 1 December 2011 Hearing Decision.

24. [FPYC] has demonstrated a likelihood of success on the merits of this action against [defendant] for the issuance of a temporary restraining order and preliminary injunction against [defendant] during the pendency of this action from taking any action to violate the Declaration, By-Laws, Rules and Regulations, and decisions of the Board of Directors and to have no contact with any of [FPYC]'s Board members and their spouses except through his legal counsel during the pendency of this Court's temporary, preliminary and permanent injunction against him and all such terms and conditions as the Court may place on [defendant] to control his menacing, offensive and abusive behavior.

25. Further, based upon the allegations of this Verified Complaint, [FPYC] has demonstrated it will sustain irreparable damage, namely bodily injury or death of its Board of Directors, Dockmaster, or other members and/or property damage for which no reasonable redress is afforded by law and to which [FPYC] in equity and good conscience should not be required to submit.

26. For the foregoing reasons, [FPYC] moves the Court for a permanent injunction against [defendant], restraining him from taking any action to violate his suspension and other provisions contained in [FPYC]'s 1 December 2011 Hearing Decision, including a permanent order enjoining [defendant] from engaging in any further menacing, offensive, threatening and abusive conduct towards [FPYC]'s Board members, their respective spouses, the Dockmaster and his spouse, employees and other representatives of [FPYC], and all other members of [FPYC].

In its 15 October 2012 order, the trial court held that:

[b]y virtue of this Order, and for so long as [defendant] remains and/or is a member in [FPYC], [defendant] (including those acting through [defendant]) shall be and is hereby PERMANENTLY RESTRAINED AND ENJOINED from engaging in the same or substantially similar violative conduct, behavior and actions as described and set forth in [FPYC]'s Hearing Decisions of April and December 2011 . . . .

The trial court then listed seventeen "prohibited actions" which mirrored defendant's alleged violations stated in FPYC's complaint. As the trial court made findings of fact in the 18 September and 15 October 2012 orders regarding defendant's behavior and conduct towards FPYC and its members and concluded that defendant's behavior and conduct was violative of FPYC's rules and regulations, the trial court acted within its sound discretion in granting FPYC's motion for summary judgment and a permanent injunction against defendant.

Defendant also contends that the 18 October 2012 order is overly broad because the language of the order's "prohibitive actions" extends to persons, locations, and dates that are currently unknown to defendant. Specifically, defendant contends that he "has absolutely no discernible standard as to the persons, places and times to which the restraints apply." Defendant further argues that the language of the order is overly broad because FPYC failed to present evidence that defendant had issues with any members of FPYC other than the FPYC board president and dockmaster.

Defendant's only citations of authority for this argument concern the proposed standard of review. Defendant urges this Court to review this issue *de novo*, to "review and weigh the evidence and find facts for ourselves." We decline defendant's request and apply the standard of review we set out earlier in this opinion: "[w]hether injunctive relief will be granted to restrain the violation of such restrictions is a matter within the sound discretion of the trial court . . . and the appellate court will not interfere unless such discretion is manifestly abused." *Buie*, 119 N.C. App. at 161, 458 S.E.2d at 216.

In its order granting a permanent injunction against defendant, the trial court noted that "[defendant] shall be and is hereby PERMANENTLY RESTRAINED AND ENJOINED from engaging in the same or substantially similar violative conduct, behavior and actions as described and set forth in [FPYC]'s Hearing Decisions of April and December 2011, both of which are . . . fully incorporated herein by reference." FPYC's motion to the trial court specifically requested "a permanent injunction against Defendant restraining and precluding him from engaging in recurring and similar violations of [FPYC]'s rules, regulations, restrictive covenants, bylaws and hearing decisions." The trial court's order stated that "Defendant's Prohibited Actions shall include, without limitation, the following:"

> (1) screaming profanities at, towards, or in the general direction of any [FPYC] member, their family members

or guests, [FPYC]'s Board of Director members ("BOD"), and/or [FPYC]'s employees and independent contractors whether in public, in private, in person, and/or through the telephone or voicemail;

(2) trespassing and/or entering upon the personal property or real property of [FPYC] members, their family members or guests, [FPYC]'s BOD, and/or [FPYC]'s employees and independent contractors;

(3) having a violent outburst of any kind whether verbal, physical, or insinuative toward [FPYC] members, their family members or guests, [FPYC]'s BOD, and/or [FPYC]'s employees and independent contractors;

(4) "flipping off" or "giving the finger to" [FPYC] members, their family members or guests, [FPYC]'s BOD, and/or [FPYC]'s employees and independent contractors;

(5) shining bright lights (including flashlights and/or high-intensity spotlights) into or onto the home or property of [FPYC] members, their family members or guests, [FPYC]'s BOD, and/or [FPYC]'s employees and independent contractors;

(6) driving any vehicle toward, in the direction of, or in such a way or in such proximity to [FPYC] members, their family members or guests, [FPYC]'s BOD, and/or [FPYC]'s employees and independent contractors that it puts the person in fear of his/her personal safety and/or blocks the person's right of way;

(7) "cussing out" any [FPYC] members, their family members or guests, [FPYC]'s BOD, and/or [FPYC]'s employees and independent contractors in public, through email, through voicemail, through internet postings, text message, or other form of written or oral communication;

(8) calling any [FPYC] members, their family members or guests, [FPYC]'s BOD, and/or [FPYC]'s employees and independent contractors an "a******," "dickhead," "pervert," or other derogatory name in public or in any email, text message, voicemail, telephone call or other interaction with any [FPYC] members, their family members or guests, [FPYC]'s BOD, and/or [FPYC]'s employees and independent contractors;

(9) threatening any kind of violence, retribution, or "pay-back" toward [FPYC] members, their family members or guests, [FPYC]'s BOD, and/or [FPYC]'s employees and independent contractors;

(10) taking any violent or destructive action toward [FPYC] members, their family members or guests, [FPYC]'s BOD, and/or [FPYC]'s employees and independent contractors and/or toward any such person's personal or real property;

(11) destroying, vandalizing, defacing, marking, or damaging (including by urinating on, spraying ketchup on, slashing the tires of, dropping electrical cords into the water, etc.) the real or personal property of [FPYC] and any [FPYC] members, their family members or guests, [FPYC]'s BOD, and/or [FPYC]'s employees and independent contractors;

(12) moving or removing any structure, barriers, signs, equipment or safety device found on or within the common areas or roadways of [FPYC];

(13) docking or causing to be docked any unauthorized boat or vessel in any slip or dock at [FPYC] or within the common area of [FPYC];

(14) "mooning," exposing himself, grabbing his crotch, sticking hoses between his legs, or making any profane and/or obscene gesture toward any [FPYC] members, their family members or guests, [FPYC]'s BOD, and/or [FPYC]'s employees and independent contractors, whether in person or on any kind or type of video or recording device located on a member's property;

(15) depositing dock carts, garbage or refuse, including but not limited to empty beer cans and broken chairs or the like, upon the property of any [FPYC] member or their family members or guests, [FPYC]'s BOD, and/or [FPYC]'s employees and independent contractors;

(16) defacing, marking, vandalizing, or damaging the common areas of [FPYC]; and,

(17) engaging in any type or kind of intimidating, harassing, and terrorizing conduct toward any [FPYC] members,

> their family members or guests, [FPYC]'s BOD, and/or [FPYC]'s employees and independent contractors.

Defendant contends that the language of the permanent injunction is overly broad, arguing that "[u]nder the language of the Order as written, the restraints could apply: to persons whom [d]efendant does not even know . . . at locations which [defendant] does not know apply . . . and at times/circumstances that [defendant] does not know applies." We agree. While the specific types of behaviors which are prohibited are themselves fairly clear, categories 1, 3–4, 7–10, 14, and 17 ban behavior in vague or unspecified terms as to persons, times, and geographic scope. Although some of the prohibited behavioral categories are limited to the geographic boundaries of FPYC, such as categories 12 ("moving or removing any structure, barriers, signs, equipment or safety device found on or within the common areas or roadways of [FPYC]"), 13 ("docking or causing to be docked any unauthorized boat or vessel in any slip or dock at [FPYC] or within the common area of [FPYC]"), and 16 ("defacing, marking, vandalizing, or damaging the common areas of [FPYC]"), the majority of the categories lack any specified boundaries, thus implying an unlimited applicability. *See Norfleet v. Baker*, 131 N.C. 99, 102, 42 S.E. 544, 545 (1902) ("Expressio unius est exclusio alterius. The presumption is that, having expressed some, they have expressed all, the conditions by which they intend to be bound under the instrument.").

This Court has previously upheld permanent injunctions where the prohibited behavior is clearly limited in terms of geographic scope. *See Matthieu v. Miller*, No. COA11-1287, 2012 N.C. App. LEXIS 886 (July 17, 2012) (finding that the trial court did not abuse its discretion in upholding injunctive relief where the injunction only affected one lot within a subdivision); *Schwartz v. Banbury Woods Homeowners Ass'n, Inc.*, 196 N.C. App. 584, 675 S.E.2d 382 (2009) (the trial court did not abuse its discretion in granting injunctive relief where the injunction was specifically limited to prohibiting the homeowners from permanently storing their RV camper on their property). However, as this Court has not previously addressed the appropriateness of injunctive relief which is seemingly unlimited in scope, we find *Webb v. Glenbrook Owners Ass'n, Inc.*, 298 S.W.3d 374 (Tex. App. 2009), to be enlightening.

In *Webb*, the defendants sued the plaintiffs for breach of their declaration of covenants and sought injunctive relief. The Texas Court of Appeals found the defendants' permanent injunction against the plaintiffs to be vague and overly broad as the injunction granted relief that went beyond the boundaries of the defendants' community. In finding

that the trial court abused its discretion in issuing the permanent injunction, the Texas Court of Appeals noted that where the injunction's prohibited behaviors "requires reference to records outside the injunction to determine all 'members, wherever located[,]' " the trial court clearly abused its discretion because "the injunction grants relief beyond that supported by the evidence by extending outside the physical boundaries of the Glenbrook community." *Id.* at 386.

We find that the instant matter is akin to that of *Webb*, as here, FPYC has obtained a permanent injunction against defendant that prohibits seventeen categories of behavior. Although some of these categories are clearly limited in terms of scope, the majority of these categories are not. Moreover, the injunction grants relief that extends beyond the boundaries of the FPYC community or immediately identifiable members of the FPYC community. We agree with defendant that the language used in categories 1, 3–4, 7–10, 14, and 17 is overly broad, as we find nothing that clearly limits these prohibited behaviors to any particular geographic area, durational period or immediately identifiable persons even though the evidence presented concerned only defendant's violations of FPYC's rules while within the FPYC community. As such, we must hold that the trial court abused its discretion in granting a permanent injunction with unlimited scope. Accordingly, we remand to the trial court solely to limit the scope of the injunction to actions directed at certain, identified individuals anywhere, such as the FPYC Board and community residents, or actions directed toward anyone in certain places, such as within the physical boundaries of the FPYC community.

Defendant further argues that the language of the order is overly broad because FPYC failed to present evidence that defendant had issues with any members of FPYC other than the FPYC Board's president and dockmaster. Defendant's argument is without merit, as his behavior and conduct was directed towards and affected more members of FPYC than just FPYC's president and dockmaster. A review of the emails sent by defendant indicates that defendant contacted numerous members of FPYC. Defendant also verbally communicated, both in person and over the telephone, with various FPYC members and their families. As defendant's actions and behaviors affected both individual members of FPYC as well as the entire FPYC community, FPYC's motion for permanent injunction was meant to prevent defendant from committing further harm against FPYC, its members and their guests. *See id.* However, as discussed above, we must remand to the trial court to have the order's "prohibited actions" limited to certain, identifiable individuals, and to the physical boundaries of the FPYC community.

V.

[5] Defendant's final argument on appeal is that the trial court erred in its 18 October 2012 order granting FPYC's motion for summary judgment where there were questions of fact, and therefore, the trial court should not have granted a permanent injunction. We disagree.

> Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law [pursuant to] N.C.G.S. § 1A-1, Rule 56(c) (20[13]). The trial court must consider the evidence in the light most favorable to the non-moving party.

Crocker v. Roethling, 363 N.C. 140, 142, 675 S.E.2d 625, 628 (2009) (citations omitted). This Court reviews a trial court's order granting or denying summary judgment *de novo*. *Builders Mut. Ins. Co. v. N. Main Constr.*, Ltd., 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006) (citation omitted).

In its 18 October 2012 order, the trial court noted that it reviewed all of the evidence presented by both parties, including the evidence defendant now claims was not properly considered, as well as the trial court's own record of previous litigation between defendant and FPYC. The trial court then determined that defendant continued to violate FPYC's rules and regulations, even after FPYC met with defendant to discuss the violations and after fourteen individual members of FPYC obtained no-contact orders against defendant. Defendant does not specifically contest these facts. He does not argue that they did not occur, nor does he contest that these actions violate the restrictive covenants. He only argues that his conduct was justified by FPYC's own unclean hands, an argument we address below. Therefore, because the evidence showed there were no genuine issues of fact that defendant's behavior and conduct had continued unabated against FPYC, the trial court did not err in granting FPYC's motion for summary judgment as FPYC is entitled to judgment as a matter of law.

Defendant further argues that summary judgment was inappropriate because FPYC acted with unclean hands towards him. Specifically, defendant argues that FPYC deliberately sought to drive him out of FPYC's community by provoking and targeting him with excessive fines and, therefore, FPYC cannot seek injunctive relief.

> When equitable relief is sought, courts claim the power to grant, deny, limit, or shape that relief as a matter of discretion. This discretion is normally invoked by considering an equitable defense, such as unclean hands or laches, or by balancing equities, hardships, and the interests of the public and of third persons.

Roberts v. Madison Cnty. Realtors Ass'n, 344 N.C. 394, 399, 474 S.E.2d 783, 787 (1996) (citation omitted). Further,

> [o]ne who seeks equity must do equity. . . . The conduct of both parties must be weighed in the balance of equity, and the party claiming estoppel, no less than the party sought to be estopped, must have conformed to strict standards of equity with regard to the matter at issue.

Creech v. Melnik, 347 N.C. 520, 529, 495 S.E.2d 907, 913 (1998) (citations omitted).

> The issuance of such an injunction depends upon the equities of the parties and such balancing is clearly within the province of the trial court. Whether injunctive relief will be granted to restrain the violation of such restrictions is a matter within the sound discretion of the trial court . . . and the appellate court will not interfere unless such discretion is manifestly abused.

Buie, 119 N.C. App. at 161, 458 S.E.2d at 216 (citations and quotation omitted).

Although defendant presented evidence that FPYC's Board president and dockmaster acted inappropriately towards him, defendant's own behavior and conduct towards FPYC was equally inappropriate.[3] The trial court, in considering FPYC's request for injunctive relief, weighed and balanced the competing equities of both parties and concluded that defendant's conduct was egregious enough to warrant the issuance of a permanent injunction. As the trial court acted within its

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3. Again we note FPYC's allegations that defendant violated FPYC's rules and retaliated by spraying ketchup on the fence and home of the FPYC board president, shining a spotlight into the home of the board president, repeatedly using profane language towards members of the FPYC board, and sending threatening messages to board members. Other allegations of rule violations against defendant included defendant riding his bike along the marina's docks, defendant's dog running loose without a leash, and defendant defacing the FPYC clubhouse bathrooms with feces.

discretion in balancing "the equities of the parties," the trial court did not err in granting a permanent injunction in favor of FPYC. We affirm summary judgment but remand to the trial court to limit the scope of the permanent injunction.

Affirmed in part; remanded in part.

Judges McGEE and STROUD concur.

IN RE ACCUTANE LITIGATION

No. 13-754

Filed 8 April 2014

Appeal and Error—interlocutory orders and appeals—protective order—no substantial right—hypothetical subpoena

A North Carolina witness's appeal from an interlocutory protective order was dismissed in an action where the defendant in a New Jersey mass tort litigation subpoenaed him for a deposition. The witness failed to identify any substantial right that would be jeopardized by delay of an appeal. Further, the issues raised by the witness all pertained to possible ramifications of a hypothetical subpoena that might or might not ever be issued, and thus did not present issues that were ripe for review.

Appeal by Dr. Michael D. Kappelman from order entered 16 April 2013 by Judge Robert H. Hobgood in Orange County Superior Court. Heard in the Court of Appeals 8 January 2014.

Nelson Mullins Riley & Scarborough LLP, by Christopher J. Blake, Joseph S. Dowdy, and T. Carlton Younger, III, for Hoffman-LaRoche Inc., and Roche Laboratories, Inc.-appellees.

Ashmead P. Pipkin for Dr. Michael D. Kappelman-appellant.

STEELMAN, Judge.

Where the defendant in a New Jersey mass tort litigation subpoenas a North Carolina witness for a deposition, the North Carolina trial court's protective order was an interlocutory order. Where the witness

failed to allege any substantial right that would be jeopardized absent immediate review, but instead speculates that if certain fact scenarios occur in the future his rights might be implicated, his appeal must be dismissed.

I. Factual and Procedural Background

In the early 1980s Hoffmann-LaRoche, Inc., began marketing Accutane, the brand name for the drug isotretinoin, which is used to treat severe acne. Beginning in 2003, lawsuits were filed alleging that the use of Accutane had caused inflammatory bowel disease. In May 2005, the New Jersey Supreme Court ordered that the litigation pertaining to Accutane be administered as a mass tort, and as of "July 2012, there [were] nearly 8000 cases listed on New Jersey's Accutane mass tort list." *Sager v. Hoffman-La Roche, Inc.*, 2012 N.J. Super. Unpub. LEXIS 1885 *9 fn2, *petition for certification denied*, 213 N.J. 568, 65 A.3d 835 (2013).

Dr. Kappelman is an Assistant Professor on the faculty of the Medical School of the University of North Carolina at Chapel Hill, whose duties include treating patients, conducting research studies, and publishing the results of his studies. This is primarily in the field of pediatric gastroenterology. He is not a party in the Accutane litigation and has not consulted with any of the parties. However, Dr. Kappelman was a co-author of "A [Causal] Association between Isotretinoin and Inflammatory Bowel Disease Has Yet to Be Established," an article published in 2009 in The American Journal of Gastroenterology (TAJG). Dr. Kappelman discussed the article in a March 2010 interview published in the Gastroenterology & Hepatology journal. He was also a co-author of "Isotretinoin Use and Risk of Inflammatory Bowel Disease: A Case Control Study," an article published in September of 2010 in TAJG. This article resulted in a letter to the editor by Hoffmann-LaRoche employees, published in TAJG in May 2011, which criticized the methodology described in the September 2010 article. This issue also contains a letter by Dr. Kappelman responding to the criticisms. Plaintiffs in the Accutane litigation have cited some of Dr. Kappelman's work in support of a causal link between Accutane and inflammatory bowel disease. When Hoffmann-LaRoche sought to introduce other writings by Dr. Kappelman to rebut plaintiffs' evidence, New Jersey trial judge Carol E. Higbee ruled that Hoffmann-LaRoche could not introduce this evidence in documentary form but would have to depose Dr. Kappelman.

Based upon a *subpoena ad testificandum* filed 15 February 2013 by the Superior Court of Atlantic County, New Jersey, the Clerk of the Superior Court of Orange County, North Carolina, issued a subpoena on

15 February 2013, for Dr. Kappelman to be deposed on 14 March 2013 in Chapel Hill. On 5 March 2013 Dr. Kappelman filed a motion to quash the subpoena and for a protective order. The motion was heard on 8 April 2013, and on 16 April 2013 the trial court entered a protective order barring Hoffmann-LaRoche from deposing Dr. Kappelman as an "involuntary non-fact" witness, but stating that he could be deposed as an expert witness without violating the protective order. The order states in relevant part:[1]

> Applying a balancing test set forth in *Anker v. G.D. Searle & Co.*, 126 F.R.D. 515, 518 (M.D.N.C. 1989), the Court finds that Dr. Kappelman is not a party to this litigation; he is an independent researcher and has demonstrated that he is [an] involuntary non-fact witness who has substantially demonstrated that his deposition would result in undue hardship and would be substantially burdensome to him as an involuntary non-fact witness in the context of the defendants' mass tort litigation in New Jersey involving 7,700 pending claims; and, no party in that litigation has retained Dr. Kappelman as an expert. Therefore, Dr. Kappelman's motion for a protective order is granted with respect to future subpoenas to Dr. Kappelman as an involuntary non-fact witness.
>
> Notwithstanding this ruling, defendants may have subpoenas issued to Dr. Kappelman as an expert witness without violating this protective order, and Dr. Kappelman will be required to appear for a deposition if he is subpoenaed as an expert.

The parties agreed during the hearing that defendant had subpoenaed Dr. Kappelman as a fact witness; however, the order does not address whether Dr. Kappelman may be deposed as a fact witness, but only bars defendants from deposing Dr. Kappelman as "an involuntary non-fact witness." And, although the most common type of "non-fact

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1. As Dr. Kappelman notes, the trial court did not rule on his motion to quash the subpoena. At the time of the hearing on Dr. Kappelman's motion, the date set for his deposition had passed. Furthermore, a North Carolina trial court lacks authority to quash a subpoena issued by a New Jersey court. *See Capital Resources, LLC v. Chelda, Inc.*, __ N.C. App. __, __, 735 S.E.2d 203, 209 (2012) ("a superior court judge in this State does not have any authority over the courts of other states, and thus could not quash subpoenas issued by such courts") (citing *Irby v. Wilson*, 21 N.C. 568, 580 (1837)), *cert. denied*, __ N.C. __, 736 S.E.2d 191 (2013).

witness" is an expert witness,[2] the order also states that the protective order would not bar Hoffmann-LaRoche from issuing a subpoena for Dr. Kappelman as an expert witness. As a result, the only legal effect of the protective order is to prevent defendants from deposing Dr. Kappelman as an involuntary non-fact lay witness. Dr. Kappelman argues in his response to Hoffmann-LaRoche's dismissal motion that the trial court's order is "muddled" and "self-contradictory." However, Dr. Kappelman did not file a motion seeking clarification of the order. *See Alston v. Fed. Express Corp.*, 200 N.C. App. 420, 423-24, 684 S.E.2d 705, 707 (2009) ("Pursuant to Rule 60(b)(6)'s 'grand reservoir of equitable power,' the trial court had jurisdiction to revisit its order so that its intentions could be made clear.") (quoting *In re Oxford Plastics v. Goodson*, 74 N.C. App. 256, 259, 328 S.E.2d 7, 9 (1985)).

Dr. Kappelman appeals.

II. Hoffmann-LaRoche's Motion to Dismiss Appeal

On 23 July 2013 Hoffmann-LaRoche filed a motion seeking dismissal of Dr. Kappelman's appeal, arguing that Dr. Kappelman had appealed from an interlocutory order that did not affect a substantial right. We agree.

A. Interlocutory Nature of Appeal

According to N.C. Gen. Stat. § 1A-1, Rule 54(a), a "judgment is either interlocutory or the final determination of the rights of the parties." " '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.' " *Hill v. StubHub, Inc.*, __ N.C. App. __, __, 727 S.E.2d 550, 553-54 (2012) (quoting *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)), *disc. review denied*, 366 N.C. 424, 736 S.E.2d 757 (2013).

On appeal, Dr. Kappelman argues that we should treat the trial court's order as final based on his interpretation of the statement in the

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2. The order does not explain what this term means. There appear to be no cases in North Carolina defining this term. A "non-fact" witness may be an expert, *see*, *Express One Int'l, Inc. v. Sochata*, No. 3-97 CV3121-M, 2001 U.S. Dist. LEXIS 25281, at *2 (N.D. Tex. 2 March 2001) (noting that the "five non-fact witnesses are traditional experts whose involvement is solely for litigation to give opinions in their specific areas of expertise"). However, in particular circumstances a person may testify as a non-fact lay witness, *see*, *e.g.*, *Jones v Williams*, 557 So. 2d 262, 263, 266 (La. App. 4 Cir. 1990) (parking manager for defendant City of New Orleans and "plaintiff's only non-fact witness" testified regarding the City's customary practice regarding enforcement of parking regulations), *cert. denied*, 558 So. 2d 607, 1990 La. LEXIS 726 (La. 1990).

trial court's order that, notwithstanding the court's entry of a protective order, "defendants may have subpoenas issued to Dr. Kappelman as an expert witness without violating this protective order, and Dr. Kappelman will be required to appear for a deposition if he is subpoenaed as an expert." Dr. Kappelman interprets this as a ruling in which the trial court "unjustly compelled Dr. Kappelman to testify as an expert without compensation or limitations on the scope of the deposition." He contends that if Hoffmann-LaRoche issues a subpoena seeking to depose him as an expert witness, that he will not be permitted to raise any objections to the subpoena or the deposition and that the trial court's order "forecloses" his ability to challenge or seek a protective order, regardless of the scope of the deposition or his circumstances at the time. We disagree.

N.C. Gen. Stat. § 1A-1, Rule 26(c) provides in part that:

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the judge of the court in which the action is pending may make any order which justice requires to protect a party or person from unreasonable annoyance, embarrassment, oppression, or undue burden or expense[.] . . .

In order to determine whether a party or deponent has shown "good cause" for an order protecting him "from unreasonable annoyance, embarrassment, oppression, or undue burden or expense," the trial court must consider the specific discovery sought and the factual circumstances of the party from whom discovery is sought. *See*, *e.g.*, *Guessford v. Pa. Nat'l Mut. Cas. Ins. Co.*, 2013 U.S. Dist. LEXIS 71636, *9-10 (M.D.N.C., May 21, 2013) ("Rule 26(c)'s requirement of a showing of 'good cause' to support the issuance of a protective order . . . contemplates a particular and specific demonstration of fact") (quoting *Jones v. Circle K Stores*, 185 F.R.D. 223, 224 (M.D.N.C. 1999) (internal quotation omitted)), *partial summary judgment granted in part and denied in part on other grounds*, 2013 U.S. Dist. LEXIS 150070 (M.D.N.C. Oct. 18, 2013). Given that the trial court's order addressed only the type of testimony for which Dr. Kappelman might be deposed, and given that the trial court could not know in advance what specific circumstances might exist at the time of a future subpoena or what information Hoffmann-LaRoche might be seeking, we conclude that the order's statement that "Dr. Kappelman will be required to appear for a deposition if he is subpoenaed as an expert" is simply a reiteration of the first part of the same sentence which states that "defendants may have subpoenas issued to Dr. Kappelman as an expert witness without violating this protective

order." In other words, the trial court was merely emphasizing that if Hoffmann-LaRoche subpoenaed Dr. Kappelman as an expert witness, he could not argue that this violated the protective order. We hold, however, that in the event that Hoffmann-LaRoche seeks to depose Dr. Kappelman as an expert witness, he may seek a protective order under Rule 26(c), if appropriate.

We also reject Dr. Kappelman's contention that we should apply the reasoning of certain federal cases as a basis for treating this as an appeal from a final order. Dr. Kappelman cites several federal cases holding that, if a judge from a different district than the location of the trial enters an order denying discovery, the party seeking discovery may appeal, given that the party will not be able to raise the issue as part of an appeal from judgment in the case. Dr. Kappelman asserts, without citation to authority, that "[t]his rationale should apply equally to the appellant who is opposing discovery." However:

> The nonappealability of orders requiring the production of evidence from witnesses has long been established. In *Alexander v. United States*, 201 U.S. 117, 50 L. Ed. 686, 26 S. Ct. 356 (1906) . . . The Supreme Court held that the order directing the witnesses to testify and produce documents was interlocutory and could be challenged by the witnesses only upon an appeal from an adjudication of contempt. . . . [T]he Supreme Court has repeatedly held that an order denying a motion to quash, or an order compelling testimony or production of documents, is not final and, hence, is not appealable regardless of how the matter is raised.

Micro Motion, Inc. v. Exac Corp., 876 F.2d 1574, 1576-77 (Fed. Cir. 1989), *appeal dismissed*, 899 F.2d 1227 (Fed. Cir. 1990). The *Micro Motion* court explained further:

> We are mindful of the harshness inherent in requiring a witness to place themself in contempt to create a final appealable decision. . . . However, it is all too certain that the consequences of recognizing a *right* to appeal all orders refusing to quash a subpoena, even where such an order 'ends' ancillary proceedings against a non-party, would be to "constitute the courts of appeals as second-stage motion courts reviewing pretrial applications of all non-party witnesses alleging some damage because of the litigation." Thus, the courts, with rare exceptions, have opted to require that the contempt route be followed.

Micro Motion, 876 F.2d at 1577-78 (quoting *Borden Co. v. Sylk*, 410 F.2d 843, 846 (3d Cir. 1969)). Dr. Kappelman does not distinguish cases such as this or cite any authority to the contrary, and we conclude that "this issue would no more be immediately appealable as a 'collateral matter' under the federal test for interlocutory appeals than it is under the substantial rights doctrine." *Frost v. Mazda Motor of Am., Inc.*, 353 N.C. 188, 195 fn2, 540 S.E.2d 324, 328-29 fn2 (2000) (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 171-72, 40 L. Ed. 2d 732, 744-45, 94 S. Ct. 2140 (1974) (internal quotation omitted).

Dr. Kappelman also argues that the court's order was final, because it was "a final judgment as to [his] motion." However, "[a] final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Veazey*, 231 N.C. at 361-62, 57 S.E.2d at 381 (citation omitted) (emphasis added). The trial court's order addressed only the ancillary issue of Dr. Kappelman's entitlement to a protective order limiting the scope of deposition, and clearly did not resolve the case "as to all the parties" involved in the litigation pertaining to Accutane. In addition, all of Dr. Kappelman's appellate arguments are premised on the likelihood of future litigation in North Carolina. We conclude that Dr. Kappelman has attempted to appeal from an interlocutory order.

B. Substantial Right

"As a general rule, interlocutory discovery orders are not immediately appealable." *K2 Asia Ventures v. Trota*, 209 N.C. App. 716, 718-19, 708 S.E.2d 106, 108 (2011) (citing *Dworsky v. Insurance Co.*, 49 N.C. App. 446, 447, 271 S.E.2d 522, 523 (1980) ("orders denying or allowing discovery are not appealable since they are interlocutory and do not affect a substantial right which would be lost if the ruling were not reviewed before final judgment."). However, N.C. Gen. Stat. § 7A-27(b)(3)(a) permits immediate appeal from an interlocutory order that "[a]ffects a substantial right." *See also* § N.C. Gen. Stat. § 1-277(a) ("An appeal may be taken from every judicial order or determination of a judge . . . which affects a substantial right[.]").

" 'Essentially a two-part test has developed — the right itself must be substantial and the deprivation of that substantial right must potentially work injury . . . if not corrected before appeal from final judgment.' " *Braun v. Trust Dev. Group, LLC*, 213 N.C. App. 606, 609, 713 S.E.2d 528, 530 (2011) (quoting *Goldston v. American Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990)). "A substantial right is 'one which will clearly be lost or irremediably adversely affected if the order is not

reviewable before final judgment.' . . . Our courts generally have taken a restrictive view of the substantial right exception. . . . The burden is on the appellant to establish that a substantial right will be affected unless he is allowed immediate appeal from an interlocutory order." *Embler v. Embler*, 143 N.C. App. 162, 165-66, 545 S.E.2d 259, 262 (2001) (quoting *Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 142, 526 S.E.2d 666, 670 (2000) (internal quotation omitted), and citing *Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 335, 299 S.E.2d 777, 780 (1983), and *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 444 S.E.2d 252 (1994)).

Dr. Kappelman identifies two "substantial rights" that he contends are implicated by the trial court's order: his alleged right under the federal and state constitutions to be paid for expert testimony, and a right, based on Dr. Kappelman's contention that he qualifies as a "journalist," to refuse to divulge information that is protected by journalistic privilege. Dr. Kappelman speculates that Hoffmann-LaRoche may subpoena him as an expert witness in the future; that if this occurs, Hoffmann-LaRoche may be unwilling to pay him for his time,[3] or Hoffmann-LaRoche might seek information that Dr. Kappelman believes is privileged based on his assertion that he is a "journalist." It is undisputed that neither of these scenarios has yet occurred. Therefore, any opinion we might offer as to (1) Dr. Kappelman's right, if any, to a particular fee for his testimony; (2) whether Dr. Kappelman qualifies as a "journalist" or; (3) whether specific information is subject to a journalist's privilege would be entirely hypothetical and speculative. It is well-established that " 'courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, declare social status, deal with theoretical problems, give advisory opinions, answer moot questions, adjudicate academic matters, provide for contingencies which may hereafter rise, or give abstract opinions.' " *Baxter v. Jones*, 283 N.C. 327, 332, 196 S.E.2d 193, 196 (1973) (quoting *Little v. Trust Co.*, 252 N.C. 229, 243, 113 S.E. 2d 689, 700 (1960)).

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3. Dr. Kappelman does not discuss N.C. Gen. Stat. § 7A-305(d), which "sets out the costs that the trial court is 'required to assess.' Under . . . N.C. Gen. Stat. § 7A-305(d)(11), a trial court is required to assess costs for '[r]easonable and necessary fees of expert witnesses solely for actual time spent providing testimony at trial, deposition, or other proceedings.'" *Springs v. City of Charlotte*, 209 N.C. App. 271, 282, 704 S.E.2d 319, 327 (2011) (quoting *Lord v. Customized Consulting Specialty, Inc.*, 164 N.C. App. 730, 734, 596 S.E.2d 891, 895 (2004). "However, a trial court may tax expert witness fees as costs only when that witness is under subpoena." *Peters v. Pennington*, 210 N.C. App. 1, 26, 707 S.E.2d 724, 741 (2011) (citing *Jarrell v. Charlotte-Mecklenburg Hosp. Auth.*, 206 N.C. App. 559, 563, 698 S.E.2d 190, 193 (2010)).

We conclude that the trial court's order was interlocutory, that Dr. Kappelman has not identified any substantial right that would be jeopardized by delay of appeal, and that the issues raised by Dr. Kappelman all pertain to possible ramifications of a hypothetical subpoena that might or might not ever be issued, and thus do not present issues that are ripe for review. For these reasons, we conclude that Dr. Kappelman's appeal must be dismissed.

DISMISSED.

Judges STEPHENS and DAVIS concur.

JERRY M. MEDLIN, PLAINTIFF
v.
NORTH CAROLINA SPECIALTY HOSPITAL, LLC, TIMOTHY N. YOUNG, AND NORTH CAROLINA EYE, EAR, NOSE & THROAT, P.A., DEFENDANTS

No. COA13-818

Filed 1 April 2014

1. Appeal and Error—appealability—written order not entered

Plaintiff's motion to shorten time to notice hearing on plaintiff's motion to compel was not considered on appeal. No written order was ever entered; parties cannot appeal from and the Court of Appeals cannot consider an order which has not been entered.

2. Appeal and Error—interlocutory orders and appeals—privilege—substantial right

The Court of Appeals considered defendant hospital's appeal as to issues regarding privilege but did not consider the additional issues in an interlocutory order that did not affect a substantial right.

3. Discovery—written interrogatories—privilege—peer review documents

The trial court did not err in a medical malpractice case by requiring non-privileged questions to be answered regarding peer review documents. By requiring responses to written interrogatories instead of oral answers to deposition questions, the trial court gave defense counsel the opportunity to ensure that a witness did not inadvertently disclose information which went beyond the scope of the question asked.

4. Discovery—privileged documents—peer review—in camera inspection

The trial court did not err when it required defendant hospital to produce for *in camera* inspection alleged peer review privileged documents. The trial court had an interest in ensuring that the asserted information was indeed privileged and did not need to rely on the word of the interested party or its counsel.

5. Constitutional Law—ex parte hearings—notice—meaningful opportunity to be heard—deliberate choice to not attend

The trial court did not err in a medical malpractice case by allegedly holding *ex parte* hearings without affording defendant hospital adequate notice and a meaningful opportunity to be heard. What defendant characterized as an *ex parte* hearing without adequate notice to all parties was actually a properly noticed hearing that defendant made a deliberate choice not to attend.

6. Appeal and Error—interlocutory orders and appeals—no substantial right

Although defendant hospital contended that the trial court erred in a medical malpractice case when it awarded attorney fees on plaintiff's motions to compel, the issue was dismissed. Defendant failed to argue a substantial right.

7. Appeal and Error—sanctions—frivolous appeal—reasonable attorney fees

The Court of Appeals taxed defendant hospital personally with the costs of this frivolous appeal and the attorney fees incurred in this appeal by plaintiff. Pursuant to N.C. R. App. P. 34(c), the case was remanded to the trial court for a determination of the reasonable amount of attorney fees incurred by plaintiff in responding to this appeal.

Appeal by defendant North Carolina Specialty Hospital, LLC from orders entered 11 March 2013 and 14 March 2013 by Judge Paul G. Gessner in Superior Court, Durham County. Heard in the Court of Appeals 12 December 2013.

Bill Faison, for plaintiff-appellee.

Brown Law LLP, by Gregory W. Brown and Amy H. Hopkins, for defendant-appellant North Carolina Specialty Hospital, LLC.

STROUD, Judge.

Defendant North Carolina Specialty Hospital, LLC appeals orders addressing various motions regarding pretrial matters. For the following reasons, we affirm and remand to the trial court for determination of the reasonable amount of attorney fees incurred by plaintiff in responding to this appeal.

I. Background

On 5 January 2011, plaintiff filed a verified complaint against defendants for medical malpractice arising from plaintiff's cataract surgery, which was performed by defendant Timothy N. Young, an employee of defendant North Carolina Eye, Ear, Nose & Throat, P.A. Plaintiff alleged that he suffered permanent damage to his eye and extreme pain as a result of the negligent use of Methylene Blue in his eye. Methylene Blue is known to be toxic to the eye, but it was mistakenly used instead of VisionBlue, a non-toxic stain intended for use in eye surgery. On or about 21 March 2011, defendant North Carolina Specialty Hospital, LLC ("defendant Hospital") answered plaintiff's complaint by denying liability and asserting three "affirmative defenses," stated as a non-specific failure "to state facts sufficient to constitute a cause of action[;]" "all applicable statutes of limitation and repose[;]" and "[p]laintiff's failure to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure." Various pretrial motions, many involving discovery, ensued, and we will discuss only those relevant for purposes of this appeal.

On or about 7 March 2013, the trial court signed an order ("Order 1") addressing pretrial motions made by the parties. The order provided that

> the Court allows the Plaintiff's Motion to Shorten Time for giving notice of this hearing so that the hearing may go forward. Moreover, the Court in its discretion and pursuant to Paragraph 13 of the Consent Amended Discovery Scheduling Order of 3 October 2012 extends the time set forth in Paragraph 6 of that Order through and including March 8, 2013. In its discretion the Court denies the Hospital's Motion For Protective Order regarding depositions noticed for March 8, 2013, and further in its discretion orders that the depositions of Joy Boyd and Cathy Pruitt and Randy Pisko, and the Civil Procedure Rule 30(b)(6) Deposition of the Hospital . . . [shall go forward

> prior to 15 March 2013] under the terms and conditions as noticed by the Plaintiff.
>
> Plaintiff's Motion to Compel Discovery is noticed for hearing March 11, 2013. To the extent Hospital's Motion For Protective Order is directed at the Notice of Hearing and/or the timing of the Notice of Hearing for March 11, 2013, in the Court's discretion the time for giving notice is shortened to the time when it was given, and Hospital's Motion is denied, and hearing on Plaintiff's Motion to Compel Discovery shall go forward on March 11, 2013 as noticed. The Court has not taken up the substantive issues raised by the Plaintiff's Motion to Compel or the Hospital's Motion for Protective Order relating to the Plaintiff's Motion to Compel, leaving those matters for hearing on March 11, 2013.

On 14 March 2013, the trial court entered an order ("Order 2") regarding further pretrial motions. After reviewing numerous documents including motions, answers to interrogatories, a response to a request for production of documents, deposition transcripts, exhibits, and authority, the trial court found

> as a Fact that in the course of the depositions of Joy Boyd and Cathy Pruitt Hospital's counsel instructed both not to answer questions regarding the process of the investigation undertaken as a result of events described in the Plaintiff's complaint. The Court, in its discretion orders that the questions Joy Boyd was instructed not to answer all be answered as if posed by written interrogatories and counsel for the Hospital shall serve answers on counsel for Plaintiff by 4 o'clock p.m. March 15, 2013 by fax, (email if agreed to by the parties) or hand delivery as follows . . .

The trial court then recited portions of Joy Boyd's deposition and ordered

> the questions Cathy Pruitt was instructed not to answer as set out below be answered as if posed by written interrogatories and counsel for the Hospital shall serve answers on counsel for Plaintiff by 4 o'clock p.m. March 15, 2013 by fax (email if agreed to by the parties) or hand delivery as follows . . . .

The trial court then recited portions of Cathy Pruitt's deposition. The trial court went on to order

> that the Hospital shall provide a "Privilege Log" with the specificity as requested in Paragraph 23 of the Plaintiff's First Set of Interrogatories to Hospital and shall serve the "Privilege Log" on counsel for Plaintiff by 4 o'clock p.m. March 15, 2013 by fax, (email if agreed to by the parties) or hand delivery.
>
> The Court has reviewed Defendant Hospital's Exhibit 1 In Camera and in its discretion concludes that those documents were prepared pursuant to NCGS § 131E-95(b) and are protected from production by the peer review statues.
>
> The Court having determined that eighteen of the twenty-one questions Joy Boyd and Cathy Pruitt were instructed not to answer are ordered answered, and that the privilege log sought by Plaintiff of the Hospital is ordered produced that Plaintiff is entitled to recover attorneys' fees and costs for bringing forward his Rule 37 Motion. The Court reserves ruling on the amount for further hearings into the time this matter required of Plaintiff's counsel including bringing forward both motions to compel, preparing for hearing, attending hearing and preparing this Order.

Defendant Hospital appeals Order 1, Order 2, and "the March 11, 2013 Oral Order [made between Order 1 and Order 2] requiring the production of peer-review privileged documents for in camera review by the trial judge and allowing the Plaintiff's Motion to Shorten Time to Notice Hearing on the Plaintiff's Motion to Compel" ("Ruling").

II. Ruling

[1] As to the Ruling on the plaintiff's Motion to Shorten Time to Notice Hearing on "the Plaintiff's Motion to Compel[,]" no written order was ever entered. This Court has previously determined that parties

> cannot appeal from and this Court cannot consider an order which has not been entered. *See Munchak Corp. v. McDaniels*, 15 N.C. App. 145, 147–48, 189 S.E.2d 655, 657 (1972) ("The general rule is that, the mere ruling, decision, or opinion of the court, no judgment or final order being entered in accordance therewith, does not have the effect of a judgment, and is not reviewable by appeal or writ of error. As to oral opinions it is said that, a mere oral order or decision which has never been expressed in a written

> order or judgment cannot, under most authorities, support an appeal or writ of error. There is case authority in North Carolina for this rule. In *Taylor v. Bostic*, 93 N.C. 415 (1885) the trial court entered a written statement of his opinion, but no order or judgment was entered. The North Carolina Supreme Court held that the appeal was premature, there being no judgment and therefore no question of law presented from which appeal could be taken." (citations, quotation marks, and brackets omitted)).

Dafford v. JP Steakhouse LLC, 210 N.C. App. 678, 683, 709 S.E.2d 402, 406 (2011). Accordingly, we will not consider any arguments on appeal regarding the trial court's oral Ruling. *See id.*

III. Interlocutory Order

[2] Defendant Hospital acknowledges that its appeal is interlocutory but contends that a substantial right regarding "the production of privileged materials and testimony" would be affected should this Court not hear its appeal. Plaintiff contends that defendant Hospital's appeal asserts that it is regarding privileged material but in actuality the material is not privileged. Plaintiff further argues that defendant Hospital attempts to appeal a decision the trial court made upon its own request and other issues which in no way affect a substantial right.

> Generally, orders denying or allowing discovery are not appealable since they are interlocutory and do not affect a substantial right which would be lost if the ruling were not reviewed before final judgment. As this Court has explained: Our appellate courts have recognized very limited exceptions to this general rule, holding that an order compelling discovery might affect a substantial right, and thus allow immediate appeal, if it either imposes sanctions on the party contesting the discovery, or requires the production of materials protected by a recognized privilege.

Britt v. Cusick ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (Jan. 7, 2014) (No. COA13-387) (citations and quotation marks omitted). Accordingly, we consider defendant Hospital's appeal as to issues regarding privilege and these issues alone; *see id.*, to the extent that plaintiff is correct, and defendant Hospital has invited its own "error" or raised issues which would not affect a substantial right, we will consider whether said issues are appropriate for our substantive review on appeal.

IV. Depositions Regarding Peer Review Privileged Matters

[3] Defendant Hospital first contends that "[t]he Trial Court erred when it ruled that Plaintiff's Counsel could secure deposition testimony on Peer Review Privileged matters." Defendant Hospital argues that the trial court erred in Order 2 when it

> ordered that the depositions of Randi Shults, Joy Boyd, and Cathy Pruitt proceed without placing appropriate limitations on their scope to ensure that questions regarding matters that were the subject of evaluation and review by The Hospital's Peer Review Committee were not posed, thereby jeopardizing The Hospital's Peer Review Privilege[,]

and when it "ordered that the handful of questions that undersigned counsel instructed witnesses Joy Boyd and Cathy Pruitt not to answer on the basis of the Peer Review Privilege be answered as if posed by written interrogatories."

As to the trial court's alleged failure to limit the scope of various depositions, defendant Hospital makes no real argument other than stating that the trial court erred nor does defendant Hospital cite any law supporting this assertion. In addition, the trial court did actually limit the scope of the depositions and did not permit all of the questions requested by plaintiff. Indeed, in this argument the only relief defendant Hospital requests is that this Court "vacate Judge Gessner's 14 March 2013 Order requiring The Hospital to provide additional testimony from Ms. Boyd and Nurse Pruitt." Accordingly, we address only the issue regarding the trial court's order requiring Joy Boyd and Cathy Pruitt to answer certain questions which had been asked at the depositions in the form of interrogatories. *See Holleman v. Aiken*, 193 N.C. App. 484, 508, 668 S.E.2d 579, 594 (2008) ("[P]laintiff has cited no legal authority in support of her argument, and pursuant to North Carolina Rule of Appellate Procedure 28(b)(6), it is deemed abandoned. *See* N.C.R. App. P. 28(b)(6).").

In order to determine if the trial court erred in requiring individuals to provide allegedly privileged information we must first determine if the information is indeed privileged. Defendant Hospital contends that the requested information is privileged pursuant to North Carolina General Statute § 131E-95(b). Questions as to what is privileged pursuant to North Carolina General Statute § 131E-95(b) are reviewed *de novo*. *Bryson v. Haywood Reg'l Med. Ctr.*, 204 N.C. App. 532, 535, 694

S.E.2d 416, 419 ("Thus, we review de novo whether the requested documents are privileged under N.C. Gen. Stat. § 131E–95(b)."), *disc. review denied*, 364 N.C. 602, 703 S.E.2d 158 (2010).

As to North Carolina General Statute § 131E–95, this Court has stated,

> By its plain language, N.C. Gen. Stat. § 131E–95 creates three categories of information protected from discovery and admissibility at trial in a civil action: (1) proceedings of a medical review committee, (2) records and materials produced by a medical review committee, and (3) materials considered by a medical review committee. Additionally, N.C.G.S. § 131E–95 states: However, information, documents, or other records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the committee.

Woods v. Moses Cone Health Sys., 198 N.C. App. 120, 126, 678 S.E.2d 787, 791-92 (2009) (citation and quotation marks omitted), *disc. review denied*, 363 N.C. 813, 693 S.E.2d 353 (2010). Our Supreme Court has further clarified though that the

> provisions [in North Carolina General Statute § 131E–95] mean that information, in whatever form available, from original sources other than the medical review committee is not immune from discovery or use at trial merely because it was presented during medical review committee proceedings; neither should one who is a member of a medical review committee be prevented from testifying regarding information he learned from sources other than the committee itself, even though that information might have been shared by the committee.
>
> The statute is designed to encourage candor and objectivity in the internal workings of medical review committees. Permitting access to information not generated by the committee itself but merely presented to it does not impinge on this statutory purpose. These kinds of materials may be discovered and used in evidence even though they were considered by the medical review committee. This part of the statute creates an exception to materials which would otherwise be immune under the third category of items as set out above.

Shelton v. Morehead Memorial Hospital, 318 N.C. 76, 83-84, 347 S.E.2d 824, 829 (1986) (citation omitted).

Plaintiff contends that neither Joy Boyd nor Cathy Pruitt "are members of a peer review committee or ever met with a peer review committee related to this matter." While we do not have the entire deposition of either Joy Boyd or Cathy Pruitt, defendant Hospital's brief identifies Joy Boyd as the Hospital's Director of Surgical Services and Cathy Pruitt as a nurse who assisted another nurse in using the Pyxis machine that dispensed Methylene Blue. Defendant Hospital does not contend that Joy Boyd or Cathy Pruitt are members of the peer review committee or that they ever met with a peer review committee though it does contend that Joy Boyd prepared documents for review by the peer review committee. Defendant Hospital directs us to portions of the record which it contends show that Joy Boyd and Cathy Pruitt testified "that everything they did in terms of discussing and investigating the incident was done within the Peer Review Process[;]" however, the cited portion of the record includes statements made by defendant Hospital's attorney, not testimony from either Joy Boyd or Cathy Pruitt. Furthermore, even defendant Hospital's attorney stated in the cited portions,

> I asked each one of them, "was it your understanding when these conversations are going on that it was part of the peer-review process?" Ms. Boyd said *her role was to work with the risk manager to gather data at the direction of the peer-review committee*. That was what she says. '*I prepare things*' – page 25, line 2. '*I prepare things that go to the peer-review process*.' "

(Emphasis added.) But "prepar[ing] things" for a peer review committee does not necessarily mean that the information gathered is privileged:

> [t]he statute is designed to encourage candor and objectivity in the internal workings of medical review committees. Permitting access to information not generated by the committee itself but merely presented to it does not impinge on this statutory purpose. These kinds of materials may be discovered and used in evidence even though they were considered by the medical review committee.

Id.

Lastly, and most importantly, we have reviewed the questions which the trial court ordered Joy Boyd and Cathy Pruitt to answer in the form of responses to written interrogatories, and we disagree with defendant

Hospital's contentions that such questions are privileged pursuant to North Carolina General Statute § 131E–95. The questions are as follows:

- "Did you prepare a report as a result of your investigation?"
- "Tell me what you did. When you say you and she worked together what are you trying to describe to me?"
- "Well, tell me how it works. How did you work together, what did you do? You're – that's what I want to understand. If – If I were sitting there watching the two of you, tell me what I see you doing."
- "Tell me what I see the two of you doing."
- "Now when you say we prepare a document, who – who dictates it?"
- "Did you do that in this instance?"
- "What part of it did you prepare?"
- "In this instance did you make notes?"
- "Have you preserved those notes, the one made in this instance?"
- "Where do you keep those notes if you have preserved them in this instance?"
- "In this instance was the report that you prepared for this instance kept in risk management?"
- "[D]id you appear before a peer review committee to discuss this incident?"
- "Did you appear before the peer review committee in this instance?"
- "Did you investigate why Vision Blue was not in the Pyxis?"
- "So what mentoring did risk management do for you in this – in the interview process for this incident?"
- "Other than gathering factual information from the nurses did the report you generated do anything other than – anything else?"

- "Do you maintain a copy of the document you prepared in your offices or in the offices under your supervision and control?"
- "Did Joy Boyd interview you about this matter?"
- "Did you talk with Joy Boyd after this event occurred?"
- "At any time have you given a written statement to anyone regarding your interaction with Ms. Whitt relating to the removal of methylene blue from the Pyxis machine on May 19, 2008?"
- "Have you had an opportunity to review any statement that you might have – well, let [sic] see, have you had an opportunity to review any statements you might have given?"

The questions are not regarding the (1) proceedings of a medical review committee [or] (2) records and materials produced by a medical review committee[.]" *Woods*, 198 N.C. App. at 126, 678 S.E.2d at 792. While the questions may implicate "materials considered by a medical review committee[;]" *id.*, there is "an exception to materials which would otherwise be immune under the third category of items" for "information not generated by the committee itself but merely presented to it[.]" *Shelton*, 318 N.C. at 83-84, 347 S.E.2d at 829. To the extent that any questions Joy Boyd and Cathy Pruitt were ordered to answer were regarding information that is protected by North Carolina General Statute § 131E-95, the questions most certainly fall into the exception of the third category. *See id.* In addition, by requiring responses to written interrogatories instead of oral answers to deposition questions, the trial court gave defendant's counsel the opportunity to ensure that a witness does not inadvertently disclose information which may go beyond the scope of the question asked. Accordingly, the trial court did not err in requiring the non-privileged questions to be answered, and this argument is overruled.

V. *In Camera* Review

[4] Defendant Hospital next contends that "the trial court erred when it required the defendant [Hospital] . . . to produce for *in camera* inspection [of] peer review privileged documents." (Original in all caps.) Defendant Hospital argues that the trial court should have relied upon other evidence to determine that the documents were indeed privileged, as defendant Hospital claimed they were. Defendant Hospital cites no authority for its assertion that if a party claims that a document is

privileged, then the trial court must accept this claim without reviewing the document in camera to make an independent legal determination of privilege. Indeed, there is abundant authority otherwise. *See*, *e.g.*, *Bryson*, 204 N.C. App. at 535, 694 S.E.2d at 419 (noting that whether a document is privileged pursuant to North Carolina General Statute § 131E–95 is a question of law). Both the United States Supreme Court and our Supreme Court have approved *in camera* review of information which is subject to a claim of privilege:

> More than a century ago, this Court held that the responsibility of determining whether the attorney-client privilege applies belongs to the trial court, not to the attorney asserting the privilege. Thus, a trial court is not required to rely solely on an attorney's assertion that a particular communication falls within the scope of the attorney-client privilege. In cases where the party seeking the information has, in good faith, come forward with a nonfrivolous assertion that the privilege does not apply, the trial court may conduct an *in camera* inquiry of the substance of the communication. *See State v. Buckner*, 351 N.C. 401, 411–12, 527 S.E.2d 307, 314 (2000) (trial court must conduct *in camera* review when there is a dispute as to the scope of a defendant's waiver of the attorney-client privilege, such as would be the case when a defendant has asserted an ineffective assistance of counsel claim); *State v. Taylor*, 327 N.C. at 155, 393 S.E.2d at 807 (same); *see also Willis v. Duke Power Co.*, 291 N.C. 19, 36, 229 S.E.2d 191, 201 (1976) (trial court may require *in camera* inspection of documents to determine if they are work-product).
>
> We note that the United States Supreme Court has also placed its imprimatur on the need for *in camera* inspections in circumstances where application of the privilege is contested. *Zolin*, 491 U.S. 554, 105 L.Ed. 2d 469 (*in camera* review to determine whether the crime-fraud exception to attorney-client privilege applies); *United States v. Nixon*, 418 U.S. 683, 41 L.Ed. 2d 1039 (1974) (*in camera* review to determine whether communications are subject to the executive privilege). The necessity for an *in camera* review of attorney-client communications in some cases is also endorsed by the Restatement of the Law Governing Lawyers: In cases of doubt whether the

> privilege has been established, the presiding officer may examine the contested communication *in camera*.

In re Investigation of Death of Eric Miller, 357 N.C. 316, 336-37, 584 S.E.2d 772, 787 (2003) (citations and quotation marks omitted). Although *Miller* addressed attorney-client privilege, the general principles which apply here are the same: the determination of privilege is a question of law which the trial judge must decide and *in camera* review of the evidence in question is proper. *See generally id.* Thus, the case law supports that on the question of privilege, the trial court certainly has an interest in ensuring that the asserted information is indeed privileged and need not rely on the word of the interested party or its counsel. *See generally id.*

Defendant Hospital goes on to contend that the trial court's "*in camera* review has colored its reception to The Hospital's defenses in this case and, if left unchecked, will likely produce a damaging effect on Peer Review Investigations[.]"[1] Defendant Hospital cites to portions of the trial court's statements in court that "someone is not acting reasonably," claiming that the trial court's review of the evidence caused the court to be "unmistakabl[y]" "prejudice[d]" against it. But the trial court did not indicate *which* party may not be "acting reasonably," and even assuming *arguendo* the trial court was implying that defendant Hospital was being unreasonable there is absolutely no evidence that the trial court made such statements because of the documents it reviewed *in camera*. Defendant Hospital "doth protest too much, methinks." William Shakespeare, *Hamlet* act 3, sc. 2.

In addition, because of their duty to rule upon claims of privilege and admissibility of evidence, it is extremely common for trial judges to acquire knowledge of evidence which is privileged, irrelevant, unfairly prejudicial, illegally gathered, or otherwise incompetent, but they also are quite accustomed to ruling upon cases without consideration of the content of any privileged or incompetent evidence previously viewed. Were we to accept defendant Hospital's argument, a trial judge would need to be recused after any *in camera* consideration of seriously damaging evidence, even if the judge determines that the evidence is protected by privilege, upon the theory that the trial judge may then be prejudiced against the party who sought to protect the evidence. There

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1. We also note that the documents which defendant Hospital claims that the trial court should not have reviewed *in camera* were not included in the record on appeal so that we could also review them *in camera*. Presumably, defendant Hospital feared that we, like the trial court, would be unable to maintain our impartiality if we were to review these records.

is simply no legal basis for such a claim, nor any factual basis to think that such a thing happened in this case. This argument is overruled.

VI. Notice

[5] Defendant Hospital next contends that "the trial court erred in holding ex parte hearings without affording the defendant [Hospital] . . . adequate notice and a meaningful opportunity to be heard." (Original in all caps.) The hearing of which defendant complains here was the 6 March 2013 hearing as to defendant Hospital's Motion for Protective Order. Yet what defendant seeks to characterize as an *ex parte* hearing without adequate notice to all parties was actually a properly noticed hearing that defendant Hospital made a deliberate choice not to attend. Even according to defendant Hospital's brief, after being notified of the time of the hearing, "[t]he Hospital undertook great efforts to inform the Court that it could not attend the 6 March 2013 hearing on its Motion[.]" Indeed, the record contains a letter from defendant Hospital's counsel noting that though aware of the hearing "none of our team is available to be heard this week. . . . For our part, we simply have other long-standing obligations in other cases in order to be ready to try this case." Defendant Hospital's "long-standing obligations in other cases" was, according to defendant Hospital, a meeting with expert witnesses at counsel's office, and use of the word "team" seems to indicate that defendant Hospital's counsel's firm does have more than one attorney. Defendant's counsel made the decision that not even one member of the "team" could attend the hearing on 6 March 2013, and that is their prerogative, but it does not entitle them to relief. Defendant Hospital had both notice of the hearing and an opportunity to be heard; defendant Hospital just chose not to exercise the opportunity. The fact that defendant Hospital chose not to attend without filing any motion requesting a continuance or other relief, and according to its own letter instead chose to interview expert witnesses, in no way indicates a due process violation on the part of the trial court. *See generally State v. Poole*, ___ N.C. App. ___, ___, 745 S.E.2d 26, 34 (" 'The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.' *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed. 2d 18, 32 (1976) (citation and quotation marks omitted)."), *disc. review denied and appeal dismissed*, ___ N.C. App. ___, 749 S.E.2d 885 (2013). Accordingly, this argument is overruled.

VII. Sanctions

[6] Lastly, defendant Hospital contends that "the trial court erred when it awarded attorney's fees on the plaintiff's motions to compel."

(Original in all caps.) In Order 2, the trial court stated, "Plaintiff is entitled to recover attorneys' fees and costs for bringing forward his Rule 37 Motion. The Court reserves ruling on the amount for further hearings into the time this matter required[.]"

> [A]n appeal from an award of attorneys' fees may not be brought until the trial court has finally determined the amount to be awarded. For this Court to have jurisdiction over an appeal brought prior to that point, the appellant would have to show that waiting for the final determination on the attorneys' fees issue would affect a substantial right.

Triad Women's Ctr., P.A. v. Rogers, 207 N.C. App. 353, 358, 699 S.E.2d 657, 660-61 (2010). As defendant Hospital failed to argue a substantial right as to attorneys' fees, we dismiss this portion of defendant Hospital's appeal as interlocutory. *See id.*

[7] We further note that pursuant to North Carolina Rule of Appellate Procedure 34 plaintiff has also filed a motion requesting this Court to sanction defendant Hospital because defendant Hospital's appeal was frivolous. *See* N.C.R. App. P. 34. We agree that most of defendant Hospital's arguments lack legal or factual basis and believe it is appropriate to sanction defendant Hospital the cost of plaintiff's attorney's fees regarding this appeal.

> [W]e therefore tax [defendant Hospital] personally with the costs of this appeal and the attorney fees incurred in this appeal by [plaintiff]. Pursuant to Rule 34(c), we remand this case to the trial court for a determination of the reasonable amount of attorney fees incurred by [plaintiff] in responding to this appeal.

Ritter v. Ritter, 176 N.C. App. 181, 185, 625 S.E.2d 886, 888-89, *disc. review denied and appeal dismissed*, 360 N.C. 483, 632 S.E.2d 490 (2006).

VIII. Conclusion

For the foregoing reasons, we affirm and remand in part.

AFFIRMED and REMANDED in part.

Judges HUNTER, JR., Robert N. and DILLON concur.

VICKIE MILLER, EMPLOYEE/PLAINTIFF
v.
CAROLINAS MEDICAL CENTER—NORTHEAST, SELF-INSURED EMPLOYER, DEFENDANT

No. COA13-1028

Filed 1 April 2014

1. Workers' Compensation—average weekly wage—Form 21 agreement—rescission—verification provision—reasonable time

The Industrial Commission erred in a workers' compensation case by reforming the amount of plaintiff employee's average weekly wage from the amount contained in the Form 21 agreement that had been approved by the Full Commission in 2007. The Full Commission lacked the authority to change plaintiff's average weekly wage since any mistake by the parties in its calculation was a mistake of law, not of fact and, therefore, not subject to rescission. However, a party to a Form 21 agreement which contains a verification provision but no provision regarding the time by which verification must be sought cannot assert a right to seek verification once a "reasonable time" has passed.

2. Workers' Compensation—temporary total disability modification—additional benefits claim—timeliness

The Industrial Commission did not err in a workers' compensation case by allowing plaintiff's claim for additional benefits relating to her 2006 injury even though defendants contended they were time-barred by either N.C.G.S. §§ 97-25.1 or 97-47. Plaintiff timely filed her claim for additional benefits. However, the amount of temporary total disability due to plaintiff for the periods of her disability from 2008-2010 was modified based on the Commission's improper modification of the Form 21 agreement.

Appeal by Defendant from opinion and award entered 30 May 2013 by the North Carolina Industrial Commission. Heard in the Court of Appeals 23 January 2014.

The Sumwalt Law Firm, by Vernon Sumwalt, for Plaintiff.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Jeffrey A. Kadis, M. Duane Jones, and Melissa H. Grimes, for Defendant.

DILLON, Judge.

Defendant Carolinas Medical Center — Northeast appeals from an opinion and award of the Full Commission of the North Carolina Industrial Commission reforming a Form 21 agreement executed by Defendant and Plaintiff Vickie Miller and granting Plaintiff's claim for additional workers' compensation benefits relating to a previously determined compensable injury. For the following reasons, we affirm in part, vacate in part, and reverse and modify in part.

I. Factual & Procedural Background

Plaintiff was thirty-two years old and had been employed by Defendant as an emergency room nurse for more than eleven years at the time of her hearing before the Full Commission. The record evidence, as presented before the Full Commission, tends to show the following: On 21 August 2006, Plaintiff sustained an injury to her lower back while working within the scope of her employment with Defendant. Defendant did not contest the compensability of Plaintiff's injury and paid for Plaintiff's medical treatment through 26 December 2006, when Plaintiff's physician, Dr. Michael Meighen, determined that Plaintiff had reached maximum medical improvement and assigned her a five percent permanent partial disability (PPD).

The parties signed a Form 21 agreement entitling Plaintiff to five percent PPD as compensation for her 2006 injury consistent with Dr. Meighen's determination. The PPD award was calculated based on an average weekly salary of $689.21 and corresponding compensation of $459.50. The Form 21 agreement was approved by the Full Commission on 29 November 2007.

Plaintiff proceeded to perform her job duties and did not seek further treatment for her back until 9 September 2008, when she returned to Dr. Meighen reporting increased pain in her lower back. Ultimately, Dr. Meighen opined that Plaintiff's "issues [were] unrelated to any work-related injury[,]" speculating that Plaintiff might have contracted Lyme disease. As a result of Dr. Meighen's determination, Defendant filed a Form 61 on 26 September 2008 denying Plaintiff further coverage for medical treatment relating to her 2006 injury.

On 31 December 2008, Plaintiff presented for treatment with Dr. Brian Rose, an orthopedic surgeon who specializes in treating spinal injuries. Dr. Rose opined that Plaintiff's back issues "likely correspond[ed] to her original work injury."

On 17 July 2009, Plaintiff presented for treatment with Dr. Daniel Oberer, a board-certified neurosurgeon, who determined that Plaintiff's back injury required surgery. Dr. Oberer performed three surgical procedures on Plaintiff. Although the first two procedures failed to produce the desired results, the third procedure, which was performed on 1 November 2010, proved successful. Plaintiff thus returned to her full-time nursing position with Defendant on 31 December 2010 and has continued working in that capacity ever since.

In November 2010, Plaintiff filed a Form 18M with the Commission, seeking medical compensation for her 2006 injury in addition to the coverage already provided under the Form 21 agreement that had been approved by the Full Commission in 2007. On 29 August 2011, Plaintiff filed an Amended Form 18, alleging that there had been a "change of condition" since she entered into the Form 21 agreement. Plaintiff also requested that her claim be assigned for hearing, asserting that Defendant had underpaid her PPD benefits "based on [a] miscalculation of [her] average weekly wage" in the Form 21 agreement. In response, Defendant filed a Form 33R asserting that Plaintiff had "failed to make her claim regarding a change of condition within 2 years of the last payment of medical compensation" and that, accordingly, her claim was barred under the applicable statute of limitations.

On 17 November 2011, Plaintiff's claim came on for hearing before Deputy Commissioner James C. Gillen, who ultimately entered an opinion and award favorable to Plaintiff. Defendant appealed to the Full Commission, which, by opinion and award entered 30 May 2013, affirmed with modifications the Deputy Commissioner's decision. The substance of the Full Commission's opinion and award, in pertinent part, was as follows:

> (1) The Form 21 agreement was reformed by the Commission to reflect what it determined to be the correct average weekly wage, $691.11, instead of $689.21, to which the parties had agreed in the original Form 21 agreement;
>
> (2) Defendant was ordered to pay Plaintiff $18.90, representing the deficiency owed to Plaintiff as a result of the new computation of the average weekly wage;
>
> (3) Plaintiff's claims for additional benefits relating to the August 2006 accident were not time-barred;
>
> (4) Defendant was ordered to pay Plaintiff temporary total disability benefits in the amount of $460.76 – an amount

> based on the recalculated average weekly benefits – for the periods between 2008 and 2010 that Plaintiff missed work due to her injury; and
>
> (5) Defendant was ordered to pay Plaintiff's medical bills incurred subsequent to the Form 21 agreement relating to Plaintiff's back injury.

From this opinion and award, Defendant appeals.

II. Analysis

A. Standard of Review

Our standard of review is well-established:

> Our review of an opinion and award by the Commission is limited to two inquiries: (1) whether there is any competent evidence in the record to support the Commission's findings of fact; and (2) whether the Commission's conclusions of law are justified by the findings of fact. If supported by competent evidence, the Commission's findings are conclusive even if the evidence might also support contrary findings. The Commission's conclusions of law are reviewable *de novo*.

Legette v. Scotland Mem'l Hosp., 181 N.C. App. 437, 442–43, 640 S.E.2d 744, 748 (2007) (internal citations omitted).

B. Reformation of the Form 21 Agreement

[1] Defendant first contends that the Full Commission erred in reforming the amount of the average weekly wage from the amount contained in the Form 21 agreement that had been approved by the Full Commission in 2007. We agree.

With respect to Plaintiff's average weekly wage, the parties agreed in the Form 21 agreement that "[t]he average weekly wage of the employee at the time of the injury, including overtime and allowances, was $689.21, subject to verification[.]" It is unclear whether, in changing the average weekly wage figure from $689.21 to $691.11, the Full Commission was *rescinding* the "average weekly wage" provision in the Form 21 agreement pursuant to N.C. Gen. Stat. § 97-17, or whether the Full Commission was simply *enforcing* the "average weekly wage" provision, specifically, the phrase which provides that the calculation was "subject to verification." We believe, in either case, that the Full Commission erred in changing the agreed-upon figure for the reasons stated below.

To the extent that the Full Commission's "reformation" constituted a *rescission* of the Form 21 agreement, we believe that we are compelled under *Swain v. C & N Evans Trucking Co., Inc.*, 126 N.C. App. 332, 484 S.E.2d 845 (1997), to conclude that the Full Commission lacked the authority to change the Plaintiff's average weekly wage since any mistake by the parties in its calculation was a mistake of law, not of fact and, therefore, not subject to rescission.

Rescission of a workers' compensation settlement agreement, such as a Form 21, is governed by N.C. Gen. Stat. § 97-17, which provides, in pertinent part, as follows:

> No party to any agreement for compensation approved by the Commission shall deny the truth of the matters contained in the settlement agreement, unless the party is able to show to the satisfaction of the Commission that there has been error due to fraud, misrepresentation, undue influence or *mutual mistake*, in which event the Commission may set aside the agreement. Except as provided in this subsection, the decision of the Commission to approve a settlement agreement is final and is not subject to review or collateral attack.

N.C. Gen. Stat. § 97-17(a) (2011) (emphasis added). The foregoing provision "provides the Commission with the authority to set aside a Form 21 Agreement entered into upon a mutual mistake of fact." *Foster v. Carolina Marble & Tile Co., Inc.*, 132 N.C. App. 505, 508-09, 513 S.E.2d 75, 78 (1999) (citing N.C. Gen. Stat. § 97-17) (emphasis added). "A mistake of law, however, unless accompanied by fraud, misrepresentation, undue influence, or abuse of a confidential relationship, 'does not affect the validity of a contract.' " *Id.* at 509, 513 S.E.2d at 78 (citation omitted). In *Swain*, we addressed the issue of whether the Commission should have set aside a Form 21 agreement on grounds of an "alleged error in the Agreement relat[ing] to the computation of the [claimant's] 'average weekly wages.' " *Swain*, 126 N.C. App. at 335, 484 S.E.2d at 848. We held the following:

> The determination of the plaintiff's "average weekly wages" requires application of the definition set forth in the Workers' Compensation Act, N.C.G.S. § 97-2(5) (1991), and the case law construing that statute and thus raises an issue of law, not fact. *See Lawrence v. Tise*, 107 N.C. App. 140, 145, 419 S.E.2d 176, 179 (1992) (legal issue presented where resolution of issue requires application of

> fixed rules of law); *Craft v. Bill Clark Construction Co.*, 123 N.C. App. 777, 780, 474 S.E.2d 808, 810-11 (not always appropriate to deduct expenses incurred in earning those wages in computing "average weekly wages"), *disc. rev. denied*, 345 N.C. 179, 479 S.E.2d 203 (1996). Because there is no evidence of fraud, misrepresentation, undue influence or abuse of a confidential relationship, any mistake made by either or both of the parties to the Agreement in the computation of the "average weekly wages" is not a basis for setting it aside.

Id. In *Foster*, we construed *Swain* as standing for the proposition that where "the parties needed to look to the Act, as well as the caselaw [sic] construing the Act, in order to determine the correct amount of the plaintiff's average weekly wages, . . . the issue [was] one of law, not fact." *Foster*, 132 N.C. App. at 509, 513 S.E.2d at 78.

Here, the Full Commission expressly found that the average weekly wage figure of $689.21 set forth in the original Form 21 agreement had been calculated by (1) dividing Plaintiff's earnings for the prior 52 weeks by 365 and then (2) multiplying the quotient by 7. The Commission further found that our General Statutes – specifically, N.C. Gen. Stat. § 97-2(5) – do not provide for the calculation of the average weekly wage to be made in the manner that had been employed in the original Form 21 agreement, but instead require that the calculation be made by dividing Plaintiff's earnings for the previous 52 weeks by 52, which, in this case, would yield a quotient of $691.11.

Applying *Swain*, we conclude that the alleged error in computing Plaintiff's average weekly wages on the parties' Form 21 agreement constituted an error of law, not of fact. As reflected in the Commission findings, the Commission's review of the purported computational error, as well as the propriety of the method which had produced that error, required reference to, and construction of, the provisions of our General Statutes. The nature of this inquiry clearly reveals the asserted error as one of law. Accordingly, we hold that based on the precedent of this Court, the Commission erred in setting aside the original Form 21 agreement. *Swain*, 126 N.C. App. at 335, 484 S.E.2d at 848; Foster, 132 N.C. App. at 509, 513 S.E.2d at 78.[1]

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1. We note that the Commission cites *Bond*, 139 N.C. App. 123, 532 S.E.2d 583 (2000), in its opinion and award as supportive of its decision to reform the Form 21 agreement. The procedural posture presented in *Bond*, however, renders that case inapplicable. In *Bond*, the plaintiff appealed to this Court, assigning error to the computational method

Plaintiff alternatively argues that the Full Commission was not actually *rescinding* the parties' agreement in Form 21 agreement concerning the average weekly wage figure, but rather *enforcing* a contractual provision therein that provides that the average weekly wage figure is "subject to verification." To the extent that the Full Commission was merely *enforcing* this verification provision, we believe that our analysis in *Swain* does not apply because, as we noted in *Pruett v. Pruett Floor Coverings*, 2004 WL 383281 (N.C. App. 2004) (unpublished), after *Swain* was decided, the verification provision was not made part of the standard Form 21 agreement until after *Swain*.[2] In other words, the standard Form 21 which was analyzed by this Court in *Swain* did not contain the verification provision.

In the present case, Defendant essentially argues that the parties do not have the right to seek verification of the average weekly wage under the verification provision of the Form 21 agreement once the agreement has been approved by the Full Commission.[3] The Form 21 agreement does not specify any time by which either party seeking verification of the average weekly wage figure must request such verification. Our Supreme Court has held that when a contract does not specify a time by which some duty or right therein is to be performed or exercised, "a reasonable time will be implied as a matter of law." *Colt v. Kimball*, 190 N.C. 169, 173, 129 S.E. 406, 409 (1925) (holding that under a contract to deliver goods, and no time of delivery is specified, delivery must be made within a "reasonable time"); *see also Trust Co. v. Ins. Co.*, 199 N.C. 465, 154 S.E. 743 (1930) (holding that where a policyholder had the right to seek reinstatement of his policy, "[i]f no time for the performance of an obligation is agreed upon by the parties, then the law prescribes that the act must be performed within a reasonable time"); *Lewis v. Allred*, 249 N.C. 486, 106 S.E.2d 689 (1959) (holding that where a contract to

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used by the Commission in its opinion and award from which the plaintiff was appealing. *Id.* at 127, 532 S.E.2d at 586. Here, Plaintiff is not appealing from an opinion and award in which the allegedly erroneous computation was made; rather, Plaintiff has raised the alleged error in order to invalidate the original Form 21 agreement.

2. The revised Form 21 also provides that the parties to an agreement may agree to waive the "subject to verification" language.

3. We note that in *Pruett* we held that the parties had the right to request the Full Commission to "verify" the average weekly wage figure contained in a Form 21 agreement. *Pruett*, 2004 WL 383281, at *5 (noting that "[t]he present printed Form 21 explicitly states that the listed wage is "subject to verification"). However, it does not appear that either party in that case raised the argument raised by Defendant in this case, as we did not address the argument.

sell land does not specify a closing date, "the law implies that it will be done within a reasonable time"). Following these principles, we hold that a party to a Form 21 agreement *which contains a verification provision but no provision regarding the time by which verification must be sought* cannot assert a right to seek verification once a "reasonable time" has passed.

In *Colt*, our Supreme Court stated that what constitutes a "reasonable time" is "generally a mixed question of law and fact, and, therefore, for the [fact-finder], but when the facts are simple and admitted, and only one inference can be drawn, it is a question of law." 190 N.C. at 174, 129 S.E. at 409. The Court, further stated that "[w]here the delay is so great as to support only one inference in the minds of all reasonable persons, then it is clearly the duty of the [court] to declare it unreasonable as a matter of law." *Id.*

In the present case, the findings made by the Full Commission – the finder of fact in this case – and the record on appeal reveal that the parties entered into the Form 21 agreement; the Form 21 agreement was approved by the Full Commission in November 2007; Defendant tendered and Plaintiff accepted benefits based on the average weekly wage calculation in the Form 21 agreement; and Plaintiff did not file any request with the Full Commission seeking verification of the calculation of her average weekly wage until her attorney filed an Amended Form 18 in August 2011.

Generally, the determination as to what constitutes a reasonable time would be a question to be resolved by the Full Commission, as the finder of fact. However, in this case, we believe that Plaintiff waited an unreasonable amount of time to seek verification, as a matter of law. We believe that, under the facts of this case, by August 2011 – being more than three and one half years after the initial benefits had been tendered and accepted and the Form 21 agreement had been approved by the Full Commission - *neither party* had the right to seek verification. Accordingly, we hold that, with respect to any claim for benefits arising out of the August 2006 accident, Plaintiff's average weekly wage is deemed to be $689.21 as agreed upon by the parties in their Form 21 agreement.

C. Additional Medical Treatment

[2] Defendant further argues that the Commission erred in allowing Plaintiff's claim for additional benefits relating to her 2006 injury, contending that her claim for additional benefits was time-barred by either N.C. Gen. Stat. § 97-25.1 or N.C. Gen. Stat. § 97-47. We disagree.

N.C. Gen. Stat. § 97-25.1 imposes, in pertinent part, the following limitation upon a claimant's right to seek medical compensation:

> The right to medical compensation shall terminate two years after the employer's last payment of medical or indemnity compensation unless, prior to the expiration of this period, . . . the employee files with the Commission an application for additional medical compensation which is thereafter approved by the Commission[.]

N.C. Gen. Stat. § 97-25.1 (2011).

Moreover, although N.C. Gen. Stat. § 97-47 authorizes the Commission to increase the amount of workers' compensation benefits previously awarded to a claimant where there is "a change in condition" – which "[o]ur case law defines . . . as a condition occurring after a final award of compensation that is 'different from those existent when the award was made' [and that] results in a substantial change in the physical capacity to earn wages," *Pomeroy v. Tanner Masonry*, 151 N.C. App. 171, 179, 565 S.E.2d 209, 215 (2002) (quoting *Weaver v. Swedish Imports Maintenance, Inc.*, 319 N.C. 243, 247, 354 S.E.2d 477, 480 (1987)) – the Commission's authority to review an award for a change of condition is expressly limited by the statute's mandate that "no such review shall be made after two years from the date of the last payment of compensation pursuant to an award . . . ." N.C. Gen. Stat. § 97-47 (2011).

The issues thus are (1) the date on which Defendant made its last payment of medical or indemnity compensation on Plaintiff's behalf; and (2) whether Plaintiff filed her request for additional medical benefits within two years of that date.

1. Defendant's Last Medical or Indemnity Payment

The record reveals that Defendant made the last *indemnity* payment on 6 December 2007, which was more than two years prior to the date on which Plaintiff filed her claim for additional benefits, in November 2010, when she filed her Form 18M. With respect to Defendant's last medical payment, the Commission's opinion and award includes the following pertinent finding of fact and conclusion of law:

> [Finding of fact] 15. On January 20, 2009, Defendant last paid $556.80 to Armstrong & Armstrong, a rehabilitation company, for rehabilitative services in Plaintiff's claim.
>
> . . . .

> [Conclusion of law] 7. Rehabilitation services, including nurse case management services, are a form of "medical compensation" under the statutory definition of that term. *See* N.C. Gen. Stat. § 97-2(19).

Defendant does not dispute that it tendered a payment to Armstrong & Armstrong, Inc. (A&A) on 20 January 2009 on Plaintiff's behalf. Rather, Defendant contends that, given the nature of the services provided by A&A in connection with Plaintiff's claim, this payment did not constitute a payment of "medical compensation" within the meaning of the North Carolina Workers' Compensation Act, and that the last medical payment was in fact made on 11 November 2008, slightly more than two years before Plaintiff filed her Form 18M with the Commission. Defendant points to evidence presented before the Commission indicating that A&A merely provided medical case management services – as opposed to actual medical treatment or other services that could be properly characterized as "effecting a cure or giving relief" to Plaintiff's medical condition – and that, in the instant case, the "sole purpose" of A&A's involvement was to schedule a single medical appointment on Plaintiff's behalf.

The relevant provision of our General Statutes defines "medical compensation" as follows:

> The term "medical compensation" means medical, surgical, hospital, nursing, and rehabilitative services, including, but not limited to, attendant care services prescribed by a health care provider authorized by the employer or subsequently by the Commission, vocational rehabilitation, and medicines, sick travel, and other treatment, including medical and surgical supplies, as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability[.]

N.C. Gen. Stat. § 97-2(19) (2011). We note our General Assembly's employment of the language "but not limited to" as indicative of its intent to set out a *non-exhaustive* list of what might constitute "rehabilitative services" in this context while affording some room for judicial augmentation. We also note that a narrow construction of this provision would undermine the oft-stated and axiomatic principle mandating that the workers' compensation provisions of our General Statutes be construed liberally in the claimant's favor. *Hollin v. Johnston County Council on Aging*, 181 N.C. App. 77, 84, 639 S.E.2d 88, 93 (2007) ("It is well established in North Carolina that the Workers' Compensation Act

should be liberally construed and that [w]here any reasonable relationship to employment exists, or employment is a contributory cause, the court is justified in upholding the award as arising out of employment."). Bearing these principles in mind, while every expense paid might not be considered "medical compensation" under N.C. Gen. Stat. § 97-2(19), we believe that the services provided by A&A in the present case do fall within the statute's ambit. While it is true that A&A did not provide "treatment" or "rehabilitative services" to Plaintiff in the conventional sense, its role as an administrative intermediary was necessary to ensure that Plaintiff received the treatment determined to be appropriate by the Commission in order to "effect a cure or give relief for" Plaintiff's compensable back injury. N.C. Gen. Stat. § 97-2(19). We, therefore, hold that Defendant last provided "medical compensation" for Plaintiff's 2006 injury when it tendered its payment to A&A on 20 January 2009.

2. Plaintiff's Request for Additional Benefits

The sole remaining issue is whether Plaintiff filed her request for additional benefits within two years of 20 January 2009. The Commission found that Plaintiff filed her Form 18M on 6 October 2010. However, Defendant states in its brief that Plaintiff filed her Form 18M on 16 November 2010 and that it was received by the Commission on 23 November 2010. In either case, given our conclusion that Defendant's 20 January 2009 payment to A&A constituted the last medical payment, we hold that Plaintiff timely filed her claim for additional benefits. In light of our resolution of the issue concerning the Commission's modification of the Form 21 agreement, however, we modify the amount of temporary total disability due to Plaintiff for the periods of her disability from 2008-2010 as set forth in our Conclusion below.

III. Conclusion

We vacate paragraph 1 of the Full Commission's 30 May 2013 opinion and award modifying the average weekly wage figure in the Form 21 agreement from $689.21 to $691.11; vacate paragraph 2 of the Full Commission's opinion and award directing Defendant to pay Plaintiff an additional $18.90 for her initial period of disability in 2006; and we reverse paragraph 4 of the Full Commission's opinion and award to the extent that it establishes the amount of Plaintiff's temporary total disability compensation award for her periods of disability between 2008 and 2010 at $460.76 per week, a figure based on the "modified" average weekly wage, and we modify this amount to $459.50 per week, the figure agreed upon by the parties in the original Form 21 agreement. We affirm the Full Commission's opinion and award in all other respects.

AFFIRMED IN PART; VACATED IN PART; REVERSED AND MODIFIED IN PART.

Judges STROUD and HUNTER, JR. concur.

PBK HOLDINGS, LLC, PLAINTIFF
v.
COUNTY OF ROCKINGHAM, DEFENDANT

NO. COA13-865

Filed 1 April 2014

1. Constitutional Law—Equal Protection Clause—enactment of zoning ordinance—legitimate governmental purposes—rational basis test

The trial court did not err in a zoning case by granting summary judgment in favor of defendant even though plaintiff contended the ordinance's distinction between local and regional landfills violated the Equal Protection Clauses of the North Carolina and United States Constitutions. Defendant's purposes in enacting the ordinance were legitimate governmental purposes and application of the rational basis test to the challenged ordinance led to the conclusion that defendant's distinction between regional and local landfills furthered that purpose.

2. Constitutional Law—Commerce Clause—zoning ordinance

The trial did not err in a zoning case by granting summary judgment in favor of defendant even though plaintiff contended that the zoning ordinance violated the Commerce Clause of the United States Constitution. The ordinance was not discriminatory in its practical effect since it affected both in-state and out-of-state municipal solid waste as applied to this plaintiff.

3. Zoning—landfills ordinance—misreading of ordinance

The trial court did not err in a zoning case by entering summary judgment in favor of defendant even though plaintiff contended that the airport radius, floodplain, truck entrance, and "catch-22" provisions of the ordinance, applicable to regional landfills, were preempted by State and Federal law. Plaintiff's arguments were based on a misreading of the challenged ordinance.

PBK HOLDINGS, LLC v. CNTY. OF ROCKINGHAM

[233 N.C. App. 353 (2014)]

Appeal by plaintiff from order entered 25 June 2013 by Judge Richard L. Doughton in Rockingham County Superior Court. Heard in the Court of Appeals 9 December 2013.

Brooks Pierce McLendon Humphrey & Leonard, L.L.P., by Daniel F.E. Smith, S. Leigh Rodenbough IV, and Darrell A. Fruth, for plaintiff-appellant.

The Brough Law Firm, by G. Nicholas Herman, and Rockingham County by Robert V. Shaver, Jr., County Attorney, for defendant-appellee.

McCULLOUGH, Judge.

Plaintiff PBK Holdings, LLC, appeals from an order of the trial court, granting summary judgment in favor of defendant County of Rockingham, denying plaintiff's motion for summary judgment, and dismissing plaintiff's action. For the reasons stated herein, we affirm the decision of the trial court.

I. Background

On 13 March 2012, defendant Rockingham County, by and through the Rockingham County Board of Commissioners, adopted an ordinance entitled "An Ordinance of the County of Rockingham, State of North Carolina, Adopting Zoning Changes to the Rockingham County Unified Development Ordinance." ("the ordinance"). The stated purpose of the ordinance was to:

> define high impact uses, to allow certain high impact uses to be approved through conditional zoning, to delete special use requirements for those uses now identified as high impact uses and to delete and add text to the table of permitted uses and other zoning sections to effect these changes.

"High impact uses" were defined as:

> those which by their nature produce objectionable levels of noise, odors, vibrations, fumes, light, smoke, traffic and/or other impacts upon the lands adjacent to them.

The following uses were considered high impact uses, "[e]ach use . . . grouped into categories based on the projected impact to the surrounding area[:]"

CLASSIFICATION	USE
Class I	1. Airstrips 2. Concrete suppliers (ready-mix)
Class II	1. Chemical manufacturing and storage 2. Cement Manufacturers 3. Sawmills 4. Bulk Storage Facility of Flammables-Propane, Gasoline, Fuel Oil and Natural Gas 5. Scrap Metal Salvage Yards, Junkyards 6. Commercial Livestock Auction
Class III	1. Commercial Incinerators 2. *Local Solid Waste Management Facilities/Landfills* 3. Chip Mills 4. Airports
Class IV	1. Asphalt Plants 2. Hazardous Waste Facilities 3. Slaughtering and Processing Plants 4. Pulp and Paper Mills 5. Motor Sports Activities (i.e. racetracks and dragstrips)
Class V	1. Explosives Manufacturing, Storage and Wholesale 2. *Regional Solid Waste Management Facilities/Landfills-Privately Owned* 3. Mining, Extraction Operations and Quarries (including sand, gravel and clay pits)

(emphasis added).

On 12 March 2013, plaintiff PBK Holdings, LLC, filed a complaint against defendant. Plaintiff is a limited liability company, formed "for the purpose of acquiring, permitting, and developing a regional municipal solid waste ("MSW") landfill" in Rockingham County, North Carolina. Plaintiff alleged that it had a special use permit application pending in Rockingham County to develop a sanitary landfill and recycling facility that would accept more than 100,000 tons of MSW per year. Plaintiff stated that the proposed landfill would fall within the "Regional Solid Waste Management Facilities/Landfills-Privately Owned" category.

Therefore, plaintiff argued that it had a "specific and legal personal legal interest in the Rockingham County zoning ordinances that impact its plans to develop a landfill."

Plaintiff argued that it was directly and adversely affected by certain amendments adopted in the ordinance and challenged the following provisions: Chapter 2, Article VII, § 7-2.B (classifies "Local Solid Waste Management Facilities/Landfills" (hereinafter "local landfills") as a Class III high impact use and "Regional Solid Waste Management Facilities/Landfills-Privately Owned" (hereinafter "regional landfills") as a Class V high impact use); § 7-4.B (lists setback requirements from property line, rights-of-way, zoning districts and structures based on Class); and § 7-5.G (sets forth additional factors to be considered in approving Regional Municipal Solid Waste-Privately Owned Landfills). Plaintiff's complaint argued that defendant was preempted from adopting provisions in conflict with North Carolina law, that certain provisions exceeded the authority of the Board of Commissioners to adopt and defendant to enforce, that the ordinance violated the Equal Protection clauses of the United States and North Carolina Constitutions, and that the ordinance violated the Commerce Clause of the United States Constitution. Based on the foregoing contentions, plaintiff argued that the trial court should enter declaratory judgment in favor of plaintiff, stating that the challenged portions of the ordinance were invalid.

On 22 April 2013, defendant filed an answer to the complaint.

On 10 June 2013, defendant filed a motion for summary judgment. On 13 June 2013, plaintiff also filed a motion for summary judgment.

Following a hearing held at the 24 June 2013 term of Rockingham Superior Court, the trial court entered an order granting defendant's motion for summary judgment, denying plaintiff's motion for summary judgment, and dismissing plaintiff's action on 25 June 2013.

Plaintiff appeals.

II. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation and quotation marks omitted).

> The moving party bears the burden of establishing the lack of a triable issue of fact. If the movant meets its burden,

> the nonmovant is then required to produce a forecast of evidence demonstrating that the [nonmoving party] will be able to make out at least a *prima facie* case at trial. Furthermore, the evidence presented by the parties must be viewed in the light most favorable to the non-movant.

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

III. Discussion

On appeal, plaintiff argues that the trial court erred by entering summary judgment in favor of defendant where (A) the ordinance's distinction between "local" and "regional" landfills violates the Equal Protection Clauses of the North Carolina and United States Constitutions; (B) the ordinance violates the Commerce Clause of the United States Constitution; and (C) the airport radius, floodplain, truck entrance, and "catch-22" provisions are preempted by State and Federal law.

A. Equal Protection Clause

[1] First, plaintiff argues that the trial court erred by entering summary judgment in favor of defendant where the ordinance's distinction between local and regional landfills violates the Equal Protection Clauses of the North Carolina and United States Constitutions. Plaintiff asserts that although local and regional landfills are similarly situated, the ordinance imposes more stringent requirements on regional landfills than are imposed on local landfills. Furthermore, plaintiff argues that there is no legitimate purpose justifying the difference in landfill classifications and that distinctions between local and regional landfills are not rationally related to defendant's stated interests. We find plaintiff's arguments unpersuasive.

We note that

> [a] municipal ordinance is presumed to be valid . . . . [T]he burden is upon the complaining party to show its invalidity or inapplicability. And a municipal ordinance promulgated in the exercise of the police power will not be declared unconstitutional unless it is clearly so, and every intendment will be made to sustain it.

Standley v. Town of Woodfin, 186 N.C. App. 134, 140, 650 S.E.2d 618, 623 (2007) (citations and quotation marks omitted).

"The principle of equal protection of the law is explicit in both the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the Constitution of North Carolina. This principle requires that all persons similarly situated be treated alike." *Dobrowolska v. Wall*, 138 N.C. App. 1, 14, 530 S.E.2d 590, 599 (2000) (citations omitted).

> The United States Supreme Court has explained that the purpose of the equal protection clause . . . is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. . . . Of course, most laws differentiate in some fashion between classes of persons. The Equal Protection Clause does not forbid classifications. It simply keeps governmental decision makers from treating differently persons who are in all relevant respects alike.

Yan-Min Wang v. UNC-CH Sch. of Med., 216 N.C. App. 185, 202-03, 716 S.E.2d 646, 657-58 (2011) (citations and quotation marks omitted).

"Accordingly, to state an equal protection claim, a claimant must allege (1) the government (2) arbitrarily (3) treated them differently (4) than those similarly situated." *Lea v. Grier*, 156 N.C. App. 503, 509, 577 S.E.2d 411, 416 (2003). "Thus, [i]n addressing an equal protection challenge, we first identify the classes involved and determine whether they are similarly situated." *Yan-Min Wang*, 216 N.C. App. at 204, 716 S.E.2d at 658 (citation and quotation marks omitted).

In the present case, the two classes at issue are local and regional landfills. Plaintiff alleges that local and regional landfills are similarly situated because they are engaged in the same activity – namely, the business of MSW disposal. Relying on the plain language definition of the terms "local" and "regional," plaintiff states that the only difference between these two classes is that local landfills accept waste from a "limited district, often a community or minor political subdivision" while regional landfills accept waste from "a geographical region" or "peripheral parts of a district." Based on the foregoing, plaintiff argues that the ordinance violates the Equal Protection Clause since "characterizations of waste based on its geographic origin have repeatedly been found groundless by the United States Supreme Court."

On the other hand, defendant contends that there is no dispute about the definitions of local versus regional landfills, arguing that the distinctions are made based on the general nature of their uses. Defendant

asserts that it is common knowledge that regional landfills, which accept waste from areas within and outside of Rockingham County, are "typically larger, dispose of greater waste tonnage, and therefore may pose the risk of having greater adverse impacts upon the health, safety and welfare in contrast to purely local and less-intensive landfills that merely dispose of waste[] generated from within the local community."

Our review indicates that the ordinance defines high impact uses as "those which by their nature produce objectionable levels of noise, odors, vibrations, fumes, light, smoke, traffic and/or other impacts upon the lands adjacent to them." The categorization of high impact uses are based on the "projected impact to the surrounding area," resulting in five different classes. "Local Solid Waste Management Facilities/Landfills" are classified as a Class III high impact use, along with commercial incinerators, chip mills, and airports. "Regional Solid Waste Management Facilities/Landfills-Privately Owned" are classified as a Class V high impact use, along with explosives manufacturing, storage, and wholesale, as well as mining, extraction operations, and quarries. Although the ordinance distinguishes between local and regional landfills, it fails to provide a definition for "local" and "regional" landfills.

"When interpreting a municipal ordinance we apply the same principles of construction used to interpret statutes. Undefined and ambiguous terms in an ordinance are given their ordinary meaning and significance. . . . To ascertain the ordinary meaning of undefined and ambiguous terms, courts may appropriately consult dictionaries." *Morris Communs. Corp. v. City of Bessemer*, 365 N.C. 152, 157-58, 712 S.E.2d 868, 872 (2011) (citations omitted).

"Local" is defined as "1. relating to place 2. of, characteristic of, or confined to a particular place or district 3. not broad; restricted; narrow." Webster's New World College Dictionary 842 (4th edition 2006). "Regional" is defined as "1. of a whole region not just a locality 2. of some particular region, district, etc.; local; sectional." Webster's New World College Dictionary 1206 (4th edition 2006). Applying these definitions to the ordinance, the use of the terms "local" and "regional" in reference to landfills suggests that the distinction lies in the size and location of the areas that the landfills serve.

However, assuming without deciding that the two classes involved in the present appeal are similarly situated for equal protection purposes, the next step in our analysis would be a determination of whether "the difference in treatment made by the law has a reasonable basis in relation to the purpose and subject matter of the legislation."

A-S-P Associates v. Raleigh, 298 N.C. 207, 226, 258 S.E.2d 444, 456 (1979) (citation omitted).

> When a governmental classification does not burden the exercise of a fundamental right or operate to the peculiar disadvantage of a suspect class, the lower tier of equal protection analysis requiring that the classification be made upon a rational basis must be applied. The "rational basis" standard merely requires that the governmental classification bear some rational relationship to a conceivable legitimate interest of government. Additionally, in instances in which it is appropriate to apply the rational basis standard, the governmental act is entitled to a presumption of validity. Classifications are presumed valid; "under the lower tier, rational basis test, the party challenging the legislation has a tremendous burden in showing that the questioned legislation is unconstitutional."

Huntington Props. v. Currituck County, 153 N.C. App. 218, 230-31, 569 S.E.2d 695, 704 (2002) (citations omitted). Because the ordinance at issue here neither burdens a suspect class, nor affects a fundamental right, the ordinance need only to satisfy the rational basis level of scrutiny to withstand plaintiff's Equal Protection Clause challenges.

Defendant asserts, and we agree, that the objective of protecting the health, safety, and environment of the community by mitigating the adverse impacts of high impact uses is a conceivable and legitimate government interest. The differences in requirements set out in the ordinance between regional and local landfills, with regional landfills being subject to more stringent regulation based on their projected higher impact to the surrounding area, are clearly rationally related to further defendant's conceivable, legitimate interest.

The ordinance provided that the purpose of its enactment was to

> define high impact uses, to allow certain high impact uses to be approved through conditional zoning, to delete special use requirements for those uses now identified as high impact uses and to delete and add text to the table of permitted uses and other zoning sections to effect these changes.

"High impact uses" are "those which by their nature produce objectionable levels of noise, odors, vibrations, fumes, light, smoke, traffic and/or other impacts upon the lands adjacent to them." The ordinance

categorized regional landfills as a Class V high impact use along with "Explosive Manufacturing, Storage and Wholesale" and "Mining, Extraction Operations and Quarries (including sand, gravel and clay pits)" based on the higher impact of "objectionable levels of noise, odors, vibrations, fumes, light, smoke, traffic, and/or other impacts" to the surrounding area, as opposed to local landfills, which were categorized as a Class III high impact use. In addition, the affidavit of Kevan Combs, plaintiff's sole manager, member, and registered agent, indicated that plaintiff's proposed regional landfill would bring in more than 100,000 tons of MSW per year.

Because defendant's purposes in enacting the ordinance are undeniably legitimate governmental purposes and because application of the rational basis test to the challenged ordinance leads us to the conclusion that defendant's distinction between regional and local landfills furthers that purpose, we reject plaintiff's arguments that the ordinance violated the Equal Protection Clauses of the United States and North Carolina Constitutions. Accordingly, we hold that the trial court did not err by granting summary judgment in favor of defendant on this issue.

B. Commerce Clause

[2] Next, plaintiff argues that the trial erred by entering summary judgment in favor of defendant on the grounds that the ordinance violates the Commerce Clause of the United States Constitution. We are not persuaded by plaintiff's arguments.

> The United States Constitution expressly grants to Congress the power to "regulate [c]ommerce with foreign [n]ations, and among the several [s]tates[.] [T]he Commerce Clause is more than an affirmative grant of power; it has a negative sweep as well" in that " 'by its own force' [it] prohibits certain state actions that interfere with interstate commerce." The United States Supreme Court has explained that the "dormant" Commerce Clause means that "[a] State is . . . precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States."
>
> It is well established that a law is discriminatory if it "tax[es] a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State. "Discrimination" for purposes of the dormant Commerce Clause is "differential treatment of in-state

> and out-of-state economic interests that benefits the former and burdens the latter."

DirecTV, Inc. v. State of North Carolina, 178 N.C. App. 659, 661-62, 632 S.E.2d 543, 546 (2006) (citations omitted).

> Commerce Clause claims are subject to a two-tiered analysis. The first tier, a virtually *per se* rule of invalidity, applies where a state law discriminates facially, in its practical effect, or in its purpose. The second tier applies if a statute regulates evenhandedly and only indirectly affects interstate commerce. In that case, the law is valid unless the burdens on commerce are clearly excessive in relation to the putative local benefits.

Waste Indus. USA, Inc. v. State, __ N.C. App. __, __, 725 S.E.2d 875, 881 (2012) (citations omitted). "In either situation the critical consideration is the overall effect of the statute on both local and interstate activity." *North Carolina Ass'n of Elec. Tax Filers v. Graham*, 333 N.C. 555, 565-66, 429 S.E.2d 544, 550 (1993) (citation omitted).

i. Facial Discrimination

Plaintiff contends that the ordinance is facially discriminatory. Plaintiff's argument presumes that regional landfills collect MSW from surrounding counties within North Carolina as well as southern Virginia, while local landfills collect MSW from only Rockingham County. By applying more stringent requirements for regional landfills, plaintiff asserts that the ordinance discriminates against out-of-state use of North Carolina landfill space.

It is well established that

> [a] state tax law is facially discriminatory where it (1) explicitly refers to state boundaries or uses other terminology that inherently indicates the tax is based on the in-state or out-of-state location of an activity; and (2) applies to entities similarly situated for Commerce Clause purposes. A facial challenge to a legislative act is . . . the most difficult challenge to mount successfully. The challenger must establish that no set of circumstances exists under which [the ordinance] would be valid. Moreover, the challenger must demonstrate there is an "explicit discriminatory design to the [ordinance]."

DirecTV, Inc., 178 N.C. App. at 663, 632 S.E.2d at 547 (citations omitted).

We note that the failure of the ordinance to define the terms "local" and "regional" compels us to apply the ordinary meanings of those words. Based on the plain language definition of those terms – "local" meaning "1. relating to place 2. of, characteristic of, or confined to a particular place or district 3. not broad; restricted; narrow" and "regional" meaning "1. of a whole region not just a locality 2. of some particular region, district, etc.; local; sectional" – we hold that although the terms make a geographical distinction, they do not explicitly refer to state boundaries or inherently indicate that the applicability of the ordinance is based on the in-state or out-of-state location of an activity. *See* Webster's New World College Dictionary 842 and 1206 (4th edition 2006). Facially, this ordinance does not explicitly put greater burdens on MSW solely because it is generated from out-of-state because, as plaintiff acknowledges, regional landfills accept MSW from counties within North Carolina as well as MSW from out-of-state. In addition, the category of regional landfills also includes privately-owned landfills without distinguishing whether the privately-owned landfills accept in-state or out-of-state MSW. Furthermore, plaintiff has failed to demonstrate an explicit discriminatory design in the ordinance. Based on the foregoing, we conclude that the ordinance is not facially discriminatory.

ii. Discrimination in its Practical Effect

In order to successfully argue that the ordinance is discriminatory in its practical effect,

> [p]laintiff[] bear[s] the initial burden of showing that a[n ordinance] has a discriminatory effect on interstate commerce. If Plaintiff[] meet[s] that burden, [defendant] bears the burden of establishing that the challenged [ordinance] "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."

DirecTV, Inc., 178 N.C. App. at 665, 632 S.E.2d at 548 (citations omitted).

Plaintiff, relying on *Oregon Waste Systems v. Dep't of Envtl. Quality*, 511 U.S. 93, 128 L. Ed. 2d 13 (1994), argues that the "more numerous and rigorous zoning provisions [applicable] to regional landfills" are akin to heightened fees assessed on the disposal of out-of-state waste which have been held to violate the Commerce Clause. We disagree.

In *Oregon Waste*, the petitioners, who were solid waste disposers, challenged Or. Rev. Stat. § 459.297(1) which imposed a "surcharge" on "every person who disposes of solid waste generated out-of-state in a

disposal site or regional disposal site" at $2.25 per ton. *Id.* at 96, 128 L. Ed. 2d at 19. "In conjunction with the out-of-state surcharge, the legislature imposed a fee on the in-state disposal of waste generated within Oregon" at $0.85 per ton, "considerably lower than the fee imposed on waste from other States." *Id.* "Subsequently, the legislature conditionally extended the $0.85 per ton fee to out-of-state waste, in addition to the $2.25 per ton surcharge . . . with the proviso that if the surcharge survived judicial challenge, the $0.85 per ton fee would again be limited to in-state waste." *Id.* The United States Supreme Court held that the statute was *facially* discriminatory because the surcharge was based upon a geographic distinction, discriminating against interstate commerce. *Id.* at 100, 128 L. Ed. 2d at 22. Since the Oregon surcharge was held to be facially discriminatory, the *Oregon Waste* Court held that the "*per se* rule of invalidity" was the proper legal standard. "As a result, the surcharge must be invalidated unless respondents can sho[w] that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* at 100-01, 128 L. Ed. 2d at 22 (citations and quotation marks omitted). Because respondents could not meet this burden, the surcharge was held to be in violation of the Commerce Clause.

Plaintiff's conclusory reliance on *Oregon Waste* is misplaced since we find the facts of the instant case distinguishable. First, we have previously held that the ordinance is not facially discriminatory like the surcharge in *Oregon Waste*. Second, whereas it was clear to the Supreme Court in *Oregon Waste* that "the differential charge favor[ed] shippers of Oregon waste over their counterparts handling waste generated in other States," here, the ordinance is not explicitly based on in-state or out-of-state location of an activity. *Id.*

Plaintiff also argues that there is a discriminatory practical effect because the "restrictions applied to regional landfills also make it more difficult for out-of-state waste to be disposed of in landfills located in Rockingham County." As examples, plaintiff states that the "increased landscape buffer, fencing requirement, and need for dust control would increase the capital and operating costs for a regional landfill, which would increase the fees for such waste disposal." Plaintiff relies on *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Nat. Res. et al*, 504 U.S. 353, 119 L. Ed. 2d 139 (1992), and *Exxon Corp v. Governor of Maryland*, 437 U.S. 117, 57 L. Ed. 2d 91 (1978) for his contentions.

In *Fort Gratiot*, the petitioner challenged a Michigan law that "prohibits private landfill operators from accepting solid waste that originates outside the county in which their facilities are located" unless the

acceptance of solid waste not generated in the county was explicitly authorized in the approved county solid waste management plan. *Fort Gratiot*, 504 U.S. at 355-57, 119 L. Ed. 2d at 144-45. The United States Supreme Court provided that "[a] state statute that clearly discriminates against interstate commerce is therefore unconstitutional 'unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.' " *Id.* at 359, 119 L. Ed. 2d at 147 (citation omitted). Because "the statute afford[ed] local waste producers complete protection from competition from out-of-state waste producers who seek to use local waste disposal areas[,]" and because "Michigan [had] not identified any reason, apart from its origin, why solid waste coming from outside the county should be treated differently from solid waste within the county," the Supreme Court held that the contested Michigan law violated the Commerce Clause. *Id.* at 361, 119 L. Ed. 2d at 148.

The circumstances of the present case, however, are distinguishable from those found in *Fort Gratiot*. Most importantly, in *Fort Gratiot*, there was an outright prohibition against in-state disposal of waste that was generated outside of the state. In the present case, the ordinance merely imposed more stringent requirements on regional landfills that accepted waste from both within the State of North Carolina and out-of-state. Defendant also identified reasons, apart from the origin of the waste to be disposed of and unrelated to economic protectionism, as to why there should be a distinction between local and regional landfills, including achieving the ordinance's objective to "mitigate[e] [the] traditional adverse impacts of a highly intensive use on water supplies, airport safety, access to public roads, noise, dust, distance from residences, and other health and safety concerns." Because the regional landfills are typically larger in size and dispose of greater amounts of waste, with this plaintiff accepting more than 100,000 tons of MSW per year, they pose a greater risk to the health, safety, and welfare of the community.

In *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 57 L. Ed. 2d 91 (1978), a Maryland statute provided that "a producer or refiner of petroleum products (1) may not operate any retail service station within the State, and (2) must extend all 'voluntary allowances' uniformly to all service stations it supplies." *Id.* at 119-20, 57 L. Ed. 2d at 96. The petitioners, who were producers of petroleum products, contended that the Maryland statute violated the Commerce Clause. The United States Supreme Court held that the statute did not violate the Commerce Clause because it did not discriminate against interstate goods or distinguish between in-state and out-of-state companies. Because "Maryland's entire gasoline supply flows in interstate commerce and since there

are no local producers or refiners, such claims of disparate treatment between interstate and local commerce would be meritless." *Id.* at 125, 57 L. Ed. 2d at 100.

Despite the holding, plaintiff cites to a footnote found in *Exxon Corp.* in support of the contention that "[if] the effect of a state regulation is to cause local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market . . . the regulation may have a discriminatory effect on interstate commerce." *Id.* at 126, 57 L. Ed. 2d at 100 n.16. Here, however, the effect of the ordinance is not to reduce the flow of out-of-state MSW and increase the share of in-state MSW, but rather to place more stringent requirements on landfills that are considered a higher class of high impact uses which by their nature produce higher levels of noise, odors, vibrations, fumes, light, smoke, traffic, etc.

The ordinance does not impact the disposal of MSW more heavily based on the fact that it is crossing state lines. Moreover, because there is no evidence in the record that plaintiff's proposed landfill would have only accepted out-of-state MSW, the ordinance affected both in-state and out-of-state MSW as applied to this plaintiff.

Based on the aforementioned reasons, we hold that the ordinance is not discriminatory in its practical effect in violation of the Commerce Clause. Plaintiff's arguments are overruled.

C. Preemption

[3] In its third argument, plaintiff argues that the trial court erred by entering summary judgment in favor of defendant where the airport radius, floodplain, truck entrance, and "catch-22" provisions of the ordinance, applicable to regional landfills, are preempted by State and Federal law.

> A city ordinance shall be consistent with the Constitution and laws of North Carolina and of the United States. An ordinance is not consistent with State or federal law when:
>
> . . . .
>
> (2) The ordinance makes unlawful an act, omission or condition which is expressly made lawful by State or federal law;
>
> . . . .

> (5) The ordinance purports to regulate a field for which a State or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation[.]
>
> . . . .
>
> The fact that a State or federal law, standing alone, makes a given act, omission, or condition unlawful shall not preclude city ordinances requiring a higher standard of conduct or condition.

N.C. Gen. Stat. § 160A-174(b)(2) and (5) (2013).

First, plaintiff challenges § 7-5.G.4.b (hereinafter "floodplain provision") and subsection c (hereinafter "airport radius provision") of the ordinance, which provides as follows:

> 4. A landfill shall not be located:
>
> . . . .
>
> b. within the 100 year floodplain.
>
> c. within five statute miles of the Rockingham County (Shiloh) Airport.

Specifically, plaintiff argues that the floodplain provision is preempted by N.C. Gen. Stat. § 130A-295.6(c)(1) and N.C. Gen. Stat. § 130A-294(a)(4)(c)(5).

N.C. Gen. Stat. § 130A-295.6(c)(1) (2013) provides that "[a] waste disposal unit of a sanitary landfill shall not be constructed within: (1) A 100-year floodplain or land removed from a 100-year floodplain designation. . . ." N.C. Gen. Stat. § 130A-294(a)(4)(c)(5) (2013) provides the following:

> (a) The Department [of Environment and Natural Resources ("DENR")] is authorized and directed to engage in research, conduct investigations and surveys, make inspections and establish a state-wide solid waste management program. In establishing a program, the [DENR] shall have authority to (4) a. Develop a permit system governing the establishment and operation of solid waste management facilities. . . . c. The [DENR] shall deny an application for a permit

> for a solid waste management facility if the [DENR] finds that: 5. The proposed facility would be located in a natural hazard area, including a floodplain, a landslide hazard area, or an area subject to storm surge or excessive seismic activity, such that the facility will present a risk to public health or safety.

Plaintiff argues that while N.C. Gen. Stat. § 130A-295.6(c)(1) prohibits a landfill from being constructed within an 100-year floodplain, other portions of the landfill facility, "i.e. portions aside from the waste disposal unit," could be constructed in the 100-year floodplain so long as there is no public health or safety risk. In addition, plaintiff argues that since it is DENR's discretion to judge whether a landfill may be developed in a floodplain, the floodplain provision applies a "blunt, blanket prohibition against any portion of a regional landfill from being built in a 100-year flood plain, even if the development is authorized by DENR." We find plaintiff's arguments meritless.

Pursuant to N.C. Gen. Stat. § 153A-136(a)-(b) (2013), a county has the authority to regulate "the storage, collection, transportation, use, disposal and other disposition" of solid wastes and to regulate such disposal and disposition by ordinance that is "consistent with and supplementary to any rules" adopted by the DENR. In addition, defendant is not prevented "from providing by ordinance or regulation for solid waste management standards which are *stricter or more extensive* than those imposed by the State solid waste management program and rules and orders issued to implement the State program." N.C. Gen. Stat. § 130A-309.09C(c) (2013) (emphasis added). That is exactly what the floodplain provision of the challenged ordinance does.

Next, plaintiff argues that the airport radius provision is preempted by state and federal law. Plaintiff asserts that although collectively, these state and federal laws provide a specific regulatory scheme addressing the siting of landfills near airports, the airport radius provision attempts to prohibit landfills in locations where they are expressly permitted by state and federal law.

Plaintiff directs our attention to the following State regulations regarding MSW landfills near airports:

> (a) A new MSWLF unit shall be located no closer than 5,000 feet from any airport runway used only by piston-powered aircraft and no closer than 10,000 feet from any runway used by turbine-powered aircraft.

(b) Owners or operators proposing to site a new MSWLF unit or lateral expansion within a five-mile radius of any airport runway used by turbine-powered or piston-powered aircraft shall notify the affected airport and the Federal Aviation Administration prior to submitting a permit application to the Division.

(c) The permittee of any existing MSWLF unit or a lateral expansion located within 5,000 feet from any airport runway used by only piston-powered aircraft or within 10,000 feet from any runway used by turbine-powered aircraft shall demonstrate that the existing MSWLF unit does not pose a bird hazard to aircraft. The owner or operator shall place the demonstration in the operating record and notify the Division that it has been placed in the operating record.

15A N.C. Admin. Code 13B.1622(1)(a) – (c) (2012). In addition 40 C.F.R. § 258.10(a) (2013) states that

> Owners or operators of new MSWLF units, existing MSWLF units, and lateral expansions that are located within 10,000 feet (3,048 meters) of any airport runway end used by turbojet aircraft or within 5,000 feet (1,524 meters) of any airport runway end used by only piston-type aircraft must demonstrate that the units are designed and operated so that the MSWLF unit does not pose a bird hazard to aircraft.

Our review indicates that defendant is correct in its argument that there is "nothing in the language of these State or federal regulations expressly or impliedly demonstrat[ing] any intent to preclude more stringent regulations on the siting of MSW landfills near airports." Thus, we reject plaintiff's assertions.

Next, plaintiff challenges the following provision of the ordinance applicable to regional landfills as being preempted by state law:

a. The Truck entrance driveway shall be located on or within two thousand (2000) feet of a major arterial highway.

(hereinafter "truck entrance provision"). Plaintiff argues that the county does not have authority to regulate vehicular traffic on a State

highway pursuant to N.C. Gen. Stat. § 153A-121(b) (2013) which provides as follows:

> This section does not authorize a county to regulate or control vehicular or pedestrian traffic on a street or highway under the control of the Board of Transportation, nor to regulate or control any right-of-way or right-of-passage belonging to a public utility, electric or telephone membership corporation, or public agency of the State. In addition, no county ordinance may regulate or control a highway right-of-way in a manner inconsistent with State law or an ordinance of the Board of Transportation.

We find that plaintiff's reading of the truck entrance provision rests upon a misapprehension. The truck entrance requirement does not regulate any vehicular traffic on a street or highway, but rather regulates the location of a driveway placed on a landfill. Therefore, we reject plaintiff's argument.

Lastly, plaintiff challenges the following provision of the ordinance as being preempted by State law:

> 3. An application for development approval shall include all the site plans and information submitted to the Department of Environment and Natural Resources for the permitting of a solid waste management facility.

Plaintiff argues that this provision is preempted by N.C. Gen. Stat. § 13A-294(b1)(4) and 15A NCAC Admin. Code 13B.1618 which sets forth requirements for an applicant's permit for a MSW landfill. Further, plaintiff alleges that this provision places a landfill developer in a "catch-22" position because while state law prohibits the developer from submitting the application for a permit to DENR until the developer has obtained local zoning approval, the ordinance prohibits local zoning approval for the landfill developer until *after* it has submitted the application for a permit to DENR. In other words, plaintiff argues that the ordinance precludes landfill developers from complying with both State and local law by requiring a developer to submit its permit application to DENR at a time when DENR prohibits such submission.

We find plaintiff's arguments to be based on a misreading of the challenged ordinance. The challenged provision does not require the developer to submit an application to the DENR but requires the developer to submit the "site plans and information" that must be submitted to the DENR for the permitting of a MSW landfill. Accordingly, we reject plaintiff's argument as it has no merit.

IV. Conclusion

Based on the reasons stated above, we reject plaintiff's argument that the ordinance violates the Equal Protection and Commerce Clauses of the North Carolina and United States Constitutions and also reject plaintiff's arguments that certain provisions of the ordinance are preempted by state and federal law. The judgment of the trial court is affirmed.

Affirmed.

Chief Judge MARTIN and Judge ERVIN concur.

JEFF ROLAN; MATTHEW COLE ROLAN, Minor, by WILLIAM S. MILLS as Guardian Ad Litem; MATTHEW BALDWIN, Minor, by SIDNEY S. EAGLES, JR., as Guardian Ad Litem and TIMOTHY BALDWIN and KELLIE BALDWIN; ISABEL SEVERA, Minor, by SIDNEY S. EAGLES, JR.[,] as Guardian Ad Litem and KATHLEEN SEVERA; WILLIAM SHY, Minor, by SIDNEY S. EAGLES, JR., as Guardian Ad Litem and TODD SHY and JENNIFER SHY; SCOTT VENABLE, Minor, by SIDNEY S. EAGLES, JR.[,] as Guardian Ad Litem and WILLIAM VENABLE and SUSAN VENABLE; CARTER CHURCH, Minor, by SIDNEY S. EAGLES, JR.[,] as Guardian Ad Litem and CHAD CHURCH and AMANDA CHURCH; LUKE CHAUVIN, Minor, by SIDNEY S. EAGLES, JR., as Guardian Ad Litem and KEITH CHAUVIN and JENNIFER CHAUVIN; CHAD ENNIS, Minor, by SIDNEY S. EAGLES, JR., as Guardian Ad Litem and JAYSON ENNIS and WENDY ENNIS; KATHLEEN MANESS, Minor, by SIDNEY S. EAGLES, JR.[,] as Guardian Ad Litem and MICHAEL MANESS and REBECCA MANESS; CARSON MCGEE, Minor, by SIDNEY S. EAGLES, JR., as Guardian Ad Litem and MIKE McGEE and VICKIE McGEE; TERRA PERRIGO, Minor, by SIDNEY S. EAGLES, JR.[,] as Guardian Ad Litem and TERRY PERRIGO and LAURA PERRIGO; CAMERON CHAUVIN, Minor, by SIDNEY S. EAGLES, JR.[,] as Guardian Ad Litem and KEITH CHAUVIN and JENNIFER CHAUVIN; AEDIN GRAY, Minor, by WILLIAM W. PLYLER as Guardian Ad Litem; KYLE GRAY; ELIZABETH GRAY; and REECE C. BUFFALOE, Minor, by WADE H. PASCHAL, JR.[,] as Guardian Ad Litem, Plaintiffs

v.

N.C. DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES, Defendant

No. COA13-601

Filed 1 April 2014

1. Appeal and Error—standard of review—findings—challenge required

In a Tort Claims action arising from an *E. coli* outbreak at the North Carolina State Fair, there was no appellate review of certain findings where plaintiffs did not challenge either the factual or legal elements of the findings. Although plaintiffs reminded the Court of Appeals of the distinction between a finding of fact and a conclusion

of law, plaintiffs must contest these findings in order to take advantage of the relevant standards of review.

2. Appeal and Error—preservation of issues—conclusion in final decision—not raised below

The plaintiffs in a tort claims case were not barred from contesting on appeal the validity of the Industrial Commission's conclusion in its decision and order regarding the standard of care where plaintiffs did not raise the issue before the Commission. It would have been impossible for plaintiffs to challenge the legal principle articulated by the Commission before it was actually stated and plaintiffs could not be barred by the "swap horses" doctrine.

3. Negligence—standard of care—petting zoo—E coli outbreak

Plaintiffs' argument that the Industrial Commission used the wrong standard of care in a Tort Claims action arising from an outbreak of *E. coli* at the North Carolina State Fair was misplaced. Plaintiffs' argument assumed that the Industrial Commission's decision turned on whether plaintiffs had adequately established that defendant knew or should have known about the risk of *E. coli*, but defendant admittedly knew there was some risk of an *E. coli* infection when operating a petting zoo. Plaintiffs were not required to show that defendants knew or should have known about the risk.

4. Negligence—premises liability—petting zoo

In a Tort Claims action arising from an outbreak of *E. coli* at a petting zoo at the North Carolina State Fair, the Industrial Commission correctly determined that defendant took reasonable steps to reduce the inherent risks. While it was certainly possible for defendant to take additional precautions, North Carolina premises liability law does not require landowners to eliminate the risk of harm to lawful visitors on their property or to undergo unwarranted burdens in maintaining their premises.

5. Negligence—findings—proximate cause

In a Tort Claims action arising from an *E. coli* outbreak at the North Carolina State Fair, plaintiffs' argument concerning a finding about proximate cause was based on a misreading of the finding. The finding was not, in fact, relevant to proximate cause.

Appeal by Plaintiffs from Decision and Order filed 4 January 2013 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 November 2013.

Roberts & Stevens, P.A., by Mark C. Kurdys and Robin A. Seelbach; Kirby & Holt, Inc., by William B. Bystrynski and David F. Kirby; Pulley Watson King & Lischer, P.A., by Charles F. Carpenter and Guy Crabtree; Moody, Williams & Roper, by C. Todd Roper; and Marler Clark, LLP, PS, by William D. Marler, for Plaintiffs.

Attorney General Roy Cooper, by Associate Attorney General Christopher McLennan; and North Carolina Department of Agriculture and Consumer Services, by Tina L. Hlabse, for Defendant.

STEPHENS, Judge.

Factual Background and Procedural History

This case arises from an *Escherichia coli* O157:H7 ("*E. coli*") outbreak linked by the North Carolina Department of Health and Human Services and the Centers for Disease Control to a petting zoo operated during the 2004 North Carolina State Fair ("the Fair"). *E. coli* is a bacterium that can cause potentially life-threatening illness in humans. Children under five years old are especially at risk. Exposure to the bacterium can result from "eating contaminated meat or leafy greens, exposure to contaminated water, or through contact" with the feces of animals carrying the bacteria in their intestinal tract. Animals carrying the disease "can look perfectly healthy and still be shedding the *E. coli*[] bacteria in their stool," and transmission can occur "when people pet, touch, or are licked by animals." Over 800,000 people visited the Fair in October of 2004. Of those 800,000 people, an estimated 20,000 visited the petting zoo, and approximately 108 contracted *E. coli*.

Among the people who contracted *E. coli*, a number of minor children ("Plaintiffs") were found to be infected. As a result, Plaintiffs filed claims for damages against Defendant North Carolina Department of Agriculture and Consumer Services under the North Carolina Tort Claims Act. Those claims were eventually consolidated into a single action, and Plaintiffs submitted a joint motion for partial summary judgment on the issue of liability to the North Carolina Industrial Commission ("the Commission") on 5 November 2010. Plaintiffs' motion was denied by order filed 20 July 2011. Following a hearing on the merits, a deputy commissioner entered a decision denying Plaintiffs' claims. Plaintiffs appealed to the full Commission, and, following a hearing on Plaintiffs' appeal, the Commission entered a Decision and Order denying all of Plaintiffs' claims.

In its Decision and Order, the Commission found the following pertinent facts: In preparation for the Fair, Defendant employed a number of veterinarians and other professionals who worked to ensure the health and safety of Fair patrons. A pre-fair risk assessment revealed that, while "hand washing stations were strategically positioned in or near the petting zoo[,] . . . there was an almost complete absence of signs warning people to wash their hands after contacting animals . . . ." As a result, one of the veterinarians put up additional signage and hand sanitizers before the Fair opened. Testimony and exhibits presented before the Commission indicate that there were a number of signs at the petting zoo during the Fair.

Structurally, the petting zoo

> consisted of a 40 foot by 60 foot open tent with a 10[ ] foot-wide gate area at the front. At the center of the front gate was a 4[ ]foot-wide area covered by a large, wooden sign that contained the petting zoo rules, including rules against smoking, eating[,] or drinking inside the petting zoo. On either side of that sign were 3[ ]foot-wide gates, with the one on the right being the entrance to the petting zoo, and the one on the left being where patrons would exit from the petting zoo. Fair patrons standing outside the petting zoo could see inside and would know that they were entering an area with sheep and goats roaming about on a bed of wood shavings. At the back of the tent there were separate pens containing animals that were too large to be roaming among small children. At the entrance to the petting zoo, there were two hand sanitizing dispensers, and immediately outside the exit gate, there were three more hand sanitizing dispensers. In addition, [a building containing] 8 permanent bathrooms with soap and water facilities[] was immediately across the street from the petting zoo, and there was another building with 4 bathrooms and soap and water facilities across from the petting zoo . . . .
>
> . . . In addition to the zoo rules sign located at the entrance to the petting zoo, there were approximately 5 signs taped to the side of the tent above the feed machines which said, in English and in Spanish, "ALWAYS WASH HANDS *BEFORE AND AFTER* TOUCHING ANIMALS IN ORDER TO PROTECT THEM AND YOU." [The owner of the

> petting zoo also] posted a sign . . . on the exit gate which read, "REMEMBER . . . wash hands after petting animals." [Moreover, t]here were . . . hand washing signs posted beneath the hand sanitizing dispensers, which [the owner] recalled having [an image of two hands being washed]. The sign was laminated and done on paper reflecting that it was issued by [Defendant]. The sign states "Hand to Mouth contact after touching animals or their environment is a health risk! Always Wash hands Before and After Touching Animals in Order to Protect Them and You!" At the bottom of that sign[] additional information was provided regarding high risk individuals, washing hands with soap and water before eating and before and after touching animals and their environment, and avoiding hand[ ] to[-]mouth activities in the livestock areas, such as eating, smoking[,] and nail biting. . . . [S]igns warning patrons to wash their hands were posted inside the petting zoo and at the petting zoo exit, and . . . the more detailed signage . . . was posted at the bottom of the hand sanitizing stations outside the entrance and exit to the zoo.

(Italics added). There were also a number of people working at the petting zoo who monitored the people entering and exiting, removed feces, and "replace[d] the soiled wood shavings with clean wood shavings." Some parents recalled seeing the signs and others did not. "Many parents testified that it was very crowded inside the petting zoo and that their children were knocked down by goats and sheep trying to get food." At oral argument, Plaintiffs' counsel referred to the zoo as a "free for all."

Field veterinarian Dr. Carol Woodlief, Defendant's main point of contact on the ground, testified that she and the other field veterinarians were aware of and took steps to protect against a number of diseases, including *salmonella*, campylobacter, coccidiosis, sore mouth, ringworm, and *E. coli*. Dr. Woodlief noted, however, that "*E. coli*[] was not 'any bigger on her mind' than any of the other potential diseases" in 2004. The field veterinarians "made sure that every animal arriving at the Fair had the requisite health certificate . . . ." They also "observed the animals to make sure there were no obvious signs of illness" and "physically handled animals to check for lumps or anything that would suggest sore mouth or ringworm . . . ." Animals showing signs of disease were pulled. Field veterinarians also "continued to observe all of the animals throughout the duration of the . . . Fair."

Given the above facts, the Commission concluded that the precautions taken by Defendant were sufficient to meet its duty of care. Specifically, the Commission stated that:

> 5. . . . [T]hose responsible for conducting the 2004 . . . Fair exercised reasonable care to keep its premises in a reasonably safe condition for lawful visitors. Further, the evidence demonstrates that the . . . Fair was conducted well within the industry standards at that time. The primary recommendations of all concerned groups and publications, *i.e.*, hand washing or hand sanitizing stations, separation of food and beverages from contact areas, and signage advising that a health risk exists and that hand washing is recommended, were fulfilled at the . . . Fair[] in accordance with then-existing nationwide industry standards, which did not require that handouts and signage include information regarding the potential severity of the health risk. Moreover, the practices in place at the . . . Fair were identical to or better than those that had been utilized at prior [state fairs in North Carolina], none of which had produced documented cases of *E. coli*[] infection resulting from human[-]to[-]animal contact.
>
> 6. In the absence of evidence that [Defendant's] employees knew or had reason to know that the animals in the [petting zoo] were actively shedding *E. coli*[] during the 2004 . . . Fair (as contrasted with their knowledge that ruminants have the potential to shed *E. coli*[]), the . . . Commission concludes that [Defendant's] employees were not negligent in failing to warn fair patrons of a hidden hazard. Given the presence of pathogens in our environment, the inability to completely eliminate enteric pathogens if human[-to]animal contact is going to be permitted, and the precautions they had in place to reduce and minimize the risk, [Defendant's] employees were not negligent with respect to their duty to warn or their duty to exercise reasonable care to keep the premises safe for lawful visitors.

(Citations and internal quotation marks omitted; italics added). In coming to that conclusion, the Commission focused on the fact that — in 2004 — the danger of *E. coli* infection at state fairs was "still an emerging issue" throughout the country. According to reports published in the months before the Fair, few states had written guidelines on

zoonotic disease or the connection between zoonotic diseases and animal exhibits. With the goal of reducing the risks of disease transmission, certain reports recommended the use of informational signage; hand sanitizer or hand washing stations with running water, soap, and disposable towels; human-to-animal contact supervision; regular removal of animal feces; and the prevention of eating and drinking in human-to-animal-contact areas.[1]

Given its conclusions, the Commission denied Plaintiffs' claims for damages. Commissioner Bernadine S. Ballance dissented from the Commission's decision on grounds that Defendant's pertinent employees — "all [d]octors of [v]eterinary [m]edicine" — "knew or reasonably should have known that *E. coli*[] was a hidden danger and posed a substantial risk of serious illness and death [to the young children who visited the petting zoo]" and failed to adequately warn the Fair's patrons of that danger. Plaintiffs appealed the Decision and Order of the Commission.

Standard of Review

"The standard of review for an appeal from the . . . Commission's decision under the Tort Claims Act shall be for errors of law only under the same terms and conditions as govern appeals in ordinary civil actions, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them." *Simmons v. Columbus Cnty. Bd. of Educ.*, 171 N.C. App. 725, 727, 615 S.E.2d 69, 72 (2005) (citation and internal quotation marks omitted). "Moreover, findings of fact which are left unchallenged by the parties on appeal are presumed to be supported by competent evidence and are, thus[,] conclusively established on appeal." *Kee v. Caromont Health, Inc.*, 209 N.C. App. 193, 195, 706 S.E.2d 781, 782–83 (2011) (citation and internal quotation marks omitted). "The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433–34, 144 S.E.2d 272, 274 (1965).

Discussion

On appeal, Plaintiffs assert that the Commission's decision should be reversed because its conclusions of law are not supported by its findings of fact. More specifically, Plaintiffs contend that: (1) the Commission's

1. One report noted that "the only way to eliminate the risk of zoonotic transmissions is to completely prevent interaction between animals and humans at animal exhibits." Recognizing that such an option "might not be feasible or desirable," however, the report suggested the above strategies for minimizing exposure.

findings of fact 32 and 33 are, in part, conclusions of law and, therefore, should not be analyzed under our deferential competent evidence standard[2]; (2) the Commission applied an incorrect standard of care, which "led the Commission . . . to the erroneous conclusion that [Defendant] was not negligent in this case"; and (3) the Commission erred in concluding that Plaintiff's injuries were not proximately caused by Defendant's negligence because the parties had already stipulated to this fact. We affirm the Commission's Decision and Order.

I. Findings of Fact 32 and 33

[1] In pertinent part, findings of fact 32 and 33 read as follows:

> 32. [T]he operators of the 2004 . . . Fair . . . exercised reasonable care in [their] respective duties to keep the [fairgrounds, including the petting zoo], in a safe condition for its lawful visitors. Regardless of whether the measures [taken] were done in response to the [reports published prior to the Fair], and regardless of whether there was strict compliance with all recommendations [made therein], the . . . Commission finds that the evidence of record establishes that [Defendant] carried out [its] respective duties with reasonable care to minimize and hopefully eliminate the risk that fair patrons who attended the [petting zoo] would contract *E. coli*[]. The signage [Defendant] used and the hand washing protocols [it] relied upon, in conjunction with [its] observation and monitoring of activities inside the petting zoo, including constant removal of fecal material by employees of the petting zoo, were in keeping with the usual and customary conduct and practices of other state fairs in 2004 under similar circumstances. The specific training that plaintiffs suggest should have been given . . . had not been developed or implemented by other state fairs in 2004, when *E. coli*[] was an emerging public health issue. The failure of any of [Defendant's] employees to give . . . specific zoonotic disease training, as opposed to . . . general discussions regarding the need to protect the public from the spread of disease from animals to humans, did not . . . constitute a failure to exercise

2. Plaintiffs do not dispute the validity of the Commission's other findings of fact. Therefore, those findings are presumed to be supported by competent evidence and conclusively established on appeal. *Kee*, 209 N.C. App. at 195, 706 S.E.2d at 782–83.

> reasonable care for the safety of the fair patrons [in 2004]. The . . . Commission finds that it was reasonable on the part of [Defendant's] employees to believe that the practices that were in place at the 2004 . . . Fair were sufficient to provide adequate protection for [f]air patrons against the transmission of zoonotic diseases. Plaintiffs have failed to prove that they contracted *E. coli*[] as a result of failure on the part of [Defendant's] employees to exercise due care for their safety.
>
> 33. With regard to [Defendant's] duty to warn fair patrons of unsafe conditions, the . . . Commission finds . . . that [Defendant] exercised reasonable care to provide warnings at the [petting zoo] that contact with the animals posed a health risk. The . . . Commission finds that [the] signage used by [Defendant's] employees in 2004 was sufficient to warn petting zoo patrons of a possible health risk and sufficient to advise them of what precautions they should observe, particularly given the fact that none of the . . . employees knew or could have determined in the exercise of due diligence that any of the animals in the petting zoo were actively shedding *E. coli*[] during the . . . Fair. The . . . Commission finds that a reasonable person exercising due care for the safety of fair patrons in 2004 was not required to provide handouts or signage describing the potential severity of the health risk, which had never surfaced before at the . . . Fair, given the precautions that were in place at the time to prevent the spread of zoonotic disease.

On appeal, Plaintiffs contend that these "findings" are more properly labeled mixed findings of fact and conclusions of law because they find facts and make legal determinations based on those findings. Therefore, Plaintiffs assert, we must not accord findings 32 and 33 "the same deference as true findings of fact on appeal." Defendant does not contest this point in its brief, merely noting that mixed findings of fact and conclusions of law are nonetheless reviewable by this Court and pointing out that "the *factual portion* of these mixed [findings]" should still be reviewed under the competent evidence standard. (Emphasis added). We agree.

With regard to mixed questions of law and fact, the factual findings of the Commission are conclusive on appeal if supported by any competent evidence. *Davis v. Columbus Cnty. Schs.*, 175 N.C. App. 95, 100, 622

S.E.2d 671, 675 (2005). As with separate findings of fact and conclusions of law, the factual elements of a mixed finding must be supported by competent evidence, and the legal elements must, in turn, be supported by the facts. *See Horn v. Sandhill Furniture Co.*, 245 N.C. 173, 177, 95 S.E.2d 521, 524 (1956) (reviewing the Commission's mixed finding and concluding that "[t]he specific facts found are insufficient to sustain the conclusion that the injury resulting in death arose out of and in the course of the employment"); *see also Beach v. McLean*, 219 N.C. 521, 525, 14 S.E.2d 515, 518 (1941) ("If [a finding of fact] is a mixed question of fact and law, it is likewise conclusive, provided there is sufficient evidence to sustain the element of fact involved.").

Therefore, findings of fact 32 and 33 are conclusive as to their factual elements if supported by competent evidence and reviewable *de novo* as to their legal elements. Here, though Plaintiffs have elected to remind us of the distinction between a finding of fact and a conclusion of law, they fail to challenge either the factual or legal elements of findings 32 and 33 as not based on competent evidence or not supporting the conclusions. Instead, they merely note in their second argument, discussed *infra*, that the Commission committed reversible error by employing an incorrect statement of the law. Therefore, we need not review the specific elements of findings 32 and 33 or engage in an analysis of whether those elements are "factual" or "legal." *See generally Helfrich v. Coca-Cola Bottling Co. Consol.*, __ N.C. App. __, __, 741 S.E.2d 408, 412 (2013) ("Findings of fact which are left unchallenged by the parties on appeal are presumed to be supported by competent evidence and are, thus[,] conclusively established on appeal.") (citations, internal quotation marks, and brackets omitted); N.C.R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned."). Plaintiffs must contest these findings in order to take advantage of the relevant standards of review and has not done so here. Accordingly, we proceed to Plaintiffs' premises liability argument.

II. Premises Liability

1. Appellate Review

[2] In their second argument on appeal, Plaintiffs contest the validity of the Commission's conclusion that Defendant did not breach its duty of care on grounds that the conclusion is based on an incorrect standard of care. Plaintiffs go on to argue that Defendant failed to act with due care under the correct standard. In response, Defendant contends that Plaintiffs are barred from challenging the standard of care applied

by the Commission because they did not raise this issue before the Commission. We disagree.

As a general rule, a party may not make one argument on an issue at the trial level and then make a new and different argument as to that same issue on appeal. *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) ("An examination of the record discloses that the cause was not tried upon that theory, and the law does not permit parties to swap horses between courts in order to get a better mount [on appeal]."). The rationale behind this rule is twofold. First, principles of fairness to both parties do not permit one party to use the appellate system to advance a new or different argument than it employed at trial simply because that party did not properly prepare or was unable to think of the argument below. *See id.* Second, as required by the process of preserving an issue for appellate review, the contention argued on appeal must have been raised, argued, and ruled on in the trial court. *See Wood v. Weldon*, 160 N.C. App. 697, 699, 586 S.E.2d 801, 803 (2003) (citing the "swap horses" rule and the rule requiring the preservation of issues for appellate review for the same point), *disc. review denied*, 358 N.C. 550, 600 S.E.2d 469 (2004). Therefore, it is implicit within the rule that a party must have actually been able to raise an argument before the trial court in order for it to be barred as impermissible "horse swapping." *See Weil*, 207 N.C. at 10, 175 S.E. at 838; *see also Wood*, 160 N.C. App. at 699, 586 S.E.2d at 803. Accordingly, arguments limited to alleged errors of law made for the first time in the trial court's written opinion cannot be deemed improper simply because those arguments were never made before the trial court. *Cf. Carden v. Owle Constr., LLC*, __ N.C. App. __, __, 720 S.E.2d 825, 827 (2012) ("A trial court's conclusions of law are fully reviewable on appeal.") (citation, internal quotation marks, and ellipsis omitted). That is to say, the appealing party cannot be charged with impermissibly *swapping* horses when it never mounted one in the first place.

Here, as discussed above, Plaintiffs are not contesting a statement or application of the law made by the Commission *during* the hearing. Rather, Plaintiffs contest the Commission's articulation and application of the law *in its Decision and Order*. As it would be impossible for Plaintiffs to challenge the legal principle articulated by the Commission before it was actually stated, Plaintiffs cannot be barred by the "swap horses" doctrine in this case. To hold otherwise would be to require a party to anticipate a court's opinion before it is written, and we decline to require such foresight here. Accordingly, Defendant's preliminary argument is overruled, and we proceed to Plaintiffs' second argument on appeal.

2. Standard of Care

Plaintiffs' second argument contains two elements. First, Plaintiffs contend that the Commission applied an incorrect legal standard in reaching its conclusions of law on the duty of care owed by Defendant to the Fair patrons. Second, Plaintiffs contend that the Commission erred in concluding that Defendant did not violate its duty of care. We are unpersuaded on both counts.

In order to prove a defendant's negligence in a premises liability case, the plaintiff must first show that the defendant either "(1) negligently created the condition causing the injury, or (2) negligently failed to correct the condition after actual or constructive notice of its existence." *Roumillat v. Simplistic Enters., Inc.*, 331 N.C. 57, 64, 414 S.E.2d 339, 342–43 (1992). "The ultimate issue which must be decided in evaluating the merits of a premises liability claim[, however,] is . . . whether [the defendant] breached the duty to exercise reasonable care in the maintenance of [its] premises for the protection of lawful visitors." *Burnham v. S&L Sawmill, Inc.*, __ N.C. App. __, __, 749 S.E.2d 75, 80 (citation and internal quotation marks omitted), *disc. review denied*, __ N.C. __, 752 S.E.2d 474 (2013).

> Reasonable care requires that the landowner not unnecessarily expose a lawful visitor to danger and give warning of hidden hazards of which the landowner has express or implied knowledge. This duty includes an obligation to exercise reasonable care with regards to reasonably foreseeable injury by an animal. However, premises liability and failure to warn of hidden dangers are claims based on a true negligence standard which focuses . . . attention upon the pertinent issue of whether the landowner acted as a reasonable person would under the circumstances.

Thomas v. Weddle, 167 N.C. App. 283, 290, 605 S.E.2d 244, 248–49 (2004) (citations, internal quotation marks, and certain ellipses omitted). Reasonable care does not require "owners and occupiers of land to undergo unwarranted burdens in maintaining their premises." *Royal v. Armstrong*, 136 N.C. App. 465, 469, 524 S.E.2d 600, 602, *disc. review denied*, 351 N.C. 474, 543 S.E.2d 495 (2000).

A. Created Harm

[3] Plaintiffs first contend that the Commission erred by relying solely on the rule that landowners "have a duty to exercise reasonable care so as not to unnecessarily expose lawful visitors to danger and to warn

them of hidden hazards of which the landowner has express or implied knowledge." Plaintiffs assert that the standard used by the Commission is incorrect because Plaintiffs were not required to show that Defendant knew or should have known about the danger of *E. coli* where, as here, Defendant "created the condition causing [the] injury." (Emphasis in original). Therefore, Plaintiffs assert that we must remand to the Commission for proper application of the correct standard of care. This argument is misplaced.

> Plaintiffs' argument assumes that the Commission's decision turns on whether Plaintiffs adequately established that Defendant knew or should have known about the risk of *E. coli*. This is incorrect. Defendant *admittedly* knew there was some risk of an *E. coli* infection by operating a petting zoo at the Fair. Indeed, Dr. Woodlief testified during the hearing that she was concerned about the possibility of a number of diseases, *including E. coli*. The fact that the Commission did not acknowledge that negligence could be proven by showing that Defendant either created the harm or had express or implied knowledge of the harm has no effect on the resolution of this case. The relevant question is whether Defendant exercised due care in October of 2004 to protect Fair patrons against *E. coli* infection and, in doing so, adequately fulfilled its duty to warn those patrons of the risk of harm. Accordingly, the omission described above cannot constitute reversible error, and Plaintiffs' argument is overruled. *See Vaughn v. N.C. Dep't of Human Res.*, 37 N.C. App. 86, 90, 245 S.E.2d 892, 894 (1978) ("We will not reverse the order of the Commission for harmless error. To warrant reversal, the error must be material and prejudicial.") (citation omitted).

B. Reasonable Care Under the Circumstances

[4] Second, Plaintiffs contend that Defendant failed to meet its duty of care because the petting zoo unreasonably exposed lawful visitors to "a significantly increased risk of contracting a potentially deadly bacteria . . . ." In order to satisfactorily minimize that risk, Plaintiffs suggest that Defendant should have done all or some of the following: provide better supervision, put up a fence between the children and the animals, require parents to carry or hold hands with small children in order to reduce the likelihood of falling, refrain from allowing or offering food in the zoo, and provide more detailed information to Fair patrons about the *specific* danger of *E. coli* infection. Plaintiffs contend that Defendant's

failure to take such precautions was a deviation from its duty of care because Defendant (1) was "charged with the responsibility to minimize and prevent the transmission of diseases from animals to humans at the . . . Fair," (2) "conducted its own assessments of the risks for disease transmission at the . . . [f]airs in 2002 and 2004," (3) "developed and issued its own recommendations toward reducing that risk," and (4) had "the latest and best available information and recommendations" regarding zoonotic diseases. We do not find Plaintiffs' position persuasive.

As Defendant notes in its brief, the precautions taken by Fair officials must be viewed in light of what a reasonable person would have done in October of 2004 to protect against the danger of *E. coli*. *See Thomas*, 167 N.C. App. at 290, 605 S.E.2d at 248–49. In 2004, *E. coli* was considered to be an "emerging public health issue." Only one state had legislation addressing the disease in the context of petting zoos, and "there were no federal laws or regulations in 2004 prohibiting petting zoo exhibits or preventing people from intermingling directly with animals at petting zoo exhibits." No evidence was presented at the hearing that an *E. coli* outbreak had occurred at the Fair prior to 2004, and the petting zoo had been an exhibit at the Fair for the past three years — in 2001, 2002, and 2003 — without an illness-related incident.

In addition, a doctor hired in 2005 by the International Association of Fairs and Expositions[3] to train fair officials to prepare for the danger of *E. coli* in human-to-animal contact settings testified that "most fairs allowed people to intermingle with animals, despite the risk of *E. coli*[] transmission." Having visited fifteen to twenty fairs each year, the doctor observed that signs used by other fairs in 2004 did not list "specific zoonotic factors or describ[e] the specific zoonotic risk, or severity of risk." Rather, the signs "primarily focused on suggesting that patrons wash their hands." Regarding enteric pathogens like *E. coli*, the doctor had previously commented that:

> We do not live in a pathogen-free environment. . . . [T]here is no known process or system to completely eliminate the risk associated with enteric pathogens. Pathogens are part of our world[,] and we must continue to manage our environment such that risk is reduced and consumers are protected as effectively as possible.

The doctor testified that, even by August of 2011, he did not see fairs listing *specific* zoonotic risks on signs.

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3. The Fair is associated with this organization.

Despite the inherent difficulty in eliminating the risk that comes from enteric pathogens, officials at the 2004 Fair participated in a "pre-fair risk assessment." This assessment was designed to "identify and correct any deficiencies prior to the opening of the Fair." According to the Commission, the "concerns raised in the . . . [pre-fair risk assessment report] regarding signage and hand washing stations were adequately and appropriately addressed prior to the opening of the 2004 . . . Fair." In addressing those concerns, officials erected additional signage and hand sanitizing stations at and near the petting zoo. The signs indicated that individuals visiting the zoo should wash their hands before and after touching the animals. Though the signs did not specifically mention *E. coli*, this omission was not atypical for fairs at that time.

While it was certainly *possible* for Defendant to take the additional precautions suggested by Plaintiffs, we agree with the Commission's conclusion that Defendant did not fail to act with due care in October of 2004 to minimize the risk of exposure to *E. coli*. Sources cited by the Commission note that it is impossible to eliminate the risk of enteric pathogens, like *E. coli*, in human-to-animal contact settings without eliminating petting zoos altogether. While sparing the children and animals from this "free for all" would have been the safer option by all accounts, Defendant's decision not to do so was not a breach of its duty of care. Petting zoos were lawful in 2004, and the Commission's findings make clear that the precautions taken by Defendant were well within the range of acceptable care for such zoos.

Our premises liability law does not require landowners to *eliminate* the risk of harm to lawful visitors on their property or undergo unwarranted burdens in maintaining their premises. We conclude that the Commission correctly determined that Defendant took reasonable steps in 2004 to appropriately reduce the inherent risks of operating a petting zoo. While such steps might not be sufficient to do so today, especially given the 2004 outbreak, Plaintiffs' suggested precautions go beyond the reasonable standard of care required of a landowner in October of 2004. To hold otherwise would be to engage in the type of Monday-morning quarterbacking that the law of negligence should avoid, and we decline to do so here. Accordingly, Plaintiffs' second argument is overruled.

3. Proximate Cause

[5] Lastly, Plaintiffs argue that the Commission erred in finding of fact 32 by stating that Plaintiffs' injuries were not proximately caused by Defendant's negligence, in contravention to the parties' stipulations

and the undisputed evidence presented at the hearing. This argument is based on a misreading of finding of fact 32.

As discussed above, finding of fact 32 states in pertinent part that "Plaintiffs have failed to prove that they contracted *E. coli*[] as a result of failure on the part of [Defendant's] employees to exercise due care for their safety." This finding is not relevant to the issue of proximate cause. Rather, it addresses whether Defendant acted with "due care." Plaintiffs' interpretation of the Commission's use of the words "as a result of" transmogrifies the Commission's statement into something other than what it is. Accordingly, Plaintiffs' third argument is overruled, and the Commission's Decision and Order is

AFFIRMED.

Judges ERVIN and DILLON concur.

STATE OF NORTH CAROLINA
v.
DAVID KEITH PRICE

No. COA13-904

Filed 1 April 2014

1. Jurisdiction—motions to dismiss—variance between oral and written orders

The trial court had jurisdiction to enter written orders granting defendant's motions to dismiss a charge of possession of a firearm by a felon where defendant made three motions to dismiss on the grounds that the Felony Firearms Act was unconstitutional, that the stop had been unnecessarily prolonged, and that the firearm had been illegally seized. The charge arose when a Wildlife Officer approached defendant while defendant was hunting, asked for defendant's hunting license, and later asked if defendant was a convicted felon. The trial court granted the dismissal in open court based solely upon the seizure being prolonged past the point where the hunting license was produced, but addressed the Felony Firearms Act constitutional issue in deference to defendant's attorney. The trial then issued two written orders dismissing the charge, one based on the Fourth Amendment violations, and the other based upon the Second Amendment violations.

2. Firearms and Other Weapons—dismissal of action—findings—supported by evidence

In a prosecution for possession of a firearm by a felon arising from a Wildlife Officer checking defendant's hunting license, the challenged findings in an order dismissing the case were supported by the evidence or were not material.

3. Firearms and Other Weapons—possession by a felon—prohibition—preservation of peace and public safety

The conclusions of law in an order dismissing a charge of possession of firearms by a felon were incorrect as a matter of law where the facts of the case more closely aligned with *Britt v. State*, 363 N.C. 546, than *State v. Whitaker*, 201 N.C. App. 190. Given the circumstances, it was not unreasonable to prohibit defendant from possessing firearms to preserve public peace and safety.

4. Search and Seizure—scope of stop—hunting license check—voluntary conversation

The trial court erred by granting defendant's motion to dismiss a charge of possession of a firearm by a felon based on the trial court's conclusion that a Wildlife Enforcement Officer exceeded the scope of a stop to check defendant's driver's license by asking defendant if he was a convicted felon. Nothing in the record indicated that defendant had an objective reason to believe that he was not free to end the conversation once he produced his driver's license and he was not "seized" in the constitutional sense when the officer asked him about his criminal history. The officer had the authority to seize defendant's rifle under the plain view doctrine.

Appeal by the State from orders entered 28 May 2012 by Judge Theodore S. Royster, Jr. in Alexander County Superior Court. Heard in the Court of Appeals 10 December 2013.

Attorney General Roy Cooper, by Assistant Attorney General Joseph L. Hyde, for the State.

Appellate Defender Staples Hughes, by Assistant Appellant Defendant David W. Andrews, for defendant-appellee.

ELMORE, Judge.

On 14 January 2013, David Keith Price (defendant) was indicted by superseding indictment for possession of a firearm by a felon under N.C.

Gen. Stat. § 14-415.1. Defendant filed three pre-trial motions. First, he filed a motion to dismiss in which he argued, *inter alia*, that the North Carolina Felony Firearms Act was unconstitutional on its face and as applied to him. Subsequently, he filed two motions to suppress–one to suppress illegally obtained statements and one to suppress illegally obtained evidence. Following a motions hearing on 11 February 2013 in Alexander County Superior Court, Judge Theodore S. Royster, Jr. granted each of defendant's motions. The State now appeals. After careful consideration, we reverse.

I. Background

At the motions hearing, Officer Chad Starbuck (Officer Starbuck), an enforcement officer for the North Carolina Wildlife Resources Commission, testified that on 2 December 2010 he was patrolling a portion of Alexander County, investigating reports of trespassing and hunting violations, when he encountered defendant near a deer stand in a pine forest. Defendant was in full camouflage and was carrying a hunting rifle. Officer Starbuck was in uniform, and, upon seeing defendant, he "got out of the vehicle and walked towards [defendant's] direction."

Officer Starbuck identified himself and asked defendant to produce his hunting license. Pursuant to N.C. Gen. Stat. § 113-136, wildlife enforcement officers are "authorized to stop temporarily any persons they reasonably believe to be engaging in activity regulated by their respective agencies to determine whether such activity is being conducted within the requirements of the law, *including license requirements*." N.C. Gen. Stat. § 113-136(f) (2013) (emphasis added). Officer Starbuck also asked defendant, "how he had got to that location?" Defendant replied that his wife dropped him off on the property.

Officer Starbuck asked defendant if he was a convicted felon? Defendant answered, "yes." After further investigation, Officer Starbuck determined that defendant was in fact a felon, and he called in Officer Michael Bruce (Officer Bruce) of the Alexander County Sheriff's Department as "backup." Officer Bruce took custody of the firearm. Defendant was neither told that he was under arrest nor placed in handcuffs at any point, and he was released from the scene to his wife. He was later arrested on 16 December 2010 on a charge of being a convicted felon in possession of a firearm.

At the motions hearing, Judge Royster granted defendant's motion to dismiss:

> I'm dismissing it based upon violation of this 4th Amendment rights of the seizure at the time past the point where he said yes, I have a hunting license, here it is, past that point I think the seizure is, or the appellate cases in the US Supreme Court have ruled when you stop someone longer than is necessary to initially investigate what you're initially stopping for, and in this case it could only be a violation, possible violation of the wildlife laws, that's what he was there for, and once he determined there was no violation of those laws any further detainment would be a seizure under the 4th Amendment. And that's the reason I'm dismissing it based upon the violation of that.

Judge Royster subsequently instructed defense counsel "to draw me an order to that effect[.]" However, the written dismissal order filed 28 May 2013 does not reference any Fourth Amendment violation; it dismisses the charge on the basis of an unconstitutional application of the Felony Firearms Act to defendant. Specifically, Judge Royster, Jr. concluded in the written order: (1) that the trial court had jurisdiction to hear and determine defendant's motion to dismiss as a violation of his constitutional rights; (2) that the Federal Firearms Act as applied was unconstitutional because defendant did not present a danger to the community; and (3) the "2004 versions of North Carolina General Statute § 14-415.1 is an unconstitutional violation of Article I, Section 30 of the North Carolina Constitution as it is an unreasonable regulation, not fairly related to the preservation of public peace and safety."[1]

II. Standard of Review

When reviewing the trial court's grant of a criminal defendant's motion to dismiss, 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) (quotation and citation omitted). We review the trial court's conclusions of law *de novo*. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

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1. We note that conclusion 3 is an incorrect statement of law. Our analysis focuses on whether § 14-415.1 is unconstitutional as applied to defendant. We decline to address whether the statute is unconstitutional on its face, as its constitutionally has been previously upheld. *See State v. Whitaker*, 201 N.C. App. 190, 203, 689 S.E.2d 395, 403 (2009).

"The standard of review for questions concerning constitutional rights is *de novo*. Furthermore, when considering the constitutionality of a statute or act there is a presumption in favor of constitutionality, and all doubts must be resolved in favor of the act." *Row v. Row*, 185 N.C. App. 450, 454–55, 650 S.E.2d 1, 4 (2007) (citations, quotations, and ellipses omitted). Under N.C. Gen. Stat. § 15A-954(a)(1) (2013), "[t]he court on motion of the defendant must dismiss the charges stated in a criminal pleading if it determines that: [t]he statute alleged to have been violated is unconstitutional on its face or as applied to the defendant." *Id.*

III. Constitutional Violation

The State makes three arguments to support its position that the trial court erred in dismissing the charge against defendant. First, the State challenges the trial court's subject matter jurisdiction. Second, the State avers that the trial court's findings of fact do not support its conclusions of law. Third, the State argues that the trial court's conclusions are erroneous as a matter of law. We will address each of these arguments in turn.

A. Subject Matter Jurisdiction

[1] The State specifically avers that the trial court lacked subject matter jurisdiction, while the case was on appeal, to enter a written order that did not accurately reflect its oral ruling at the motions hearing. The thrust of the State's argument is that because the trial court orally dismissed the charge against defendant based on a violation of his Fourth Amendment rights, the trial court lacked jurisdiction to enter a written order dismissing the charge due to an unconstitutional application of the Federal Firearms Act. We disagree.

"Whether a trial court has subject-matter jurisdiction is a question of law, reviewed *de novo* on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010). N.C. Gen. Stat. § 15A-1448(a) sets forth the guidelines for time for entry of an appeal and jurisdiction over a case. Under N.C. Gen. Stat. § 15A–1448(a)(3), "[t]he jurisdiction of the trial court with regard to the case is divested . . . when notice of appeal has been given and the period described in [N.C.G.S. § 15A–1448(a)(1)-(2)] . . . has expired." Subsection (1) of N.C. Gen. Stat. § 15A–1448(a) provides that "[a] case remains open for the taking of an appeal to the appellate division for the period provided in the rules of appellate procedure for giving notice of appeal." *Id.* § 15A–1448(a)(1).

Rule 4 of the North Carolina Rules of Appellate Procedure allows two modes of appeal in a criminal case. First, a party may give oral notice

of appeal, provided it is spoken at the time of trial. *State v. Oate*s, 366 N.C. 264, 268, 732 S.E.2d 571, 574 (2012). Second, notice of appeal may be in writing and "filed with the clerk of court . . . at any time between the date of the rendition of the judgment or order and the fourteenth day after entry of the judgment or order." *Id.*

In making its argument, the State relies on *State v. Davis*, where this Court stated that the "general rule is that the jurisdiction of the trial court is divested when notice of appeal is given[.]" 123 N.C. App. 240, 242, 472 S.E.2d 392, 393 (1996) (citation omitted) (holding that the trial court was without jurisdiction to amend the judgment in the course of settling the record on appeal to reflect the intentions of the trial court when the original judgment clearly did not reflect the trial court's intentions).

Here, defendant filed three pre-trial motions which were heard at the 11 February 2013 hearing. Two of these motions, defendant's "Motion to Suppress Illegally Obtained Evidence," and defendant's "Motion to Suppress Defendant's Statements," were each less than a page in length. The third motion, defendant's "Motion to Dismiss as a Violation of Defendant's Constitutional Rights," was twenty-one pages. This motion was entirely devoted to defendant's arguments that the Felony Firearms Act violated the Second and Fourteenth Amendments, and that the Act was unconstitutional on its face and as applied to defendant. *Id.*

The trial court heard defendant's suppression arguments first. Defendant argued that Officer Starbuck illegally seized defendant's firearm pursuant to the "plain view" doctrine because Officer Starbuck lacked probable cause to believe the firearm was "contraband, or an instrumentality or evidence of a crime." The trial court moved on to the Fourth Amendment analysis at the hearing. Following defendant's suppression arguments, the trial court ruled that it was going to grant both suppression motions because of its determination that defendant's Fourth Amendment rights had been violated by an illegally prolonged seizure of defendant. The trial court then allowed defendant to proceed and make his arguments based upon the alleged unconstitutionality of the Felony Firearms Act.

Following the argument on defendant's third motion, the trial court stated in open court that it was going to dismiss the charge of possession of a firearm by a felon based solely on its ruling that defendant's Fourth Amendment rights had been violated because defendant had been detained after the purpose of the seizure – determining whether defendant possessed a valid hunting license – had ended. However, the

trial court then continued on to address whether the Felony Firearms Act was unconstitutionally applied to defendant in this instance:

> [I]n deference to you [defendant's attorney], since this is a very important question, I will find as applied to this defendant, his constitutional rights concerning the 2nd Amendment were violated.
>
> If you want to [appeal] we'll see what's going to happen, but I'm actually dismissing it not based on that grounds. She asked me to rule on the constitutionality concerning, as applied to him and I'm doing that, but I'm dismissing it because I think his 4th Amendment right was violated[.]

The trial court then entered two orders on 28 May 2013, one granting defendant's motions to suppress and dismissing the charge based upon the Fourth Amendment violation found by the trial court, and the other granting defendant's motion to dismiss based upon the Second Amendment violations found by the trial court.

The State argues that this case is analogous to *Davis*, in which this Court determined the trial court had acted without jurisdiction when it materially amended its judgment after notice of appeal had been taken from that judgment. *Id.* In *Davis*, the defendant was convicted of felonious breaking or entering, felonious larceny, and felonious possession of stolen property pursuant to a breaking or entering. The defendant then admitted to having attained habitual felon status. *Id.* at 241, 472 S.E.2d at 393. Because the General Assembly did not intend to punish the defendant for larceny of property *and* possession of the same property that he stole, judgment needed to be arrested for either the felonious larceny or felonious possession of stolen property charge. *See State v. Perry*, 305 N.C. 225, 235, 287 S.E.2d 810, 816 (1982), *overruled in part on different grounds by State v. Mumford*, 364 N.C. 394, 699 S.E.2d 911 (2010) (holding that a defendant may not be convicted and punished for both larceny of property and the possession of that same property). However, neither party moved for arrest of either judgment at trial, and the trial court did not do so *ex mero motu*. *Davis*, 123 N.C. App. at 243, 472 S.E.2d at 394. The trial court subsequently entered its written judgment, which mistakenly arrested judgment on all three underlying convictions, and sentenced the defendant solely based upon his having attained habitual felon status. *Id.* at 241, 472 S.E.2d at 393. This error having been brought to its attention, the trial court, subsequent to the defendant's having entered notice of appeal, conducted a hearing in which the State moved for arrest of judgment solely on the conviction for possession of stolen

goods. *Id.* at 241-42, 472 S.E.2d at 393. The trial court then entered an amended judgment which stated in relevant part:

> The Jury returns into open court with its verdict and finds the defendant Guilty of Felonious Breaking and Entering, Larceny, and Possession of Stolen Goods.
>
> Motion is made by the State to Arrest Judgment as to Possession of Stolen Goods. Motion is allowed.
>
> IT IS THEREFORE ORDERED by the Court to Arrest Judgment as to Possession of Stolen Goods.

Id. at 242, 472 S.E.2d at 393.

This Court in *Davis* vacated the "amended" judgment, reasoning:

> Our review of the trial transcript in this case reveals no motion [made at trial] by the State to arrest judgment as to the charge of possession of stolen property, and no indication that the court did so ex mero motu. Indeed, the judgment of the court, as rendered in open court, indicates that the court did not arrest judgment as to any of the three felonies for which defendant was convicted by the jury. After the court accepted the jury's verdicts, defendant admitted the existence of prior convictions necessary to establish his status as an habitual felon.
>
> . . . .
>
> Thus, we must conclude that the amended judgments do not accurately reflect the actual proceedings and, therefore, were not a proper exercise of the court's inherent power to make its records correspond to the actual facts and "speak the truth." To the contrary, it appears that the amended judgments impermissibly corrected a judicial error.

Id. at 243, 472 S.E.2d at 394.

In contrast, defendant in this case argued vigorously at the hearing that "as applied to [defendant] [the Felony Firearms Act] should not be applied, that it's unconstitutional. And Your Honor, even on a broader fashion we would argue that the statute is too broadly applied and does not meet the test of strict scrutiny." The trial court, after considering the arguments of defendant and the State, stated that defendant "asked me to rule on the constitutionality concerning, as applied to him and I'm doing that[.]" The trial court then ruled in part: "I will find as applied to

this defendant, his constitutional rights concerning the 2nd Amendment were violated." The State then entered oral notices of appeal from the rulings granting each of defendant's three motions. One of those notices of appeal was for the trial court's granting of defendant's motion to dismiss based upon its determination that the Felony Firearms Act was unconstitutional on its face and as applied to defendant.

Unlike the factual situation in *Davis*, in this matter defendant argued the constitutionality of the Act to the trial court, and submitted a written motion, the trial court acknowledged the argument, stated that it would rule on the motion, and did so orally. The State, clearly aware that the motion to dismiss had been decided in defendant's favor, gave notice of appeal from that motion. The trial court then reduced its ruling to writing and entered it.

We do not believe *Davis* stands for the proposition that the trial court is restricted to only including in its written judgments or orders that which it had already stated in open court. *Davis* stands for the principle that the trial court lacks jurisdiction to correct judicial errors, or address issues never litigated, by written order or judgment following valid entry of notice of appeal.

The case before us does not involve the correction of judicial error, and we hold that the events at trial, and resulting orally rendered judgment, sufficiently signaled the contents of the written order now contested by the State. We hold that the trial court had jurisdiction to enter all three of its written orders.

B. Findings of Fact Unsupported by Competent Evidence

[2] Assuming the trial court had subject matter jurisdiction, which it did, the State assigns error to the trial court's findings of facts 1, 14, 20, 22, 23, 26, and 34.

Unchallenged findings of "fact[] are presumed to be correct and are binding on appeal." *State v. Eliason*, 100 N.C. App. 313, 315, 395 S.E.2d 702, 703 (1990) (citation omitted). As such, we limit our review to whether the unchallenged facts support the trial court's conclusions of law. *Id.* "Immaterial findings of fact are to be disregarded." *In re Custody of Stancil*, 10 N.C. App. 545, 549, 179 S.E.2d 844, 847 (1971).

The challenged findings are as follows:

> 1. Defendant is a resident of Alexander County, North Carolina, and has resided in the state of North Carolina since his youth.

> 14. Officer Starbuck . . . searched [defendant] for weapons.
>
> 20. Defendant was held at the scene approximately 20-30 minutes before being allowed to leave.
>
> 22. Officer Starbuck testified that E-315 of the Wildlife Resources Policy Manual applies in this case.
>
> 23. The State has presented no evidence that the search of [d]efendant's person or the seizure of his weapon were consensual.
>
> 26. The crime with which Defendant was charged and convicted of [sic] did not involve any act or threat of violence and did not involve a firearm.
>
> 34. Since completing his sentences for the offense in which he was convicted the Defendant has become a reputable member of the community. Defendant's voting rights were restored in 2010 and he is able and registered to vote in Stony Point, Alexander County, North Carolina. Defendant participates in a Wildlife Commission.

Findings #14, #20, #22, and #23 are supported by the record, specifically by Officer Starbuck's testimony. Officer Starbuck testified that once he "secured the firearm [I] made sure that [defendant] had no other firearms." When asked how long defendant was held at the scene, Officer Starbuck replied: "It could have been 30 minutes. You know, it could have been 20." In addition, Officer Starbuck testified that he followed the procedure set forth in section E-315 of the Wildlife Resources Policy Manual. Finding #23 is supported by the record: Officer Starbuck searched defendant for weapons, and a statement in the chain of custody provides that the "[g]un was seized by [Officer] Starbuck [] when [defendant] came out of the woods." Finding #26 is in reference to defendant's conviction for selling and delivering marijuana and is supported by competent evidence. In support of Finding #34, Officer Starbuck testified that defendant "tended to be a prominent person in the community." However there is no evidence regarding defendant's voting rights. Finding #1 is irrelevant; however, it is supported in that defendant's hunting license states that he is a resident of Alexander County. The challenged facts are supported by competent evidence. To the extent that any of the challenged findings are unsupported, they are immaterial to the outcome and are disregarded.

C. Erroneous Conclusions of Law

[3] Lastly, the State argues that the conclusions of law set out in the dismissal order are incorrect as a matter of law. We agree.

The Felony Firearms Act (the Act), codified in N.C. Gen. Stat. § 14–415.1, was enacted by the General Assembly in 1971. The Act made it unlawful for any person previously convicted of a crime punishable by imprisonment of more than two years to possess a firearm, with certain exemptions for felons whose civil rights had been restored. *Johnston v. State*, ___ N.C. App. ___, ___, 735 S.E.2d 859, 864-65 (2012) *writ allowed*, *review on additional issues denied*, 366 N.C. 562, 738 S.E.2d 360 (2013) *appeal dismissed*, 366 N.C. 562, 738 S.E.2d 361 (2013) *aff'd*, 749 S.E.2d 278 (2013); 1971 N.C. Sess. Laws ch. 954, § 2. Initially, the Act only prohibited felons from the possessing of "any handgun or other firearm with a barrel length of less than 18 inches or an overall length of less than 26 inches[.]" *Britt v. State*, 363 N.C. 546, 547, 681 S.E.2d 320, 321 (2009)(citation omitted). In 2004 the General Assembly amended the statute "to extend the prohibition on possession to *all* firearms by any person convicted of any felony, even within the convicted felons own home and place of business." *Id.* at 548, 681 S.E.2d at 321 (emphasis added); Act of July 15, 2004, ch. 186, sec. 14.1, 2004 N.C. Sess. Laws 716, 737.1.

At the time defendant was charged and presently, N.C. Gen. Stat. § 14-415.1 (2013) provides:

> (a) It shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm or any weapon of mass death and destruction as defined in G.S. 14-288.8(c). For the purposes of this section, a firearm is (i) any weapon, including a starter gun, which will or is designed to or may readily be converted to expel a projectile by the action of an explosive, or its frame or receiver, or (ii) any firearm muffler or firearm silencer. This section does not apply to an antique firearm, as defined in G.S. 14-409.11.

Our courts have held that a felon may challenge the statute as it applies to him or her on grounds that it violates Article I, Section 30 of the North Carolina Constitution. In considering these "as-applied" challenges, we must contemplate the following five factors: "(1) the type of felony convictions, particularly whether they involved violence or the threat of violence[;] (2) the remoteness in time of the felony convictions; (3) the felon's history of law-abiding conduct since the crime[;] (4) the

felon's history of responsible, lawful firearm possession during a time period when possession of firearms was not prohibited[;] and (5) the felon's assiduous and proactive compliance with the 2004 amendment." *Whitaker*, at 205, 689 S.E.2d at 404 (quotations omitted) (citing *Britt*, 363 N.C. at 550, 681 S.E.2d at 323 (2009), *aff'd on other grounds*, 364 N.C. 404, 700 S.E.2d 215 (2010)).

In *Britt*, the plaintiff, Mr. Britt, pled guilty to the nonviolent offense of felony possession with intent to sell and deliver the controlled substance (methaqualone) in 1979. 363 N.C. at 547, 681 S.E.2d at 321. Mr. Britt completed his probation in 1982 and his civil rights were fully restored in 1987. *Id.* When the 2004 amendment to the Act took effect, Mr. Britt "had a discussion with the Sheriff of Wake County, who concluded that possession of a firearm by plaintiff would violate the statute as amended in 2004. [Mr. Britt] thereafter divested himself of all firearms, including his sporting rifles and shotguns that he used for game hunting on his own land." *Id.* at 548, 681 S.E.2d at 322. Mr. Britt then initiated "a civil action against the State of North Carolina, alleging that N.C.G.S. § 14-415.1 as amended violat[ed] multiple rights he [held] under the United States and North Carolina Constitutions." *Id.* at 548-49, 681 S.E.2d at 322. Our Supreme Court found the 2004 version of N.C. Gen. Stat. § 14-415.1 to be unconstitutional *as applied* to Mr. Britt because of "his long post-conviction history of respect for the law, the absence of any evidence of violence by plaintiff, and the lack of any exception or possible relief from the statute's operation[.]" *Id.* at 550, 681 S.E.2d at 323. Specifically, our Supreme Court concluded: "[I]t is unreasonable to assert that a nonviolent citizen who has responsibly, safely, and legally owned and used firearms for seventeen years is in reality so dangerous that any possession at all of a firearm would pose a significant threat to public safety." *Id.* at 550, 681 S.E.2d at 323.

Alternatively, in *Whitaker*, after applying the five factors relied upon in *Britt*, this Court found N.C. Gen. Stat. § 14–415.1 to be constitutional as applied to Mr. Whitaker who was convicted of three prior non-violent felonies, the most recent conviction on a drug charge only a few years prior, and who had notice of the 2004 amendment and demonstrated a disregard for the law despite never misusing a firearm. 201 N.C. App. at 206–07, 689 S.E.2d 404–05.

Defendant argues on appeal that the circumstances in his case are analogous to those in *Britt*, not *Whitaker*. Applying the five-factor test enumerated in *Britt*, we are not persuaded. Defendant has two felony convictions for selling a controlled substance (marijuana) and one conviction for felony attempted assault with a deadly weapon. While

defendant was convicted of the drug offenses in 1989, he was more recently convicted of the felony of attempted assault with a deadly weapon in 2003. Although there is no evidence to suggest that defendant has misused firearms, there is also no evidence that defendant has attempted to comply with the 2004 amendment to the statute. We think it noteworthy that defendant completed his sentence for the conviction of attempted assault with a deadly weapon in 2005, *after* the 2004 amendment was enacted. Therefore, he should have been on notice of the changes in legislation. When Mr. Britt learned of the 2004 amendment, he relinquished his hunting rifle on his own accord. Defendant took no such action. We conclude that facts of this case more closely align with those in *Whitaker*, not *Britt*. Given the circumstances, it is not unreasonable to prohibit defendant from possessing firearms in order to preserve public peace and safety. The trial court erred in dismissing the charge against defendant on the basis that the Act was unconstitutional as applied to him.

IV. Motions to Suppress

[4] The State next argues that the trial court erred in granting defendant's motion to suppress his statements and the motion to suppress evidence. We agree. The crux of this issue is whether Officer Starbuck exceeded the scope of a valid stop when he asked defendant if he was a convicted felon.

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 reviewed *de novo* on appeal. *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

Here, the trial court made twenty-three findings of fact in its order granting defendant's motions to suppress. The State challenges four of these findings as being unsupported by competent evidence. The remaining nineteen findings are binding on appeal. *See Eliason*, *supra*. The challenged findings are as follows:

> 13. Officer Starbuck . . . searched [defendant] for weapons.
>
> 19. Defendant was held at the scene approximately 20-30 minutes before being allowed to leave.

> 21. Officer Starbuck testified that E-315 of the Wildlife Resources Policy manual applies in this case.
>
> 22. The State has presented no evidence that the search of [d]efendant's person or the seizure of the weapon were consensual.

These challenged findings mirror the challenged findings entered in the trial court's dismissal order. As discussed above, these findings were supported by substantial evidence and, therefore, are binding upon this Court. Based on the findings, the trial court concluded: (1) defendant was illegally questioned about his prior criminal record as he was not advised of his Miranda rights; (2) defendant was held beyond the time required for the investigation; (3) defendant's gun was illegally seized without a warrant, probable cause, or defendant's consent; (4) the seizure of defendant's gun was not within the written policies and procedures of the North Carolina Wildlife Resources Commission; and (5) the State failed to justify a warrantless search and seizure of defendant's property. These conclusions of law are fully reviewable on appeal. *Id.* As such, we turn to applicable principles of law in reviewing the trial court's conclusions. *State v. Farmer*, 333 N.C. 172, 186, 424 S.E.2d 120, 128 (1993).

The Fourth Amendment to the United States Constitution and Article I, § 20 of the North Carolina Constitution prohibit unreasonable searches and seizures. *State v. McBennett*, 191 N.C. App. 734, 737, 664 S.E.2d 51, 54 (2008) (citations omitted). This constitutional protection is designed to "prevent arbitrary and oppressive interference by [law] enforcement officials with the privacy and personal security of individuals." *United States v. Martinez-Fuerte*, 428 U.S. 543, 554, 49 L. Ed. 2d 1116, 1126 (1976) (citations omitted).

It is well established that

> [l]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification. The person approached, however, need not

> answer any question put to him; indeed he may decline to listen to the questions at all and may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds. If there is no detention—no seizure within the meaning of the Fourth Amendment—then no constitutional rights have been infringed.

Farmer, 333 N.C. 186-87, 424 S.E.2d 120, 128-29 (citation and quotation omitted). "Seizure occurs when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *State v. Foreman*, 133 N.C. App. 292, 296, 515 S.E.2d 488, 492 (1999) *aff'd as modified*, 351 N.C. 627, 527 S.E.2d 921 (2000) (citation and quotation omitted). A person "subject to detention beyond the scope of the initial seizure is still seized under the Fourth Amendment." *State v. Jackson*, 199 N.C. App. 236, 241, 681 S.E.2d 492, 496 (2009).

Like seizure, deciding whether a person is in "custody" requires an objective review of the circumstances surrounding the interrogation and a determination of the effect those circumstances would have on a reasonable person. *State v. Garcia*, 358 N.C. 382, 391, 597 S.E.2d 724, 733 (2004). "A person is in custody for purposes of *Miranda* when it is apparent from the totality of the circumstances that there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Id.* at 396, 597 S.E.2d at 736 (quotations and citations omitted).

Defendant concedes that Officer Starbuck was allowed to stop him pursuant to N.C. Gen. Stat. § 113-136(f), which, again, authorizes an enforcement officer to make a temporary stop of a person that he reasonably believes is engaging in activity regulated by the Wildlife Resources Commission to determine whether such activity is being conducted within the requirements of the law, including license requirements. N.C. Gen. Stat. § 113-136(f) (2013). Defendant also acknowledges that per N.C. Gen. Stat. § 113-136(k), he was required to show a valid hunting license. However, because he was required by law to stop, defendant maintains that the stop constituted a "seizure," and was not consensual. Moreover, because the scope of the stop was limited to confirming or dispelling Officer Starbuck's suspicion that he was hunting within the requirements of the law, defendant argues that Officer Starbuck exceeded the scope of the stop when he asked defendant if he was a felon *after* defendant produced a valid hunting license. The State

argues that defendant was neither seized nor in custody when Officer Starbuck asked defendant whether he was a felon.

The record indicates that Officer Starbuck found defendant hunting in the woods, approached him, identified himself, and asked defendant to show his hunting license. Defendant was holding a hunting rifle. Once Officer Starbuck was satisfied that defendant held a valid license, he asked, without demanding, if defendant was a convicted felon. Defendant answered, "yes."

Here, defendant admits that he knew that the stop was valid and he knew its purpose. As such, nothing in the record indicates that defendant had an objective reason to believe that he was not free to end the conversation once he produced his hunting license. Again, law enforcement officers do not violate the Fourth Amendment simply by putting questions to a person who is willing to listen. We conclude defendant was not "seized" in the constitutional sense when Officer Starbuck asked him about his criminal history. *See Farmer*, 333 N.C. at 188-89, 424 S.E.2d at 129-30 (holding that the defendant was not "seized," briefly or otherwise, when officers approached him on a public street, identified themselves as law enforcement, displayed no weapons, and simply asked him for information concerning his identity, place of residence, and why he was covered with what appeared to be blood).

Likewise, the record does not support a conclusion that defendant was in custody at the time he was questioned—he was neither arrested nor restrained. As such, the trial court's conclusions of law #1 and #2 are erroneous. Defendant's statement that he was a felon was voluntary, and he was seized no sooner than when Officer Starbuck learned that he was a felon. Accordingly, the trial court erred in granting defendant's motion to suppress his statements.

In addition, Officer Starbuck had authority to seize defendant's rifle without a warrant. "Under the plain view doctrine, police may seize contraband or evidence without a warrant if (1) the officer was in a place where he had a right to be when the evidence was discovered; (2) the evidence was discovered inadvertently; and (3) it was immediately apparent to the police that the items observed were evidence of a crime or contraband." *State v. Grice*, ___ N.C. App. ___, ___, 735 S.E.2d 354, 357 (2012), *review allowed*, *writ allowed*, 743 S.E.2d 179 (2013) (quotations and citations omitted). "The term 'immediately apparent' in a plain view analysis is satisfied only if the police have probable cause to believe that what they have come upon is evidence of criminal conduct." *State v. Graves*, 135 N.C. App. 216, 219, 519 S.E.2d 770, 772 (1999) (quotations

and citations omitted). "Probable cause for an arrest has been defined to be a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty[.]" *State v. Zuniga*, 312 N.C. 251, 259, 322 S.E.2d 140, 145 (1984) (quotations and citations omitted).

Here, the first prong of the plain view test is clearly met as Officer Starbuck was rightfully patrolling hunting grounds in accordance with his job duties. The second prong of the test is also satisfied because Officer Starbuck discovered that the rifle was contraband inadvertently when defendant admitted that he was a convicted felon. Lastly, a reasoned analysis of the record evidence suggests that Officer Starbuck had probable cause to believe that defendant committed the crime of possession of a firearm by a convicted felon. In fact, the commission of the crime could not have been more apparent—defendant, while holding his rifle, admitted that he was a convicted felon. Thus, prong three is satisfied because it certainly became immediately apparent to Officer Starbuck that the rifle was contraband once defendant confessed to being a felon. The trial court's conclusions of law #3, #4, and #5 are erroneous. Accordingly, the trial court erred in concluding that defendant was entitled to the suppression of the gun.

V. Conclusion

The trial court erred in granting defendant's motion to dismiss the charge on the basis that N.C. Gen. Stat. § 14-415.1 was unconstitutional as applied to defendant. Further, defendant's Fourth Amendment rights were not violated during the stop and seizure. Accordingly, the trial court also erred in concluding that defendant was entitled to the suppression of his statements and the suppression of the firearm. We reverse.

Reversed.

Judges McGEE and HUNTER, Robert, C., concur.

STATE OF NORTH CAROLINA
v.
MICHAEL TALBERT

No. COA13-896

Filed 1 April 2014

1. Satellite-Based Monitoring—second-degree rape—aggravated offense

The trial court did not err in a satellite-based monitoring (SBM) case by finding that defendant's second-degree rape conviction constituted an aggravated offense, subjecting him to lifetime SBM. Bound by the decision in *State v. Oxendine*, 206 N.C. App. 205, the Court of Appeals determined that the elements of second-degree rape under N.C.G.S. § 14-27.3(a)(2) are sufficient to constitute an "aggravated offense" as defined in N.C.G.S. 14-208.6(1a).

2. Satellite-Based Monitoring—aggravated offense—second-degree rape—elements of offense—reliance on underlying facts harmless

The trial court improperly relied on several underlying facts of defendant's second-degree rape offense in its determination that defendant had committed an aggravated offense for satellite-based monitoring (SBM) purposes. Although the trial court was only to have considered the elements of the offense of which defendant was convicted, the offense of second-degree rape under N.C.G.S. § 14-27.3(a)(2) constituted an aggravated offense, so any reliance on the underlying facts of defendant's offense was harmless.

Appeal by defendant from order entered 14 February 2013 *nunc pro tunc* to 30 September 2011 by Judge A. Robinson Hassell in Forsyth County Superior Court. Heard in the Court of Appeals 9 December 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Joseph Finarelli, for the State.

Mark L. Hayes for defendant-appellant.

McCULLOUGH, Judge.

Defendant Michael Talbert appeals an order by the trial court requiring him to enroll in lifetime satellite-based monitoring after finding that

defendant had committed an aggravated offense within the meaning of N.C. Gen. Stat. § 14-208.6(1a). For the reasons discussed herein, we affirm the trial court's order.

I. Background

On 12 September 2002, an indictment was returned charging defendant with one count of second-degree rape in violation of N.C. Gen. Stat. § 14-27.3(a). Defendant was also charged with one count of second-degree sexual offense in violation of N.C. Gen. Stat. § 14-27.5(a). Both indictments alleged that the victim was physically helpless at the time of the incident.

On 14 February 2003, a jury found defendant guilty of both charges. Defendant was sentenced to an active term of fifty-one (51) to seventy-one (71) months imprisonment. Defendant was also required to register as a sex offender upon release.

Defendant appealed to our Court. Our Court found no error in the trial court's proceedings in *State v. Talbert*, 2004 N.C. App. LEXIS 711 (2004) (unpublished).

On 5 August 2011, defendant was sent a notice from the North Carolina Department of Correction ("DOC"), informing him that he was to appear for a satellite-based monitoring ("SBM") determination hearing scheduled for 29 August 2011 in Forsyth County Superior Court. DOC had made an initial determination that defendant had been convicted of an aggravated offense as defined in section 14-208.6(1a) of the North Carolina General Statutes, and thus, had met the criteria set out in section 14-208.40(a)(1) requiring enrollment in SBM for life.

Following the hearing, the trial court entered an order 6 July 2012 *nunc pro tunc* to 30 September 2011. The 6 July 2012 order made the following pertinent findings of fact:

> 2) In the State's indictment, the State alleged as to Count 2 specifically with regard to the second-degree rape and sex offense charges — in Count 1 and Count 2 — both allegations were with respect to the victim being, at the time, physically helpless. . . .
>
> 3) Upon conviction, the defendant appealed, and the case was heard in the Court of Appeals on February 4, 2004 whereupon it issued its opinion on May 4, 2004 finding no error with the trial court proceedings or with the sentencing.

4) A copy of the Court of Appeals' opinion was obtained in a duplication by microfilm of the court file upon which the Court takes judicial notice as being an accurate copy and within the bounds as maintained by the Clerk of Superior Court in Forsyth County. . . .

5) The Court further finds as a fact as set forth in the body of the appellate opinion . . . an account of the facts, the defendant's acknowledgement that he had sex with the victim and his acknowledgment that she had not consented, and his acknowledgement and admission that he removed the victim's pants and underwear while she was passed out[.] [T]he next day, the victim went to the Forsyth Medical Center for a sexual assault examination. Forensic Nurse Courtney Tucker found at least 14 tears to the victim's cervix and bruise on her outer right thigh. Nurse Tucker indicated she did not believe the sex was consensual[.] Nurse Tucker also believed that the injuries were consistent with blunt force trauma and with the victim's assertion that she was asleep or passed out at the time of digital penetration and intercourse.

The trial court concluded that defendant had committed an aggravated offense within the meaning of N.C. Gen. Stat. § 14-208.6 and that defendant was an appropriate candidate for lifetime SBM. For reasons unclear from the record, on 14 February 2013, the trial court entered another written order making the same findings of fact and conclusions of law as in the 6 July 2012 order.

Defendant appeals.

II. Standard of Review

In reviewing the SBM orders, "[w]e review the trial court's findings of fact to determine whether they are supported by competent record evidence, and we review the trial court's conclusions of law for legal accuracy and to ensure that those conclusions reflect a correct application of law to the facts found." *State v. McCravey*, 203 N.C. App. 627, 637, 692 S.E.2d 409, 418 (2010) (citation omitted). "The trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Jarvis*, 214 N.C. App. 84, 94, 715 S.E.2d 252, 259 (2011) (citation and quotation marks omitted).

III. Discussion

On appeal, defendant argues that (A) because defendant's prior conviction did not involve the use of "force" as contemplated in N.C. Gen. Stat. § 14-208.6(1a), his conviction for second-degree rape did not constitute an aggravated offense, and thus, the trial court erred by requiring defendant to enroll in lifetime SBM. In the alternative, defendant argues that (B) the trial court erred by relying on the particular underlying facts of defendant's prior conviction in determining whether defendant had committed an aggravated offense.

A. Aggravated Offense

[1] First, defendant argues the trial court erred by finding that his second-degree rape conviction constituted an aggravated offense pursuant to N.C. Gen. Stat. § 14-208.6(1a), subjecting him to lifetime SBM. Specifically, defendant argues that his second-degree rape conviction did not involve the "use of force or threat of serious violence." We disagree.

"When an offender is convicted of a reportable conviction as defined by G.S. 14-208.6(4), and there has been no determination by a court on whether the offender shall be required to enroll in [SBM], the Division of Adult Correction shall make an initial determination on whether the offender falls into one of the categories described in G.S. 14-208.40(a)." N.C. Gen. Stat. § 14-208.40B(a) (2013). "If the Division of Adult Correction determines that the offender falls into one of the categories described in G.S. 14-208.40(a), the district attorney, representing the Division of Adult Correction, shall schedule a hearing in superior court for the county in which the offender resides." N.C. Gen. Stat. § 14-208.40B(b) (2013).

At defendant's hearing, the trial court found that defendant's second-degree rape conviction constituted an "aggravated offense" within the meaning of N.C. Gen. Stat. § 14-208.6(1a). An "aggravated offense" is defined as

> any criminal offense that includes either of the following: (i) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim of any age through *the use of force or the threat of serious violence*; or (ii) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old.

N.C. Gen. Stat. § 14-208.6(1a) (2013) (emphasis added).

"When a trial court determines whether a crime constitutes an aggravated offense, it is only to consider the elements of the offense of which a defendant was convicted and is not to consider the underlying factual scenario giving rise to the conviction. In other words, the elements of the offense must fit within the statutory definition of aggravated offense." *State v. Green*, __ N.C. App. __, __, 746 S.E.2d 457, 464 (2013) (citation and quotation marks omitted).

In the case *sub judice*, defendant was convicted of second-degree rape based upon an indictment alleging a violation of N.C. Gen. Stat. § 14-27.3(a), which governs situations in which the victim was "physically helpless." N.C.G.S. § 14-27.3(a) provides the following:

> (a) A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person:
>
> (1) By force and against the will of the other person; or
>
> (2) Who is mentally disabled, mentally incapacitated, or *physically helpless*, and the person performing the act knows or should reasonably know the other person is mentally disabled, mentally incapacitated, or *physically helpless*.

N.C.G.S. § 14-27.3(a) (2013) (emphasis added).

The only applicable North Carolina case regarding this issue is addressed in *State v. Oxendine*, 206 N.C. App. 205, 696 S.E.2d 850 (2010). In *Oxendine*, the defendant pled guilty to numerous charges including three counts of second-degree rape involving a mentally disabled victim under subsection (a)(2). *Id.* at 206, 696 S.E.2d at 851. The defendant was ordered to enroll in SBM after being released from prison and he appealed the trial court's order. *Id.* at 208, 696 S.E.2d at 851-52. The majority accepted the State's argument that the defendant "should nonetheless be required to enroll in lifetime SBM given that he pled guilty to three counts of second-degree rape of a mentally disabled victim, an aggravated offense as defined by N.C.G.S. § 14-208.6(1a)" and based its conclusion solely on our Court's decision in *State v. McCravey*, 203 N.C. App. 627, 692 S.E.2d 409 (2010) (holding that where the essential elements of second-degree rape pursuant to N.C.G.S. § 14-27.3(*a*)(*1*) are "covered by the plain language of 'aggravated offense' as defined by N.C. Gen. Stat. § 14-208.6(1a), we hold that second-degree rape is an

'aggravated offense' " subject to lifetime SBM). *Id.* at 209, 696 S.E.2d at 853 (emphasis added).

Because we are bound by the decision in *Oxendine*, we reject defendant's arguments that subsection (a)(2) of N.C. Gen. Stat. § 14-27.3 does not constitute an aggravated offense for SBM purposes. *See In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (holding that "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court").

While we reinforce the ultimate conclusion reached in *Oxendine*, we find valuable guidance in Judge Stroud's separate concurring opinion. In her concurrence, Judge Stroud agreed with the ultimate result reached by the majority opinion "to the extent that it . . . remands to the trial court for entry of an order that defendant enroll in SBM for life under N.C. Gen. Stat. § 14-208.40A(c), as second-degree rape under N.C. Gen. Stat. § 14-27.3(a)(2) is an 'aggravated offense' as defined by N.C. Gen. Stat. § 14-208.6(1a)." However, she noted that mere citation to *McCravey* by the majority opinion "is not an adequate rationale for this holding, given the issues raised in this case." *Id.* at 212, 696 S.E.2d at 855. Judge Stroud observed that while *McCravey* held that second-degree rape pursuant to N.C. Gen. Stat. § 14-27.3(a)(1) is an aggravated offense, "this Court has not previously addressed the issue of whether second-degree rape under N.C. Gen. Stat. § 14-27.3(a)(2) is an 'aggravated offense.' " *Id.* at 213, 696 S.E.2d at 855. In order to provide a "more in-depth analysis" of the issue, Judge Stroud stated the following:

> In *McCravey*, the defendant argued "that the statutory definition of 'aggravated offense' in N.C. Gen. Stat. § 14-208.6(1a) is unconstitutionally vague because it does not specify what constitutes 'use of force[.]' " [*McCravey*] at __, 692 S.E.2d at 418. This Court considered the context and purpose of the SBM statute and the case law which has defined "the force required in a sexual offense of this nature." *Id.* at __, 692 S.E.2d at 419-20. In *McCravey*, we held that
>
> > The language of N.C. Gen. Stat. § 14-208.6(1a) – 'through the *use of force* or the threat of serious violence' – reflects the established definitions as set forth in case law of both physical force and constructive force, in the context of the sexual

> offenses enumerated in N.C. Gen. Stat. §§ 14-27.2, 14-27.3, 14-27.4, and 14-27.5. (emphasis added).
>
> The legislature intended that the same definition of force, as has been traditionally used for second-degree rape, to apply to the determination under N.C. Gen. Stat. § 14-208.6(1a) that an offense was committed by 'the use of force or the threat of serious violence.' *Id.*

Id. at 213-14, 696 S.E.2d at 855-56 (emphasis added).

Furthermore, Judge Stroud discussed our Supreme Court's decision in *State v. Holden*, 338 N.C. 394, 450 S.E.2d 878 (1994), a case we find relevant to the issue before us. In *Holden*, the defendant argued that there was no evidence presented from which a jury could find that a prior conviction of attempted second-degree rape involved violence or the threat of violence, sufficient to prove an aggravating factor pursuant to N.C.G.S. § 15A-2000(e)(3). *Id.* at 404, 450 S.E.2d at 883. The North Carolina Supreme Court held that attempted second-degree rape pursuant to N.C. Gen. Stat. § 14-27.3(a)(2) involved the "use or threat of violence to the person" within the meaning of N.C. Gen. Stat. § 15A-2000(e)(3), which lists aggravating circumstances that may be considered when sentencing a defendant to life or death. *Id.* Under N.C. Gen. Stat. § 15A-2000(e)(3), the required prior felony

> can be either one which has as an element the involvement of the use or threat of violence to the person, such as rape or armed robbery, or a felony which does not have the use or threat of violence to the person as an element, but the use or threat of violence to the person was involved in its commission.

Id. (citations omitted) (emphasis added). The *Holden* Court noted that "for purposes of N.C.G.S. § 15A-2000(e)(3), rape is a felony which has as an element the use or threat of violence to the person" and that the "felony of attempt to commit rape is therefore by nature of the crime a felony which threatens violence." *Id.* at 404-405, 450 S.E.2d at 883-84 (citations omitted). The *Holden* Court rejected the "notion of any felony which may properly be deemed 'non-violent rape'" and relied on the opinions of military courts:

> Under the Uniform Code of Military Justice, rape is always, and under any circumstances, deemed as a matter of law to be a crime of violence. *United States v. Bell*,

> 25 M.J. 676 (A.C.M.R. 1987), *rev. denied*, 27 M.J. 161 (C.M.A. 1988); *United States v. Myers*, 22 M.J. 649 (A.C.M.R. 1986), *rev. denied*, 23 M.J. 399 (C.M.A. 1987). As stated in *Myers*, military courts "specifically reject the oxymoronic term of 'non-violent rape.' The more enlightened view is that rape is always a crime of violence, no matter what the circumstances of its commission." *Myers*, 22 M.J. at 650. "Among common misconceptions about rape is that it is a sexual act rather than a crime of violence." *United States v. Hammond*, 17 M.J. 218, 220 n.3 (C.M.A. 1984).

Id. at 405, 450 S.E.2d at 884 (citation omitted). Based on similar logic, the *Holden* Court held that the crime of attempted rape always involved at least a "threat of violence" within the meaning of N.C. Gen. Stat. § 15A-2000(e)(3) and stated the following:

> The acts of having or attempting to have sexual intercourse with another person who is mentally defective or incapacitated and statutorily deemed incapable of consenting – just as with a person who refuses to consent – involve the "use or threat of violence to the person" within the meaning of N.C.G.S. § 15A-2000(e)(3). In this context, the force inherent to having sexual intercourse with a person who is deemed by law to be unable to consent is sufficient to amount to 'violence' as contemplated by the General Assembly in this statutory aggravating circumstance. Likewise, the attempt to have sexual intercourse with such a person inherently includes a threat of force sufficient to amount to a "threat of violence" within the meaning of this aggravating circumstance.
>
> Nor do we believe that having or attempting to have sexual intercourse with a "physically helpless" person in violation of N.C.G.S. § 14-27.3(a)(2) may properly be deemed "non-violent" rape or attempted rape. We find no merit in the suggestion that N.C.G.S. § 14-27.3(a)(2) makes it a crime to have *consensual* sexual intercourse with a physically helpless person.

Id. at 406, 450 S.E.2d at 884-85 (citations omitted) (emphasis in original).

For the foregoing reasons, we conclude that the elements of second-degree rape under N.C. Gen. Stat. § 14-27.3(a)(2) are sufficient to constitute an "aggravated offense" as defined in N.C. Gen. Stat. 14-208.6(1a).

Accordingly, we hold that the trial court did not err in ordering defendant to enroll in lifetime SBM.

B. Elements of the Convicted Offense

[2] Defendant argues and the State concedes that at the SBM hearing and in both the 29 June 2012 order and 14 February 2013 order, the trial court referenced and relied on several underlying facts of defendant's second-degree rape offense in its determination of whether defendant had committed an aggravated offense for SBM purposes.

It is well established, when determining whether an offense is an aggravated offense pursuant to N.C.G.S. § 14-208.40A, the trial court is only to consider the elements of the offense of which a defendant was convicted and is not to consider the underlying factual scenario. *See Green*, __ N.C. App. at __, 746 S.E.2d at 464. However, as discussed above, this Court has previously held that the offense of second-degree rape under subsection (a)(2) constitutes an aggravated offense. Therefore, the trial court properly ordered defendant to enroll in lifetime SBM. Any reliance on the underlying facts of defendant's offense to determine that it was an aggravated offense and any procedural defects were harmless in the circumstances before us. The order of the trial court subjecting defendant to lifetime SBM is affirmed.

Affirm.

Chief JUDGE MARTIN and JUDGE ERVIN concur.

WASHINGTON v. CLINE

[233 N.C. App. 412 (2014)]

FRANKIE DELANO WASHINGTON AND
FRANKIE DELANO WASHINGTON, JR., PLAINTIFFS
v.
TRACEY CLINE, ANTHONY SMITH, WILLIAM BELL, JOHN PETER, ANDRE T. CALDWELL, MOSES IRVING, ANTHONY MARSH, EDWARD SARVIS, BEVERLY COUNCIL, STEVEN CHALMERS, PATRICK BAKER, THE CITY OF DURHAM, NC, AND THE STATE OF NORTH CAROLINA, DEFENDANTS

No. COA13-224-2

Filed 1 April 2014

1. Appeal and Error—interlocutory orders and appeals—Rule 54(b) certification—prevention of fragmentary appeals

Although plaintiffs' appeal was from an interlocutory order since it dismissed one but not all parties, that order was properly certified under N.C.G.S. § 1A-1, Rule 54(b) and defendant Baker's appeal from the trial court's denial of a motion to dismiss for insufficient service of process was allowed in order to prevent fragmentary appeals.

2. Process and Service—motion to dismiss—sufficiency of service of process

The trial court's order dismissing all defendants-appellees except the City was reversed, and the trial court's order denying defendant Baker's motion to dismiss for insufficient service of process was affirmed. Plaintiffs properly proved service via N.C.G.S. § 1A-1, Rule 4(j)(1)d and under N.C.G.S. § 1-75.10(5); further, the trial court's order dismissing the City revealed that plaintiffs failed to properly serve a party designated by rule to receive service on behalf of the City.

3. Process and Service—denial of motion to amend summons—correction of name of city manager—jurisdiction

The trial court did not abuse its discretion by denying plaintiffs' motion to amend the summons against the City to correct the name of the person currently holding the office of city manager. It would have conferred jurisdiction over the City without proper service of process.

4. Appeal and Error—preservation of issues—failure to cite authority

Although defendant Baker contended that the trial court erred by denying his motion to dismiss an action for failure of the

summonses to contain the "title of the cause," he failed to cite any authority for this proposition.

Appeals by plaintiffs and defendant Patrick Baker from orders entered 6 November 2012 by Judge W. Osmond Smith, III in Durham County Superior Court. Originally heard in the Court of Appeals 28 August 2013. Petition for Rehearing allowed 6 January 2014.

Ekstrand & Ekstrand LLP, by Robert C. Ekstrand, for plaintiffs-appellants.

Wilson & Ratledge, PLLC, by Reginald B. Gillespie, Jr., and Office of the City Attorney, by Kimberly M. Rehberg, for defendant-appellant Patrick Baker and defendants-appellees the City of Durham, North Carolina, Edward Sarvis, Beverly Council, and Steven Chalmers.

Kennon Craver, PLLC, by Joel M. Craig and Henry W. Sappenfield, for defendants-appellees Anthony Smith, William "Doug" Bell, John Peter, Moses Irving, and Anthony Marsh.

HUNTER, Robert C., Judge.

Frankie Washington ("Washington") and Frankie Washington, Jr. ("Washington, Jr.") (collectively "plaintiffs") and defendant Patrick Baker ("Baker") appeal from interlocutory orders entered by Judge W. Osmond Smith, III on 6 November 2012 in Durham County Superior Court. Plaintiffs appeal from orders granting nine of twelve defendants'[1] motion to dismiss for insufficient service of process and denying plaintiffs' motion to amend the summons against defendant City of Durham ("the City"). Baker appeals from orders denying his motion to dismiss for insufficient service of process and denying his motion to dismiss the action for failure of the summonses to contain the "title of the cause" as is required by North Carolina Rule of Civil Procedure 4(b).

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1. Baker is the only defendant-appellant. Andre T. Caldwell, although named in the complaint, is not listed in the briefs as an appellee, and does not appear to have been a party to the suit at the time the trial court entered its orders. Therefore, the nine defendants whose motion to dismiss was granted, and thus the nine appellees to plaintiffs' appeal, are Steven Chalmers ("Chalmers"), Beverly Council ("Council"), Anthony Smith ("Smith"), William Bell ("Bell"), John Peter ("Peter"), Moses Irving ("Irving"), Anthony Marsh ("Marsh"), Edward Sarvis ("Sarvis"), and the City of Durham ("the City") (collectively "defendants-appellees," or, when including Baker, "defendants").

On appeal, plaintiffs assert that: (1) the trial court erred by granting defendants-appellees' motion to dismiss for insufficient service of process because plaintiffs properly served those defendants via designated delivery service and defendants are estopped from asserting such defense, and (2) the trial court erred by denying plaintiffs' motion to amend the summons for the City because such amendment would not prejudice the City. Baker argues that: (1) the trial court erred by denying his motion to dismiss for insufficient service of process because plaintiffs failed to meet the statutory requirements for designated delivery service, and (2) the trial court erred by failing to dismiss the action because the summonses did not contain the "title of the cause" as is required by statute.

On 5 November 2013, this Court filed an opinion affirming the trial court's orders granting the City's motion to dismiss for insufficient service of process, denying Baker's motion to dismiss for insufficient service of process, denying plaintiffs' motion to amend the summons, and denying Baker's motion to dismiss for failure of the summonses to contain the "title of the cause." However, we reversed the trial court's order granting all other defendants-appellees' motion to dismiss for insufficient service of process. Upon reexamination, we maintain this disposition, but we modify the originally filed opinion. This opinion supersedes the previous opinion filed 5 November 2013.

Background

Plaintiffs' claims against defendants arise out of the arrest, prosecution, conviction, and ultimate release of Washington that took place over a six-year period between 30 May 2002 and 22 September 2008. After a four-year, nine-month delay between arrest and trial, Washington was convicted of first-degree burglary, two counts of second-degree kidnapping, robbery with a dangerous weapon, attempted robbery with a dangerous weapon, assault and battery, and attempted first-degree sex offense. This Court vacated his convictions due to delays attributed to the State in violation of Washington's right to a speedy trial under the Sixth Amendment of the United States Constitution and Article I, Section 18 of the North Carolina Constitution. *See State v. Washington*, 192 N.C. App. 277, 665 S.E.2d 799 (2008). On 21 September 2011, Washington and Washington, Jr. filed a complaint and obtained civil summonses against defendants for, *inter alia*, violations of federal and state constitutional provisions, malicious prosecution, negligence, negligent and intentional infliction of emotional distress, conspiracy, and supervisory liability.

Plaintiffs attempted to serve process on defendants using FedEx, a designated delivery service. All defendants except Council were served between 23 and 27 September 2011; Council was served on 25 October 2011.

The packages containing summonses and copies of the complaint sent to the City and Baker contained the following directory paragraphs, respectively:

> City of Durham
> c/o Patrick Baker
> 101 City Hall Plaza
> Durham NC 27701
>
> Patrick Baker City Manager
> City of Durham
> 101 City Hall Plaza
> Durham NC 27701

At the time of service, Baker was the City Attorney, not the City Manager. Both packages were received by April Lally ("Lally"), a receptionist and administrative assistant in the City Attorney's Office; Lally signed for the packages and later handed them to Baker. Baker later filed an affidavit with the trial court in which he admitted to receiving the summons and complaint against him.

Plaintiffs attempted to serve Chalmers at his home, but left the package containing the summons and complaint with Chalmers' visiting twelve-year-old grandson who was playing in the front yard. Chalmers' grandson went inside and gave Chalmers the package; Chalmers later filed an affidavit with the trial court admitting that he received the summons and complaint against him.

Plaintiff attempted to serve Council by delivering the package via FedEx to her home, but no one was there at the time of delivery. The driver left the package on the door step to the side door; Council later filed an affidavit with the trial court admitting that she received the summons and complaint against her later that evening when she returned home.

Plaintiff attempted to serve Bell, Irving, Marsh, Peter, Sarvis, and Smith by having a FedEx driver deliver their summonses and copies of the complaint to the City Police Department's loading dock. Bell and Irving were former employees of the City's Police Department at the time of delivery; Marsh, Peter, Sarvis, and Smith were then-current employees. The driver left the package with Brenda T. Burrell ("Burrell"),

an employee for the City's Police Department who is responsible for "receiving materials and supplies delivered to the Police Department for use in its operations." Each of these defendants filed an affidavit with the trial court admitting that he received the summons and complaint against him.

Plaintiffs filed with the trial court affidavits of service and receipts generated by the designated delivery service for each defendant. They also re-filed the defendants' affidavits in which they admitted to receiving the summonses and copies of the complaint against them as evidence of effective service of process.

On 11 January 2012, Cline and the State of North Carolina filed motions to dismiss for insufficient service of process, among other claims not relevant to this appeal. On 23 March 2012, all remaining defendants also filed a motion to dismiss for insufficient service of process. That same day plaintiffs filed a motion to amend the summons issued to the City to replace Baker with the then-current City Manager. On 6 November 2012 Judge Smith entered orders: (1) denying plaintiffs' motion to amend the summons; (2) denying motions to dismiss for insufficient service of process as to Baker, Cline, and the State of North Carolina[2]; and (3) granting motions to dismiss for insufficient service of process as to defendants-appellees. On 15 November 2012, plaintiffs filed a timely notice of appeal. On 27 November 2012, Baker also filed timely notice of appeal.

Grounds for Appellate Review

[1] The orders from which plaintiffs and Baker appeal are interlocutory. "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, the Court does allow immediate appeal of interlocutory orders in some circumstances.

> [I]mmediate appeal of interlocutory orders and judgments is available in at least two instances. First, immediate review is available when the trial court enters a final judgment as to one or more, but fewer than all, claims or parties and certifies there is no just reason for delay . . . . Second, immediate appeal is available from an interlocutory order or judgment which affects a substantial right.

2. Only Baker appeals from this order.

Sharpe v. Worland, 351 N.C. 159, 161-62, 522 S.E.2d 577, 579 (1999) (quotation marks omitted); *see also* N.C. Gen. Stat. § 1-277(a) (2013) ("An appeal may be taken from every judicial order . . . which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action.").

Here, plaintiffs appeal from an order dismissing defendants-appellees, who comprise more than one but not all parties. This order is in effect a final judgment as to those defendants-appellees, and the trial court certified in the order dismissing them that there was no just reason for delay in appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. As such, plaintiffs appeal of the trial court's order granting defendants-appellees' motion to dismiss is properly before this Court. *See DKH Corp. v. Rankin-Patterson Oil Co.*, 348 N.C. 583, 585, 500 S.E.2d 666, 668 (1998) ("[I]f the trial court enters a final judgment as to a party or a claim and certifies there is no just reason for delay, the judgment is immediately appealable.").

Although Baker admits that his appeal does not stem from a final judgment or an order affecting a substantial right, he argues that the Court should hear his appeal in order to prevent "fragmentary appeals." The circumstances here are comparable to those in *RPR & Assocs., Inc. v. State*, 139 N.C. App. 525, 530-31, 534 S.E.2d 247, 251-52 (2000), in which this Court chose to hear an appeal from the trial court's denial of a motion to dismiss for insufficient service of process that was not itself immediately appealable, but was related to an issue properly before the Court. The Court reasoned that "to address but one interlocutory or related issue would create fragmentary appeals." *Id.* at 531, 534 S.E.2d at 252. Here, Baker's appeal involves the application of the same rules to the same facts and circumstances as plaintiffs' appeal, which we choose to allow. Therefore, in order to prevent fragmentary appeals, we find that Baker's appeal is also proper at this time.

Additionally, we find the appeals from the trial court's orders denying plaintiffs' motion to amend the summons against the City and denying defendants' motion to dismiss for failure of the summons to "contain the title of the cause" are also properly before the Court pursuant to N.C. Gen. Stat. § 1-278, which provides that "[u]pon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment." Here, plaintiffs properly appeal from a final judgment, and the above orders involve the merits and necessarily affect that judgment. Therefore, appellate review is appropriate at this stage of litigation.

Discussion

I. Sufficiency of Service of Process

[2] Plaintiffs first argue that the trial court erred by granting defendants-appellees' motion to dismiss for insufficient service of process. Baker argues that the trial court erred by denying his motion to dismiss for insufficient service of process. After careful review, we reverse the trial court's order dismissing all defendants-appellees except the City and affirm the trial court's order denying Baker's motion to dismiss.

A. Estoppel

At the outset, plaintiffs cite *Storey v. Hailey*, 114 N.C. App. 173, 441 S.E.2d 602 (1994), in support of their argument that defendants are estopped from asserting the defense of insufficient service of process. In *Storey*, this Court ruled that the defendants were estopped from asserting insufficient service of process as a defense where they asked for and received extensions of time without alerting the plaintiff to any possible defects in service, and plaintiffs ran out of time to effect valid service due to the extensions. The Court reasoned that by doing so, the defendants in effect "lulled [the] plaintiff into a 'false sense of security' and probably prevented [the] plaintiff from discovering her error and effecting valid service within the statutory period." *Storey*, 114 N.C. App. at 176, 441 S.E.2d at 604. Here, although defendants did receive extensions of time from the trial court, they explicitly stated that the reason for the extensions was to "determine whether any Rule 12 or other defenses [were] appropriate." Defendants-appellees' and Baker's motion to dismiss for insufficient service of process were entered pursuant to Rule 12(b)(5). Therefore, plaintiffs had notice that such motions could be filed. Furthermore, defendants-appellees in fact served plaintiffs with their answer containing the defenses on 16 December 2012, four days before the last day in which plaintiffs could have obtained extensions of the summonses. It is evident that plaintiffs had actual notice of the defenses, because they served their reply to the answer on 20 December 2011, the same day that the summonses expired. Therefore, because defendants were not responsible for plaintiffs' failure to extend the life of the summonses, we find that *Storey* is inapposite and defendants are not estopped from asserting the defense of insufficient service of process.

B. Natural persons

Defendants-appellees and Baker moved to dismiss this action under Rule 12(b)(5) for insufficient service of process. "We review *de novo* questions of law implicated by denial of a motion to dismiss for

insufficiency of service of process." *New Hanover Cnty. Child Support Enforcement ex rel. Beatty v. Greenfield*, __ N.C. App. __, __, 723 S.E.2d 790, 792 (2012).

Rule 4(j)(1)d of the North Carolina Rules of Civil Procedure sets forth the requirements for service of process on natural persons via designated delivery service, the method utilized by plaintiffs here:

> d. By depositing with a designated delivery service . . . a copy of the summons and complaint, addressed to the party to be served, delivering to the addressee, and obtaining a delivery receipt.

N.C. Gen. Stat. § 1A-1, Rule 4(j)(1)d (2013). Where defendants appear in an action and challenge the service of the summons (as all defendants did here), service by designated delivery service may be proved in the following manner:

> (5) Service by Designated Delivery Service. - In the case of service by designated delivery service, by affidavit of the serving party averring all of the following:
>
> a. That a copy of the summons and complaint was deposited with a designated delivery service as authorized under G.S. 1A-1, Rule 4, delivery receipt requested.
>
> b. That it was in fact received as evidenced by the attached delivery receipt or other evidence satisfactory to the court of delivery to the addressee.
>
> c. That the delivery receipt or other evidence of delivery is attached.

N.C. Gen. Stat. § 1-75.10(a)(5) (2013).

At issue in this case is the interpretation of the phrase "delivering to the addressee" in Rule 4(j)(1)d and section 1-75.10(5). Defendants summarize their argument as follows: "because FedEx did not deliver the process to the addressee or an agent of the addressee, the requirement of Rule 4(j)(1)d of 'delivering to the addressee' was not met, and therefore service was insufficient." In support of this contention, they further argue that "[e]stablished case law of the Supreme Court and this Court holds that Rule 4's requirements for service of process are to be strictly enforced." We agree that Rule 4 is "to be strictly *enforced* to insure that a defendant will receive actual notice of a claim against him." *Hamilton v. Johnson*, __ N.C. App. __, __, 747 S.E.2d 158, 162 (2013) (emphasis added) (quoting *Grimsley v. Nelson*, 342 N.C. 542, 545, 467 S.E.2d 92,

94 (1996)). However, the greater weight of precedent supports a liberal approach to interpreting the language of the rules. Both of our appellate courts have explicitly recognized liberality as the canon of construction when interpreting the North Carolina Rules of Civil Procedure. *See Excel Staffing Serv., Inc. v. HP Reidsville, Inc.*, 172 N.C. App. 281, 285, 616 S.E.2d 349, 352 (2005) ("It is true that our Supreme Court instructed that when construing the Rules of Civil Procedure . . . that '[l]iberality is the canon of construction.' ") (quoting *Lemons v. Old Hickory Council, Boy Scouts of America, Inc.*, 322 N.C. 271, 275, 367 S.E.2d 655, 657 (1988)). The *Lemons* Court explained that:

> The Rules of Civil Procedure were adopted by the General Assembly at the urging of the North Carolina Bar Association "to eliminate the sporting element from litigation." The philosophy underlying these rules was that:
>
> > *Technicalities and form are to be disregarded in favor of the merits of the case.* One of the purposes of the rules was to take the sporting element out of litigation. No single rule is to be given disproportionate emphasis over another rule which also has application. Rather, the rules are to be applied as a harmonious whole. The rules are designed to eliminate legal sparring and fencing and surprise moves of litigants. The aim is to achieve simplicity, speed and financial economy in litigation. *Liberality is the canon of construction.*

Lemons, 322 N.C. at 274-75, 367 S.E.2d at 657 (emphasis added) (citation omitted).

Furthermore, the General Assembly itself added commentary to Rule 4 indicating that it is "complementary" to the jurisdiction statutes in N.C. Gen. Stat. § 1-75.1 et. seq. which were "proposed for consideration contemporaneously with [the North Carolina Rules of Civil Procedure]." *See* N.C. Gen. Stat. § 1A-1, Rule 4 official commentary (2013). Section 1-75.1 states that the jurisdiction statutes, including section 1-75.10, "shall be *liberally construed* to the end that actions be speedily and finally determined *on their merits*. The rule that statutes in derogation of the common law must be strictly construed does not apply to this Article." N.C. Gen. Stat. § 1-75.1 (2013) (emphasis added). The canon of liberality noted by both this Court and the Supreme Court and the General Assembly's explicit intent to have actions "speedily and finally determined on their merits" underlie the general recognition in this state that:

> A suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice; and the purpose of process is to bring parties into court. If it names them in such terms that every intelligent person understands who is meant, . . . it has fulfilled its purpose; and courts should not put themselves in the position of failing to recognize what is apparent to everyone else.

Wiles v. Welparnel Const. Co., Inc., 295 N.C. 81, 84-85, 243 S.E.2d 756, 758 (1978) (quoting *United States v. A.H. Fischer Lumber Co.*, 162 F.2d 872, 873 (4th Cir. 1947)).

Turning to the facts of this case, we believe that *Granville Med. Ctr. v. Tipton*, 160 N.C. App. 484, 493, 586 S.E.2d 791, 797 (2003), is helpful to our analysis. In *Granville Medical Center*, the plaintiff served the defendant via certified mail under Rule 4(j)(1)c of the North Carolina Rules of Civil procedure and won default judgment when the defendant failed to answer the complaint. *Id.* at 485-86, 586 S.E.2d at 793. To prove service under section 1-75.10(4), the plaintiff presented the trial court with an affidavit attesting that the summons and complaint were delivered to the defendant and a signature was obtained on the registry receipt. *Id.* at 490-91, 586 S.E.2d at 796-97. The defendant attempted to rebut the presumption of proper service by averring that the individual who signed for the summons and complaint was not connected to the defendant in any way. *Id.* at 493, 586 S.E.2d at 798.

In addressing section 1-75.10(4) and Rule 4(j)(1)c, the *Granville Medical Center* Court held that "a defendant who seeks to rebut the presumption of regular service generally must present evidence that service of process failed to accomplish its goal of providing defendant with notice of the suit, rather than simply questioning the identity, role, or authority of the person who signed for delivery of the summons." *Granville Med. Ctr.*, 160 N.C. App. at 493, 586 S.E.2d at 797 (2003) (citing *In re Williams*, 149 N.C. App. 951, 959, 563 S.E.2d 202, 206 (2002) (where the defendant "did not rebut this presumption by showing he never received the summons and complaint" the Court held that "defendant was sufficiently served with process"); *Poole v. Hanover Brook, Inc.*, 34 N.C. App. 550, 555, 239 S.E.2d 479, 482 (1977) (a defendant who "did not attempt to rebut this presumption by showing that he did not receive copies of the summons and complaint" held to have "failed to show that service of process was insufficient because a delivery was not made to a proper person")). Thus, the *Granville Medical Center* Court held that:

> In the present case, defendant's affidavit essentially states that (1) he did not personally sign the registry receipt indicating delivery of the summons, (2) the receipt was signed by "S" or "F" Hedgepeth, and (3) defendant had never employed a person named Hedgepeth "as an agent, officer, employee, or principal[.]" On this basis, defendant asserts his affidavit proves the person signing for receipt of the summons "was not in any way connected with the defendant." However, as the trial court observed, the fact that Hedgepeth was not defendant's agent or principal does not necessarily mean he had no connection to defendant. *Further, as discussed above, the crucial issue is not whether the individual signing for the summons was formally employed by defendant as his agent, but whether or not defendant in fact received the summons. Conspicuously absent from defendant's affidavit is any allegation that he did not receive the summons, or did not receive notice of the suit.*
>
> We conclude that it was not error for the trial court to conclude that defendant was properly served with the summons. This assignment of error is overruled.

Granville Med. Ctr., 160 N.C. App. at 493-94, 586 S.E.2d at 798 (emphasis added).

Although the holding of *Granville Medical Center* is distinguishable because it analyzed whether the defendant could rebut a presumption of service, we find its reasoning as to the interplay between Rule 4 and section 1-75.10 persuasive. The rules analyzed by the *Granville Medical Center* Court are materially similar to those at issue in this case. Rule 4(j)(1)c, like Rule 4(j)(1)d, requires "deliver[y] to the addressee" to effectuate valid service; section 1-75.10(4), like section 1-75.10(5), allows proof of delivery to the addressee with "other evidence" sufficient to establish that the summons and complaint were "in fact received." The *Granville Medical Center* Court held that whether the defendant in fact received the summons and complaint is the "crucial issue" to rebut a presumption of "deliver[y] to the addressee" under Rule 4(j)(1)c and section 1-75.10(4). Thus, given the nearly identical language of these rules, it follows that where defendants challenge "deliver[y] to the address" under Rule 4(j)(1)d and section 1-75.10(5), the "crucial issue" is whether the summons and complaint were in fact received by the defendants challenging service.

Furthermore, principles of statutory construction lead us to conclude that defendants' argument that Rule 4(j)(1)d requires direct service exclusively on a defendant or his service agent is without merit. "The best indicia of [legislative] intent are the language of the statute . . . the spirit of the act and what the act seeks to accomplish." *Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980). The General Assembly's stated objective in passing the jurisdiction statutes in sections 1-75.1 et. seq. was to have actions "speedily and finally determined on their merits." N.C. Gen. Stat. § 1-75.1. To achieve this end, the General Assembly drafted section 1-75.10 with plain language allowing a plaintiff to prove service under Rule 4(j)(1)d with either a return receipt or "other evidence" that copies of the summons and complaint were "in fact received" by the addressee, not evidence that the delivery service employee personally served the individual addressee or his service agent. N.C. Gen. Stat. § 1-75.10(a)(5)(b). Further, when construing a statute, "the entire sentence, section, or statute must be taken into consideration, and every word must be given its proper effect and weight." *Nance v. S. Ry. Co.*, 149 N.C. 366, 271, 63 S.E. 116, 118 (1908). Defendants' interpretation would provide almost no weight to the phrase "in fact received" in section 1-75.10. Viewed under the doctrine of *expressio unius est exclusio alterius*, which means the expression of one thing is the exclusion of another, the fact that the legislature declined to include a personal delivery requirement in Rule 4(j)(1)d when it did so in other subsections throughout the statute indicates its intention to exclude it. *See* N.C. Gen. Stat. § 1A-1, Rule 4(j)(5)a (2013) (prescribing "personal service" on a city, town, or village as an effective method of service); *Haywood v. Haywood*, 106 N.C. App. 91, 99-100, 415 S.E.2d 565, 570 (1992) *rev'd in part*, 333 N.C. 342, 425 S.E.2d 696 (1993).

Here, by presenting the trial court with affidavits from defendants-appellees and Baker admitting that they actually received the summonses and complaints after the service documents were addressed to them and sent through FedEx, plaintiffs provided incontrovertible "other evidence" under section 1-75.10(5) that the summonses and complaints were "in fact received" by the addressees. Therefore, based on the persuasive reasoning of the *Granville Medical Center* Court, the General Assembly's stated goal in enacting section 1-75.10, and the plain language of the statute itself, we hold that plaintiffs properly proved service via Rule 4(j)(1)d under section 1-75.10(5), and the trial court's conclusion that plaintiffs failed to properly prove service on defendants-appellees, except the City, was in error.

Defendants disagree with our conclusion for a number of reasons. First, they contend that because Rule 4(j)(1)c and 4(j)(1)d both contain the requirement that a summons and complaint be "deliver[ed] to the addressee," this Court should follow precedent established by cases where Rule 4(j)(1)c was construed. We agree with this general proposition, as is exemplified by our analysis of the *Granville Medical Center* decision above. However, defendants cite *Hunter v. Hunter*, 69 N.C. App. 659, 317 S.E.2d 910 (1984), which they argue is directly on point. Defendants claim that the *Hunter* Court held that "transmitting process via certified mail to the defendant's place of employment, but not delivering the certified mail to the defendant herself, even though the process was ultimately delivered to the defendant, was invalid." However, defendants ignore the *Hunter* Court's application of section 1-75.10. *See id.* at 661, 317 S.E.2d at 911. In applying this provision, the *Hunter* Court actually held that:

> [W]e find that plaintiff has *failed to show proof of service of process in the manner provided by [section 1-75.10]. . . . The affidavit* and accompanying delivery receipt show only that the summons was forwarded to defendant's place of business. There is no showing from *the affidavit that defendant herself received a copy of the summons and complaint. The trial court had before it no evidence from which it could have determined that the summons was in fact delivered to defendant* since there was no genuine registry receipt or "other evidence" of delivery attached to the affidavit. We, therefore, conclude that plaintiff did not establish valid service of process over defendant and affirm the order of the trial court setting aside the judgment of divorce.

Id. at 663, 317 S.E.2d at 912 (emphasis added). This case is therefore readily distinguishable; the trial court here, unlike the trial court in *Hunter*, had before it affidavits from each defendant signifying that they all, in fact, received the summons and complaint against them after they were delivered by FedEx. Had the trial court in *Hunter* been presented with similar evidence signifying delivery, it could have determined that the summons and complaint were "in fact received", per section 1-75.10, on which it based its holding.[3]

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3. Defendants also argue that *Osman v. Reese*, No. COA09-950, 2010 WL 1315595 (N.C. Ct. App. Aril 6, 2010) is analogous to *Hunter* and should be followed by this Court despite being unpublished. They claim that the *Osman* Court held that "service via certified mail delivered to defendant's co-worker at defendant's place of employment was

Next, defendants argue that their actual notice of the suit did not cure the defect in service rendered by FedEx's failure to hand the summons and complaint to each defendant or his or her respective service agents. The cases that defendants claim support application of this principle here are distinguishable in material aspects. First, defendants cite *Grimsley*, 342 N.C. at 544-46, 467 S.E.2d at 94, and claim that in that case "[t]here was no question that process was received: [the] defendant answered the complaint. Nevertheless, process was held to be insufficient." In actuality, the basis of the plaintiff's argument in *Grimsley* was that "while [the defendant] *was not actually served with summons and complaint*, *[the insurance company's] 12 October 1992 answer* constituted a general appearance by [the defendant], thereby precluding [the defendant] from raising the defense of lack of personal jurisdiction." *Id.* at 545, 467 S.E.2d at 94 (emphasis added). Thus, it is clear that the defendant in *Grimsley* did not answer the complaint; a third party to the suit did. *Id.* at 546, 467 S.E.2d at 95. The Court stated unequivocally that "[the defendant] has never been served with [the] summons and complain as required by the Rules of Civil Procedure." *Id.* at 546, 467 S.E.2d at 94. This case is therefore distinguishable because defendants here actually received copies of the summons and complaint and filed answers directly.

Furthermore, the other cases cited by defendants in support of this proposition are equally distinguishable because in each of them, the Court held that service was actually defective. *See Mabee v. Onslow Cnty. Sheriff's Dept.*, 174 N.C. App. 210, 211-12, 620 S.E.2d 307, 308 (2005) (holding that service was defective under N.C. Gen. Stat. § 162-16 because it was executed by an individual other than those vested with authority to do so under the statute, and that this defect could not be cured by actual notice of the proceedings); *Fulton v. Mickle*, 134 N.C. App. 620, 624, 518 S.E.2d 518, 521 (1999) (holding that service was defective under Rule 4(j)(6)c because the summons and complaint were not sent to a party vested with authority to accept service on behalf of a corporation); *Long v. Cabarrus Cnty. Bd. of Educ.*, 52 N.C. App. 625, 626, 279 S.E.2d 95, 96 (1981) (holding that service was defective under

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invalid under Rule 4(j)(1)c, *even though defendant ultimately received the process*, because the requirement of 'delivering to the addressee' had not been met." However, the Court explicitly stated that "*[The defendant] signed affidavits averring that he had never been served with process in this case, and that he never 'received a copy of the Summons and Complaint that was purportedly mailed to [him] c/o Merchant's Tire.'*" *Id.* at *2 (emphasis added). The co-worker who received the summons and complaint averred that "[he] never provided copies to [the defendant.]" *Id.* Because of this crucial factual distinction, we disagree with defendants' assertion that *Osman* has precedential value.

Rule 4(j)(5)c because it was not made on a person vested with authority to receive service on behalf of a county or city board of education). For reasons discussed in more detail above, we do not hold that service under Rule 4(j)(1)d here was defective; therefore, we do not purport to hold that actual notice of the suit cured a defect in service.

Defendants next contend that *Hamilton v. Johnson*, __ N.C. App. __, __, 747 S.E.2d 158, 162-63 (2013) is controlling and requires a holding that service was defective because the FedEx employee did not personally serve defendants or their service agents. Although they correctly characterize the holding in *Hamilton* — that delivery by FedEx to an alleged concierge of a building did not constitute "delivery to the addressee" under Rule 4(j)(1)d — we still find this case to be distinguishable. *See id.* at __, 747 S.E.2d at 162-63. In *Hamilton*, the plaintiff attempted to serve the summons and complaint on the defendant by mailing them to his residence in Texas via FedEx. *Id.* at __, 747 S.E.2d at 160. When the package arrived, an individual identified as "KKPONI" signed for the documents, but the defendant failed to appear at the subsequent hearing for which service was meant to provide notice. *Id.* The *Hamilton Court* stated that:

> Absent any statutory presumption, plaintiff bore the burden of proving that "KKPONI" [the alleged concierge] was defendant's agent, authorized by law to accept service of process on his behalf.
>
> Here, the trial court's order is devoid of any findings as to whether "KKPONI" was an agent authorized to accept service of process on defendant's behalf. In fact, it is unclear how "KKPONI" was employed in the building—if an employee at all. Thus, we cannot conclude that service on "KKPONI," an alleged concierge, satisfies Rule 4(j)(1)(d)'s requirement of "delivering to the addressee."

Id. at __, 749 S.E.2d at 163.

The fact that distinguishes *Hamilton* from this case is that the Court makes no mention of whether the defendant actually received the summons and complaint, or more specifically, whether the plaintiff attempted to prove service under section 1-75.10 with affidavits indicating that the defendant received the summons and complaint. In fact, the *Hamilton* Court makes no citation to section 1-75.10, a statute crucial to our holding that the General Assembly explicitly states must be read "contemporaneously" with Rule 4. *See* N.C. Gen. Stat. § 1A-1, Rule

4 general commentary. Thus, because we are faced with additional facts not discussed by the Court in *Hamilton*, its holding is distinguishable.

Ultimately, defendants' arguments as to why Rule 4(j)(1)d should be read to require personal service on a defendant or his service agent, exclusive of all other individuals and regardless of whether the defendant actually receives the summons and complaint, are unavailing. Because the trial court erred in its conclusions, we reverse the trial court's order dismissing defendants-appellees and affirm the order denying Baker's motion to dismiss.

C. The City

Unlike natural persons, service may only be valid and effective upon a city:

> [b]y personally delivering a copy of the summons and of the complaint to its mayor, city manager or clerk; by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, *addressed to its mayor*, *city manager or clerk*; or by depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the mayor, city manager, or clerk, delivering to the addressee, and obtaining a delivery receipt. As used in this sub-subdivision, "delivery receipt" includes an electronic or facsimile receipt.

N.C. Gen Stat. § 1A-1, Rule 4(j)(5)a (2013) (emphasis added). The list of parties named in the statute is exclusive; service upon anyone other than the mayor, city manager, or clerk is insufficient to confer jurisdiction over a city. *See Johnson v. City of Raleigh*, 98 N.C. App. 147, 149-50, 389 S.E.2d 849, 851-52 (1990) (holding that service of summons was insufficient to confer personal jurisdiction over defendant city where a copy of the summons and complaint was delivered to a person other than an official named in Rule 4(j)(5)), *disc. review denied*, 327 N.C. 140, 394 S.E.2d 176.

Here, the summons and complaint were not addressed to either the mayor, city manager, or clerk, as is required by Rule 4(j)(5)a; they were addressed to Baker, who was the City Attorney. Delivery to Baker, although technically delivery to the addressee, was insufficient to confer jurisdiction over the City because he is not a named official capable of receiving service on behalf of the City. Furthermore, there is no direct evidence that the City's mayor, city manager, or clerk ever received the

summons and complaint or were otherwise served in any way. The only evidence plaintiffs provide is a newspaper article wherein the City's mayor said that he would discuss the lawsuit with other city officials and council members. Although they may have had actual notice of this action, there is no evidence indicating that any of the required parties in Rule 4(j)(5)a were ever served with the summons and complaint. Unlike the service on defendants who are natural persons, service on the City was defective because plaintiffs did not comply with Rule 4(j)(5)a, and any actual notice that those parties enumerated in the rule may have had did not cure this defect. *Fulton*, 134 N.C. App. at 624, 518 S.E.2d at 521 (citation and quotation omitted).

Therefore, we hold that the trial court did not err in granting the City's motion to dismiss for insufficient service of process.

II. Motion to Amend the Summons

[3] Plaintiffs next argue that the trial court abused its discretion by denying its motion to amend the summons against the City to correct the name of the person currently holding the office of city manager. We find no abuse of discretion.

The North Carolina Rules of Civil Procedure vest discretion in the hands of the trial courts to allow or disallow parties to amend summonses:

> At any time, before or after judgment, in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to substantial rights of the party against whom the process issued.

N.C. Gen. Stat. § 1A-1, Rule 4(i) (2013). This Court therefore reviews such orders for abuse of discretion. *See White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) ("It is well established that where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion."). Although the trial courts have wide discretion in this arena, that power has been limited by this Court to those cases where the trial court initially acquired jurisdiction over the defendant. *See Carl Rose & Sons, Ready Mix Concrete, Inc. v. Thorp Sales Corp.*, 30 N.C. App. 526, 529, 227 S.E.2d 301, 303 (1976) ("The broad discretionary power given the court . . . does not extend so far as to permit the court by amendment of its process to acquire jurisdiction over the person of a defendant

where no jurisdiction has yet been acquired. A defendant cannot, in this short-hand manner by amendment, be brought into court without service of process.") (citation and quotations omitted), *overruled on other grounds*, *Wiles v. Welparnel Const. Co., Inc.*, 295 N.C. 81, 86, 243 S.E.2d 756, 758-59 (1978).

As stated above, in order to confer jurisdiction over the City, plaintiffs needed to comply with Rule 4(j)(5) by sending the summons and complaint addressed to either the City's mayor, city manager, or clerk and delivering to one of those three parties. Because plaintiffs failed to do so, the trial court never acquired jurisdiction over the City. *Glover v. Farmer*, 127 N.C. App. 488, 490, 490 S.E.2d 576, 577 (1997) ("Absent valid service of process, a court does not acquire personal jurisdiction over the defendant and the action must be dismissed.").

Therefore, based on the rule set out in *Carl Rose & Sons*, we find that the trial court did not abuse its discretion by denying plaintiff's motion to amend the summons, as it would confer jurisdiction over the City without proper service of process.

III. Title of the Cause

[4] Baker argues on appeal that the trial court erred by denying his motion to dismiss the action for failure of the summonses to contain all of the necessary information required by Rule 4(b), namely the "title of the cause." We disagree.

This Court reviews the conclusions of law entered by the trial court in its order *de novo*. *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004).

Pursuant to Rule 4(b) of the North Carolina Rules of Civil Procedure, "[t]he summons shall . . . contain the title of the cause." N.C. Gen. Stat. § 1A-1, Rule 4(b) (2013). Here, the title of the cause in the summons listed "Frankie Washington and Frankie Washington, Jr." as plaintiffs and "CITY OF DURHAM (N.C.) ET AL" as defendants. Baker argues that the title of the cause in the summons is defective because it does not list all defendants and does not mirror the title of the cause in the complaint. He cites to no authority for the proposition that these characteristics render the title of the cause in the summons defective, and we find none. Therefore, we find that the argument is abandoned. *See Metric Constructors, Inc. v. Industrial Risk Insurers*, 102 N.C. App. 59, 64, 401 S.E.2d 126, 129 (1991) ("Because the appellee cites no authority for this argument, it is deemed abandoned").

Conclusion

Because plaintiffs properly proved service by Rule 4(j)(1)d under section 1-75.10(5), we reverse the trial court's order dismissing all defendants-appellees except the City, and we affirm the trial court's order denying Baker's motion to dismiss for insufficient service of process. We affirm the trial court's order dismissing the City, because the record reveals that plaintiffs failed to properly serve a party designated by rule to receive service on behalf of the City. Finally, we affirm the trial court's denial of plaintiffs' motion to amend the summons against the City and Baker's motion to dismiss for failure of the summonses to contain the title of the cause.

AFFIRMED in part and REVERSED in part.

Judges GEER and McCULLOUGH concur.

DAVITA BISHOP, EMPLOYEE, PLAINTIFF
v.
INGLES MARKETS, INC., EMPLOYER, SELF-INSURED, DEFENDANT

No. COA13-1102

Filed 15 April 2014

1. Workers' Compensation—work-related injury—causation—sufficient evidence

The Full Industrial Commission did not err in a workers' compensation case by determining that plaintiff's work-related injury caused plaintiff's seizures. There was expert medical testimony in the record that the Full Commission relied on in determining the causal connection between plaintiff's fall and her current medical conditions. As a result, the Full Commission properly addressed the issue of causation.

2. Workers' Compensation—reopen record—additional evidence—no abuse of discretion

Plaintiff failed to show that the Full Industrial Commission abused its discretion in a workers' compensation case by reopening the record to obtain additional evidence.

3. Workers' Compensation—award of compensation—sufficient evidence

The Full Industrial Commission did not err in a workers' compensation case by awarding plaintiff temporary total indemnity compensation and medical compensation. Plaintiff provided sufficient evidence to satisfy either part one or part three of the test set forth in *Russell v. Lowes Product Distrib.*, 108 N.C. App. 762.

Appeal by defendant-employer from Opinion and Award entered 12 July 2013 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 March 2014.

Law Office of Gary A. Dodd, by Gary A. Dodd, for plaintiff-appellee.

Northup, McConnell & Sizemore PLLC, by Steven W. Sizemore, for defendant-appellant.

MARTIN, Chief Judge.

Defendant-employer Ingles Markets, Inc. appeals from an Opinion and Award of the Full Commission of the North Carolina Industrial Commission awarding workers' compensation benefits, attorney's fees, and costs to plaintiff-employee Davita Bishop. For the reasons stated herein, we affirm.

On 30 January 2008, plaintiff slipped and fell on a recently waxed floor while working in the Ingles deli. After reporting the fall to the store manager, plaintiff sought medical treatment at OneBeacon Healthcare. She explained that she fell and hit her head, and that she was experiencing dizziness as well as pain to her head, lower back, and hip. Plaintiff was diagnosed as having a lower back sprain and a mild concussion. She was also given a note excusing her from work until 5 February 2008.

However, plaintiff's condition did not improve, and she went to Sisters of Mercy Urgent Care on 9 February 2008, complaining of pain in her left hip and lower back. Plaintiff was given a note excusing her from work until 13 February 2008. Plaintiff returned to Sisters of Mercy Urgent Care three times in February, and results of an MRI scan revealed "a slight anterolisthesis at L4-5, degenerative disc disease, spondylosis, facet arthrosis and annular bulging at L4-5 and L5-S1."

After the MRI, it was recommended that plaintiff begin physical therapy and that she return to work with the following restrictions: working for no more than four hours a day; no lifting of anything over ten pounds; and no standing, walking, or sitting for more than twenty minutes at a time. On 11 March 2008, plaintiff returned to work pursuant to these restrictions.

Plaintiff was referred to Dr. Richard Broadhurst and saw him on 29 May 2008 for an evaluation and treatment. On 14 July 2008, plaintiff saw Dr. Broadhurst again because she felt she was being asked to perform tasks at work that she was not physically capable of performing. In response, Dr. Broadhurst issued several work restrictions including, "lifting [no] more than ten pounds, no ladder climbing, no repetitive bending or twisting or forward reaching and to stand and walk to control the pain." On 28 August 2008, Dr. Broadhurst again issued work restrictions for plaintiff. Also in August 2008, plaintiff began taking classes, on days she did not have to work, in a Masters of Divinity program at Gardner-Webb University.

On 26 September 2008, plaintiff returned to OneBeacon and complained of "blackout spells," stating that she had fainted at work the day before. Plaintiff underwent an electroencephalogram ("EEG") which suggested that plaintiff might have partial epilepsy. As a result, plaintiff

was referred to Dr. Duff Rardin, who diagnosed plaintiff as possibly having epilepsy. On 5 November 2008, a coworker witnessed plaintiff have a blackout spell. Following this incident, plaintiff underwent an MRI that showed an abnormal signal.

While plaintiff's seizure condition was ongoing, Dr. Broadhurst, on 15 December 2008, determined that plaintiff had reached maximum medical improvement and assigned plaintiff permanent work restrictions. On 30 December 2008, however, Dr. Broadhurst asked Dr. Rardin if plaintiff's 30 January 2008 fall caused plaintiff's seizures. Dr. Rardin responded that he did not think that the fall caused plaintiff's seizures.

Plaintiff continued to suffer from seizures, so Dr. Rardin completed the medical section of plaintiff's Family Medical Leave ("FMAL") application, noting that plaintiff should not work due to her seizure activity. Dr. Rardin also recommended that plaintiff stop taking classes at Gardner-Webb due to her seizures. Plaintiff stopped working on 15 July 2009 when her FMAL application was approved.

On 29 July 2009, plaintiff was admitted to Mission Hospital for epilepsy monitoring, and the staff was able to observe one of plaintiff's seizures. It was determined that plaintiff's seizures were nonepileptic. Plaintiff, nonetheless, continued to have seizures. Dr. Rardin testified that stressors in a person's life can cause nonepileptic seizures, but he did not state an opinion about whether plaintiff suffered from such stressors. Also, while at Mission Hospital, Dr. C. Britt Peterson, a psychiatrist, saw plaintiff and diagnosed her with "a major depressive disorder or a possible adjustment disorder with depressed mood and possible conversion disorder."

Eventually, Dr. Rardin recommended that plaintiff see Karen Katz a licensed clinical social worker with a master's degree in social work and psychology from Syracuse University. During the first meeting, Ms. Katz took plaintiff's family history and conducted a clinical assessment. Ms. Katz used anxiety and depression screening tools to diagnose plaintiff with an anxiety disorder and chronic depression that Ms. Katz believed began early in plaintiff's life. Ms. Katz opined that plaintiff's 30 January 2008 fall exacerbated her preexisting anxiety and depression.

The forgoing evidence was presented to the Full Commission at a hearing on 15 November 2011. After the hearing, the Full Commission issued an order on 5 January 2012 reopening the record for receipt of "additional evidence to consist of an orthopedic evaluation and a neuropsychological evaluation." Pursuant to this order, Dr. Stephen David conducted an orthopedic evaluation of plaintiff, and Dr. John Barkenbus

conducted a neuropsychological evaluation of plaintiff. Both doctors also reviewed plaintiff's medical records and were deposed.

Dr. Barkenbus, a neuropsychiatry expert, testified that the medical records he reviewed did not indicate that plaintiff suffered from seizures prior to her fall. He also testified that plaintiff's anxiety and depression contributed to her seizure disorder, but that her fall was the initiating event that caused her resulting medical and psychological conditions. Dr. David, an expert in orthopedic surgery, testified that plaintiff's current medical problems prevent her from consistently sustaining gainful employment.

Based on this evidence, the Full Commission awarded plaintiff weekly compensation, medical compensation for her seizures, and attorney's fees. Commissioner Nance dissented from the Full Commission's Opinion and Award because she did not find Ms. Katz's testimony credible. Defendant appeals.

On appeal defendant argues that the Full Commission erred in (1) finding that plaintiff's fall caused her seizure disorder, (2) reopening the record to obtain additional evidence, and (3) awarding plaintiff disability compensation. We disagree.

The North Carolina Supreme Court has clearly stated that "appellate courts reviewing Commission decisions are limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). However, "[t]he Commission's conclusions of law are reviewed *de novo*." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

"Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." *Allred v. Exceptional Landscapes, Inc.*, __, N.C. App. __, __, 743 S.E.2d 48, 51 (2013). However, when we review the challenged findings of fact, we do not reweigh the evidence because the Commission is the fact finder. *Smith v. First Choice Servs.*, 158 N.C. App. 244, 248, 580 S.E.2d 743, 747, *disc. rev. denied*, 357 N.C. 461, 586 S.E.2d 99 (2003). Instead, we limit our review to determining "whether the record contains any evidence tending to support the finding[s]." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). As a result, " '[t]he findings of fact of the Industrial Commission are conclusive on appeal

when supported by competent evidence, even though there [may] be evidence that would support findings to the contrary.' " *Id.* (quoting *Jones v. Myrtle Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965)). Also, we view the evidence in the record in a light most favorable to the plaintiff, and the "plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence." *Id.*

[1] First, defendant argues that the Full Commission erred in determining that plaintiff's work-related injury caused plaintiff's seizures. In making this argument, defendant relies on *Hawkins v. General Electric Co.*, 199 N.C. App. 245, 249, 683 S.E.2d 385, 389 (2009), for the proposition that when "a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury." Thus, throughout defendant's argument, it challenges several findings of fact, which we will address later, on the basis that the Full Commission could not find these facts based on Ms. Katz's testimony because she is not an expert.

The proposition that only an expert can give competent opinion evidence as to causation when a complicated medical question is involved has its basis in *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 256 S.E.2d 389, 391 (1980). In *Click*, the North Carolina Supreme Court stated:

> For an injury to be compensable under the terms of the Workmen's Compensation Act, it must be proximately caused by an accident arising out of and suffered in the course of employment. *There must be competent evidence to support the inference that the accident in question resulted in the injury complained of, i.e.*, some evidence that the accident at least might have or could have produced the particular disability in question. The quantum and quality of the evidence required to establish *prima facie* the causal relationship will of course vary with the complexity of the injury itself. There will be many instances in which the facts in evidence are such that any layman of average intelligence and experience would know what caused the injuries complained of. On the other hand, where the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury.

Id. (emphasis added) (citations omitted) (internal quotation marks omitted).

From this paragraph it is clear that the Court was concerned about the quality of the evidence relied upon by the Industrial Commission when considering complicated causation issues. Therefore, the Commission may make findings of fact based on the testimony of a person that is not an expert, but must rely on competent expert testimony to infer that there is causation when a complicated medical question is involved.

We will now address each of defendant's challenges to the Full Commission's findings of fact, as well as defendant's contention that there is no causal connection between the work-related injury and plaintiff's seizures.

First, defendant challenges finding of fact 36, which states:

> On September 18, 2009, Dr. Rardin referred Plaintiff to Karen Katz, a licensed clinical social worker, for psychological assistance regarding Plaintiff's non-epileptic seizure disorder. Ms. Katz has a Masters degree in psychology and is providing psychotherapy to Plaintiff. Ms. Katz is qualified and competent to state her opinions as to Plaintiff's psychological condition.

Defendant asserts that the Full Commission erred in finding that Ms. Katz could state her opinions as to plaintiff's psychological condition because Ms. Katz is not qualified to make a diagnosis or offer opinions as to causation. This argument fails.

As stated earlier, the Commission must rely on expert testimony when determining the issue of causation when complicated medical questions are involved. *See id.* Finding of fact 36 has nothing to do with causation; it simply recites Ms. Katz's educational training, the fact that she is treating plaintiff with respect to her psychological condition, which is within Ms. Katz's training, and that she could properly offer her opinion as to plaintiff's psychological condition.

Next, defendant challenges finding of fact 37, which states:

> Ms. Katz does not administer psychological "testing" but does perform "screening" for conditions such as anxiety. In Plaintiff's case she performed such screening and has assessed Plaintiff with generalized anxiety disorder, and dysthymia, a chronic depression which began early in her

> life. She also assessed that Plaintiff suffers from an adjustment disorder. This assessment by Ms. Katz is consistent with that of Dr. Peterson, the psychiatrist.

Defendant challenges this finding of fact on the basis that the Commission bolstered Ms. Katz's assessment by saying it was supported by Dr. Peterson. Again, this argument fails.

As stated earlier, when we review a record in a workers' compensation case, we limit our review to whether the record contains any evidence that tends to support the Commission's findings. *See Adams*, 349 N.C. at 681, 509 S.E.2d at 414. In this case, Ms. Katz assessed that plaintiff was depressed. Also in evidence is a discharge summary from Mission Hospital that states that Dr. Peterson diagnosed plaintiff with a depressive disorder. This evidence supports the Commission's finding that the "assessment by Ms. Katz is consistent with that of Dr. Peterson."

Defendant also questions finding of fact 38, which states:

> It is Ms. Katz' opinion that Plaintiff's fall exacerbated her pre-existing depression and anxiety. During her treatment with Ms. Katz, Plaintiff has made slow, but steady progress. Ms. Katz opined that Plaintiff needs ongoing treatment with medications and psychotherapy and that Plaintiff is currently unable to work "full time."

Defendant contends that the Full Commission could not find that in "Ms. Katz' opinion . . . Plaintiff's fall exacerbated her pre-existing depression and anxiety." As discussed earlier, the Full Commission was permitted to find facts relating to Ms. Katz's testimony as long as the Full Commission did not rely on Ms. Katz's testimony when inferring causation. To the extent that the Full Commission relied upon Ms. Katz's testimony to infer causation, the Full Commission erred. However, in finding of fact 45 the Full Commission stated that it was giving great weight to Dr. Barkenbus's testimony when inferring causation, and Dr. Barkenbus testified that he thought plaintiff's fall was the initiating event that caused several medical and psychological issues.

Finally, defendant challenges findings of fact 44 and 45. Finding of fact 44 states:

> Based upon a preponderance of the evidence, the Full Commission finds that as a consequence of her January 30, 2008 accident, Plaintiff experienced an exacerbation of her underlying psychological condition, including her pre-existing anxiety and depression.

Finding of fact 45 states:

> Based upon a preponderance of the evidence of record, including the opinion of Dr. Barkenbus, which the Full Commission gives great weight, the Full Commission finds that Plaintiff's pre-existing anxiety and depression which were exacerbated by her compensable injury, contributed to her seizure disorder.

Defendant maintains that the Full Commission could not have found a preexisting psychological condition because no expert diagnosed plaintiff with a psychological condition, and no medical expert testified as to the exacerbation of any preexisting condition.

This argument challenges findings of fact, as well as the Full Commission's inference of causation. First, we only need to find some evidence in the record that supports the Full Commission's findings of fact. *See Adams*, 349 N.C. at 681, 509 S.E.2d at 414. Dr. Barkenbus, who was tendered as a medical expert, stated that in his report he was concerned with "some level of panic anxiety prior to [plaintiff's] fall, [and that] [t]here was more ongoing depression in the aftermath of her fall." Thus, there is evidence in the record to support the finding that plaintiff suffered from anxiety before her fall.

Second, Dr. Barkenbus testified that he thought the fall was the initiating event that caused several medical and psychological issues that affected plaintiff's ability to work. The Full Commission stated in finding of fact 45 that it was giving great weight to Dr. Barkenbus's testimony. Therefore, there is expert medical testimony in the record that the Full Commission relied on in determining the causal connection between plaintiff's fall and her current medical conditions. *See Click*, 300 N.C. at 167, 256 S.E.2d at 391. As a result, the Full Commission properly addressed the issue of causation.

[2] Next, we address the Full Commission's order reopening the record. When a party appeals a deputy commissioner's opinion and award to the Full Commission, it may "if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award." N.C. Gen. Stat. § 97-85(a) (2013). As a result, this statute confers plenary powers to the Full Commission to receive additional evidence, rehear the parties, amend the award, and reconsider the evidence. *Lynch v. M. B. Kahn Constr. Co.*, 41 N.C. App. 127, 130, 254 S.E.2d 236, 238, *disc. rev. denied*, 298 N.C. 298, 259 S.E.2d 914 (1979). Therefore, the Full Commission's determination relating to one of its plenary powers "will not be reviewed on appeal

absent a showing of manifest abuse of discretion," *id.* at 131, 254 S.E.2d at 238, and an abuse of discretion occurs when a determination "is so arbitrary that it could not have been the result of a reasoned decision." *Porter v. Fieldcrest Cannon, Inc.*, 133 N.C. App. 23, 26, 514 S.E.2d 517, 520 (1999).

Defendant does not argue that the Full Commission's decision to reopen the record was an unreasoned decision. Instead, defendant seems to argue that the Full Commission's decision was unfair because it gave the plaintiff a second opportunity to prove her case. Such an argument fails to show that the Full Commission abused its discretion, and we will not review its determination to reopen the record.

[3] Finally, defendant argues that the Full Commission should not have awarded plaintiff temporary total indemnity compensation and medical compensation because plaintiff failed to provide evidence that satisfies the test in *Russell v. Lowes Product Distrib.*, 108 N.C. App. 762, 425 S.E.2d 454 (1993). We disagree.

Under the Workers' Compensation Act, an employee is disabled when their earning capacity has been impaired. *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 434, 342 S.E.2d 798, 804 (1986), *appeal after remand*, 86 N.C. App. 227, 356 S.E.2d 801 (1987). Thus, the employee must show that "he is unable to earn the same wage he had earned before the injury, either in the same employment or in other employment." *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457.

The employee may meet this burden in one of four ways:

> (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Id.

In this case, the Full Commission concluded that plaintiff had satisfied the *Russell* test under either part one or part three. The Full Commission made the following unchallenged finding of fact:

> [I]t would have been futile for Plaintiff to look for suitable employment due to her limited and past relevant vocational history of working primarily as a deli cook which required prolonged standing and lifting up to 50 pounds, her limited vocation skills associated mainly with the type of work she is currently unable to perform . . . her current seizure disorder, in combination with her work related, severe permanent restrictions assigned by Dr. Broadhurst of no lifting more than ten pounds, sitting or resting up to ten minutes each hour, no ladder climbing, minimal stair climbing and no repetitious twisting or forward trunk reaching, and her other physical limitations due to severe pain, needing a cane to ambulate, her need for multiple medications and her non-work related medical conditions, including a stroke and heart attack following her injury.

This finding of fact supports the Full Commission's conclusion that it would have been futile for plaintiff to search for employment. *See Barrett v. All Payment Servs., Inc.*, 201 N.C. App. 522, 527, 686 S.E.2d 920, 924 (2009) (holding that the plaintiff had satisfied part three of the *Russell* test because the Commission found "it would be futile for [employee] to seek employment, given his advanced age, his prior work history, his pre-existing conditions, his severely debilitating back condition due [to] his current work related [sic] injury as well as non-work related [sic] causes and his work related [sic] physical restrictions" (alterations in original)), *writ of supersedeas and disc. rev. denied*, 363 N.C. 853, 693 S.E.2d 915 (2010).

In conclusion, for the reasons stated above, we affirm the Opinion and Award of the Full Commission.

Affirmed.

Judges McGEE and CALABRIA concur.

BLAKELEY v. TOWN OF TAYLORTOWN

[233 N.C. App. 441 (2014)]

TIMOTHY BLAKELEY, PLAINTIFF
v.
TOWN OF TAYLORTOWN, NORTH CAROLINA;
A MUNICIPAL CORPORATION, DEFENDANT

No. COA13-853

Filed 15 April 2014

1. Damages and Remedies—termination of employment—emotional distress

The trial court did not err by instructing the jury that it could award plaintiff both emotional distress damages and damages for future lost wages in an action arising from the termination of a police chief's at-will employment. There is a difference when emotional distress is a required element of a claim and when it is a type of damage. Plaintiff was not required to show either "severe emotional distress" or "extreme and outrageous conduct" by defendant to be awarded emotional distress or pain and suffering damages.

2. Damages and Remedies—jury's methodology not clear—consistent with evidence

Defendant was unable to meet its burden of showing that the trial court abused its discretion in denying defendant's motion to amend the verdict pursuant to Rule 59(a)(5) and (6) in an action arising from the dismissal of an at-will police chief. Although it was unclear exactly how the jury reached its overall figure, the jury's verdict was consistent with plaintiff's evidence, and defendant failed to show that the award was so excessive that it could have only resulted from passion or prejudice.

3. Damages and Remedies—mitigation—reasonable care and diligence

In an action arising from the dismissal of a police chief, the trial court did not abuse its discretion in denying defendant's motion to amend the verdict based on plaintiff's failure to mitigate his damages where the evidence clearly established that plaintiff used reasonable care and diligence when trying to find a new job.

4. Damages and Remedies—discharge from employment—amount earned after discharge

In an action arising from the termination of an at-will police chief's employment, the trial court abused its discretion by denying defendant's motion to amend the verdict with regard to the amount plaintiff earned after his employment with the town ended.

5. Damages and Remedies—compensatory damages—emotional distress included

In an action arising from the termination of an at-will police chief's employment, defendant's argument that "actual damages" do not include emotional distress damages and damages for future lost wages was without merit. Compensatory and actual damages are synonymous and compensatory damages include emotional distress and lost wages.

6. Police Officers—termination of employment—refusal to provide information

In an action arising from the termination of an at-will police chief's employment, the evidence was sufficient to go to the jury on the issue of whether plaintiff was discharged based on his refusal to provide town officials with confidential information on the status of ongoing drug cases. There is a difference between being asked on the progress of the drug cases versus being asked to provide information about confidential informants.

7. Criminal Law—closing argument—improper remarks—not prejudicial

There was no gross impropriety requiring intervention *ex mero motu* in plaintiff's closing arguments in an action arising from the termination of a police chief's at-will employment. Statements that characterized the Town and at-will employment in an unflattering way and highly inflammatory remarks about the mayor, among others, were improper, but not so prejudicial as to entitle defendant to a new trial.

Appeal by defendant from order entered 16 March 2012 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 5 February 2014.

The McGuinness Law Firm, by J. Michael McGuinness, and John W. Roebuck for plaintiff-appellee.

Cranfill Sumner & Hartzog LLP, by Dan M. Hartzog, Jr., and Patrick H. Flanagan for defendant-appellant.

Amicus curiae brief submitted by Narron, O'Hale and Whittington, P.A., by John P. O'Hale, for the Southern States Police Benevolent Association and the North Carolina Police Benevolent Association.

HUNTER, Robert C., Judge.

Defendant the Town of Taylortown ("the Town" or "defendant") appeals the order denying its motion for judgment notwithstanding the verdict or, in the alternative, for amendment of the judgment and/or a new trial. After careful review, we reverse the order denying defendant's motion to amend the verdict and remand for the trial court to reduce the jury's verdict by $5,886.97. As to all other bases for defendant's motions, we find no error.

Background

This action arises out of the termination of plaintiff Timothy Blakeley ("plaintiff" of "Chief Blakeley") from his at-will employment as the Chief of Police for the Town. Plaintiff was hired in 2003. In 2004, a dispute arose between plaintiff and the mayor of Taylortown, Ulysses S.G. Barrett, Jr., ("Mayor Barrett") regarding the Town's use of a Cushman ATV ("the ATV") on the streets and highways in the Town. Plaintiff had observed the vehicle being operated by a Town employee on the public streets and highways. After doing some research, plaintiff determined that the ATV was not being operated in a lawful manner. Plaintiff presented his findings to the Town Council sometime in August 2004. Plaintiff claims that he was told at the August meeting by Mayor Barrett to not concern himself with the ATV. After the meeting, plaintiff obtained more information and called Mayor Barrett up directly to discuss it. Plaintiff brought the information to Mayor Barrett's home. The next day, plaintiff received a "write-up" for failing to follow the chain of command. Specifically, plaintiff was written up for failing to first notify James Thompson, the Police Commissioner, before contacting Mayor Barrett. After this, members of the Town Council noticed an increased tension between plaintiff and Mayor Barrett.

In 2006, plaintiff was contacted by the North Carolina State Bureau of Investigation ("the SBI") concerning alleged corruption by the Taylortown Board. Eventually, as a result of this investigation, Mayor Barrett was charged with illegally benefiting from a public contract; these charges were later dropped. During the SBI investigation, sometime in August 2006, plaintiff informed the Town Council that he was involved in the investigation after he received permission from an SBI agent to do so. Plaintiff alleged that after he informed the Town Council about his involvement in the investigation, his professional relationship with Mayor Barrett and certain members of the Town Council "substantially and materially changed."

On 29 August 2006, Mayor Barrett sent plaintiff a written memo informing him that plaintiff's repeated requests during the annual budget process needed to stop. Moreover, Mayor Barrett also informed plaintiff that he had received complaints about him from several Town citizens.

During plaintiff's employment, there was a general concern about what was characterized as a drug problem in the Town. Chief Blakeley claimed that, throughout his employment, the Mayor and certain Town Council members requested confidential information about ongoing narcotics cases "constant[ly]" and "on a continuous basis." Specifically, plaintiff alleged that the Council members asked him for information about confidential informants. In November 2006, Commissioner Thompson held a meeting with Chief Blakeley and pressured him to discuss ongoing cases. In his monthly chief's report to the Board, Chief Blakeley contended that he provided them all the "legally permissible information" he could with regard to these cases. However, he claimed that he was continually pressured to provide additional confidential information, which he refused to do.

On 31 October 2006, Mayor Barrett wrote a memo criticizing plaintiff's record and claiming that he had no confidence in plaintiff's abilities. On 6 February 2007, the Town held a closed session meeting, which plaintiff attended. The Board provided plaintiff written notice of the issues they had with his performance. The Town also passed a motion that plaintiff would receive a review of his job performance within 30 days. Plaintiff claims that he never received a review. On 7 March 2007, the Board met again to consider a resolution to terminate plaintiff's employment. By a vote of 3 to 2, the Board voted to terminate plaintiff. Five days later, the Board voted again and voted 5 to 0 in favor of termination.

On 9 February 2010, plaintiff filed a complaint against the Town alleging the following causes of action: (1) common law wrongful discharge; (2) violations of North Carolina's Law of the Land clause; (3) violations of substantive and procedural due process; (4) common law misrepresentation; and (5) common law obstruction of justice. Defendant filed an answer and partial motion for judgment on the pleadings with regard to all of plaintiff's claims except the claim of wrongful discharge. On 7 June 2010, the matter came on for hearing before Judge John O. Craig, III. Judge Craig granted defendant's motion for judgment on the pleadings. On 10 June 2011, defendant moved for summary judgment as to plaintiff's remaining claim for wrongful discharge. This motion was denied in open court on 27 June 2011 by Judge James M. Webb.

The matter was tried during the 27 June 2011 term of court. After numerous motions regarding the jury instructions, the trial court instructed the jury on the common law tort of wrongful discharge of an at-will employee in violation of public policy. With regard to what public policy plaintiff claimed he refused to violate, the trial court instructed the jury on two statutes: (1) N.C. Gen. Stat. § 14-230, which prohibits a public official from refusing to discharge his duties; and (2) N.C. Gen. Stat. § 14-226(a), which prohibits the intimidation or interference with witnesses. The jury was asked to answer four issues: (1) Was the plaintiff's refusal to participate in conduct which violated public policy a substantial factor in the defendant's decision to terminate him?; (2) Would defendant have terminated plaintiff if he had not refused to participate in that conduct?; (3) What amount of damages is plaintiff entitled to recover?; and (4) By what amount should the plaintiff's actual damages be reduced? On 7 July 2011, the jury returned a verdict and answered the issues as: yes, no, $291,000, and $191,000, respectively. That same day, plaintiff filed a motion for equitable relief of front pay in lieu of reinstatement. Defendant filed a motion in response, arguing that plaintiff was not entitled to recover front pay as an at-will employee because at-will employees are not entitled to lost wages.

On 29 September 2011, defendant filed a motion for judgment notwithstanding the verdict or in the alternative for amendment of the judgment and/or a new trial. Pursuant to Rule 59, defendant argued that the trial court should amend the judgment because: (1) plaintiff failed to meet his burden of establishing actual damages; (2) the judgment should only include the actual wages plaintiff would have earned working for the Town up until the date of trial minus the amount of wages plaintiff actually earned during that time; and (3) in the alternative, the amount of the judgment should be amended to reflect the actual wages plus benefits plaintiff would have earned working for the Town minus the amount of wages plaintiff actually earned. Furthermore, defendant alleged that a new trial was warranted to correct an error of law, prevent a miscarriage of justice, prevent an erroneous judgment, fix a verdict that was against the weight of the evidence, fix the erroneous jury instructions, address plaintiff counsel's inflammatory and prejudicial statements during trial, and because the jury's award of damages was excessive.

On 16 March 2012, Judge Webb issued an order, among other things: (1) denying plaintiff's motion for equitable relief in the form of front pay; (2) denying defendant's Rule 59 motions; and (3) awarding plaintiff the amount of the verdict $100,000 plus $6,811.45 in costs and fees. Defendant timely appealed on 16 April 2012.

Standard of Review

On appeal, when defendants move for a new trial pursuant to Rule 59(a)(5), (6), and (7), a trial court's decision "may be reversed on appeal only in those exceptional cases where an abuse of discretion is clearly shown." *Greene v. Royster*, 187 N.C. App. 71, 78, 652 S.E.2d 277, 282 (2007); *see also Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982). "An appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *Anderson v. Hollifield*, 345 N.C. 480, 483, 480 S.E.2d 661, 663 (1997). However, we review the trial court's denial of a motion for a new trial pursuant to Rule 59(a)(8) *de novo*. *Auto. Grp., LLC v. A-1 Auto Charlotte, LLC*, __ N.C. App. __, __, 750 S.E.2d 562, 565 (2013).

Arguments

I. Defendant's Motion to Amend the Verdict

[1] First, defendant argues that the trial court erred in denying its motion to amend the verdict pursuant to Rule 59 because: (1) plaintiff failed to meet his burden of establishing the amount of actual damages he was entitled to; (2) even assuming plaintiff proved actual damages, the jury's award was in excess of any actual damages proven at trial and the jury must have improperly considered either hypothetical future wages or emotional distress damages, neither of which constitute actual damages; and (3) the jury failed to properly adjust the damage award based on plaintiff's failure to mitigate his damages.

The only claim submitted to the jury was plaintiff's wrongful discharge claim in violation of public policy. Ordinarily, an employee without a definite term of employment is an employee at-will and may be discharged without reason. *Still v. Lance*, 279 N.C. 254, 259, 182 S.E.2d 403, 406 (1971). However, the employee-at-will rule is subject to certain exceptions. Our appellate Courts first recognized a public-policy exception to the employment-at-will doctrine in *Sides v. Duke Univ.*, 74 N.C. App. 331, 328 S.E.2d 818, *disc. rev. denied*, 314 N.C. 331, 333 S.E.2d 490 (1985), and *Coman v. Thomas Mfg. Co.*, 325 N.C. 172, 381 S.E.2d 445 (1989). "An employer wrongfully discharges an at-will employee if the termination is done for an unlawful reason or purpose that contravenes public policy." *Garner v. Rentenbach Constructors Inc.*, 350 N.C. 567, 571, 515 S.E.2d 438, 441 (1999).

At trial, the jury was instructed that the amount of damages plaintiff may be entitled to included nominal damages and actual damages.

Furthermore, the trial court went on to instruct that should plaintiff prove by the greater weight of the evidence that he has suffered actual damages by reasons of the wrongful termination and the amount, those damages would include "that amount of money necessary to place the plaintiff in the same economic position in which he would have been if the wrongful termination had not occurred. Actual damages also means some actual loss, hurt, or harm[.]" The trial court went on to state that actual damages could include future losses. Defendant contends that the trial court's inclusion of future lost wages and emotional distress damages in the measure of plaintiff's actual damages constituted error.

Pursuant to Rule 59(a)(8) ("[e]rror in law occurring at the trial and objected to by the party making the motion"), defendant argues that the trial court committed an error of law in allowing plaintiff to recover damages for emotional distress and future lost wages because those types of damages at not available for a claim of wrongful discharge. Thus, the issue is whether a plaintiff asserting a cause of action for wrongful discharge is entitled to these traditional types of tort damages.

Initially, it should be noted that "[i]n order to obtain relief under Rule 59(a)(8), a defendant must show a proper objection at trial to the alleged error of law giving rise to the Rule 59(a)(8) motion." *Davis v. Davis*, 360 N.C. 518, 522, 631 S.E.2d 114, 118 (2006). Here, even though defendant did not object to the instructions after the trial court read them to the jury, the record indicates that defendant properly objected to these jury instructions at the charge conference, and the trial court refused to alter the instructions on damages; thus, defendant properly preserved this issue for appellate review, *Wall v. Stout*, 310 N.C. 184, 189, 311 S.E.2d 571, 575 (1984), and our review is *de novo*, *Auto. Grp., LLC*, __ N.C. App. at __, 750 S.E.2d at 565.

While our Courts clearly recognize that a claim for wrongful discharge of an at-will employee constitutes a tort claim, *see Salt v. Applied Analytical, Inc.*, 104 N.C. App. 652, 662, 412 S.E.2d 97, 102-103 (1991) ("tort claim alleging wrongful discharge"); *McDonnell v. Guilford County Tradewind Airlines*, 194 N.C. App 674, 678, 670 S.E.2d 302, 306 (2009) (wrongful discharge in violation of public policy is a tort claim), exactly what type of damages a plaintiff may be entitled to and whether it includes all traditional types of damages allowed in other tort claims has not been explicitly addressed. Defendant contends that emotional distress damages and future lost wage damages are not available for the tort of wrongful discharge of an at-will employee. In support of this argument, defendant cites two cases, *Bennett v. Eastern Rebuilders, Inc.*, 52 N.C. App. 579, 279 S.E.2d 46 (1981), and *Block v. Paul Reverse*

Life Ins. Co., 143 N.C. App. 228, 547 S.E.2d 51 (2001), for the proposition that at-will employees are not entitled to back pay or lost wage damages. However, the plaintiffs in these cases sued their former employers for breach of contract, not based on a claim of wrongful discharge. *Bennett*, 52 N.C. App. at 582, 279 S.E.2d at 49; *Block*, 143 N.C. App. at 238, 547 S.E.2d at 59. We note that, in the majority of jurisdictions that recognize the common law tort of wrongful discharge for at-will employees, plaintiffs may recover for lost wages, future lost earnings, and emotional distress. *See* 86 A.L.R.5th 397 (2001). Moreover, we find no reason why these types of tort damages would not be available to a plaintiff seeking relief for wrongful discharge in violation of public policy. Therefore, the trial court did not err by instructing the jury that it may award plaintiff both emotional distress damages and damages for future lost wages.

In support of its argument, defendant contends that the tort of wrongful discharge is more similar to a claim of intentional infliction of emotional distress ("IIED") and negligent infliction of emotional distress ("NIED") than other types of torts. Accordingly, defendant argues that because plaintiff failed to show "extreme and outrageous" conduct by defendant or "severe emotional distress," he did not meet the "stringent standard" required for emotional distress recovery. However, defendant's argument confuses the distinction between emotional distress as a type of tort damage with emotional distress constituting a specific element in a cause of action. To prove a claim of IIED, a plaintiff must show, among other things, that a defendant engaged in "extreme and outrageous conduct," which caused "severe emotional distress." *Bryant v. Thalhimer Bros., Inc.*, 113 N.C. App. 1, 7, 437 S.E.2d 519, 522 (1993). Similarly, in an NIED claim, one of the required elements is that the plaintiff suffer "severe emotional distress." *Johnson v. Ruark Obstetrics & Gynecology Associates, P.A.*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990). In contrast, emotional distress damages, sometimes referred to as "pain and suffering" damages, is a "basis for recovery." *Iadanza v. Harper*, 169 N.C. App. 776, 780, 611 S.E.2d 217, 221 (2005). "Moreover, physical injury is only one aspect of 'pain and suffering,' which also may include emotional suffering[.]" *Id.* Thus, there is a difference when emotional distress is a required element of a claim and when it is a type of damage. Moreover, there is no requirement that a plaintiff must show severe emotional distress in order to recover pain and suffering damages. *See Iadanza*, 169 N.C. App. at 780, 611 S.E.2d at 221-22 (rejecting the argument that "the psychological component of damages for 'pain and suffering' must meet the same standard as the element of 'severe emotional distress' that is part of claims for infliction of emotional distress"). Thus, plaintiff was not required to show either "severe emotional distress" or "extreme and

outrageous conduct" by defendant to be awarded emotional distress or pain and suffering damages.

[2] Next, defendant contends that the trial court erred in not granting his motion to amend the verdict because the jury "manifestly disregarded" the jury instructions, pursuant to Rule 59(a)(5), and because the award was in excess of the evidence at trial, under Rule 59(a)(6).

Our review of this issue on appeal is abuse of discretion. *Greene*, 187 N.C. App. at 78, 652 S.E.2d at 282.

Here, it is unclear from the jury verdict how the jury reached the $291,000 award for damages. With regard to the damages for lost wages, plaintiff testified that he lost $140,462 in wages and benefits from the Town between the time of termination and trial. In calculating this number, plaintiff excluded the money he earned while he was employed as a police captain in Afghanistan. Furthermore, plaintiff claimed he lost approximately $6,626 in lost 401K benefits. Plaintiff also testified that his termination affected his future ability to obtain work in the field. Specifically, plaintiff contended that he had applied for approximately twenty-four other jobs in law enforcement in various parts of North Carolina and had four pending applications at the time of trial. Finally, plaintiff claimed that he suffered emotional distress as a result of the termination, including depression. It appears that the jury awarded plaintiff approximately $150,000 in either future lost wages, emotional distress, or a combination of both.

While defendant claims that the jury "manifestly disregarded" the instructions in awarding these types of damages, as discussed above, these types of traditional tort damages may be awarded in a wrongful discharge action. The trial court specifically instructed the jury that it could award these types of damages; thus, there is no basis for the contention that the jury "manifestly disregarded" the instructions. Furthermore, although it is unclear exactly how the jury reached its overall figure, the jury's verdict was consistent with plaintiff's evidence, and defendant has failed to show that the award was so excessive that it could have only resulted from passion or prejudice. Accordingly, defendant is unable to meet its burden of showing that the trial court abused its discretion in denying defendant's motion to amend the verdict pursuant to Rule 59(a)(5) and (6).

[3] Additionally, defendant contends that the jury disregarded the trial court's instructions because they did not reduce the award based on plaintiff's failure to mitigate his damages. Defendant claims that, while plaintiff applied for other law enforcement positions, he only applied for

chief of police positions. By failing to apply for other types of law enforcement positions, the jury should have reduced his award accordingly.

"Under the law in North Carolina, an injured plaintiff must exercise reasonable care and diligence to avoid or lessen the consequences of the defendant's wrong. If plaintiff fails to mitigate his damages, for any part of the loss incident to such failure, no recovery can be had." *Lloyd v. Norfolk Southern Railway Co.*, __ N.C. App. __, __, 752 S.E.2d 704, 706 (2013) (internal quotation marks omitted).

At trial, the court instructed the jury that plaintiff's damages must be reduced by the amount which he could have earned from similar employment using reasonable diligence and that "reasonable diligence requires that an employee seek and accept similar employment in the same locality." Given the testimony at trial concerning plaintiff's attempts to find new employment, defendant's argument is without merit. Plaintiff testified that he had applied for several types of positions, including a position as Chief of Police and an instructor of law enforcement at a college. In fact, plaintiff eventually took a contract position in Afghanistan as a police advisor for the Department of State. Furthermore, plaintiff listed twenty-four places he had applied to without specifying what type of position he applied for. Thus, the trial court did not abuse its discretion in denying defendant's motion to amend the verdict on this basis because the evidence clearly established that plaintiff used reasonable care and diligence when trying to find a new job.

[4] Next, defendant argues that the trial court abused its discretion in denying his motion to amend the verdict because the jury failed to properly reduce the amount of damages awarded by the amount of money plaintiff earned after his employment with the Town ended from substitute employment and unemployment benefits. Specifically, defendant contends that the award should have been reduced by $196,886.97, not $191,000.

At trial, plaintiff's tax records for the years 2008-2010 were submitted which showed that plaintiff earned approximately $186,772.97 from his employment with DynCorp and Trigger Time. Furthermore, he received $10,114 in unemployment benefits. In total, he earned $196,886.97. Consequently, the trial court abused its discretion in denying defendant's motion to amend the verdict with regard to this issue because the evidence clearly established that plaintiff earned $196,886.97 from other employers and unemployment benefits. Accordingly, we reverse the order denying defendant's motion to amend on this basis and remand to the trial court to reduce the verdict by $5,886.97—the difference between

$191,000, the amount the jury reduced its award by, and $196,886.97, the amount that the award should have been reduced by as established by the evidence.

II. Defendant's Motion for a New Trial

[5] Next, defendant argues that the trial court erred in denying its motion for a new trial because: (1) the trial court erred in instructing the jury that it may include damages for emotional distress in plaintiff's award of actual damages; (2) the evidence was not sufficient to justify the verdict because plaintiff failed to meet his burden of establishing that defendant requested him to participate in conduct which violated public policy; and (3) plaintiff counsel's statements during closing argument were highly inflammatory and prejudicial.

As noted above, we review the trial court's denial of defendant's motion for a new trial on these bases for abuse of discretion. *In re Will of Buck*, 350 N.C. 621, 627, 516 S.E.2d 858, 862 (1999).

With regard to defendant's argument concerning the jury instructions, as discussed, plaintiff was entitled to seek emotional distress damages and future lost wage damages in his claim for wrongful discharge. Furthermore, our Courts have repeatedly held that actual damages include emotional distress damages. *See Ringgold v. Land*, 212 N.C. 369, 371, 193 S.E. 267, 268 (1937) ("'Actual damages' are synonymous with 'compensatory damages' and with 'general damages.' Damages for mental suffering are actual or compensatory. They are not special nor punitive, and are given to indemnify the plaintiff for the injury suffered.") (internal citations omitted); *see also First Value Homes, Inc. v. Morse*, 86 N.C. App. 613, 617, 359 S.E.2d 42, 44 (1987). Furthermore, "[c]ompensatory damages provide recovery for, *inter alia*, mental or physical pain and suffering, lost wages and medical expenses." *Iadanza*, 169 N.C. App. at 780, 611 S.E.2d at 221. Therefore, since compensatory and actual damages are synonymous and compensatory damages include emotional distress and lost wages, defendant's argument that "actual damages" do not include emotional distress damages and damages for future lost wages is without merit.

[6] Next, defendant contends that the evidence was insufficient to establish that defendant requested plaintiff participate in conduct which violated public policy. Specifically, defendant characterizes the evidence as too vague and unspecific to submit the issue to the jury.

To state a claim for wrongful discharge in violation of public policy, an employee has the burden of showing that his "dismissal occurred for

a reason that violates public policy." *Considine v. Compass Grp. USA, Inc.*, 145 N.C. App. 314, 317, 551 S.E.2d 179, 181, *aff'd per curiam*, 354 N.C. 568, 557 S.E.2d 528 (2001). However, "something more than a mere statutory violation is required to sustain a claim of wrongful discharge under the public-policy exception. An employer wrongfully discharges an at-will employee if the termination is done for an *unlawful reason* or *purpose* that contravenes public policy." *Garner v. Rentenbach Constructors Inc.*, 350 N.C. 567, 571, 515 S.E.2d 438, 441 (1999) (internal quotation marks omitted).

> While there is no specific list that enumerates what actions fall within this exception, wrongful discharge claims have been recognized in North Carolina where the employee was discharged (1) for refusing to violate the law at the employer's request, (2) for engaging in a legally protected activity, or (3) based on some activity by the employer contrary to law or public policy.

Combs v. City Elec. Supply Co., 203 N.C. App. 75, 80, 690 S.E.2d 719, 723 (2010) (internal quotation marks omitted).

Contrary to defendant's characterization of the evidence, we conclude that the evidence was sufficient to go to the jury on the issue of whether plaintiff was discharged based on his refusal to provide confidential information on the status of ongoing drug cases. Plaintiff claims that he was discharged in retaliation for his refusal to provide members of the Town Council and Mayor Barrett with confidential information about ongoing narcotics cases. Had he chosen to provide this information, plaintiff argued that he would have violated N.C. Gen. Stat. § 14-230. N.C. Gen. Stat. § 14-230 provides, in pertinent part that "[i]f any . . . official . . . of any city or town . . . shall willfully omit, neglect or refuse to discharge any of the duties of his office, for default whereof it is not elsewhere provided that he shall be indicted, he shall be guilty of a Class 1 misdemeanor." Initially, we note that "a chief of police as well as a policeman is an officer of the municipality which engages his services, within the meaning of the provisions of G.S. § 14-230[.]" *State v. Hord*, 264 N.C. 149, 156-57, 141 S.E.2d 241, 246 (1965). As Chief of Police, plaintiff had a duty to protect the integrity of ongoing criminal cases. In doing so, plaintiff was required to ensure that information about those cases, particularly information about informants, remain confidential. Otherwise, the safety of those informants would be jeopardized.

Plaintiff testified that he was repeatedly asked by members of the Town Council to provide confidential information on "an ongoing basis."

Commissioner Lonnie Jones testified that one of the reasons plaintiff was discharged was based on his failure to keep the Board properly apprised of the status of investigations even after being repeatedly requested to do so. There is a difference between being asked on the progress of the drug cases versus being asked to provide information about confidential informants. By asking him to provide this information, defendant was not only asking him to violate N.C. Gen. Stat. § 14-230, but it was also asking him to violate public policy which protects the safety of confidential informants. Given that plaintiff believed and testified that defendant wanted confidential information which he was legally not allowed to share and the fact that, had he done so, plaintiff would have violated the law and public policy, defendant is unable to establish that the trial court abused its discretion in denying its motion for a new trial.

[7] Finally, defendant contends that the trial court erred in denying his motion for a new trial based on plaintiff counsel's inflammatory and prejudicial remarks during closing arguments.

Since defendant did not object at trial to these remarks, where a party fails to object during closing arguments, "our review is limited to discerning whether the statements were so grossly improper that the trial court abused its discretion in failing to intervene ex mero motu." *O'Carroll v. Texasgulf, Inc.*, 132 N.C. App. 307, 315, 511 S.E.2d 313, 319 (1999).

In its brief, defendant cites several statements made by plaintiff counsel that it characterized as grossly improper. We agree with defendant that those statements made by plaintiff's counsel that characterized the Town and at-will employment in an unflattering way and the highly inflammatory remarks regarding Mayor Barrett, among others, were improper. Upon review, however, these statements were not so prejudicial as to entitle defendant to a new trial. Defendant did not object to this argument at trial, and our review is limited to discerning whether the statements were so grossly improper that the trial court abused its discretion in failing to intervene *ex mero motu*. *Id.* We do not believe the argument rises to the level of gross impropriety, and, thus, the trial court did not abuse its discretion by failing to intervene.

Conclusion

With regard to defendant's motion to amend the verdict based on the jury's failure to properly offset the amount of damages by the amount of money plaintiff earned in other jobs and in unemployment benefits, we remand for the trial court to reduce the judgment by $5,886.97. As to all

other bases for the denial of defendant's motion to amend the verdict and motion for a new trial, we find no error.

REVERSED AND REMANDED IN PART; NO ERROR IN PART.

Judges GEER and McCULLOUGH concur.

TERRI DEW BOOKMAN, ADMINISTRATRIX OF THE ESTATE OF CARTHINA ROBERSON DEW, PLAINTIFF
v.
BRITTHAVEN, INC., D/B/A BRITTHAVEN OF WILSON, DAVITA RX, LLC, WILSON MEDICAL CENTER, MORGAN JONES, AND COURTNEY LASSITGER, DEFENDANTS

No. COA13-948

Filed 15 April 2014

1. Appeal and Error—interlocutory orders and appeals—order denying arbitration

An order denying a motion to compel arbitration was interlocutory but immediately appealable.

2. Arbitration and Mediation—motion to compel—documents signed by family

A motion to compel arbitration in a wrongful death action was remanded where decedent was admitted to Britthaven after being discharged from the hospital after surgery, the decedent's husband and adult daughter signed all of the documents when checking decedent into Britthaven following surgery, and the question of whether arbitration should be compelled was remanded for further findings on whether the husband and daughter had the apparent authority to bind decedent.

Appeal by defendant from order entered 10 May 2013 by Judge Milton F. Fitch, Jr. in Wilson County Superior Court. Heard in the Court of Appeals 21 January 2014.

Taylor Law Office, by W. Earl Taylor, Jr., for plaintiff-appellee.

Williams Mullen, by Brian C. Vick and Elizabeth D. Scott, for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant Britthaven, Inc. d/b/a Britthaven of Wilson ("Britthaven") appeals from the trial court's order denying its motion to compel arbitration. On appeal, Britthaven argues that apparent authority existed to bind the principal to the arbitration agreement, and therefore, the trial court erred by ruling that the arbitration agreement is unenforceable.

After careful review, we reverse the trial court's order and remand for further proceedings.

Background

On 24 August 2010, Carthina Dew ("Mrs. Dew") was admitted into Britthaven after being discharged from Wilson Medical Center following surgery on her broken femur. Mrs. Dew was awake, alert, lucid, and responsive to questions when she arrived at Britthaven. However, she did not sign any of the legal documents needed to admit her into the facility. Her husband, Frederick Dew ("Mr. Dew"), and her daughter, Terri Dew Bookman ("Mrs. Bookman"), signed all relevant documents. They met with Janet Watson ("Ms. Watson"), Britthaven's admission coordinator. Ms. Watson filed an affidavit with the trial court averring that Mr. Dew and Mrs. Bookman presented themselves as having authority to sign all documents needed on Mrs. Dew's behalf prior to her admission into Britthaven. Ms. Watson presented Mr. Dew and Mrs. Bookman with twelve documents, including one titled "RESIDENT AND FACILITY ARBITRATION AGREEMENT – READ CAREFULLY" ("the arbitration agreement"). When it came time to sign the documents, Mr. Dew had Mrs. Bookman sign his name, "Fred Dew," on the arbitration agreement and all other admission documents. Mrs. Bookman primarily signed Mr. Dew's name on signatory lines intended for either the resident's signature or the signature of the resident's representative or responsible party. For example, on the "Facility Resident Directory Opt Out Instructions," Mrs. Bookman signed "Fred Dew" on the line reserved for the "Signature of Resident or Legal Representative."

Mrs. Dew was discharged from Britthaven on or about 7 September 2010. She died on 3 November 2010, allegedly due to complications with large pressure ulcers. On 28 September 2011, Mrs. Bookman filed a wrongful death action against Britthaven and four other defendants in her capacity as Administratrix of Mrs. Dew's estate ("plaintiff").[1] Britthaven

1. Britthaven is the only defendant that is a party to this appeal.

moved to compel arbitration pursuant to the arbitration agreement bearing Mrs. Bookman's signature of Mr. Dew's name. At the hearing on Britthaven's motion, plaintiff challenged the validity of the arbitration agreement by arguing that neither Mrs. Bookman nor Mr. Dew had actual authority to execute the arbitration agreement on Mrs. Dew's behalf. The trial court agreed, entering an order denying Britthaven's motion to compel arbitration, but did not determine whether Mr. Dew or Mrs. Bookman had apparent authority to sign the arbitration agreement on Mrs. Dew's behalf. That order was appealed to this Court, where the case was remanded by unpublished opinion for findings of fact and conclusions of law relating to the issue of apparent authority. *See Bookman v. Britthaven, Inc.*, No. COA12-663, 2013 WL 1314965 (N.C. Ct. App. April 2, 2013) ("*Bookman I*").[2]

On remand, Britthaven's request to present further evidence on the issue of apparent authority went unanswered by plaintiff's counsel and the trial court. The trial court entered a new order drafted by plaintiff's counsel without conducting an evidentiary hearing or considering any further evidence. It concluded that neither Mr. Dew nor Mrs. Bookman had "legal authority, expressed authority, actual authority, implied authority, or apparent authority" to sign the arbitration agreement on Mrs. Dew's behalf, and thus it denied Britthaven's motion to compel arbitration. Britthaven filed timely notice of appeal from the order.

Discussion

I. Apparent Authority

Britthaven's sole argument on appeal is that the trial court erred by denying its motion to compel arbitration because Mr. Dew and Mrs. Bookman had apparent authority to sign the arbitration agreement on Mrs. Dew's behalf. After careful review, we reverse and remand.

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2. Plaintiff contends that under the doctrine of the law of the case, the *Bookman I* Court determined that "the [trial court's] additional findings fully support the conclusion of law that neither Mr. Dew nor Mrs. Bookman had apparent authority to execute the Arbitration Agreement on behalf of Mrs. Dew and that Defendant-Britthaven's Motion to Compel Arbitration must be denied." However, the *Bookman I* Court explicitly stated that "[n]othing in this opinion is intended to express any view on the merits of the apparent agency issue," and "[w]e do not address plaintiff's arguments regarding the merits of the apparent agency argument because that issue must be considered in the first instance by the trial court." *Bookman I*, at *1, *4. Thus, plaintiff's argument is overruled. *See Goldston v. State*, 199 N.C. App. 618, 624, 683 S.E.2d 237, 242 (2009) ("[T]he law of the case applies only to issues that were decided in the former proceeding.").

[1] Britthaven's appeal from the trial court's order denying its motion to compel arbitration is interlocutory. Appeals may be taken from interlocutory orders in two circumstances:

> First, the trial court may certify that there is no just reason to delay the appeal after it enters a final judgment as to fewer than all of the claims or parties in an action. N.C.G.S. § 1A–1, Rule 54(b) [2013]. Second, a party may appeal an interlocutory order that "affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment."

Dep't of Transp. v. Rowe, 351 N.C. 172, 174–75, 521 S.E.2d 707, 709 (1999) (citation omitted), *cert. denied*, 534 U.S. 1130, 151 L. E. 2d 972 (2002). This Court has previously held that "[t]he 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." *U.S. Trust Co., N.A. v. Stanford Grp. Co.*, 199 N.C. App. 287, 289-90, 681 S.E.2d 512, 514 (2009) (citation and quotation marks omitted). Thus, we hold that Britthaven's appeal is properly before us.

[2] "When a party disputes the existence of a valid arbitration agreement, the trial judge must determine whether an agreement to arbitrate exists." *Sciolino v. TD Waterhouse Investor Servs., Inc.*, 149 N.C. App. 642, 645, 562 S.E.2d 64, 66, *disc. review denied*, 356 N.C. 167, 568 S.E.2d 611 (2002). "The trial court's findings regarding the existence of an arbitration agreement are conclusive on appeal where supported by competent evidence, even where the evidence might have supported findings to the contrary." *Ellision v. Alexander*, 207 N.C. App. 401, 404, 700 S.E.2d 102, 106 (2010). "Accordingly, upon appellate review, we must determine whether there is evidence in the record supporting the trial court's findings of fact and if so, whether these findings of fact in turn support the conclusion that there was no agreement to arbitrate." *Sciolino*, 149 N.C. App. at 645, 562 S.E.2d at 66.

"The law of contracts governs the issue of whether an agreement to arbitrate exists." *Brown v. Centex Homes*, 171 N.C. App. 741, 744, 615 S.E.2d 86, 88 (2005). In order to hold an alleged principal contractually liable to a third party for the acts of his agent, the third party has the burden of proving that

> a particular person was at the time acting as a servant or agent of the [principal]. An agent's authority to bind his principal cannot be shown by the agent's acts or declarations. This can be shown only by proof that the principal

> authorized the acts to be done or that, after they were done, he ratified them. One who seeks to enforce against an alleged principal a contract made by an alleged agent has the burden of proving the existence of the agency and the authority of the agent to bind the principal by such contract.

Simmons v. Morton, 1 N.C. App. 308, 310, 161 S.E.2d 222, 223 (1968) (citations omitted).

Here, the trial court was to determine whether Mr. Dew or Mrs. Bookman had apparent authority to bind Mrs. Dew as their principal to the arbitration agreement.

> Apparent authority is that authority which the principal has held the agent out as possessing or which he has permitted the agent to represent that he possesses. Under the doctrine of apparent authority, a principal's liability in any particular case must be determined by what authority the third person in the exercise of reasonable care was justified in believing that the principal had, under the circumstances, conferred upon his agent.

Munn v. Haymount Rehab. & Nursing Ctr., 208 N.C. App. 632, 639, 704 S.E.2d 290, 295 (2010) (citation and quotation marks omitted). Furthermore, "the principal cannot restrict his liability for acts of his agent within the scope of his apparent authority by limitations thereon of which the person dealing with the agent has not notice." *Morpul Research Corp. v. Westover Hardware, Inc.*, 263 N.C. 718, 721, 140 S.E.2d 416, 419 (1965).

> The law of apparent authority usually depends upon the unique facts of each case[.] . . . Thus, in a case where the evidence is conflicting, or susceptible to different reasonable inferences, the nature and extent of an agent's authority is a question of fact to be determined by the trier of fact. Where different reasonable and logical inferences may not be drawn from the evidence, the question is one of law for the court.

Foote & Davies, Inc. v. Arnold Craven, Inc., 72 N.C. App. 591, 595, 324 S.E.2d 889, 893 (1985) (citations omitted).

On remand, the trial court found as fact that:

> 13. Neither Frederick Washington Dew nor Terri Dew Bookman discussed with Carthina Roberson Dew anything

with regards to consenting to any arbitration on her behalf on August 24, 2010 or at anytime relevant hereto.

. . .

15. Carthina Roberson Dew did not delegate to Terri Dew Bookman or Frederick Washington Dew the right and/or authority to *agree to any arbitration agreement* on her behalf on August 24, 2010 or at anytime relevant hereto.

. . .

18. Carthina Roberson Dew did not give the authority either expressed or implied to Terri Dew Bookman or Frederick Washington Dew to *execute the Resident and Facility Arbitration Agreement.*

19. Carthina Roberson Dew did not hold Terry Dew Bookman nor Frederick Washington Dew out to Britthaven, Inc., as having or possessing the right and/or authority to *execute or agree to any arbitration agreement* on her behalf on August 24, 2010 or at anytime relevant hereto, nor did she make or indicate any manifestations of such authority to Britthaven, Inc.

. . .

21. At no time during the admission procedure on August 24, 2010 or at anytime relevant hereto did Carthina Roberson Dew hold Terry Dew Bookman or Frederick Washington Dew out as possessing the right to *agree or enter into any arbitration agreement* on her behalf.

22. At no time during the admission procedure on August 24, 2010 or at anytime relevant hereto did Carthina Roberson Dew permit Terry Dew Bookman or Frederick Washington Dew to represent that they possessed the right or authority to agree or *enter into any arbitration agreement on her behalf.* (Emphasis added.)

Based on these findings of fact, the trial court concluded that neither Mr. Dew nor Mrs. Bookman had apparent authority to sign the arbitration agreement on Mrs. Dew's behalf and that any belief on Britthaven's part of apparent authority was unreasonable and unjustified under the circumstances. Even assuming that the trial court's findings of fact are supported by competent evidence and are thus binding on appeal, *Ellision*, 207 N.C. App. at 404, 700 S.E.2d at 106, they are insufficient to support

the trial court's conclusion that no apparent authority existed to bind Mrs. Dew to the arbitration agreement.

Significantly, the trial court made no factual findings as to whether Mrs. Dew conferred authority on Mrs. Bookman or Mr. Dew to conduct the admission process in general on her behalf. Thus, its analysis as to the arbitration agreement is incomplete. Ms. Watson averred that both Mr. Dew and Mrs. Bookman "presented themselves as having full authority to act on behalf of Mrs. Dew, and to sign and execute any and all necessary documents on her behalf." Indeed, not only does plaintiff not challenge the enforceability of any of the eleven other contracts signed by Mrs. Bookman and Mr. Dew on Mrs. Dew's behalf, Mrs. Bookman averred that she signed documents in Mr. Dew's name so that Mrs. Dew could be "admitted" into Britthaven. The complaint itself states that Mrs. Dew was "admitted" into Britthaven, and the trial court found as fact that "[Mrs. Dew] was admitted as a resident" of Britthaven. Ms. Watson averred that the paperwork signed by Mrs. Bookman and Mr. Dew is "necessary" for a resident to be admitted into Britthaven. Therefore, the trial court's finding of fact that Mrs. Dew was "admitted" and plaintiff's own concession that Mrs. Dew was "admitted" tends to show that at the very least, there may have been actual or apparent authority conferred on Mr. Dew or Mrs. Bookman to execute some or all of the contracts that were needed in order to complete the admission process.

If such authority did exist, the issue regarding the apparent authority to enter into the arbitration agreement would become one of scope. The North Carolina Supreme Court has established that "[t]he principal is liable upon a contract duly made by his agent with a third person . . . when the agent acts within the scope of his apparent authority, unless the third person has notice that the agent is exceeding his actual authority." *Morpul Research Corp.*, 263 N.C. at 721, 140 S.E.2d at 418. Throughout the admission process, Mrs. Bookman and Mr. Dew signed twelve contracts with Britthaven on Mrs. Dew's behalf. Of those twelve contracts, they now challenge the enforceability of only one – the arbitration agreement. Mrs. Bookman signed Mr. Dew's name on signatory lines reserved for Mrs. Dew or her "Legal Representative," "Responsible Party," and "Agent or Representative." Ms. Watson averred that neither Mr. Dew nor Mrs. Bookman "raised any objection to agreeing to or signing any of the documents that I presented them" and that "[a]t no time during the admission process, did Mr. Dew or his daughter make any statement or take any action to suggest that their authority to act on behalf of Mrs. Dew was limited in any way or that either lacked the authority to sign any of the paperwork on her behalf." Given that Mrs. Bookman and Mr. Dew may have had authority to conduct the admission process for Mrs.

Dew, and Ms. Watson averred that she was unaware of any limitation on this authority if it existed, there remains evidence which the trial court failed to address in its findings of fact and conclusions of law "that would allow, but not require, a finding of apparent authority" to enter into the arbitration agreement. *Bookman I*, at *4.

Rather than allowing Britthaven, the party bearing the burden of proof, to put on further evidence as to these matters after remand from *Bookman I*, the trial court entered new findings of fact taken verbatim from plaintiff's proposed order. Such findings are only supported by affidavits from Mrs. Bookman and Mr. Dew that were initially presented to the trial court in support of plaintiff's argument that there was no *actual* authority to bind Mrs. Dew to the arbitration agreement. Plaintiff presented no evidence for the purpose of resolving the issue of apparent authority. Thus, because the trial court denied Britthaven the opportunity to carry its burden of establishing apparent authority and failed to address all issues raised by the evidence it had before it, we conclude that it did not fully comply with the *Bookman I* Court's mandate to enter "further findings of fact and conclusions of law regarding whether either Mr. Dew or [Mrs.] Bookman had apparent authority to enter into the arbitration agreement in this case." *Bookman I*, at *4; *see Small v. Small*, 107 N.C. App. 474, 477, 420 S.E.2d 678, 681 (1992) ("In a trial without a jury, it is the duty of the trial judge to resolve all issues raised by the pleadings and the evidence by making findings of fact and drawing therefrom conclusions of law upon which to base a final order or judgment.").

Because the trial court failed to enter findings of fact or conclusions of law resolving: (1) whether Mr. Dew or Mrs. Bookman had authority to bind Mrs. Dew to the other admission contracts; (2) whether the arbitration agreement fit into the scope of this potential authority; (3) whether there was any limitation on this potential authority; and (4) whether Britthaven was aware of any limitation on this authority if one existed, we must reverse the trial court's order and remand. We further instruct the trial court to conduct an evidentiary hearing as needed to resolve these outstanding issues.

Conclusion

For the reasons stated above, we reverse the trial court's order denying Britthaven's motion to compel arbitration and remand for further proceedings.

REVERSED AND REMANDED.

Judges McGEE and ELMORE concur.

DEAVEN GREY DAVIS, DANETTE DAVIS AND DICKIE G. DAVIS, PLAINTIFFS
v.
HERMILO SALAZAR URQUIZA, DEFENDANT

No. COA13-1089

Filed 15 April 2014

Process and Service—insufficient service of process—motion to dismiss—uninsured motorist carrier—service on claims adjuster

The trial court did not err by granting the motion of an uninsured motorist carrier to dismiss for insufficient process or insufficient service of process. Where a plaintiff seeks to bind an uninsured motorist carrier to the result in a case, the carrier must be served by the traditional means of service within the limitations period. In the instant case, plaintiffs' service upon a claims adjuster was insufficient. Plaintiffs' alias and pluries summonses issued after defendant was served had no legal effect.

Appeal by plaintiffs from order entered 11 March 2013 by Judge James M. Webb in Surry County Superior Court. Heard in the Court of Appeals 18 February 2014.

Daggett, Shuler, Koontz, Nauman & Bell, P.L.L.C., by Michael W. Clark, for plaintiff-appellants.

Willardson & Lipscomb, LLP, by John S. Willardson, for unnamed defendant-appellee, North Carolina Farm Bureau Mutual Insurance Company.

STEELMAN, Judge.

Where valid service of process was not made upon an uninsured motorist carrier within the applicable statute of limitations period, the trial court did not err in granting the motion of the uninsured motorist carrier to dismiss for insufficient process or insufficient service of process.

I. Factual and Procedural Background

On 15 July 2009, Deaven Grey Davis, then a minor, was a passenger in a vehicle struck by another vehicle operated by Hermilo Salazar Urquiza ("defendant"). On 31 May 2012, Deaven Davis, along with her parents, Danette and Dickie G. Davis (collectively, "plaintiffs") filed

suit against defendant, seeking monetary damages for personal injuries resulting from the collision.

Defendant was an uninsured motorist. Plaintiffs contended that North Carolina Farm Bureau Mutual Insurance Company ("Farm Bureau") provided uninsured motorists' coverage for the collision in accordance with N.C. Gen. Stat. § 20-279.21(b)(3). Defendant was served with a copy of the summons and complaint on 29 July 2012. Plaintiffs also contended that National Grange Insurance Company ("National Grange") provided applicable uninsured motorists' coverage.

On 5 June 2012, counsel for plaintiffs mailed a copy of the summons and complaint to Steve Wagoner, a claims adjuster for Farm Bureau, by certified mail, at Wagoner's office in Wilkesboro. These documents were received on 7 June 2012. On 6 July 2012, Farm Bureau filed an answer to plaintiffs' complaint, as an unnamed party, specifically asserting the defenses of insufficiency of process and insufficiency of service of process, as well as the statute of limitations. On 27 December 2012, Farm Bureau gave notice to plaintiffs of a hearing on 7 January 2013 concerning its motion to dismiss based upon insufficiency of process and insufficiency of service of process. On 31 December 2012, Farm Bureau served the affidavit of H. Julian Philpott, Jr. This affidavit stated that Steve Wagoner "was not now, nor has he ever been an officer, director or managing agent of North Carolina Farm Bureau Mutual Insurance Company, nor has he ever been a designated process agent for that company..."

Plaintiffs caused alias and pluries summonses to be issued by the Clerk of Superior Court of Surry County, directed to defendant, on 20 July 2012, 25 September 2012, and 10 December 2012. On 2 January 2013, plaintiffs mailed a copy of the summons and complaint to Wayne Goodwin, Commissioner of Insurance, by certified mail, in order to serve Farm Bureau in accordance with the provisions of N.C. Gen. Stat. § 58-16-30. This was received by the Commissioner of Insurance on 7 January 2013.

On 7 January 2013, Farm Bureau's motion to dismiss was heard before the trial court. By order filed 11 March 2013, the trial court granted defendant's motion, and dismissed plaintiffs' complaint against Farm Bureau as an unnamed defendant, with prejudice.

Plaintiffs appeal.

II. Standard of Review

"We review de novo the grant of a motion to dismiss." *Lea v. Grier*, 156 N.C. App. 503, 507, 577 S.E.2d 411, 414 (2003). Where there is no

valid service of process, the court lacks jurisdiction over a defendant, and a motion to dismiss pursuant to Rule 12(b) should be granted. *Sink v. Easter*, 284 N.C. 555, 561, 202 S.E.2d 138, 143 (1974).

III. Service of Process

In their sole argument on appeal, plaintiffs contend that the trial court erred in dismissing the complaint against Farm Bureau for insufficient process and/or insufficient service of process. We disagree.

N.C. Gen. Stat. § 20-279.21(b)(3), concerning uninsured motorist coverage, provides that:

> [T]he insurer shall be bound by a final judgment taken by the insured against an uninsured motorist if the insurer has been served with copy of summons, complaint or other process in the action against the uninsured motorist by registered or certified mail, return receipt requested, or in any manner provided by law . . . The insurer, upon being served as herein provided, shall be a party to the action between the insured and the uninsured motorist though not named in the caption of the pleadings and may defend the suit in the name of the uninsured motorist or in its own name. The insurer, upon being served with copy of summons, complaint or other pleading, shall have the time allowed by statute in which to answer, demur or otherwise plead (whether the pleading is verified or not) to the summons, complaint or other process served upon it. . . . The failure to post notice to the insurer 60 days in advance of the initiation of suit shall not be grounds for dismissal of the action, but shall automatically extend the time for the filing of an answer or other pleadings to 60 days after the time of service of the summons, complaint, or other process on the insurer.

N.C. Gen. Stat. § 20-279.21(b)(3)(a) (2013). This statute provides that, in order for an uninsured motorist carrier to be bound by a proceeding, mere notice is insufficient; the carrier must be formally served with process. *See Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 576, 573 S.E.2d 118, 122 (2002) (holding that the statute "unequivocally requires that the UM carrier be served with a copy of the summons and complaint in order to be bound by a judgment against the uninsured motorist.").

Under Rule 4(j)(6) of the North Carolina Rules of Civil Procedure, service of process can be effected upon a corporation:

> a. By delivering a copy of the summons and of the complaint to an officer, director, or managing agent of the corporation or by leaving copies thereof in the office of such officer, director, or managing agent with the person who is apparently in charge of the office.
>
> b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or the party in a manner specified by any statute.
>
> c. By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the officer, director or agent to be served as specified in paragraphs a and b.
>
> d. By depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the officer, director, or agent to be served as specified in paragraphs a. and b., delivering to the addressee, and obtaining a delivery receipt. As used in this sub-subdivision, "delivery receipt" includes an electronic or facsimile receipt.

N.C. R. Civ. P. 4(j)(6) (2013). In addition, N.C. Gen. Stat. § 58-16-30 provides that an insurance company can be served by serving the North Carolina Commissioner of Insurance. N.C. Gen. Stat. § 58-16-30 (2013).

We have previously held that statutes concerning service of process must be strictly complied with, and that even actual notice, if it does not comply with statutory requirements, does not give the court jurisdiction over a party. *Fulton v. Mickle*, 134 N.C. App. 620, 623-24, 518 S.E.2d 518, 520-21 (1999). In *Fulton*, we held that service upon a party was defective for two reasons: first, because it was delivered by regular mail instead of certified mail; second, because the recipient was not one of those listed in Rule 4(j)(6) as authorized to receive service. We hold that this latter basis, the lack of an authorized recipient, is controlling in the instant case.

"[A] defendant who seeks to rebut the presumption of regular service generally must present evidence that service of process failed to accomplish its goal of providing defendant with notice of the suit. However, once the defendant has pled the statute of limitations, the burden is on the plaintiff to show that his cause of action accrued within the limitations period." *Lawrence v. Sullivan*, 192 N.C. App. 608,

621-22, 666 S.E.2d 175, 182-83 (2008) (citations and quotations omitted). In *Lawrence*, the plaintiff, seeking to bring an action against Sullivan, served process within the applicable limitations period by certified mail. The letter was signed for by one James Holt. The plaintiff voluntarily dismissed the case, and then refiled it within one year. The defendant, in her affidavit, stated that she did not reside at the residence where the certified letter was delivered or receive a copy of the summons and complaint. The trial court held that the defendant had rebutted the presumption of valid service within the limitations period, placing the burden upon the plaintiff to prove that the action accrued within the limitations period. The trial court held that the plaintiff failed to do so, and that defendant was entitled to a dismissal due to insufficient process or service of process within the applicable limitations period. We affirmed. *Id.* at 623, 666 S.E.2d at 183.

In the instant case, plaintiffs mailed a copy of the summons and complaint to Steve Wagoner, a claims adjuster for Farm Bureau, by certified mail on 5 June 2012. Plaintiffs' complaint alleged that the accident took place on 15 July 2009. The applicable statute of limitations for personal injury in tort, and for service on a UM carrier, arising out of an automobile accident is three years. N.C. Gen. Stat. § 1-52(16) (2013); *Thomas v. Washington*, 136 N.C. App. 750, 754, 525 S.E.2d 839, 842 (2000) (holding that "the three-year tort statute of limitations, which begins running on the date of an accident, also applies to the uninsured motorist carrier.").

The affidavit of H. Julian Philpott, Jr., states that Wagoner was neither an officer nor director, nor a designated agent for service of process, for Farm Bureau. This affidavit rebutted the presumption that service upon Wagoner was effective. Plaintiff failed to present evidence to demonstrate effective service within the limitations period. We therefore hold that plaintiffs' purported service of process upon Steve Wagoner was defective.

Plaintiffs contend that this case presents us with "a new set of facts with no case law directly on point." This is simply not correct. Our opinion in *Thomas v. Washington* is controlling. In *Thomas*, the plaintiff had uninsured motorist coverage, and was in an accident on 31 March 1995; "the three-year statute of limitations applicable to automobile negligence actions ran on 31 March 1998." *Thomas*, 136 N.C. App. at 751-53, 525 S.E.2d at 841.[1] The plaintiff instituted an action within the

1. We are puzzled as to why appellee does not directly cite to *Thomas v. Washington* in its brief. Rather, its argument is based upon a recommended decision of a federal

limitations period, and properly served the individual defendants; however, the uninsured motorist carrier was not served within the applicable three-year period. Plaintiff contended that service upon the insurance company was nonetheless effective, despite being served upon the company's registered agent after the expiration of the limitations period. Plaintiff's contention was that the limitations period was based on contract, not on tort, and that the action was kept alive through alias or pluries summonses. *Id.* at 753-54, 525 S.E.2d at 842. We disagreed, holding that the three-year tort statute of limitations applied, and that alias or pluries summonses only extend the action upon defendants who are not served, until such time as service can be made. *Id.* at 753-55, 525 S.E.2d 842-43. We further held that:

> Our appellate courts have required strict compliance with the statutes which provide for service of process on insurance companies in similar situations. For example, in *Fulton v. Mickle* this Court held that mailing a copy of the summons and complaint by *regular mail to a claims examiner for the insurer* did not comply with the requirement of Rule 4(j)(6)(c) of the Rules of Civil Procedure that a copy of the summons and complaint be mailed by "registered or certified mail, return receipt requested, addressed to the officer, director or agent to be served...."

Id. at 755, 525 S.E.2d at 843.

Where a plaintiff seeks to bind an uninsured motorist carrier to the result in a case, the carrier must be served by the traditional means of service, within the limitations period. In the instant case, plaintiffs' service upon a claims adjuster was insufficient. As we held in *Thomas*, plaintiffs' alias and pluries summonses issued after defendant was served have no legal effect. *Id.* at 755, 525 S.E.2d at 843. Plaintiffs' service upon the Commissioner of Insurance outside of the limitations period mandated dismissal.

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magistrate in *Neth. Ins. Co. v. Cockman*, 342 F. Supp. 2d 396 (M.D.N.C. 2004), which references *Thomas v. Washington*. Appellee cites this decision as if it was authoritative. It is not. With regard to matters of North Carolina state law, "neither this Court nor our Supreme Court is 'bound by the decisions of federal courts, including the Supreme Court of the United States, although in our discretion we may conclude that the reasoning of such decisions is persuasive.'" *Libertarian Party of N.C. v. State*, 200 N.C. App. 323, 331, 688 S.E.2d 700, 706 (2009) *aff'd as modified*, 365 N.C. 41, 707 S.E.2d 199 (2011) (quoting *State ex rel. Martin v. Preston*, 325 N.C. 438, 449–50, 385 S.E.2d 473, 479 (1989)). Briefs should cite directly to controlling North Carolina precedent.

The trial court did not err in granting Farm Bureau's motion to dismiss for insufficiency of process or insufficiency of service of process.

This argument is without merit.

AFFIRMED.

Judges McGEE and ERVIN concur.

DUKE ENERGY CAROLINAS, LLC, PLAINTIFF
v.
BRUTON CABLE SERVICE, INC., DEFENDANT/THIRD-PARTY PLAINTIFF
v.
ROBERT WAYNE TAYLOR AND WIFE, LOIS K. TAYLOR; DAVIS-MARTIN-POWELL AND ASSOCIATES, INC., AND JON ERIC DAVIS, THIRD-PARTY DEFENDANTS

No. COA13-686

Filed 15 April 2014

1. Pleadings—unsworn letters and correspondence—summary judgment

The trial court erred in a case involving an easement dispute by admitting unsworn letters between counsel for third-party plaintiff and third-party defendant in violation of N.C.G.S. § 1A-1, Rule 56(e) and by considering them in the decision to grant defendants' motion for summary judgment.

2. Statutes of Limitations and Repose—land surveyor—ten-year period—action timely commenced

The trial court erred in a case involving an easement dispute by granting summary judgment in favor of third-party defendant based on the statute of limitations. The ten-year limitation period in N.C.G.S. § 1-47(6)(a) applied and third-party plaintiff commenced its action within ten years of the last act giving rise to the cause of action.

3. Indemnity—third-party action—joinder permissible

Third-party plaintiff's claim was proper where it alleged indemnity with language mirroring in part that of N.C.G.S. § 1A-1, Rule 14(a). Furthermore, because third-party plaintiff properly alleged indemnification pursuant to Rule 14 in the third-party complaint, the joinder of claims was permissible pursuant to N.C.G.S. § 1A-1, Rule 18.

Appeal by defendant/third-party plaintiff from order entered 11 October 2012 by Judge Lucy N. Inman in Randolph County Superior Court. Heard in the Court of Appeals 6 November 2013.

Biesecker, Tripp, Sink & Fritts, L.L.P., by Joe E. Biesecker, for third-party plaintiff-appellant Bruton Cable Service, Inc.

Pharr Law, PLLC, by Steve M. Pharr, for third-party defendant-appellees Davis-Martin-Powell and Associates, Inc. and Jon Eric Davis.

CALABRIA, Judge.

Defendant/third-party plaintiff Bruton Cable Service, Inc. ("Bruton") appeals from an order granting summary judgment in favor of third-party defendants Davis-Martin-Powell and Associates, Inc. ("DMP") and Jon Eric Davis ("Davis") (collectively "defendants"). Bruton voluntarily dismissed its claims against third-party defendants Robert Wayne Taylor and Lois K. Taylor ("the Taylors") on 29 April 2013. Duke Energy Carolinas, LLC ("Duke") voluntarily dismissed its claims against Bruton on 2 May 2013. Neither the Taylors nor Duke are parties to the instant appeal. We reverse.

I. Background

In April 2005, Bruton, a North Carolina corporation, purchased Lots 7 and 59 ("the property") from the Taylors. The property was located in the Randolph Hills Subdivision, Phase II ("the subdivision"), in Randolph County, North Carolina. Prior to Bruton's ownership of the property, DMP, a North Carolina corporation engaged in the business of surveying, engineering, and land planning, prepared the plat. Davis, a DMP employee and registered surveyor, certified the plat that was recorded on 8 July 2003 at Plat Book 84, Page 95 at the Randolph County Register of Deeds. The final recorded plat showed Duke's right-of-way easement (the "Duke easement" or "Duke's easement") pursuant to an agreement dated 20 May 1970.

According to Davis' plat, Duke's easement extended 150 feet over and across Lots 7 and 59 of the subdivision. Relying on the information in the recorded final subdivision plat ("the plat") depicting a 150-foot Duke easement, Bruton planned the location of single-family homes and a septic tank repair and drain field on the property. Bruton began construction in 2006.

On 31 October 2006, Duke representative Ervin Summers ("Summers") visited the property to determine whether the construction was within Duke's easement. Summers then sent Bruton a letter dated 8 February 2007 stating Duke's objection to all encroachments that existed within Duke's deeded and recorded 200-foot easement for the property. Summers requested the removal of the encroachments on Duke's easement. At the time Bruton received Duke's letter, the house on Lot 59 was almost complete and the house on Lot 7 was approximately 60% complete. Bruton also sent DMP several letters regarding the encroachment due to the inaccurate survey.

On 7 July 2011, since the parties were unsuccessful in negotiations regarding the disputed easement, Duke filed a complaint against Bruton alleging that a portion of Bruton's house that was under construction encroached upon Duke's easement, and sought, *inter alia*, an order to remove the encroachment from the 200-foot wide electrical transmission line easement. Duke also sought a permanent injunction against Bruton, prohibiting it from further interfering with Duke's ability to protect the safety of the public, provide reliable electrical service to the public, and properly and safely maintain its transmission lines.

On 22 December 2011, Bruton filed an answer and a third-party complaint against DMP and Davis. In its answer, Bruton denied liability and acknowledged that any alleged liability was the result of Bruton's reasonable and justifiable reliance upon defendants' actions, representations, and warranties that the Duke easement was 150 feet wide.

In its third-party complaint against defendants, Bruton alleged, *inter alia*, that

> DMP and Davis, in the course of their business and profession, prepared the final map for the Randolph Hills Subdivision, Phase II, for the benefit of persons who would acquire Lots 7 and 59. [Defendants] reasonably knew that a purchaser of Lots 7 and 59 would reasonably rely on the information and representation contained in that survey as shown on the map.
>
> 33. In performing the services necessary for the production of the map . . . [defendants] were required to comply with the provisions of N.C.G.S. § 47-30(f)(8). [Defendants] did not comply with that statute. The failure to comply with that statute caused [Bruton] to incur damages. That statute was enacted for the benefit and protection of the general public. [Bruton], as a purchaser of Lots 7 and 59

and as a member of the general public, is one of the class of persons for whose benefit [defendants] supplied the information and statements shown on the plat. [Bruton] is a person for whose protection that statute was enacted by the legislature. Although [Bruton] was not personally aware of the defect in the map, [Bruton] was entitled to rely on the accuracy of that map. [Defendants] knew or should have known that members of the public such as [Bruton] and other purchasers of lots in that subdivision would rely on the accuracy of that map.

34. On or about 29 April 2005 [Bruton] acquired ownership of Lots 7 and 59, Phase II, Randolph Hills Subdivision according to the plat which is duly recorded in Plat Book 84, Page 95 in the Register of Deeds of Randolph County, North Carolina.

. . .

37. [Bruton] reasonably relied on [defendants'] representation of the [Duke] easement as shown on the final recorded map.

38. After acquiring the two lots, [Bruton] began construction of a house on each lot in late 2006. Each house was located in order to comply with the required set-back and zoning limits, the requirements of the Restrictive Covenants, other applicable laws and rules and outside the [Duke] easement as shown on the plat prepared by [defendants]. [Bruton's] agents relied on the plat.

39. On or about February 10, 2007, [Bruton] received a letter dated February 8, 2007 from [Duke]. The letter asserted that [Duke] had a 200-foot wide easement on Lots 7 and 59. [Duke] informed [Bruton] that no portion of either house, driveway, septic system or other improvements could be located within any area of the 200-foot wide easement.

. . .

41. When [Bruton] received that letter, the house on Lot 59 was almost complete and the house on Lot 7 was approximately sixty percent (60%) complete. To mitigate possible damages, [Bruton] ceased work on each house and incurred expenses to relocate the septic tank system on Lot 59 outside of the alleged Duke easement.

> Approximately 50% of the house on Lot 7 is within the alleged [Duke] easement. If the Court grants [Duke] any or all the relief it requests, the house on Lot 7 will have to be disassembled and demolished. Both houses were planned as single-family residences.
>
> 42. [Bruton] spent approximately $191,301.90 for Lot 7 and construction of the house on Lot 7. [Bruton] spent approximately $224,821.23 for Lot 59 and construction of the house on Lot 59. [Bruton] will have to remove the house on Lot 7 and remove the unused septic system from encroaching on the easement. [Bruton] will incur expenses.
>
> 43. [Defendants] were negligent in that they failed to accurately identify and locate the [Duke] easement on the map . . . as required by N.C.Gen.Stat. [sic] § 47-30(f)(8) and other applicable law. Such failure constitutes negligence. [Defendants] failed to exercise that care and competence in obtaining and communicating accurate information regarding the [Duke] easement. [Defendants] negligently misrepresented the accurate width of the [Duke] easement. The actions of [defendants] constitute a mistake on their part.
>
> 44. As a direct and proximate result of [defendants'] negligence, [Bruton] has been damaged in an amount incurred or to be incurred in excess of $10,000.00 for purchase price of each lot, construction of each house, removal of the house on Lot 7 and removal of the septic tank system on Lot 59.
>
> 45. [Bruton] could not have prevented the damages it has incurred or will incur.

On 9 January 2012, defendants filed an answer to Bruton's third-party complaint. As one of the affirmative defenses, defendants alleged Bruton's claims were barred by the statute of limitations. On 18 July 2012, defendants filed a motion to dismiss the complaint, and in the alternative, a motion for summary judgment. After a hearing on 17 September 2012, at which defendants specifically argued that Bruton's claim was time-barred by the statute of limitations, the trial court granted summary judgment in favor of defendants. Bruton appeals.

II. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to 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)). "A genuine issue of material fact arises when the facts alleged . . . are of such nature as to affect the result of the action." *N. Carolina Farm Bureau Mut. Ins. Co. v. Sadler*, 365 N.C. 178, 182, 711 S.E.2d 114, 116 (2011) (citation and quotation marks omitted). In a summary judgment motion, the court may consider "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits" to see if there is any genuine issue of material fact. N.C. Gen. Stat. § 1A-1, Rule 56(c) (2013). This Court reviews the pleadings and all other evidence in the record in the light most favorable to the nonmoving party and draws all reasonable inferences in that party's favor. *Sadler*, 365 N.C. at 182, 711 S.E.2d at 117.

III. Summary Judgment

Bruton argues that the trial court erred in admitting unsworn letters and considering them in the decision to grant defendants' motion for summary judgment, and more importantly by basing that decision on the statute of limitations. We agree.

A. Admission of Correspondence

[1] As an initial matter, submitted affidavits must meet the requirements of Rule 56(e) of the North Carolina Rules of Civil Procedure: "affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." N.C. Gen. Stat. § 1A-1, Rule 56(e) (2013). Unsworn letters and correspondence are not the type of evidence considered by the court pursuant to Rule 56, and should not be considered during summary judgment. *Strickland v. Doe*, 156 N.C. App. 292, 296, 577 S.E.2d 124, 129 (2003). Instead, "parties are required to set forth facts in affidavits or as otherwise provided." *Id.*, 577 S.E.2d at 129 (quotation marks omitted). *See also Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 705, 709, 582 S.E.2d 343, 345-46 (2003) (unsworn statements and inadmissible hearsay "cannot be relied upon" in a summary judgment motion).

In the instant case, defendants introduced several letters between Bruton's counsel and defense counsel purporting to support their

summary judgment motion. While defendants contend the letters were offered for the purpose of showing Bruton's awareness of damages, the reason for offering the letters does not negate the fact that the letters themselves were unsworn correspondence that did not comply with the requirements of Rule 56.

Bruton also argues that the letters should not have been admitted because they contained impermissible hearsay, legal opinions and presumptions, and statements in the course of settlement negotiations. However, since the trial court erred by improperly considering unsworn correspondence between Bruton's counsel and defense counsel, and defendants did not comply with the requirements of Rule 56, it is unnecessary to address these arguments.

B. Statute of Limitations

[2] In addition to considering unsworn correspondence, we address whether the Bruton's third-party action was barred by the statute of limitations.

To determine whether Bruton timely filed its third-party complaint, we must determine when Bruton, as the aggrieved party, became entitled to maintain an action. Bruton specifically alleged in the third-party complaint that defendants, as registered land surveyors, negligently misrepresented the accurate width of the Duke easement. According to our Supreme Court in *Raftery v. Wm. C. Vick Constr. Co.*, a statute of limitations begins to run against an aggrieved party when that aggrieved party becomes entitled to maintain an action for the wrongful act that was committed. 291 N.C. 180, 186-87, 230 S.E.2d 405, 408 (1976) (citation omitted). In a claim specifically alleging negligent misrepresentation, the cause of action accrues when two events occur: (1) the claimant discovers the misrepresentation, and (2) the claimant suffers harm because of the misrepresentation. *Guyton v. FM Lending Servs., Inc.*, 199 N.C. App. 30, 35, 681 S.E.2d 465, 478 (2009) (citation omitted).

Although defendants contend that N.C. Gen. Stat. § 1-52(16) should apply, N.C. Gen. Stat. § 1-52(18) specifically excludes § 1-52(16) and includes § 1-47(6). Pursuant to N.C. Gen. Stat. § 1-52(18) (2013), a three-year limitation applies to actions "[a]gainst any registered land surveyor . . . or any person acting under his supervision and control for physical damage or economic or monetary loss due to negligence or a deficiency in the performance of surveying or platting as defined in G.S. 1-47(6)." According to N.C. Gen. Stat. § 1-47(6), an action against any registered land surveyor and any person acting under his supervision or control

for physical damage or for economic or monetary loss due to negligence in the performance of surveying or platting must be commenced "within 10 years after the last act or omission giving rise to the cause of action." N.C. Gen. Stat. § 1-47(6)(a) (2013). This limitation applies *to the exclusion of* N.C. Gen. Stat. § 1-52(16). N.C. Gen. Stat. § 1-47(6)(c) (2013).

Since Davis is a registered land surveyor, DMP is a company specifically engaged in surveying and platting, and this appeal involves a complaint based upon negligent surveying that caused Bruton to suffer property damage and economic loss due to defendants' negligent survey, N.C. Gen. Stat. §§ 1-52(18) and 1-47(6) both apply. However, both statutes provide differing limitation periods for actions against registered land surveyors. Pursuant to *Fowler v. Valencourt*, "[w]here one of two statutes might apply to the same situation, the statute which deals more directly and specifically with the situation controls over the statute of more general applicability." 334 N.C. 345, 349, 435 S.E.2d 530, 532 (1993) (citations omitted). "Moreover, where there is doubt as to which of two possible statutes of limitation applies, the rule is that the longer statute is to be selected." *Id.* at 350, 435 S.E.2d at 533 (citation omitted). Therefore, the ten-year limitation period applies.

In the instant case, Bruton officially discovered defendants' misrepresentation in the survey regarding the location of the easement when Bruton received Summers' letter dated 8 February 2007 regarding the encroachments on Duke's easement. Duke filed a complaint against Bruton on 7 July 2011. Bruton, as the aggrieved party in Duke's complaint, was then entitled to maintain a cause of action against the third-party defendants for negligent misrepresentation of the easement.

Since Duke's allegations caused Bruton economic loss, Bruton filed an answer and third-party complaint against defendants on 22 December 2011, alleging, *inter alia*, that Bruton reasonably relied upon the representation in the plat prepared by Davis depicting Duke's right of way as 150-feet wide. Since Bruton promptly filed its third-party action against defendants after receiving the Duke action, we hold that pursuant to N.C. Gen. Stat. § 1-47(6), which is the more specific statute, Bruton commenced its action within 10 years of the last act giving rise to the cause of action. The trial court erred by granting summary judgment for defendants. Bruton's third-party complaint for negligent misrepresentation against defendants was timely filed and was not time-barred.

Defendants contend that Bruton's claim for negligent misrepresentation of the easement accrued in 2006, when Summers initially visited the property. However, even if Bruton's claim accrued in 2006, the

third-party complaint was still filed within 10 years, and thus timely filed pursuant to N.C. Gen. Stat. § 1-47(6).

IV. Validity of Third-Party Action

[3] Since we conclude that Bruton's third-party complaint was timely filed and not time-barred by the applicable statute of limitations, the final issue is whether Bruton was permitted to file its third-party action. Defendants contend that Bruton's claim is an inappropriate direct action disguised as a third-party action.

Pursuant to Rule 14, "any time after commencement of the action a defendant, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him." N.C. Gen. Stat. § 1A-1, Rule 14(a) (2013). Since Bruton's third-party complaint specifically alleges "that the third-party defendants are liable to Bruton Cable for all or part of [Duke's] claims against Bruton Cable," Bruton's third-party complaint alleges indemnity with language mirroring in part that of Rule 14(a).

Defendants also contend that Bruton's negligent misrepresentation claim is inappropriate because a third-party plaintiff may only assert derivative damages against a third-party defendant. However, Rule 18 of the North Carolina Rules of Civil Procedure states that "[a] party asserting a claim for relief as an original claim, counterclaim, cross claim, or third-party claim, may join, either as independent or alternate claims, as many claims, legal or equitable, as he has against an opposing party." N.C. Gen. Stat. § 1A-1, Rule 18(a) (2013). Since Bruton properly alleges indemnification pursuant to Rule 14 in the third-party complaint, the joinder of claims is permissible pursuant to Rule 18.

V. Conclusion

Bruton's third-party complaint alleged negligent misrepresentation for justifiably relying to its detriment on defendants' misrepresentation of the accurate width of the Duke easement in the recorded plat. As a result, Bruton suffered physical damage and economic or monetary loss. Because N.C. Gen. Stat. § 1-47(6) applies pursuant to *Fowler*, Bruton was required to file its third-party complaint within 10 years of the last act or omission giving rise to the cause of action. Bruton's third-party complaint was properly filed pursuant to the North Carolina Rules of Civil Procedure within 10 years of both Summers' visit to the property in October 2006 and the official letter from Duke in February 2007. In the light most favorable to Bruton as the nonmoving party, defendants are

not entitled to judgment as a matter of law. For these reasons, summary judgment should have been denied. We reverse.

Reversed.

Judges HUNTER, Robert C. and HUNTER, JR., Robert N. concur.

STEVEN G. GORDON, PLAINTIFF
v.
DEBORAH J. GORDON, DEFENDANT

No. COA13-937

Filed 15 April 2014

1. Contempt—civil—findings—ability to pay

The trial court did not err by holding plaintiff in civil contempt for his willful disregard of the order requiring him to pay $5,000 per month to defendant (his former wife) and ordering him jailed unless he paid $20,000 to defendant. The trial court considered plaintiff's ability to comply as of the date of the hearing and within the sixty days afforded to him to take any additional measures he may need to take.

2. Contempt—civil—credit—amount owed on distributive award—no double counting

The trial court did not err in a civil contempt case by failing to credit plaintiff with the $7,322.42 seized by defendant from plaintiff's checking account. The $7,322 seized did reduce the amount he owed on the distributive award judgment, and plaintiff did not get to count the amount seized by defendant twice.

Appeal by plaintiff from Order entered on or about 24 April 2013 by Judge Jan H. Samet in District Court, Guilford County. Heard in the Court of Appeals 6 February 2014.

Randolph M. James, PC, by Randolph M. James, for plaintiff-appellant.

Woodruff Law Firm, P.A., by Jessica Snowberger Bullock, for defendant-appellee.

STROUD, Judge.

Steven Gordon ("plaintiff") appeals from an order entered on or about 24 April 2013 finding him to be in civil contempt and ordering him jailed unless he pays $20,000 to his former wife, Deborah Gordon ("defendant"), within 60 days. We affirm.

I. Background

Much of the background to this case was discussed in our opinion arising from the last contempt order that plaintiff appealed:

> The parties were married in 1983 and separated in 2007. On 21 August 2009, the parties executed a mediated settlement agreement, pursuant to which Plaintiff was required to pay Defendant a distributive award in the amount of $1,200,000.00 and to pay $5,600.00 per month in post-separation support until $1,000,000.00 of the distributive award had been paid. In return, Defendant agreed to waive the right to receive additional post-separation support or alimony.
>
> On 24 August 2009, Plaintiff filed a complaint for divorce. On 28 October 2009, Defendant filed an answer in which she admitted the material facts alleged in Plaintiff's complaint and asserted counterclaims for, among other things, divorce, distribution of the parties' IRA accounts, breach of contract, specific performance of the mediated settlement agreement, and attorney's fees. In a reply filed on 13 November 2009, Plaintiff admitted that he had not made all the payments required by the mediated settlement agreement and asserted various defenses stemming from his alleged inability to obtain a bank loan or otherwise procure the funds needed to make the required payments.
>
> On 5 May 2010, the trial court entered a consent order which provided, in pertinent part, that:
>
> . . . .
>
> Plaintiff shall pay to Defendant on the first day of each month beginning June 1, 2010 the sum of $9000, by direct deposit to her checking account until the earlier to occur of the following:
>
> (i) July 31, 2011 or

(ii) The sale of 8640 Adkins Road, Colfax, NC

. . . .

On 12 April 2012, the trial court orally determined that Plaintiff was in contempt of the consent judgment by willfully failing to list the Adkins Road property for sale with Ms. Laney; stated that Defendant had chosen, instead, to list the property with an "inexperienced" agent who "doesn't even come close to having the qualities, the skills necessary, the connections necessary to sell this price of a house;" and noted that, in the court's "opinion [, Plaintiff] really [wasn't] trying to satisfy this obligation" because he did not "believe that [he] should have to pay [Defendant any more] money." As a result, the trial court told Plaintiff that he was being held in contempt of court for willfully failing to list the property with Ms. Laney and that, in the event that he failed to execute a listing contract with her within fourteen days, he would be jailed pending compliance with the relevant provision of the consent judgment.

Gordon v. Gordon, ___ N.C. App. ___, 746 S.E.2d 21, 2013 WL 3049072 at *1-*3 (2013) (unpublished) (brackets and ellipses omitted), *disc. rev. denied*, ___ N.C. ___, 753 S.E.2d 679 (2014). Defendant appealed the 2012 contempt order to this Court. *Id.* at *4. We affirmed. *Id.* at *13.

Since the 2012 order, there have been additional conflicts between the parties over the money plaintiff owes defendant. After November 2012, plaintiff failed to pay the $5,000 per month that had been ordered by the trial court. As a result, defendant filed a motion for contempt. The trial court issued an order to show cause, finding that there was probable cause to believe plaintiff was in contempt of the 2010 Consent Order. Plaintiff responded, claiming that he was unable to make the required payments.

The trial court held a hearing on defendant's contempt motion on 26 February 2013. By order entered 24 April 2013, the trial court made written findings of fact and conclusions of law. The trial court held plaintiff in civil contempt and ordered that he be jailed if he failed to pay $20,000 in arrearages within 60 days "until such time as he complies with this order." Plaintiff filed notice of appeal to this Court on 30 April 2013.

II. Civil Contempt

[1] Plaintiff argues on appeal that the trial court erred in holding him in contempt because it failed to find that he has the present ability to pay the $20,000 he concedes that he owes. We disagree.

A. Standard of Review and Burden of Proof

> Review in civil contempt proceedings is limited to whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law. Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment. However, findings of fact to which no error is assigned are presumed to be supported by competent evidence and are binding on appeal. The trial court's conclusions of law drawn from the findings of fact are reviewable *de novo*. A show cause order in a civil contempt proceeding which is based on a sworn affidavit and a finding of probable cause by a judicial official shifts the burden of proof to the defendant to show why he should not be held in contempt.

Tucker v. Tucker, 197 N.C. App. 592, 594, 679 S.E.2d 141, 142-43 (2009) (citations, quotation marks, and brackets omitted). Here, there was a show cause order with a judicial finding of probable cause. Therefore, the burden was on plaintiff "to show why he should not be held in contempt." *Id.* at 594, 679 S.E.2d at 143.

B. Present Ability to Pay

The trial court found plaintiff to be in civil contempt and ordered him to pay $20,000 in arrearages within 60 days or be sent to jail. Plaintiff argues that there was no finding and no evidence that he was presently able to comply or take reasonable steps to purge his contempt and that therefore he could not be subjected to an indefinite term in jail for civil contempt.

> For civil contempt to be applicable, the defendant must be able to comply with the order or take reasonable measures that would enable him to comply with the order. We hold this means he must have the present ability to comply, or the present ability to take reasonable measures that would enable him to comply, with the order.

Jones v. Jones, 62 N.C. App. 748, 749, 303 S.E.2d 583, 584 (1983); *see also* N.C. Gen. Stat. § 5A-21(a)(3) (2013). "Reasonable measures" to pay an outstanding judgment could include "borrowing the money, selling defendant's . . . property . . . , or liquidating other assets, in order to pay the arrearage." *Teachey v. Teachey*, 46 N.C. App. 332, 335, 264 S.E.2d 786, 787-88 (1980).

> When a defendant has the present means to comply with a court order and deliberately refuses to comply, there is a present and continuing contempt and the court may commit such defendant to jail for an indefinite term, that is, until he complies with the order. Under such circumstances, however, there must be a specific finding of fact supported by competent evidence to the effect that such defendant possesses the means to comply with the court order. Our Supreme Court has indicated . . . that the court below should take an inventory of the property of the plaintiff; find what are his assets and liabilities and his ability to pay and work—an inventory of his financial condition—so that there will be convincing evidence that the failure to pay is deliberate and wilful.

Bennett v. Bennett, 21 N.C. App. 390, 393-94, 204 S.E.2d 554, 556 (1974).

First, we must address plaintiff's argument that the trial court failed to find that he has the present ability to comply with its order. The trial court specifically found that

> 17. The evidence before the Court establishes conclusively that Plaintiff had the present ability to pay the $5,000 monthly alimony for the months of November and December of 2012 and January and February of 2013.
>
> 18. During the relevant period, Plaintiff had available to him from his business for his personal use at least $20,000 in cash used for the purchase of vehicles used as leased vehicles. He also had available at least $20,000 available to pay alimony through cash advances available through lines of credit associated with credit cards. Evidence also shows that Plaintiff had as much as $16,000 in business cash used to pay mortgage payments for his relatives' mortgages or rents.

The trial court then concluded that "Plaintiff *had* the present ability to comply with the May 5, 2010 Consent Order Judgment directing Plaintiff to pay [the] $5,000 per month alimony payment." (emphasis added.)

Plaintiff contends that the trial court's use of the word "had" rather than the word "has" is fatal to its judgment, as this shows that the Court failed to make findings as to his present ability to pay. Plaintiff claims that although he may have *had* the ability to pay $20,000 at some time in the past prior to the hearing, at the time of the hearing he no longer

had such present ability. The hearing was held on 26 February 2013, at which time the trial court took the matter under advisement; the order was entered on 24 April 2013. Plaintiff does not claim that his circumstances changed between date of the February 2013 hearing and entry of the order in April 2013; his argument focuses only on the word "had."

Although we agree that a trial court must make findings as to a contemnor's present ability to pay before holding him in civil contempt, we cannot take the word "had" out of the context of the entire order. Perhaps some of the confusion as to verb tense arises from the fact that at any civil contempt hearing, the parties are presenting evidence of what has happened in the past to prove the present state of affairs to enable the trial court to make findings of fact about what the present circumstances are and what will likely happen in the future. And then the written order from that hearing is actually prepared and entered after the hearing, so that the trial court is necessarily referring to events that occurred and evidence that was presented in the past, which was the present on the date the events happened or on the date of the hearing. Time stubbornly refuses to stand still even long enough for a hearing to be completed or an order prepared and entered. We must read the findings of fact with these considerations in mind.

The findings in this case are similar to those we approved in *Hartsell v. Hartsell*, 99 N.C. App. 380, 385, 393 S.E.2d 570, 574 (1990). In *Hartsell*, the trial court found that " 'defendant had at all times been fully capable and able of complying with all provisions of the Court's decree' and that 'defendant had the present ability and continuing capability to comply with all remaining provisions of the Court's decree with which he had not heretofore complied.' " *Id.* at 385, 393 S.E.2d at 573 (brackets omitted). Despite the trial court's use of the word "had," we affirmed the trial court's conclusion that the defendant's failure to comply was willful and that he had the *present* ability to comply because there was evidence that he had "the present ability to take reasonable measures that would enable him to comply." *Id.* at 386, 393 S.E.2d at 574.

Taking the findings as a whole, it is clear that the trial court considered plaintiff's ability to comply as of the date of the hearing and within the sixty days afforded to him to take any additional measures he may need to take. The trial court properly took an inventory of plaintiff's recent income and expenses in considering his ability to comply throughout the relevant period, including February 2013, when the hearing was held. *See Bennett*, 21 N.C. App. at 393-94, 204 S.E.2d at 556. It made findings on his various sources of income, how he pays his expenses, and other voluntary expenses he has undertaken to pay rather

than paying the judgment. Given the extensive evidence presented and findings made regarding plaintiff's income and expenses, we hold that the trial court's finding on present ability to pay is adequate.

Plaintiff further argues that there was no evidence to support a finding that he had the present ability to pay. Plaintiff claims that the trial court "made no findings regarding cash available to plaintiff as of the hearing or as of the day the Order was entered." This is true, but the trial court also did not order plaintiff to pay immediately on the day of the hearing nor immediately on the date the order was entered. The trial court gave plaintiff 60 days after entry of the order to acquire the $20,000, and the findings show that plaintiff had various options to accomplish this.

The trial court found that plaintiff's 2012 income was approximately $139,641. Plaintiff earned approximately $15,000 per month in November and December 2012. The trial court also found that "the personal debts of the Plaintiff are paid through the business and $180,000 in personal expenses were paid from October 2011 through October 2012." The trial court found that plaintiff voluntarily pays thousands of dollars in expenses for his adult children and his mother, totaling more than $16,500 over the course of four months. Plaintiff does not challenge any of these findings as unsupported by competent evidence, so they are binding on appeal. *Tucker*, 197 N.C. App. at 594, 679 S.E.2d at 143.

Although plaintiff should have well been able to pay defendant by temporarily ceasing to pay the expenses he had been paying for his adult children and mother, the trial court also made findings regarding his ability to take reasonable measures that would enable him to comply by borrowing the funds. The evidence showed that plaintiff had two credit cards. As of December 2012, one had a cash advance available of $4,500 and the other had an available cash advance of $4,590. The credit cards also provided plaintiff with available lines of credit in excess of $44,887. Plaintiff does not argue that he expected his income or expenses to change substantially in the foreseeable future. Plaintiff did contend at the hearing that his business, Flash Gordon Motors & Leasing, Inc., was in decline, and of course this was contested by defendant's evidence. In any event, the trial court heard and considered this evidence, weighed its credibility, and made its findings, which did not include a finding that the business was failing. Therefore, it was fully appropriate for the trial court to base its finding of present ability to pay on evidence of income and expenses in the recent past. *See Parsons v. Parsons*, ___ N.C. App. ___, ___, 752 S.E.2d 530, 534 2013 (noting that future expenses "can [generally] only be predicted based on past experience"). This evidence

shows that plaintiff could take reasonable steps to pay the full $20,000 he owes by paying a portion of his $15,000 monthly income, taking out cash advances from his credit cards, ceasing to voluntarily pay the expenses of other family members, and/or transferring any expenses in excess of his income to his credit cards for those months.

Plaintiff further challenges the trial court's consideration of his business assets in finding a present ability to comply. He contends that considering business expenditures "would effectively eliminate the corporate identity of any closely-held corporation." Again, we disagree.

In determining a contemnor's present ability to pay, the appellate courts of this state have directed trial courts to "take an inventory of the property of the plaintiff; find what are his assets and liabilities and his ability to pay and work—an inventory of his financial condition." *Bennett*, 21 N.C. App. at 393-94, 204 S.E.2d at 556. Considering how a contemnor pays his expenses is an important part of this analysis.

In *Foy v. Foy*, 69 N.C. App. 213, 316 S.E.2d 315 (1984), we affirmed a trial court's finding of willful noncompliance with an alimony order. In reviewing the trial court's willfulness findings, we considered the defendant's interest in a closely held company as a possible source of funds for the defendant, even though he did not receive any direct income. *Foy*, 69 N.C. App. at 215, 316 S.E.2d at 316-17. Plaintiff's interest in his company is far more clearly established than that of the defendant in *Foy*.

Here, the trial court's findings indicated that plaintiff had a history of using his corporate assets to pay for his personal debts and personal expenses. In fact, the evidence showed that he had used corporate assets to pay $180,000 in personal expenses from October 2011 through October 2012. Plaintiff does not argue that this finding is unsupported by the evidence. These expenditures relate directly to plaintiff's assets and liabilities and to his ability to pay the arrearages. Therefore, the trial court properly considered plaintiff's corporate assets and liabilities and did not impair or disregard his business's corporate identity in any way.

Given this evidence and the findings made by the trial court, we hold that the trial court did not err in concluding that within 60 days plaintiff could take reasonable steps to pay the entire $20,000 of the arrearages between using the cash advances, charging any expenses not covered by the business to one of his credit cards, and ceasing to voluntarily pay thousands of dollars to his other relatives. *See Williford v. Williford*, 56 N.C. App. 610, 612, 289 S.E.2d 907, 909 (1982) ("[P]ayment of alimony may not be avoided merely because the husband has remarried and

voluntarily assumed additional obligations." (citation, quotation marks, and ellipses omitted)); *Teachey*, 46 N.C. App. at 335, 264 S.E.2d at 787-88 (noting that reasonable efforts could include borrowing money and liquidating assets); *Watson v. Watson*, 187 N.C. App. 55, 67, 652 S.E.2d 310, 319 (2007) (affirming a finding of civil contempt where the trial court afforded the defendant 90 days to take reasonable measures to pay the required sum), *disc. rev. denied*, 362 N.C. 373, 662 S.E.2d 551 (2008).

Plaintiff argues that compliance with the order would require him to take on debts he could never hope to pay off, but neither the evidence nor the findings support plaintiff's dim view of his wherewithal. The trial court's uncontested findings show that he earned approximately $15,000 per month in the months preceding the hearing, that plaintiff had the ability to pay thousands of dollars per month to family members, and that his debts and $180,000 of his personal expenses were paid by his business. Drawing money from any of these sources could properly be considered "reasonable measures" to pay off the arrearages. *See Teachey*, 46 N.C. App. at 335, 264 S.E.2d at 787-88.

C. Crediting the Amount Seized from Plaintiff

[2] Plaintiff next contends that the trial court erred in not crediting him with the $7,322.42 seized by defendant from his checking account. These funds were seized by execution upon a judgment which was entered upon the distributive award of $1,025,000; that judgment is not a subject of this appeal. Plaintiff's argument conveniently ignores the fact that these funds were seized by execution to pay this outstanding judgment, which is separate from his alimony obligation, as well as the 5 May 2010 consent order, which differentiates between the $5,000 per month he is required to pay in alimony and the $1,025,000 distributive award.[1] The 5 May 2010 order specifically states that the "alimony does not reduce the $1,025,000 distributive award."

The 12 April 2012 judgment and order further clarified this distinction. At that time, plaintiff still owed approximately $894,023 toward the distributive award. The trial court continued to require that plaintiff pay $5,000 per month as alimony until the distributive award was paid in full. The trial court specifically stated that the monthly $5,000 payment "is not a credit against the money judgment." It further clarified that "[t]he requirement that Plaintiff Husband make monthly payments to

1. Plaintiff also argues that the $5,000 per month ordered by the trial court in the May 2010 consent order was not actually "alimony." Plaintiff specifically consented to the order which identified this payment as "alimony." He never appealed from that order and cannot now collaterally attack that determination.

Defendant Wife for support and maintenance does not alter, limit, delay, or postpone Defendant Wife's rights to enforce the money judgment and to pursue all collection rights and remedies."[2] As these prior orders make clear, the $7,322 was seized by execution on the judgment entered as to the $1,025,000 distributive award. The $7,322 seized did reduce the amount he owed on the distributive award judgment, and plaintiff does not get to count the amount seized by defendant twice.

III. Conclusion

Based on plaintiff's repeated, willful disregard of court orders, as found by the trial court, and the trial court's adequate findings regarding plaintiff's present ability to pay $20,000 within 60 days, we conclude that the trial court did not err in holding plaintiff in civil contempt for his willful disregard of the order requiring him to pay $5,000 per month to defendant. We affirm the trial court's order.

AFFIRMED.

Judges CALABRIA and DAVIS concur.

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2. Plaintiff did appeal that order and the subsequent June 2012 order holding plaintiff in contempt for willful failure to comply with the 5 May 2010 order. Both orders were affirmed by this Court. *Gordon*, 2013 WL 3049072 at *13. We further rejected plaintiff's characterization of the $5,000 monthly payment as an "alternative penalty." *Id.*

CURTIS RAY HOLMES, PLAINTIFF
v.
NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE CO., INC., DEFENDANT

No. COA13-1096

Filed 15 April 2014

Contracts—breach—insurance policy—interpretation of terms—vacant building

The trial court did not err in a breach of contract case by granting summary judgment to defendant and denying plaintiff's motion for summary judgment. The undisputed facts showed that the building was "vacant" for purposes of the insurance contract for more than 60 days prior to the theft. As a result, under that contract, plaintiff was not entitled to compensation for his loss and defendant did not breach the contract by refusing to pay the $40,000 to replace the stolen heating units.

Appeal by plaintiff from Order entered 10 July 2013 by Judge John O. Craig, III, in Superior Court, Guilford County. Heard in the Court of Appeals 6 February 2014.

Cahoon & Swisher, North & Cooke, by A. Wayland Cooke, for plaintiff-appellant.

Nelson Levine De Luca & Hamilton, LLC, by David L. Brown and David G. Harris II, for defendant-appellee.

STROUD, Judge.

Dr. Curtis Holmes ("plaintiff") appeals from an order denying his motion for summary judgment and granting summary judgment in favor of North Carolina Farm Bureau Mutual Insurance Co., Inc. We affirm.

I. Background

Plaintiff is a dentist and property owner living in Greensboro. He owns several office buildings in the Greensboro area, including one at 5415 Friendly Avenue ("5415 Friendly") and one across the street at 5411 Friendly Avenue ("5411 Friendly"). Plaintiff purchased an office-lessor's insurance policy from defendant to cover his property. The policy excludes from coverage any building that has been vacant for more than 60 consecutive days before a loss, including loss by theft. The policy

defines a vacant building for property owner policies under section 9(a)(1)(b) of the policy. Under this section, a building is vacant "when 70% or more of its total square footage: (i) Is not rented; or (ii) Is not used to conduct customary operations." The policy clarifies that "[w]hen this policy is issued to the owner of a building, building means the entire building."

In November 2011, someone stole eight heating and air conditioning units from outside 5415 Friendly. Plaintiff informed the police, but the perpetrator was never found. Plaintiff also made a claim to defendant for the loss under the office-lessor policy. Defendant refused to cover plaintiff's loss because it believed that the vacancy provision of the policy applied.

Plaintiff filed a complaint in Guilford County Superior Court alleging breach of the insurance contract and seeking recovery in excess of $40,000 for the stolen heating units plus attorney's fees and costs. Defendant answered, contending that plaintiff's recovery was barred by the vacancy provision of the insurance contract. Defendant also filed a counterclaim for declaratory judgment concerning the rights and obligations of the parties under this policy. The parties conducted discovery and filed cross-motions for summary judgment. The evidence forecast by the parties tended to show the following:

5415 Friendly has five separate units: named "A," "B," "C," "D," and "G." Unit A was 1,344 square feet; Unit B was 1,064 square feet; Unit C was either 2,688 or 2,577 square feet[1]; Unit D was 2,128 square feet; and Unit G was 1,064 square feet. The total square footage of 5415 Friendly was thus either 8,288 square feet or 8,177 square feet. As of November 2011, only one of the five units at 5415 Friendly was rented—Unit A. Units B, D, and G were all vacant.[2] The classification of Unit C was the primary point of contention at the summary judgment hearing.

The evidence showed that Unit C was not leased in the sixty days before the theft. However, plaintiff had been allowing one of the tenants of 5411 Friendly, two independent real estate attorneys named Charles McNeil III and Ken Lucas, to use Unit C as storage for their old files and excess furniture. The attorneys had a key to Unit C and could have used

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1. In his deposition, plaintiff stated that Unit C was approximately 2,688 square feet. In his responses to defendant's requests for admission, however, he claimed that Unit C was 2,577 square feet.

2. The evidence showed that plaintiff used Unit D to store excess furniture, but he agreed that it should be considered "vacant."

the entire space until plaintiff found a regular tenant. Mr. McNeil and Mr. Lucas kept their files in one 144 square foot room in Unit C. They did not use two additional 144 square foot rooms which contained various furniture of uncertain provenance. The rest of the space was not used.

Mr. McNeil testified that he, Mr. Lucas, or one of their employees would go to Unit C once or twice a week to store, retrieve, or review files. He further stated that they would sometimes sit in one of the chairs in Unit C to review the stored files, but that they normally only stayed five to ten minutes. None of them used any of the space on the second floor of Unit C. Mr. McNeil stated that the storage and review of old files was a "customary operation" of his law practice.

After reviewing the discovery and hearing arguments from the parties, the trial court allowed defendant's motion for summary judgment, and denied plaintiff's motion, by order entered 10 July 2013. Plaintiff filed notice of appeal to this Court on 31 July 2013.

II. Summary Judgment

On appeal, plaintiff argues that the trial court erred in granting summary judgment to defendant and denying his motion for summary judgment because the undisputed facts showed that over 30% of 5415 Friendly was either rented or used for customary operations.

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 and quotation marks omitted), *disc. rev. denied*, 366 N.C. 423, 736 S.E.2d 497 (2013).

B. Analysis

Both parties agree that there are no genuine issues of material fact. They only disagree on the proper interpretation of the vacancy provision of the insurance contract. That provision states:

9. Vacancy

a. Description of Terms

(1) As used in this Vacancy Condition, the term building and the term vacant have the meanings set forth in (1)(a) and (1)(b) below:

(a) When this policy is issued to a tenant, and with respect to that tenant's interest in Covered Property, building means the unit or suite rented or leased to the tenant. Such building is vacant when it does not contain enough business personal property to conduct customary operations.

(b) When this policy is issued to the owner of a building, building means the entire building. Such building is vacant when 70% or more of its total square footage:

(i) Is not rented; or

(ii) Is not used to conduct customary operations.

. . . .

b. Vacancy Provisions

If the building where loss or damage occurs has been vacant for more than 60 consecutive days before that loss or damage occurs:

(1) We will not pay for any loss or damage caused by any of the following even if they are Covered Causes of Loss:

. . . .

(e) Theft;

Defendant contends that under the definition in subsection (a)(1)(b), which applies to plaintiff as an owner, if either 30% or less of the entire covered building is rented, or if 30% or less of the building is used to conduct customary operations, then the building is considered vacant. Under this interpretation, a building could be 30% rented and have another 30% used for customary operations, but the building would still be considered vacant. Plaintiff argues, by contrast, that this provision means that if more than 30% of the building is either rented or used to conduct customary operations, then it is not vacant. Under this interpretation, that same building with 30% rented and 30% used for

customary operations would be considered 60% occupied, and therefore not vacant. We conclude that we need not resolve this issue here because even under plaintiff's interpretation of the contract, 5415 Friendly was vacant for more than sixty days before the theft.

It is uncontested that all of Unit A, 1,344 square feet, was rented during the relevant period. Unit A constitutes approximately 16% of the total square footage of the building. Unit C has been the sole point of contention in this case. There was no evidence that it was rented at a relevant time. Therefore, the only question is whether Unit C was used for "customary operations" and how much of Unit C was so used.

The evidence showed that Mr. McNeil and Mr. Lucas only stored files in one 144 square foot room of Unit C. The evidence did show that Mr. McNeil and Mr. Lucas used that room on a fairly regular basis, once or twice a week. They would store and retrieve client files in the room and sometimes sit in the chair in that room to review the files. Mr. McNeil opined that the storage and review of these archived files was a part of his customary operations. Nevertheless, that 144 square foot room was the only portion of Unit C that they used as part of these operations. Although there was evidence that some pieces of furniture were stored in two additional rooms, there was no evidence that Mr. McNeil and Mr. Lucas ever used those rooms. Mr. McNeil stated that he was unsure who owned the furniture, but that he did not think it was his.

Plaintiff argues that we should count the entirety of Unit C as being "used for customary operations" because one room within that unit was being used and those using it had permission to occupy the entire unit. But that interpretation is contrary to the plain language of the contract.

> 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 (citations and quotation marks omitted).

Subsection (b) of the definitional section defines "building" as the "entire building" and defines "vacancy" in relation to the total square

footage of the building. While plaintiff contends that not considering all of Unit C "occupied" is "like being a little bit pregnant," the plain language of the contract directs us to consider only the portion of the total square footage "used to conduct customary operations." Therefore, the relevant question under the contract is what percentage of the total square footage was actually so used, not what amount *could* have been used.

Here, only 144 square feet of Unit C were used to conduct customary operations of Mr. McNeil's law practice. Combined with the area of Unit A, which was 1344 square feet, the total square footage either rented or used to conduct customary operations was 1488 square feet. Using either measure of the total square footage—8288 square feet or 8177 square feet—this area does not exceed 30%.[3] We conclude that the uncontested facts show that 5415 Friendly was "vacant" for purposes of the insurance contract for more than 60 days prior to the theft.

As a result, under that contract, plaintiff was not entitled to compensation for his loss and defendant did not breach the contract by refusing to pay the $40,000 to replace the stolen heating units. We hold that there are no genuine issues of material fact and defendant is entitled to judgment as a matter of law. Therefore, we affirm the trial court's order allowing defendant's motion for summary judgment and denying plaintiff's motion.

III. Conclusion

For the foregoing reasons, we hold that the trial court correctly determined that there are no genuine issues of material fact and that defendant is entitled to judgment as a matter of law. Therefore, we affirm the trial court's order allowing defendant's motion for summary judgment.

AFFIRMED.

Judges CALABRIA and DAVIS concur.

3. Using either measure of total square footage, the percentage rented or used was approximately 18%.

IN RE ADOPTION OF "BABY BOY" BORN APRIL 10, 2012

No. COA13-912

Filed 15 April 2014

1. Appeal and Error—interlocutory orders and appeals—order voiding birth parent's relinquishment

An interlocutory order voiding a birth mother's relinquishment in an adoption case, which effectively nullified her consent to the adoption, was heard on the merits by the Court of Appeals. The merits of interlocutory appeals concerning a putative father's consent to adoption have been addressed, and there is no reason not to afford the birth mother the same protection.

2. Oaths and Affirmations—birth mother's relinquishment—sworn before notary

The trial court erred in an adoption case by voiding the birth mother's relinquishment on the basis that she did not execute the relinquishment document while "under oath". It was undisputed that the birth mother signed the relinquishment in a notary's presence, the notary testified that she witnessed the birth mother's signature, the birth mother stated in writing that she had been "duly sworn" when she signed the document, and the notary's verification recited that the birth mother had sworn to the document before the notary. Additionally, a social worker read the word "swear" aloud in administering the oath. N.C.G.S. § 10B-3(14)(c) was satisfied.

3. Adoption—grounds for voiding—fraud in obtaining relinquishment—not found

The only applicable grounds for voiding the relinquishment of the birth mother in an adoption case required the birth mother to prove by clear and convincing evidence that her relinquishment was obtained by fraud or duress. The trial court correctly concluded that there was no constructive or actual fraud in the procurement of the relinquishment.

4. Adoption—birth mother's relinquishment—gender omitted—substantial compliance

A birth mother's relinquishment that omitted the baby's gender in an adoption case was in substantial compliance with the law where the gender was omitted based on the mother's request.

IN RE ADOPTION OF BABY BOY

[233 N.C. App. 493 (2014)]

Appeal by respondents from order entered 15 February 2013 by Judge Debra Sasser in Wake County District Court. Heard in the Court of Appeals 21 January 2014.

WAKE FAMILY LAW GROUP, by Katherine Hardersen King, for respondent-appellee.

Cheri C. Patrick for petitioner-appellants Laura and Richard Zug, Jr.

MANNING, FULTON & SKINNER, P.A., by Michael S. Harrell, for petitioner-appellant Amazing Grace Adoptions.

ELMORE, Judge.

Laura Catherine Zug and Richard Charles Zug, Jr. (the Zugs) and Amazing Grace Adoptions (the Agency) appeal Judge Sasser's order entered 15 February 2013 declaring Amy Marie Costin's relinquishment void. After careful consideration, we reverse.

I. Background

The facts in this case are largely undisputed. Amy Marie Costin (the birth mother) is the biological mother of a baby boy (Baby Boy) born 10 April 2012 at WakeMed Cary Hospital. The biological father of the minor child signed a relinquishment placing "Baby Boy" in the care of the Agency and has made no attempt to revoke. The birth mother contacted the agency prior to Baby Boy's birth to discuss the possibility of placing the baby for adoption. Her primary contact at the Agency was social worker Hayley Walston (Ms. Walston). On 13 December 2011, approximately halfway through her pregnancy, the birth mother officially contracted for services with the Agency. The birth mother indicated to Ms. Walston that she wanted a closed adoption and did not want the baby to be placed nearby. Thereafter, the birth mother and Ms. Walston were in frequent communication regarding her desire to relinquish the child for adoption. On 6 February 2012, Ms. Walston informed the birth mother that the agency had identified a family who would agree to her terms.

One day after Baby Boy's birth, Ms. Walston went to the hospital to obtain the birth mother's relinquishment of Baby Boy to the Agency. Under N.C. Gen. Stat. § 48-3-701(a), a birth parent "may relinquish all parental rights or guardianship powers, including the right to consent to adoption, to an agency." To complete the relinquishment process, Ms. Walston asked a notary employed by WakeMed, Ms. Darlene Durbin

("Ms. Durbin" or "the notary"), to notarize the "Relinquishment of Minor for Adoption by Parent or Guardian" (the relinquishment). Ms. Durbin had been a notary for approximately three years and agreed to notarize the relinquishment, although she had never notarized an adoption form before and was unfamiliar with the legalities of the adoption process.

Ms. Durbin accompanied Ms. Walston to the birth mother's hospital room to witness the relinquishment. Ms. Durban testified that she stayed for "at least 30 minutes" as Ms. Walston completed the relinquishment procedure. As part of this procedure, Ms. Walston read aloud the relinquishment form and reviewed a twenty-six-question questionnaire with the birth mother that addressed all aspects of the relinquishment. The relinquishment begins, "I, Amy Marie Costin, being duly sworn, declare . . ." It also states, "I understand that my Relinquishment to Adoption of the minor may be revoked within 7 days following the day on which it is executed," and "I understand that to revoke my Relinquishment for Adoption, as provided in G.S. 48-3-706, the revocation must be made by giving written notice to the agency to which the Relinquishment was given."

The questionnaire begins with an acknowledgement: "All forms were read aloud by the staff member and were signed in the presence of Darlene Durbin, notary, and the following questions were asked in their presence." The birth mother's responses to the questions were recorded and included the following:

> Q. Do you feel that your mind is perfectly clear?
>
> A. Yes.
>
> Q Has anyone told you that you must sign these papers?
>
> A. No.
>
> Q. Has anyone coerced you in any way or applied pressure or unduly influenced you to make an adoption plan for your child(ren)?
>
> A. No.
>
> Q. Did I persuade or coerce you in any way to sign a relinquishment, or has any of the Amazing Grace Adoptions staff members done so?
>
> A. No.
>
> Q Do you understand you may revoke your decision within 7 days of signing this document?

A. Yes.

Q. Do you understand that if within 7 days you decide to revoke your release you must make your revocation in writing and deliver it to the director of the agency?

A. Yes.

Q. Do you understand that when you sign these documents you are giving up all legal rights to this child(ren)?

A. Yes.

Q. Have you read and do you fully understand all the documents you are signing?

A. Yes.

Q. Do you need more time to think about your decision?

A. No.

It was not until after all of the forms were read to the birth mother that she signed the relinquishment and the questionnaire. Ms. Durbin then completed the notary certificate. The birth mother received a copy of the relinquishment. Ms. Walston testified that she had previously reviewed the relinquishment form with the birth mother several months prior.

On 18 April 2012, the seventh day after signing her relinquishment, the birth mother testified that she texted Ms. Walston sometime between 10:00 p.m. and 11:00 p.m. and asked, "is today the last day?" Ms. Walston confirmed that it was in fact the last day that she could revoke her relinquishment. The birth mother did not attempt to revoke at that time.

The following morning (day eight), the birth mother texted Ms. Walston to indicate that she had changed her mind. Later that day, the birth mother met with Ms. Walston and the director of the Agency to discuss the situation. There is no record evidence that the birth mother ever provided the Agency with written notice of her intent to revoke her relinquishment. Ultimately, the Agency informed the birth mother that her relinquishment would not be revoked because she did not give notice of her revocation within the statutorily prescribed seven-day period. As such, the Agency proceeded with the adoption and placed Baby Boy with the Zugs on 23 April 2012. The Zugs filed their petition to adopt Baby Boy that same day. Baby Boy has since remained in the Zugs' custody.

On 11 June 2012, the birth mother filed a motion to dismiss the adoption petition and motion to declare her relinquishment void, alleging that the purported relinquishment was void for "lack of compliance with a mandatory statutory requirement[.]" The trial court took the case under advisement and, in an order filed 15 February 2013, made the following pertinent findings of fact:

> 6. Ms. Darlene Durbin, an employee of WakeMed Cary Hospital, was asked to notarize the documents. Ms. Durbin was not familiar with adoption forms and did not review the forms before undertaking to notarize them. Ms. Durbin was present for over a half hour while Ms. Walston went through a twenty-six question questionnaire dealing with various aspects of the relinquishment before having the [the birth mother] sign the purported relinquishment[].
>
> 7. The uncontroverted evidence and Ms. Durbin's own testimony indicates that Ms. Durbin did not put either biological parent under oath before or after signing the relinquishment forms, nor did she ask them to "swear," "affirm" or any words to that effect. No Bible or other Holy Scriptures were used by Ms. Durbin during the notary process, and no oaths or affirmations were administered prior to the purported relinquishments being signed or at any time since.
>
> 11. Pursuant to N.C.G.S. 48-3-702(a) "A relinquishment executed by a parent or guardian must conform substantially to the requirements in this Part and **must be signed and acknowledged under oath before an individual authorized to administer oaths or take acknowledgments.**" [emphasis in original]
>
> 12. The language regarding "under oath" in N.C.G.S. 48-3-702 is not mere surplus, as language regarding "under oath" is included in some sections of Chapter 48 for types of consents/relinquishments and not in others. It is precise and purposeful language. Being a parent is a fundamental right that must be protected, and while the adoption statutes should be construed liberally in many instances, the biological parents' rights are protected by the U.S. Constitution. The child's rights to be with the biological parent(s) also must be protected. The "under oath" language in N.C.G.S. 48-3-702 is meant to prevent biological

> parents from claiming that they didn't understand what they were signing or didn't know what they were doing to prevent future litigation.

The trial court then made the following conclusions of law:

> 2. Under N.C.G.S. 48-3-702, the sex of the baby was a mandatory provision in the relinquishment but was not completed in the purported relinquishment. Additionally, under 48-3-702, the signature of Movant had to be obtained while she was under oath.
>
> 4. The purported relinquishment signed by Movant on April 11, 2012 is not a valid relinquishment in that it does not conform to the mandatory statutory requirements of a relinquishment as set out in N.C.G.S. 48-3-702 and is void to operate as a relinquishment.
>
> 5. There is no valid relinquishment by the Movant in this matter.
>
> 6. Because there was never a valid relinquishment signed by Movant, no revocation of her relinquishment was required, and the revocation statutes don't apply.
>
> 8. There was no constructive fraud or actual fraud by the [A]gency in the procurement of the relinquishment.
>
> 9. This matter should not be remanded back to the Clerk of Superior Court at this time and should remain with District Court for a later hearing on Movant's request to dismiss the adoption petition.

The trial court thereafter granted the birth mother's petition to declare her relinquishment void. The Zugs and the Agency (collectively petitioners) now appeal.

II. Interlocutory Appeal

[1] In the instant case, the trial court entered an interlocutory order voiding the birth mother's relinquishment, which effectively nullified the birth mother's purported consent to the adoption. As our Courts have previously addressed the merits of interlocutory appeals concerning a putative father's consent to adoption, we see no reason not to afford the birth mother the same protection. *See In re Adoption of Anderson*, 165 N.C. App. 413, 598 S.E.2d 638, 639 (2004), *rev'd on other grounds*,

360 N.C. 271, 624 S.E.2d 626 (2006); *In re Byrd*, 137 N.C. App. 623, 529 S.E.2d 465 (2000), *aff'd sub nom.*, 354 N.C. 188, 552 S.E.2d 142 (2001).

III. Analysis

[2] The primary issue presented on appeal is whether the birth mother's consent to relinquish her parental rights to the Agency was valid. Petitioners argue that the trial court erred in voiding the relinquishment on the basis that the birth mother did not execute it while "under oath" as mandated by N.C. Gen. Stat. § 48-3-702. We agree.

We note that petitioners did not assign error to any of the trial court's findings of fact. As such, all of the trial court's findings of fact are deemed conclusive on appeal. *Fakhoury v. Fakhoury*, 171 N.C. App. 104, 108, 613 S.E.2d 729, 732 (2005). We review the trial court's conclusions of law *de novo*. *Boseman v. Jarrell*, 364 N.C. 537, 549, 704 S.E.2d 494, 502 (2010).

The laws governing adoptions in North Carolina are creatures of statutory construction as set forth in Chapter 48 of our general statutes. Our legislature requires that Chapter 48 "be liberally construed and applied to promote its underlying purposes and policies." N.C. Gen. Stat. § 48-1-100(d) (2013). "[T]he needs, interests, and rights of minor adoptees are primary. Any conflict between the interests of a minor adoptee and those of an adult shall be resolved in favor of the minor." N.C. Gen. Stat. § 48-1-100(c) (2013). Here, the trial court relied on N.C. Gen. Stat. § 48-3-702(a) in voiding the birth mother's relinquishment. The statute provides that "[a] relinquishment executed by a parent or guardian must **conform substantially** to the requirements in this Part **and** must be **signed and acknowledged under oath** before an individual authorized to administer oaths or take acknowledgments." N.C. Gen. Stat. 48-3-702(a) (2013).

This is not a case where the birth mother argues that her consent to relinquish Baby Boy was not given knowingly and voluntarily. In fact, the birth mother admits that she signed her relinquishment before a notary public, that she knew what she was signing, and the consequences, that she signed knowing the time limits for revocation, and that she contacted Ms. Walston to confirm that it was her last day to revoke prior to the expiration of the seven-day period. Further, the birth mother admits that Ms. Walston asked her a series of questions, which she answered truthfully before the notary. In "the absence of evidence of fraud on the part of the notary, or evidence of a knowing and deliberate violation," we recognize a presumption of regularity to notarial acts. N.C. Gen. Stat. § 10B-99 (2013). This presumption of regularity allows notarial acts to

be upheld, "provided there has been substantial compliance with the law." N.C. Gen. Stat. § 10B-99. Thus, the presumption of regularity acts to impute a "substantial compliance" component to notarial acts, including the administration of oaths.

We turn now to the pertinent issue before us—whether the birth mother was under oath when she signed her relinquishment. *See* N.C. Gen. Stat. § 48-3-702(a). Our Supreme Court has maintained that statutes should be read and understood according to the natural and most obvious import of the language without resorting to subtle and forced construction for the purpose of either limiting or extending their operation. *State v. Carpenter*, 173 N.C. 767, 92 S.E. 373, 374 (1917). "If the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning[.] . . . This is especially true in the context of adoption, which is purely a creation of statute." *Boseman* at 545, 704 S.E.2d at 500 (citations and quotation marks omitted).

We read N.C. Gen. Stat. 48-3-702(a) to require both (1) substantial performance of the requirements set out in Chapter 48, and (2) that the relinquishment must be signed and acknowledged under oath before an individual authorized to administer oaths or take acknowledgments. From its plain language, we hold that the legislature intended for the "substantial compliance" component of N.C. Gen. Stat. 48-3-702(a) to apply only to the requirements set out in Chapter 48. There is no "substantial compliance" component concerning the oath requirement on the face of N.C. Gen. Stat. 48-3-702(a).

An oath is administered to a document signer (the principal) when the principal is required to make a sworn statement about certain facts. An oath is defined as:

> A notarial act which is legally equivalent to an affirmation and in which a notary certifies that at a single time and place all of the following occurred:
>
> a. An individual appeared in person before the notary.
>
> b. The individual was personally known to the notary or identified by the notary through satisfactory evidence.
>
> c. The individual made a vow of truthfulness on penalty of perjury while invoking a deity or using any form of the word "swear."

N.C. Gen. Stat. § 10B-3(14) (2013).

An acknowledgment is a notarial act that occurs when a notary certifies that at a single time and place:

> a. An individual appeared in person before the notary and presented a record.
>
> b. The individual was personally known to the notary or identified by the notary through satisfactory evidence.
>
> c. The individual did either of the following:
>
> i. Indicated to the notary that the signature on the record was the individual's signature.
>
> ii. Signed the record while in the physical presence of the notary and while being personally observed signing the record by the notary.

N.C. Gen. Stat. § 10B-3(1) (2013). There is no oath requirement for an acknowledgment. When an oath is administered in conjunction with a principal's signing, the notarization functions as a verification or proof, not an acknowledgment. N.C. Gen. Stat. § 10B-3(28).

A. Notary to Administer an Oath

In the instant case, there is no real issue about the Agency's compliance with subparagraphs (a) and (b) of N.C. Gen. Stat. § 10B-3(14). However, the trial court found that subparagraph (c) was not satisfied, in part, because Ms. Durbin "did not put [the birth mother] under oath before or after signing the relinquishment forms[.]" By the trial court's reasoning, the notary or certifying officer is the only individual with authority to administer an oath to a document signor. Again, we disagree.

Initially, we would like to discuss the role of a notary when administering oaths and affirmations, particularly given that the case law on this topic is fairly sparse. It is the primary function of a notary to serve as an impartial witness when authenticating legal documents and administering oaths or affirmations. A notarization that requires the signor to be placed under oath begins with the administration of an oath or affirmation. A traditional jurat notarization recites that a document has been "subscribed and sworn to" before a notary. BLACK'S LAW DICTIONARY 866 (8th ed. 2004). By its administration, an oath or affirmation gives weight to the truthfulness of the document's substance. The failure to administer an oath or affirmation as required may result in a defective notarization. Should this occur, the document bearing the defective notarization may be invalidated and the underlying transaction voided. The "consequence of the failure of notaries to [] administer such oaths

or affirmations constitutes a disservice to document signers, to the third parties who rely upon notarized signatures, and to the office of notary public." Michael L. Closen, *To Swear . . . or Not to Swear Document Signers: The Default of Notaries Public and A Proposal to Abolish Oral Notarial Oaths*, 50 Buff. L. Rev. 613, 617 (2002). Accordingly, we cannot stress enough the seriousness of properly administering oaths and affirmations, and we urge notaries to be diligent in performing this duty.

Neither statutory nor common law clearly sets forth the formalities of oath administration. For example, North Carolina's "oath" statute, N.C. Gen. Stat. § 10B-3(14), does not specifically require that the notary orally administer the oath. By its plain language, the notary need only certify that the notary witnessed the signor make a vow of truthfulness by using any form of the word "swear." In fact, none of our notarial statutes specify by their plain language that the notary is required to administer an oral oath to the principal prior to notarization. Nevertheless, the trial court in the instant case voided the birth mother's relinquishment on this basis.

The case law pertaining to this issue supports an alternative outcome. First, we look to *State v. Knight*, an early North Carolina Supreme Court case, for the proposition that a notary (or other authorized individual) may delegate the administration of an oath to a third party who is not vested with authority to administer oaths. 84 N.C. 789 (1881). In *Knight*, the Martin County coroner, J.H. Ellison, had sole authority to administer an oath to certain witnesses. However, he allowed justice of the peace, J.L. Ewell, to place the witnesses under oath in his presence and before the court. *Id.* at 791-92. The defendant moved to arrest judgment on grounds that the witnesses were not properly administered the oath. Our Supreme Court disagreed on the basis that it "sufficiently appear[ed] that the administration of the oath was the act of the coroner." *Id.* at 793. Our Supreme Court concluded that the administration of an oath is a ministerial act and it

> may be administered by any one [sic] in the presence and by the direction of the court[.] . . . It was just as competent for the coroner to have called upon any unofficial bystander to administer the oath for him, as upon a justice of the peace. It was therefore immaterial whether in this case the justice had the authority to administer the oath or not.

Id.

Relying in part on *Knight*, the Alabama Supreme Court addressed a similar issue in *Walker v. State*, 107 Ala. 5, 18 So. 393 (1895). In *Walker*, the defendant was prosecuted for perjury after making a false affidavit attesting to a certain conveyance of land. In executing the affidavit, Elbert Holt, a deputy clerk without authority to administer an oath, "in point of actual, physical fact, administered the oath to the defendant[.]" *Id.* at 9, 18 So. at 394. The Alabama Supreme Court held that Elbert Holt's administration satisfied the oath requirement because E.R. Holt, the clerk with authority, "was present at the time, knew what was going on, and directed or assented to the administering of the oath, which was done in his name as such clerk, and the evidence of which—the jurat—was made out and stands in his name[.]" *Id.* at 9-10, 18 So at 394. The Alabama Supreme Court opined:

> [T]his actual administration by Elbert Holt was, under the circumstances, in legal contemplation the official act of E.R. Holt, the de jure clerk of the court, is fully settled by the authorities (*State v. Knight*, 84 N.C. 789, 793; *Stephens v. State*, 1 Swan, 157; *Oaks v. Rodgers*, 48 Cal. 197); and this upon the general principle that a ministerial act done by one under the authority, and by the direction, or with the knowledge and assent, and especially in the presence, of an officer duly authorized to perform that act, is the act of the officer himself.

Id. at 10, 18 So. at 394.

More recently, in *Gargan v. State*, 805 P.2d 998 (Alaska App. 1991), the Alaska Court of Appeals considered an argument similar to the one advanced by the birth mother in the instant case. *Gargan* concerned the defendant's perjury conviction involving an affidavit that purported on its face to be sworn before a notary. Evidence at trial established that the notary had not actually administered an oath prior to notarizing the affidavit. *Id.* at 1004. Nevertheless, the trial judge allowed the jurors to consider the statement during their deliberations.

The Alaska Court opined that the crucial issue was not whether an oath was actually administered, but whether the signed statement constituted "a verification on its face of the truthfulness of the facts contained therein."[1] *Id.* at 1005. The Alaska Court concluded that the

1. A verification is defined as (1) a formal declaration made under oath by the principal swearing to the truthfulness of the statements in a document, or (2) an oath or affirmation that an authorized officer administers to an affiant or deponent, or (3) any act of notarizing. Black's Law Dictionary 1593 (8th ed. 2004).

document satisfied the substantial requirements of a verification given that the defendant: (1) was properly identified, (2) knowingly signed the document in the notary's presence, (3) the document contained the language "duly sworn," and (4) the notary actually notarized the document. *Id.* As such, the Alaska Court held that the oath requirement was satisfied upon notarization. *Id.*

We find *Gargan* noteworthy for the proposition that an oath is considered administered when an individual signs a document in a notary's presence that contains the language "duly sworn" or its equivalent. The Alaska Court essentially held that the "duly sworn" language in a document is equivalent to the delivery of a verbal oath, provided certain other factors are satisfied. In the instant case, respondents advance the same proposition—they contend that because the birth mother (1) knowingly signed the document in the notary's presence, (2) the document contained the language "duly sworn," and (3) the notary verified the swearing, the "oath was administered by the certifying official at the time [the birth mother] signed the relinquishment." At present we express no opinion on the merits of respondent's argument or the Gargan decision, namely because the facts of the case before us show that an oath was administered to the birth mother by Ms. Walston.

On appeal, counsel for the birth mother argues that the notary herself was required to deliver the oath for it to be effective. Counsel reasons: It "is part of the notary's training to know how to administer an oath" and "if we somehow take away the requirement that the notary have to administer an oath, we have negated the entire notarial act. We have taken away something that the notary is required to do." Counsel applies this logic to the notarization of affidavits—arguing that any party who executes an affidavit should be permitted at a later time to withdraw it on the basis that it was not given under oath. Alternately, petitioners argue that an oath was effectively administered when Ms. Walston read the relinquishment to the birth mother stating, "I, Amy Marie Costin being duly sworn, declare . . . [.]"

We agree with petitioners. In the instant case, the birth mother advances a purely technical argument and has failed to present sufficient evidence to overcome the presumption of regularity created in favor of the validity of notarial acts. *See Moore v. Moore*, 108 N.C. App. 656, 658, 424 S.E.2d 673, 674, *aff'd*, 334 N.C. 684, 435 S.E.2d 71 (1993) (holding that the plaintiff-husband failed to overcome the presumption in favor of the legality of an acknowledgment when it was undisputed that he signed the separation agreement, but advanced the technical argument that the agreement was void because the notary did not witness

his signature since she walked "in and out of the conference room"). Here, it is undisputed that the birth mother signed the relinquishment in the notary's presence. The notary testified that she witnessed the birth mother's signature and verified the document. In doing so, the notary attested by her seal that the document was "sworn to (or affirmed) and subscribed" before her. Nothing in the record impeaches her certification, including the notary's testimony that she did not place the birth mother under oath.

The administration of an oath is a ministerial duty and it may be delivered by persons who lack official authority, provided that a certifying officer is present and directs or assents to the administration. Here, in substance and legal effect, the requirement that the birth mother be placed "under oath" was satisfied when Ms. Walston read the relinquishment to her. The notary was physically present when the oath was administered, aware of the circumstances, and thereby implicitly assented to its administration, which was done in her name. By these facts, it sufficiently appears that the administration of the oath was the act of the notary. *See Knight*, *supra*.

Further, the plain language of N.C. Gen. Stat. § 10B-3(14)(c) requires the principal to make a vow of truthfulness "while invoking a deity or using any form of the word 'swear.' " Again, "any form" of the word "swear" may be utilized—the statute does not mandate that the signor orally repeat the word "swear." Here, the birth mother stated in writing that she had been "duly sworn" when she signed the document. The notary's verification recites that the birth mother had sworn to the document before the notary. Additionally, Ms. Walston read the word "swear" aloud in administering the oath. We hold that N.C. Gen. Stat. § 10B-3(14)(c) was satisfied. Accordingly, we conclude that the trial court erred in entering an order declaring the birth mother's relinquishment void. There was a valid relinquishment in this matter, which the birth mother failed to timely revoke.

B. Statutory Grounds to Void Relinquishment

[3] As we have held that the relinquishment was not void *ab initio*, the birth mother was limited to challenging her relinquishment on the express grounds established by the legislature to void relinquishments. N.C. Gen. Stat. § 48-3-707. Absent the consent of the parties, the only applicable grounds for voiding the relinquishment in the instant case requires the birth mother to prove by clear and convincing evidence that her relinquishment was obtained by fraud or duress. N.C. Gen. Stat. § 48-3-707(a)(1).

In its order, the trial court concluded: "There was no constructive fraud or actual fraud by the [A]gency in the procurement of the relinquishment." Upon conducting a *de novo* review of the record, we agree. The Agency made every effort to ensure that the birth mother was apprised of the complexity of the situation and the legalities of the adoption process. Ms. Walston testified that she reviewed the relinquishment with the birth mother prior to Baby Boy's birth, she read the relinquishment aloud, and the birth mother was given a copy of the form. Again, this is not a case where the birth mother argues that her consent to relinquish Baby Boy was not given knowingly and voluntarily.

C. Designation of Baby Boy's Sex on Relinquishment Form

[4] Finally, we recognize that for a relinquishment to be complete, it must disclose the "date of birth or the expected delivery date, the sex, and the name of the minor, if known[.]" N.C. Gen. Stat. 48-3-703. Here, the relinquishment omitted Baby Boy's gender. In Finding #4, the trial court found: "There was no evidence that [the birth mother] requested this omission or why this information was omitted." We disagree. Ms. Walston testified that the birth mother requested a closed adoption and "did not plan to see the child or even want to know the sex of the child[.]" The birth mother testified: "I never wanted an open adoption. . . . We never discussed an open adoption." Accordingly, there is evidence that the Agency omitted the sex of Baby Boy based on what it perceived to be the birth mother's request. Regardless, N.C. Gen. Stat. § 48-3-702(a) provides that a relinquishment only needs to be executed in substantial compliance with the law, and this was accomplished.

IV. Conclusion

In sum, the trial court erred in entering an order voiding the birth mother's relinquishment. The relinquishment is valid and conforms to the mandatory statutory requirements as set out in N.C. Gen. Stat. § 48-3-702. Accordingly, we reverse the trial court's order.

Reversed.

Judges McGEE and HUNTER, Robert C., concur.

STATE v. ALLEN

[233 N.C. App. 507 (2014)]

STATE OF NORTH CAROLINA
v.
HUBERT ALLEN, DEFENDANT

No. COA13-1100

Filed 15 April 2014

1. Constitutional Law—effective assistance of counsel—failure to object—no prejudice shown

Trial counsel did not provide defendant with ineffective assistance of counsel in an assault with a deadly weapon case. Even assuming arguendo that defense counsel was deficient in failing to object to testimony regarding defendant selling drugs, defendant failed to show how this testimony prejudiced him.

2. Criminal Law—jury instructions—self-defense—sufficient

The trial court did not commit plain error by failing to instruct the jury on self-defense for the charge of discharging a firearm into an occupied vehicle. The trial court gave jury instructions as to self-defense on four out of five charges and where defendant agreed that he was satisfied with the jury instructions, defendant could not show plain error.

Appeal by defendant from judgments entered 18 April 2013 by Judge Michael R. Morgan in Person County Superior Court. Heard in the Court of Appeals 5 March 2014.

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

Appellate Defender Staples Hughes, by Assistant Appellate Defender Charlesena Elliott Walker, for defendant-appellant.

BRYANT, Judge.

A claim of ineffective assistance of counsel will be denied where defendant cannot show how his counsel's error prejudiced him. Where the trial court gave jury instructions as to self-defense on four out of five charges and where defendant agreed that he was satisfied with the jury instructions, defendant cannot show plain error.

At 7:00 p.m. on 15 June 2012, the Roxboro Police Department received a call about a shooting on Highway 501. When officers arrived

at the scene, they saw a car with shattered front and back windows on the passenger's side and multiple bullet holes in the front driver's and passenger's doors, in the head rest on the front passenger side, and inside the car. The driver of the car, Crystal Barker, had a bullet graze wound to her shoulder. Barker's boyfriend, Bryant Richardson, had also been in the car at the time of the shooting but was not hurt. Barker told Officer Mills that a red SUV pulled alongside her while she was driving and the SUV's driver fired multiple shots into her car before speeding away. Police searched Barker and Richardson, then searched Barker's car where they found bullets and bullet fragments but no weapons.

After receiving information from a confidential informant regarding the shooting, the Roxboro police responded to a residence on Holeman Ashley Road. A burgundy SUV was found parked behind the residence. Upon entering the residence, the police encountered defendant Hubert Allen. Defendant was taken into custody, and a loaded handgun was recovered from a table next to him.

At the police station, defendant waived his Miranda rights and gave a statement to Detective Shull in which he admitted to shooting at Barker's car. Defendant stated that while driving down Highway 501, he received threatening messages, then saw a man leaning out of a car making a hand gesture towards him in imitation of a gun. Defendant told Detective Shull that this man, later identified as Richardson, then fired shots towards defendant. Defendant stated that he returned fire at Barker's car because he felt threatened.

On 15 June 2012, a Person County grand jury indicted defendant on one count each of assaulting Richardson with a deadly weapon with intent to kill, assaulting Barker with a deadly weapon with intent to kill and inflicting serious injury, discharging a firearm into an occupied vehicle, attempted first-degree murder of Barker, and attempted first-degree murder of Richardson. On 18 April 2013, a jury convicted defendant on all charges. The jury also found the existence of an aggravating factor, that "defendant knowingly created a great risk of death to more than one person by means of a weapon which would normally be hazardous to the lives of more than one person." The trial court found the aggravating factor outweighed three mitigating factors and entered two judgments, each sentencing defendant to a term of 157 to 201 months, to be served consecutively. Defendant appeals.

On appeal, defendant raises two issues: (I) whether trial counsel provided defendant with ineffective assistance of counsel; and (II) whether the trial court committed plain error with regard to jury instructions.

I.

[1] Defendant first argues that trial counsel provided him with ineffective assistance of counsel. We disagree.

"In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001) (citations omitted).

> It is well established that ineffective assistance of counsel claims "brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." Thus, when this Court reviews ineffective assistance of counsel claims on direct appeal and determines that they have been brought prematurely, we dismiss those claims without prejudice, allowing defendant[s] to bring them pursuant to a subsequent motion for appropriate relief in the trial court.

State v. Thompson, 359 N.C. 77, 122–23, 604 S.E.2d 850, 881 (2004) (quoting *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524–25 (2001)).

> Criminal defendants are entitled to the effective assistance of counsel. When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness. In order to meet this burden [the] defendant must satisfy a two part test.
>
> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.
>
> In considering [ineffective assistance of counsel] claims, if a reviewing court can determine at the outset that there is no reasonable probability that in the absence of

> counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient.

State v. Boozer, 210 N.C. App. 371, 382–83, 707 S.E.2d 756, 765 (2011) (citations and quotation omitted), *disc. review denied*, 365 N.C. 543, 720 S.E.2d 667 (2012). "Judicial scrutiny of counsel's performance must be highly deferential." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). "Trial counsel are necessarily given wide latitude in these matters [of trial strategy]. Ineffective assistance of counsel claims are not intended to promote judicial second-guessing on questions of strategy as basic as the handling of a witness." *State v. Milano*, 297 N.C. 485, 495–96, 256 S.E.2d 154, 160 (1979) (citation and quotation omitted), *overruled on other grounds by State v. Grier*, 307 N.C. 628, 300 S.E.2d 351 (1983).

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . .

Strickland, 466 U.S. at 689 (citation omitted).

Defendant contends that his counsel was ineffective because: she "pro-actively elicited a hearsay statement" that conflicted with his claim of self-defense; she failed to object to evidence that he sold drugs on a prior occasion; and she failed to move to dismiss the charges at the close of the evidence. Because the record reveals no further investigation is required, we review defendant's ineffective assistance of counsel claims.

Defendant pursued a self-defense strategy at trial and now argues on appeal that his counsel elicited hearsay testimony that contradicted his self-defense claim. The testimony in question concerned the statements of a confidential informant that were included in Officer Williams' police report. The State questioned Officer Williams as to his role in the investigation, to which Officer Williams responded that his job was to find the shooter and that he solicited information to that effect. On cross-examination, defense counsel asked "follow-up" questions seeking further explanation of what Officer Williams had done to "find the shooter," and specifically, what the confidential informant had told him. Officer Williams testified that the confidential informant said that the shooting was a result of a "drug deal that went bad" and that Richardson

had been "in Roxboro in a silver and gray vehicle, just like the victim's vehicle, looking for [defendant]" because defendant owed him money, and that Richardson had told defendant "to have his money or there would be war."

Defendant's self-defense theory was that Richardson believed defendant owed him money for drugs, that Richardson threatened defendant and that Richardson came looking for defendant. Richardson started shooting at defendant when he saw him, at which point defendant shot back in self-defense. Therefore, it appears from the record that defense counsel elicited the hearsay testimony as part of defendant's self-defense trial strategy, as the confidential informant's statements bolstered defendant's self-defense strategy by showing why defendant felt threatened by Richardson and fired at Barker's car. Such evidence does not contradict defendant's self-defense strategy. Further, even without the admission of the confidential informant's statement concerning a "drug deal that went bad," there was sufficient evidence presented by which a jury could determine if defendant fired at Barker's car in self-defense, regardless of whether the shooting was drug-related.

Defendant next contends he received ineffective assistance of counsel because his counsel failed to object to evidence concerning defendant's selling of drugs on a prior occasion. When defendant testified on his own behalf, his counsel asked him questions regarding when he purchased a handgun and why; defendant responded that he purchased the gun in March 2012 after he began receiving threatening messages. Defendant further testified that he had "never been convicted of nothing." On cross-examination, the State asked defendant to further clarify his statements concerning the handgun, the threatening messages, and his record. Perhaps, as defendant alleges, his counsel may have been deficient in failing to object to evidence of defendant selling drugs. However, as we discuss infra, even if defense counsel was deficient in that one instance, there is no reasonable possibility that this error affected the outcome of the case.

Defendant further argues that he received ineffective assistance of counsel because his counsel failed to move to dismiss the charges at the close of the evidence. Specifically, defendant contends that had defense counsel moved to dismiss the charges at the close of the evidence, the trial court "likely would have dismissed" the attempted murder and assault charges because the evidence was insufficient to show an intent to kill. Likewise, defendant contends, the trial court "likely would have dismissed" the charge of assault on Barker with a deadly weapon

with intent to kill inflicting serious injury because Barker's bullet graze wound was not serious.

> In weighing the sufficiency of the evidence, the trial court considers all evidence admitted at trial, whether competent or incompetent: . . . in the light most favorable to the State, giving the State the benefit of every reasonable inference that might be drawn therefrom. Any contradictions or discrepancies in the evidence are for resolution by the jury. The trial judge must decide whether there is substantial evidence of each element of the offense charged. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

State v. Cox, 190 N.C. App. 714, 720, 661 S.E.2d 294, 299 (2008) (citations omitted). The trial judge must merely ensure that there exists substantial evidence as to each element of the offense; the jury's job is to determine beyond a reasonable doubt whether the evidence proves the defendant was guilty of the offense. *State v. Matias*, 354 N.C. 549, 551–52, 556 S.E.2d 269, 270 (2001) (citations omitted).

"The elements of attempted first-degree murder are: (1) a specific intent to kill another; (2) an overt act calculated to carry out that intent, which goes beyond mere preparation; (3) malice, premeditation, and deliberation accompanying the act; and (4) failure to complete the intended killing." *State v. Tirado*, 358 N.C. 551, 579, 599 S.E.2d 515, 534 (2004) (citations omitted). "The elements of assault with a deadly weapon with intent to kill inflicting serious injury are: (1) an assault, (2) with the use of a deadly weapon, (3) with an intent to kill, and (4) inflicting serious injury, not resulting in death." *Id.* "The requisite 'intent to kill' may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances." *State v. Musselwhite*, 59 N.C. App. 477, 480, 297 S.E.2d 181, 184 (1982) (citation omitted).

To show defendant had intent to kill Barker and Richardson, the State presented evidence that: defendant admitted he sped up to reach Barker's car before firing into it; defendant fired directly into Barker's car at close range; defendant's multiple shots fired directly at the car resulted in bullet holes in the front driver and passenger doors, the front passenger seat, and the front passenger's seat headrest; bullets shattered both windows on the passenger's side; and Barker sustained a bullet wound to her shoulder. Defendant admitted that he could have, but

did not, call 911 at any time between when he received the threats and the shooting. This evidence, viewed in the light most favorable to the State, is sufficient to establish the element of intent for the charges of attempted murder and assault. *See id.; see also State v. Davis*, 349 N.C. 1, 37, 506 S.E.2d 455, 475 (1998) (holding that to show intent where a firearm is used against a victim, "[t]he malice or intent follows the bullet." (citations omitted)).

Defendant also contends that because Barker's bullet graze wound was not serious the trial court would have dismissed the offense of assault with a deadly weapon with intent to kill inflicting serious injury upon a proper motion to dismiss. Defendant contends Barker's injury was not serious because its treatment did not require hospitalization or medication, nor did it cause Barker to miss work. "Serious injury" means physical or bodily injury, but not death, resulting from an assault with a deadly weapon. *State v. Joyner*, 295 N.C. 55, 65, 243 S.E.2d 367, 373—74 (1978) (citations omitted). Whether serious injury has been inflicted depends on the particular facts of each case and is a question for the jury. *State v. Ferguson*, 261 N.C. 558, 560, 135 S.E.2d 626, 628 (1964). "[A]s long as the State presents evidence that the victim sustained a physical injury as a result of an assault by the defendant, it is for the jury to determine the question of whether the injury was serious." *State v. Alexander*, 337 N.C. 182, 189, 446 S.E.2d 83, 87 (1994) (citation omitted). "The trial court is required to submit lesser included degrees of the crime charged in the indictment when . . . there is evidence of guilt of the lesser degrees." *State v. Simpson*, 299 N.C. 377, 381, 261 S.E.2d 661, 663 (1980) (citations omitted).

The trial court, at the request of defense counsel and in light of the evidence presented as to the seriousness of Barker's injury, instructed the jury as to all lesser-included charges for the offense of assault with a deadly weapon with intent to kill inflicting serious injury: assault with a deadly weapon with intent to kill, assault with a deadly weapon inflicting serious injury, and assault with a deadly weapon. The trial court also defined "serious injury" in its instructions to the jury. As such, "[w]hether serious injury ha[d] been inflicted" to Barker was a question for the jury to decide based upon the evidence presented. *Ferguson*, 261 N.C. at 560, 135 S.E.2d at 628; *see also State v. Stephens*, 347 N.C. 352, 493 S.E.2d 435 (1997) (bullet graze wound to the face was a serious injury); *Alexander*, 337 N.C. 182, 446 S.E.2d 83 (cuts to the victim's arm from glass shattered by a bullet constituted a serious injury); *State v. Bell*, 87 N.C. App. 626, 362 S.E.2d 288 (1987) (bullet graze wound above the eye was a serious injury). Where "the evidence is sufficient to support a conviction, the

defendant is not prejudiced by his counsel's failure to make a motion to dismiss at the close of all the evidence." *State v. Fraley*, 202 N.C. App. 457, 467, 688 S.E.2d 778, 786 (2010) (citation omitted). Given the record in this case and the case law noted above regarding what facts may constitute serious injury, there is no likelihood the trial court would have dismissed the charge of assault with a deadly weapon with intent to kill inflicting serious injury had defense counsel made a motion to dismiss.

Reviewing the record in its entirety, plaintiff's ineffective assistance of counsel claim must fail. Even assuming *arguendo* that defense counsel was deficient in failing to object to testimony regarding defendant selling drugs, defendant has failed to show how this testimony prejudiced him. "The fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 248 (1985) (citation omitted). "After examining the record we conclude that there is no reasonable probability that any of the alleged errors of defendant's counsel affected the outcome of the trial." *Id.* at 563, 324 S.E.2d at 249. Accordingly, defendant's arguments are overruled, and his claim of ineffective assistance of counsel denied.

II.

[2] Defendant next argues that the trial court committed plain error in failing to instruct the jury on self-defense for the charge of discharging a firearm into an occupied vehicle. We disagree.

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

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

Defendant contends the trial court committed plain error in failing to instruct the jury on self-defense as it related to the charge of discharging a firearm into an occupied vehicle. Specifically, defendant argues that "the trial court acted under a misapprehension of the law" in its decision not to give a self-defense instruction. Defendant's argument lacks merit, as a review of the record indicates that the trial court gave sufficient instruction to the jury on self-defense.

In its instructions to the jury on the charges of attempted first-degree murder and assault, the trial court instructed the jury as to self-defense for each charge. For the charge of discharging a firearm into an occupied vehicle, the trial court did not give the full instruction on self-defense, but rather stated that the jury must find whether defendant committed this offense without justification or excuse. In a jury instruction conference held outside of the jury's presence, defendant agreed to this instruction, stating that: "Your Honor, the defendant agrees that the self-defense instruction has been given multiple, multiple times here, and also that your Honor gave within his instructions on this particular charge, added without justification qualifications. The defendant is satisfied, your Honor."

This Court has held that "a charge must be construed contextually, and isolated portions of it will not be held prejudicial when the charge as a whole is correct." *State v. Gaines*, 283 N.C. 33, 43, 194 S.E.2d 839, 846 (1973) (citations omitted).

> Where the charge as a whole presents the law fairly and clearly to the jury, the fact that isolated expressions, standing alone, might be considered erroneous affords no grounds for a reversal. Technical errors which are not substantial and which could not have affected the result will not be held prejudicial.

State v. Jones, 294 N.C. 642, 653, 243 S.E.2d 118, 125 (1978) (citations omitted).

Here, it is clear from the record that "the trial court unmistakably placed the burden of proof upon the State to satisfy the jury beyond a reasonable doubt that defendant did not act in self-defense" when he shot at Barker's car. *See id.* at 654, 243 S.E.2d at 125. Furthermore, as the jury convicted defendant of the attempted first-degree murder and assault charges even though each of these offenses was given with a self-defense instruction, it seems unlikely that the jury would have reached a different result had the trial court given a full instruction on self-defense for the charge of discharging a firearm into an occupied vehicle. Moreover, defendant accepted the trial court's proposed instruction, stating that the repetition of the self-defense instruction for the other four charges, coupled with a clear instruction that the jury must determine whether defendant discharged a firearm into an occupied vehicle without justification or excuse, was sufficient. As defendant has failed to show fundamental error or prejudice, his argument is accordingly overruled. *See id.* at 654, 243 S.E.2d at 125. ("We think the jury clearly

understood that the burden was upon the State to satisfy it beyond a reasonable doubt that defendant did not act in self-defense and clearly understood the circumstances under which it should return a verdict of not guilty by reason of self-defense."); *see also State v. Creasman*, No. COA02-1498, 2003 N.C. App. LEXIS 1249 (July 1, 2003) (holding that where the trial court gave full self-defense instructions for the first two charges against the defendant, the defendant was not prejudiced where the trial court did not give a full self-defense instruction as to a third charge). We find no error in the judgment of the trial court. Defendant's claim of ineffective assistance is denied.

No error.

Judges STEPHENS and DILLON concur.

STATE OF NORTH CAROLINA
v.
CHRISTOPHER LEON BLAKNEY, DEFENDANT

No. COA13-1088

Filed 15 April 2014

1. Drugs—marijuana—intent to sell or deliver—evidence sufficient

The trial court did not err by denying defendant's motion to dismiss a charge of possession with intent to sell or deliver marijuana. Although defendant contended that the amount of marijuana found in his car was too small for intent to sell or deliver as opposed to mere possession for personal use, the circumstances provided sufficient evidence to survive defendant's motion to dismiss.

2. Sentencing—habitual felon proceeding—evidence of consolidated offense

There was no error at a habitual felon proceeding where a judgment offered into evidence contained an additional, consolidated, felony offense. The trial court gave jury instructions which directed and limited the jury's consideration of the evidence to three specific felony convictions only and, given the overwhelming and uncontradicted evidence of the three convictions, there was essentially no likelihood of a different result if the trial court had redacted the additional conviction.

STATE v. BLAKNEY

[233 N.C. App. 516 (2014)]

Appeal by defendant from judgment entered 13 February 2013 by Judge William Z. Wood, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 19 February 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General James M. Stanley, Jr., for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Kathleen M. Joyce, for defendant-appellant.

BRYANT, Judge.

Where the State presents sufficient evidence of each element of an offense, a motion to dismiss is properly denied. Where defendant can show no prejudice from irrelevant evidence admitted during an habitual felon proceeding, any error therefrom is harmless.

On 23 February 2011, Officer Neff of the Winston-Salem Police Department observed a car speeding and crossing the double-yellow center line while driving on Silas Creek Parkway around 10:00 p.m. Officer Neff initiated a traffic stop of the car and noticed that the driver, defendant Christopher Leon Blakney, smelled of alcohol and had glassy, bloodshot eyes. Officer Neff arrested defendant under suspicion of driving while impaired and called for assistance; Officer Allen responded.

While searching defendant's car, Officer Allen found marijuana under the center armrest. A large amount of cash was found on the car's front floorboard along with a glass Mason jar containing marijuana residue. A digital scale and batteries were also found underneath the front seats. A white shopping bag containing a box of sandwich baggies and a glass Mason jar of marijuana was found in the trunk,along with a second bag containing additional marijuana packaging supplies. Four "dime bags" of marijuana were also found in the trunk.[1] A total of 84.8 grams (2.99 ounces) of marijuana was recovered from defendant's car.

On 16 May 2011, a Forsyth County Grand Jury indicted defendant for possession with intent to sell or deliver marijuana, possession of drug paraphernalia, driving while impaired, and driving while license revoked. Defendant was also indicted as an habitual felon.

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1. When asked to clarify what he meant when he said "dime bag," Officer Allen testified that a "dime bag" is "a small plastic bag often used in the packaging for sale of illegal narcotics. So those who sell these -- sell narcotics break their product down to get it – they get it in large shipments and break it down into the smaller sellable items, packages for easy transactions, very small scale and discrete transactions."

On 13 February 2013, a jury found defendant guilty of possession with intent to sell or deliver marijuana, possession of drug paraphernalia, and driving while license revoked. Defendant was found not guilty of driving while impaired. The jury also found defendant guilty of having attained the status of an habitual felon. The trial court sentenced defendant to 88 to 115 months in prison. Defendant appeals.

On appeal, defendant argues that the trial court erred in: (I) denying defendant's motion to dismiss; and (II) admitting evidence of an additional felony conviction during defendant's habitual felon proceeding.

I.

[1] Defendant first argues that the trial court erred in denying his motion to dismiss at the close of all the evidence. We disagree.

> We review the trial court's denial of a motion to dismiss *de novo*. A motion to dismiss for insufficient evidence is properly denied if 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. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. All evidence, both competent and incompetent, and any reasonable inferences drawn therefrom, must be considered in the light most favorable to the State. Additionally, circumstantial evidence may be sufficient to withstand a motion to dismiss when a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is the jury's duty to determine if the defendant is actually guilty.

State v. Burton, ___ N.C. App. ___, ___, 735 S.E.2d 400, 404 (2012) (citations and quotations omitted). "The State is entitled to every reasonable inference to be drawn from the evidence. 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).

Defendant argues that the trial court erred in denying his motion to dismiss because the State failed to prove that defendant intended to sell or deliver marijuana. Specifically, defendant contends the State failed to

prove defendant's intent to sell or deliver marijuana because the amount of marijuana found in defendant's car was too small to be the "substantial amount" required for a possession with intent to sell or deliver marijuana conviction.

Pursuant to North Carolina General Statutes, section 90-95, the offense of possession with intent to sell or deliver has three elements: (1) possession; (2) of a controlled substance; with (3) the intent to sell or deliver that controlled substance. N.C. Gen. Stat. § 90-95(a)(1) (2013). The State may demonstrate intent through direct or circumstantial evidence. *State v. Jackson*, 145 N.C. App. 86, 89–90, 550 S.E.2d 225, 229 (2001). Although the "quantity of the controlled substance alone may suffice to support the inference of an intent to transfer, sell or deliver," it must be a substantial amount. *State v. Morgan*, 329 N.C. 654, 659–60, 406 S.E.2d 833, 835–36 (1991). "[T]he intent to sell or distribute may be inferred from (1) the packaging, labeling, and storage of the controlled substance, (2) the defendant's activities, (3) the quantity found, and (4) the presence of cash or drug paraphernalia." *State v. Nettles*, 170 N.C. App. 100, 106, 612 S.E.2d 172, 176 (2005).

The State concedes that lab testing was not completed on the marijuana collected from defendant's car. Defendant argues that because no testing was done, the total amount of marijuana collected (84.8 grams) is not accurate because this weight included marijuana seeds, stems, and other material that should have been excluded before weighing. Defendant further argues that even if the weight of the marijuana (84.8 grams) is accurate, such a small amount is consistent with personal use, rather than for sale or delivery. Defendant cites *State v. Wiggins*, 33 N.C. App. 291, 235 S.E.2d 265 (1977), and *State v. Wilkins*, 208 N.C. App. 729, 703 S.E.2d 807 (2010), in support of his argument.

In *Wiggins*, the defendant was convicted of possession with intent to sell or deliver marijuana after a total of 215.5 grams of marijuana was found growing in and around his home. This Court found that "this quantity alone, without some additional evidence, is not sufficient to raise an inference that the marijuana was for the purpose of distribution." *Wiggins*, 33 N.C. App. at 294–95, 235 S.E.2d at 268 (citations omitted).

In *Wilkins*, the defendant was stopped and arrested on several outstanding warrants. During a pat-down of the defendant, officers found three small bags of marijuana weighing a total of 1.89 grams and $1264.00 cash in small denominations. The defendant was convicted of possession with intent to sell or deliver marijuana and manufacturing marijuana. On appeal, this Court reversed the defendant's conviction for possession with intent to sell or deliver marijuana, noting that

"[t]he evidence in this case, viewed in the light most favorable to the State, indicates that defendant was a drug user, not a drug seller." *Wilkins*, 208 N.C. App. at 733, 703 S.E.2d at 811.

We find *Wiggins* and *Wilkins* to be inapposite to the instant case. The State presented evidence that defendant's car contained a total of 84.8 grams of marijuana found in the body and trunk of the car, and the marijuana was found in multiple containers including two "previously vacuum sealed bags," two sandwich bags, four "dime bags," and five other types of bags. Marijuana was also found in two glass Mason jars. A box of sandwich bags was found in the trunk, and digital scales were found underneath the front seats of the car. This evidence showed not only a significant quantity of marijuana, but the manner in which the marijuana was packaged (such as four "dime bags") raised more than an inference that defendant intended to sell or deliver the marijuana. Further, the presence of items commonly used in packaging and weighing drugs for sale — a box of sandwich bags and digital scales — along with a large quantity of cash in small denominations provided additional evidence that defendant intended to sell or deliver marijuana, as opposed to merely possessing it for his own personal use as was determined to be the case in *Wiggins* and *Wilkins*. Therefore, taking the evidence in the light most favorable to the State, sufficient evidence of possession with intent to sell or deliver marijuana was presented to survive defendant's motion to dismiss. *See State v. Baxter*, 285 N.C. 735, 738, 208 S.E.2d 696, 698 (1974) ("The jury could reasonably infer an intent to distribute from the amount of the substance found, the manner in which it was packaged and the presence of other packaging materials."), *overruled in part on other grounds by State v. Childers*, 41 N.C. App. 729, 255 S.E.2d 654 (1979). Defendant's argument is overruled.

II.

[2] Defendant next argues that the trial court erred in admitting evidence of an additional felony conviction at defendant's habitual felon proceeding. Specifically, defendant contends that by not redacting a second consolidated felony offense contained within a judgment offered into evidence by the State, the trial court committed error pursuant to Rules 401, 403, 404(b), and 609. We disagree.

On appeal, in reviewing a trial court's rulings under Rule 401 and 403, this Court has held that:

> Although the trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403,

> such rulings are given great deference on appeal. Because the trial court is better situated to evaluate whether a particular piece of evidence tends to make the existence of a fact of consequence more or less probable, the appropriate standard of review for a trial court's ruling on relevancy pursuant to Rule 401 is not as deferential as the 'abuse of discretion' standard which applies to rulings made pursuant to Rule 403.

State v. Tadeja, 191 N.C. App. 439, 444, 664 S.E.2d 402, 407 (2008) (citation omitted). Evidence is relevant if it has "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 (2013). "[E]vidence is relevant if it has any logical tendency, however slight, to prove a fact in issue in the case." *State v. Hannah*, 312 N.C. 286, 294, 322 S.E.2d 148, 154 (1984) (citation omitted). "Although 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 (2013).

North Carolina General Statutes, section 14-7.1, states that a person may be charged as an habitual felon if he "has been convicted of or pled guilty to three felony offenses." N.C. Gen. Stat. § 14-7.1 (2013). For an habitual felon charge, the prior felony convictions of a defendant may be proven by "stipulation of the parties or by the original or a certified copy of the court record of the prior [felony] conviction [pursuant to] N.C. Gen. Stat. § 14-7.4." *State v. Gant*, 153 N.C. App. 136, 143, 568 S.E.2d 909, 913 (2002). "[T]he preferred method for proving a prior conviction includes the introduction of the judgment itself into evidence." *State v. Maynard*, 311 N.C. 1, 26, 316 S.E.2d 197, 211 (1984) (citation omitted).

The State, in prosecuting the habitual felon charge against defendant, introduced into evidence certified copies of three prior judgments: judgment for possession with intent to sell/deliver cocaine entered on 8 May 1997; judgment for possession with intent to manufacture, sell and deliver cocaine entered on 8 October 1998; and judgment for possession with intent to sell or deliver marijuana entered on 8 May 2003. Each judgment included a copy of the corresponding plea transcript. The judgment which defendant challenges, entered 8 May 1997, involved two felony convictions, each for possession with intent to sell or deliver cocaine, which had been consolidated into one judgment. Defendant argues that the trial court's refusal to redact one of the two felony

convictions attached to the judgment was highly prejudicial to him. We disagree. While the additional felony conviction was irrelevant in determining whether defendant was an habitual felon, defendant has not demonstrated how this evidence prejudiced him.

> Defendant bears the burden of proving the testimony was erroneously admitted and he was prejudiced by the erroneous 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. Moses, 350 N.C. 741, 762, 517 S.E.2d 853, 867 (1999) (citations and quotation omitted).

In admitting the judgments into evidence, the trial court denied defendant's redaction request as to the consolidated judgment, noting that "[defendant] pled to whatever he pled to. It was just consolidated." The trial court then gave jury instructions as to the habitual felon charge which directed and limited the jury's consideration of the evidence to three specific felony convictions only. As such, the record reflects nothing to indicate that defendant was prejudiced by the inclusion of the additional conviction. Moreover, defendant has not challenged the validity of the prior convictions, the plea transcripts, or the resulting judgments. "Given the overwhelming and uncontradicted evidence of the three felony convictions, there is essentially no likelihood that a different result . . . would have ensued if the trial court had redacted [the additional conviction]." *State v. Ross*, 207 N.C. App. 379, 400, 700 S.E.2d 412, 426 (2010) (citation, quotation and bracket omitted). Accordingly, defendant's argument is overruled.

No error.

Judges STEPHENS and DILLON concur.

STATE OF NORTH CAROLINA
v.
DONNELL TRACY COUSIN, DEFENDANT

No. COA13-543

Filed 15 April 2014

1. Evidence—hearsay—questioning investigator about other murder suspects—truth of matter asserted—harmless error

The trial court did not abuse its discretion in a felonious obstruction of justice and accessory after the fact case by denying defendant the opportunity to question an investigator about other murder suspects. By defendant's own admission, he sought to offer this testimony at least in part for the purpose of demonstrating the truth of the matter asserted. Further, any error was harmless since defendant was still able to elicit similar evidence by alternative means. Finally, constitutional arguments that were not raised at trial were dismissed.

2. Obstruction of Justice—felonious—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of felonious obstruction of justice. Viewed in the light most favorable to the State, a jury question existed as to whether defendant unlawfully and willfully obstructed justice by providing false statements to law enforcement officers investigating the death with deceit and intent to defraud.

3. Accomplices and Accessories—accessory after the fact—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of accessory after the fact. The jury could rationally have concluded that the purpose of defendant's actions was to prevent the officers from learning the identity of the actual killer.

4. Criminal Law—prosecutor's arguments—jurors are voice and conscience of community

The trial court did not abuse its discretion in a felonious obstruction of justice and accessory after the fact case by allowing the State to make a closing argument that allegedly appealed to the jury's passion and prejudice without intervening *ex mero motu*. Our Supreme Court has held that it is not improper for the State to remind the jurors that they are the voice and conscience of the community.

5. Constitutional Law—double jeopardy—sentencing for both felonious obstruction of justice and accessory after the fact

The trial court did not subject defendant to double jeopardy by sentencing him for both felonious obstruction of justice and accessory after the fact. The two offenses are distinct, and neither is a lesser-included offense of the other.

Appeal by defendant from judgments entered 2 November 2012 by Judge W. Osmond Smith, III in Caswell County Superior Court. Heard in the Court of Appeals 23 October 2013.

Roy Cooper, Attorney General, by Ryan Haigh, Special Deputy Attorney General, for the State.

McCotter Ashton, P.A., by Rudolph A. Ashton, III and Kirby H. Smith, III for defendant-appellant.

DAVIS, Judge.

Defendant Donnell Tracy Cousin ("Defendant") appeals from his convictions of felonious obstruction of justice and accessory after the fact. His primary contentions on appeal are that the trial court erred in (1) denying him the opportunity to question and cross-examine an investigator about suspects in the murder out of which Defendant's charges arose; (2) denying his motions to dismiss; (3) allowing the prosecution to make statements during closing argument that appealed to the passion and prejudice of the jury; and (4) imposing multiple consecutive sentences for the same acts and offenses in violation of his constitutional rights. After careful review, we conclude that Defendant received a fair trial free from prejudicial error.

Factual Background

The State presented evidence at trial tending to establish the following facts: On 8 July 2005, Larry Mebane ("Mebane") was found mortally wounded in his car in Caswell County with three gunshot wounds to his head. Lieutenant Michael Adkins ("Lt. Adkins") of the Caswell County Sheriff's Office was one of the first officers to arrive on the scene after emergency services had been contacted via a 911 call. He found a handgun wedged between the driver's seat and the center console of the car. Lt. Adkins also noticed that the front passenger window of Mebane's car was "busted out" and that a beer can was lying near the car. The car was running with loud music playing on the radio.

Law enforcement officers first became aware of Defendant on 15 July 2005 when he was stopped at a checkpoint set up in the area of the shooting, which led to a subsequent interview of Defendant 11 days later at the Caswell County Sheriff's Office. When Defendant arrived at the Sheriff's Office on 26 July 2005, he gave a written statement to Investigator Jerald Brown ("Investigator Brown"), who was heading the investigation into the Mebane shooting along with State Bureau of Investigation ("SBI") Special Agent Brian Norman ("Agent Norman"). In this statement, Defendant indicated to Investigator Brown that he had seen Mebane around 10:30 p.m. on the night of the shooting. Defendant also named three specific individuals, Josh Anderson, Hugh Anderson, and Terrance Jackson, as having been with Mebane at the time of the shooting.

Defendant then voluntarily returned to the Caswell County Sheriff's Office on 30 March 2006 and provided additional information to Investigator Brown. During this meeting, Defendant stated that Mebane had been stopped earlier in the day by a man named Jeffrey Murdock and that Murdock had demanded money from Mebane. However, Defendant did not directly implicate Jeffrey Murdock in the shooting.

Defendant gave his next statement on 22 June 2006 at the Alamance County Sheriff's Office where he was being questioned in regard to unrelated felony charges in Alamance County. Defendant told investigators that "I know who the damn shooter is and I ain't going to tell him [referring to Agent Norman] nothing." Defendant proceeded to say that "Tego[1] [sic] Anderson is your shooter." Defendant added that "Josh and Hugh (Anderson) were on [sic] Josh's car and the two of them pulled over in front of Larry and got out." He then stated that "Tego [sic] pulled up behind Larry on [sic] the white truck and boxed him in so Larry couldn't go forwards or backwards. Larry got out of his car and was arguing with Josh and Hugh when Tego [sic] walked up from behind and shot Larry in the head!"

On 26 June 2006, Defendant gave another statement to Investigator Brown in which — this time — he stated that he was actually with Mebane when he was shot. Defendant stated that Mebane was being chased by Josh Anderson, Hugh Anderson, and Tino Anderson. He further related that Hugh Anderson "took a pistol and smacked Larry upside the face with it." He also said that "Hugh was the only one I saw with my own eyes with a gun."

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1. Tino Anderson's name is spelled in various places in the record as "Tego" Anderson. Both spellings refer to the same individual.

Defendant subsequently gave a different statement on 6 July 2006 to the Alamance County Sheriff's Office. On this occasion he stated that "[t]he night of the shooting I saw the man who shot Larry. It was Tino."

On 17 October 2006, Defendant was interviewed by Sheriff Michael Welch ("Sheriff Welch") of the Caswell County Sheriff's Office. During this interview, Defendant stated that "Tino was there, but he didn't shoot Larry."

On 14 November 2006, Defendant requested to speak with the "sheriff or someone in charge" about Mebane's murder. Chief Deputy Tim Britt ("Chief Deputy Britt") of the Alamance County Sheriff's Office was notified of Defendant's request and conducted an interview with him that was observed by Investigator Brown and Sheriff Welch. Defendant proceeded to give the following statement to Chief Deputy Britt:

> We [Defendant and Mebane] then turned right onto Dailey Store Road. . . . Sylvester Harris was in the middle of the road waving his hands. Larry Mebane stopped and got out. . . . As I was getting out of the car, I heard Sylvester Harris say to Larry Mebane, "Where is the drugs and money at, I know you got it!" . . . Sylvester's brother was standing beside the car they had been in. His name is Maurice Harris. . . . The next thing I saw as I got out of the car was Sylvester Harris shoot Larry Mebane in the back of the head.

The last statement that Defendant gave investigators occurred on 14 April 2008. Defendant claimed he had information regarding the gun used in the Mebane murder, and Investigator Brown and Sheriff Welch conducted an interview with him. Defendant denied knowing the location of the weapon but stated he could point them "in the right direction of that." He stated that Josh Anderson was Mebane's killer and admitted that his prior statements naming Tino Anderson as the shooter were deliberate falsehoods designed to mislead and misdirect law enforcement in their ongoing investigation into the murder. He admitted that "I put Tino in the middle as a block one time" and that in his earlier statements he had been "making you waste your time and gas and your ink pen." Defendant then stated that "I wasn't there on the scene period. Never was." At the end of the interview, Investigator Brown asked if everything he had told the officers was truthful, and Defendant replied "nope."

On 15 November 2011, Defendant was indicted on one count of accessory after the fact to first degree murder and seven counts of felonious obstruction of justice. A jury trial was held in Caswell County Superior Court on 29 October 2012. At the conclusion of the State's evidence,

Defendant moved to dismiss all of the charges against him. The motion was denied. Defendant renewed his motion to dismiss at the close of all the evidence, and the trial court once again denied the motion.

Defendant was convicted of all charges. He was sentenced consecutively to: (1) 168 to 211 months on the accessory after the fact charge; and (2) 168 to 211 months on the seven counts of obstruction of justice charges after the charges were consolidated. Defendant gave notice of appeal in open court.

Analysis

I. Denial of Defendant's Opportunity to Question Investigator Brown Regarding Other Suspects.

[1] Defendant first argues that the trial court erred by denying him the opportunity to question Investigator Brown about other suspects in the Mebane murder. At trial, Defendant's counsel sought to elicit from Investigator Brown during cross-examination information about his interviews with persons involved in the Mebane murder investigation. Specifically, she inquired whether during his interviews with Oscar Jackson and Terrence Jackson, either of those individuals had discussed or divulged any information relating to the identity of the shooter. The State objected to this entire line of questioning on the ground that the questions sought inadmissible hearsay because the statements sought were being offered to prove the truth of the matter asserted. The trial court sustained the State's objections. As an alternative basis, the trial court excluded the evidence under Rule 403 of the North Carolina Rules of Evidence based on the danger of unfair prejudice, confusion of the issues, and the possibility of confusing the jury.

Defendant argues the trial court's exclusion of the statements as inadmissible hearsay and under Rule 403 was erroneous. Defendant contends that this evidence was directly relevant to the issues presented and that its exclusion violated his constitutional right to present a defense.

Rule 801(c) of the North Carolina Rules of Evidence defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. R. Evid. 801(c).

Defendant asserts that in pursuing this line of questioning, he sought to "show how the investigation of Larry Mebane unfolded. More importantly, these questions were designed to determine if any of Cousin's statements to law enforcement were true and/or corroborated."

We rejected a similar argument in *State v. Hairston*, 190 N.C. App. 620, 625, 661 S.E.2d 39, 42 (2008), *disc. review denied*, 363 N.C. 133, 676 S.E.2d 47 (2009). In *Hairston*, this Court found no error in the trial court's ruling that testimony by a detective about a third party's statements indicating that the third party did not know the defendant would constitute inadmissible hearsay:

> Defendant contends that the statement was not offered for the truth of the matter asserted, but instead was offered as a historical fact — that is, whether Hicks knew defendant or not. Defendant, however, goes on to argue that the trial court's ruling requires reversal because, according to defendant, such evidence would have aided defendant's arguments concerning his alibi defense. According to defendant, had the testimony been admitted, the jury could have used the information as "proof" that Brown and another person, not defendant, committed the robbery. In essence, defendant argues that the testimony was not elicited for its truth, but had it been admitted, the jury could have used the statement for the truth of the matter asserted, that Hicks, who had used the stolen credit cards, did not know defendant — thus making it less likely that defendant participated in the robbery of Moore. Accordingly, the trial court did not err in sustaining the State's objection as the testimony was offered for the truth of the matter asserted.

Id.

We believe the same is true here. By Defendant's own admission, he sought to offer this testimony at least in part for the purpose of demonstrating the truth of the matter asserted. As such, the trial court did not abuse its discretion in sustaining the State's objections to this line of questioning on hearsay grounds. *See State v. Waring*, 364 N.C. 443, 498, 701 S.E.2d 615, 649 (2010) (holding that "[t]he range of cross-examination, though broad, is subject to the trial judge's discretionary powers to keep it within reasonable bounds. The trial court's rulings on cross-examination will not be held in error absent a showing that the verdict was improperly influenced thereby.") (internal quotation marks and citations omitted), *cert. denied*, ___ U.S. ___, 181 L.Ed.2d 53 (2011).[2]

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2. Because we conclude the trial court's exclusion of the evidence on hearsay grounds did not constitute an abuse of discretion, we elect not to address the trial court's alternative basis for exclusion based on Rule 403.

Even assuming *arguendo* that the trial court erred in excluding the evidence, we believe any such error was harmless. *See State v. Augustine*, 359 N.C. 709, 731, 616 S.E.2d 515, 531 (2005) (holding that to establish prejudice resulting from an evidentiary ruling by the trial court, a defendant must show a reasonable possibility that a different result would have been reached had an evidentiary ruling not been made), *cert. denied*, 548 U.S. 925, 165 L.Ed.2d 988 (2006).

Here, no prejudice to Defendant occurred as a result of the trial court's ruling. Our review of the record reveals that Defendant was still able to elicit similar evidence concerning the Mebane murder investigation by alternative means. *See State v. Rinck*, 303 N.C. 551, 572, 280 S.E.2d 912, 927 (1981) (holding that "any error by the trial court in sustaining the State's objections was cured when the evidence sought to be admitted was subsequently admitted without objection."). At trial, evidence concerning persons of interest in Investigator Brown's investigation was elicited through Defendant's subsequent line of questioning to Investigator Brown. Therefore, any error in the exclusion of this evidence was harmless.

Defendant also contends that the exclusion of this evidence violated his constitutional rights but concedes that no constitutional argument was asserted by him at trial. "Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal, not even for plain error." *State v. Jones*, 216 N.C. App. 225, 230, 715 S.E.2d 896, 900-01 (2011) (citation and quotation marks omitted). Therefore this claim is not properly before us.

II. Denial of Motions to Dismiss

Defendant next contends that the trial court erred in denying his motions to dismiss the charges of felonious obstruction of justice and accessory after the fact based on the insufficiency of the evidence. A trial court's denial of a defendant's motion to dismiss is reviewed *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). On appeal, this Court must determine "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation and quotation marks omitted), *cert. denied*, 531 U.S. 890, 148 L.Ed.2d 150 (2000). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980). Evidence must be viewed in the light most favorable to the State with every reasonable inference

drawn in the State's favor. *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L.Ed.2d 818 (1995).

A. Felonious Obstruction of Justice

[2] [I]n order to convict [a] Defendant of the common law offense of obstruction of justice, the State [is] required to demonstrate that Defendant ha[s] committed an act that prevented, obstructed, impeded or hindered public or legal justice. Although obstruction of justice is ordinarily a common law misdemeanor, N.C. Gen. Stat. § 14-3(b) provides that "[i]f a misdemeanor offense as to which no specific punishment is prescribed be infamous, done in secrecy and malice, or with deceit and intent to defraud, the offender shall . . . be guilty of a Class H felony." For that reason, [u]nder N.C. Gen. Stat. § 14-3(b) (1979), for a misdemeanor at common law to be raised to a Class H felony, it must be infamous, or done in secret and with malice, or committed with deceit and intent to defraud. If the offense falls within any of these categories, it becomes a Class H felony and is punishable as such.

State v. Taylor, 212 N.C. App. 238, 246, 713 S.E.2d 82, 88 (2011) (internal citations and quotation marks omitted). We have previously noted that "this State has a policy against parties deliberately frustrating and causing undue expense to adverse parties gathering information about their claims. . . ." *State v. Wright*, 206 N.C. App. 239, 242, 696 S.E.2d 832, 835 (2010).

In the present case, Defendant gave eight written statements to law enforcement officers concerning the events surrounding the murder of Mebane. In his first two written statements on 26 July 2005 and 30 March 2006, he denied being at the scene of Mebane's murder but identified individuals who may have been involved with Mebane's death.

In his next six statements on 22 June 2006, 26 June 2006, 6 July 2006, 17 October 2006, 14 November 2006, and 14 April 2008, Defendant admitted being present at the scene of the crime. In these statements, Defendant identified various alternating persons as the killer. On 22 June 2006, Defendant named Tino Anderson as the shooter and stated that Hugh Anderson and Josh Anderson were also involved. On 26 June 2006, Defendant named Hugh Anderson as the killer as he was "the only one I saw with my own eyes with a gun."

On 17 October 2006, Defendant did not identify any specific individual as the shooter but placed Tino, Hugh, and Josh Anderson at the scene

and stated: "Tino was there, but he didn't shoot Larry." On 14 November 2006, Defendant gave a different story, indicating that Maurice Harris and Sylvester Harris tried to rob Mebane and that Sylvester Harris was the shooter and then stated that "the next thing I saw as I got out of the car was Sylvester Harris shoot Larry Mebane in the back of the head."

On 15 April 2008, Defendant changed his story once again, stating that "I done already gave [sic] told you the name of who killed him already . . . Josh Anderson." Defendant also claimed in that statement that he was not at the scene when Mebane was murdered. Defendant then admitted that he had named Tino Anderson as the shooter in a previous statement as a "block." At the end of the interview, Defendant was asked if he was telling the truth and he responded "nope."

Defendant argues that the State offered no evidence that any of his statements were false or misleading and instead simply relied on the contradictory nature of Defendant's statements. We disagree.

Agent Norman of the SBI testified as to the significant burden imposed on the investigation of Mebane's murder resulting from Defendant's various conflicting statements. Agent Norman further explained that each lead was "followed up" and that the SBI ultimately determined that each person identified by Defendant had an alibi and was not present at the scene when the shooting occurred.

Clearly, when viewed in the light most favorable to the State, a jury question existed as to whether Defendant (1) unlawfully and willfully (2) obstructed justice by providing false statements to law enforcement officers investigating the death of Larry Mebane (3) with deceit and intent to defraud. Therefore, the trial court properly denied Defendant's motion to dismiss the felonious obstruction of justice charges.

B. Accessory After the Fact

[3] Defendant also asserts the trial court should have granted his motion to dismiss the charge of accessory after the fact because the State failed to produce substantial evidence that Defendant made false statements with the intent to help the actual perpetrator escape detection, arrest, or punishment.

The elements of accessory after the fact are as follows: "(1) the felony has been committed by the principal; (2) the alleged accessory gave personal assistance to that principal to aid in his escaping detection, arrest, or punishment; and (3) the alleged accessory knew the principal committed the felony." *State v. Duvall*, 50 N.C. App. 684, 691, 275 S.E.2d 842, 849, *rev'd on other grounds*, 304 N.C. 557, 284 S.E.2d 495 (1981); *see*

also N.C. Gen Stat. § 14-7; *State v. Barnes*, 116 N.C. App. 311, 316, 447 S.E.2d 478, 480 (1994). We note that N.C. Gen. Stat. § 14-7 permits the conviction of an accessory after the fact "whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice. . . ." N.C. Gen. Stat. § 14-7 (2013). Furthermore,

> [t]his Court has recognized that an indictment may properly allege unknown conspirators in charging a criminal conspiracy. It rationally follows that an indictment is valid which alleges the existence of an unknown co-principal in charging a crime. Here the bills of indictment do not allege that [the defendant's co-conspirator] was the person who actually perpetrated the offenses. The indictments charged that a crime was committed by an unknown person and that defendant was present, aiding and abetting in the deed. Thus the acquittal of [the defendant's co-conspirator] was not a sufficient basis for dismissal of the charges.

State v. Beach, 283 N.C. 261, 269, 196 S.E.2d 214, 220 (1973) (internal citations omitted), *overruled on other grounds by State v. Adcock*, 310 N.C. 1, 33, 310 S.E.2d 587, 605-06 (1981). Moreover, Defendant concedes in his brief that "[t]he State does not have to identify the killer of Larry Mebane, in order to convict [Defendant] of Accessory After the Fact of First Degree Murder."

Here, as discussed above, the evidence — when viewed in the light most favorable to the State — tended to show that Defendant gave eight different written statements to authorities on his own volition providing a wide array of scenarios surrounding the death of Mebane. In these various statements, Defendant identified four different individuals as being the person who shot Mebane. Furthermore, he admitted near the end of his 14 April 2008 interview with Investigator Brown and Sheriff Welch that he had not been truthful to investigators. The jury could rationally have concluded that his false statements were made in an effort to shield the identity of the actual shooter.

There was competent evidence introduced at trial that allowed the jury to rationally conclude that Defendant knew the identity of Mebane's shooter and was protecting that person. First, Defendant's statements to investigators suggested that he had, in fact, been present at the murder scene as his statements revealed his knowledge of information that could only have been obtained by someone physically present at the scene. In addition to knowing the location of the shooting, he also knew

that (1) Mebane had been left for dead in the passenger seat of the car; (2) a handgun was found wedged in between the seat and the console of the car; (3) a beer can was left beside the car; (4) Mebane had been shot in the head; (5) the car radio was on and playing loud music following the shooting; and (6) Mebane's jaw was broken.

Second, the fact that Defendant knew the true identity of the shooter was demonstrated by the testimony of his former girlfriend, Sheila Satterfield, who testified as follows:

> Q. Sheila, the question is, did Tracy tell you he was with Larry when he got shot?
>
> A. He did. He did.
>
> Q. And did Tracy tell you how the shooting occurred?
>
> A. He said he jumped out the car and ran. All I know somebody was shooting guns. That's all I know.
>
> Q. Did Tracy eventually tell you who that shooter was?
>
> A. I can't remember the name, but we was at a store one day, and he told me it was a guy that was in a brown Honda.
>
> Q. Did he actually point out the person in the store?
>
> A. I -- see I wasn't in the store. I was in the car, and um, when he came back, he said that's the guy that killed Little Larry. Look. Look. Look. I said, Oh, I ain't looking. Get in this car, and let's go.

Finally, Defendant admitted in his 14 April 2008 statement that "I put Tino [Anderson] in the middle as a block one time," thereby raising the inference that he was deliberately thwarting the investigators' attempts to apprehend Mebane's killer. In that same statement, Defendant further acknowledged that his false statements had made "you waste your time and gas and your ink pen," indicating that he was fully aware his false statements were resulting in a misuse of law enforcement time and resources by causing the investigators to chase false leads. The jury could rationally have concluded that the purpose of his actions was to prevent the officers from learning the identity of the actual killer.

We conclude that the evidence presented by the State was sufficient to raise a jury question as to the accessory after the fact charge. Accordingly, Defendant's argument is overruled.

III. State's Closing Argument

[4] Defendant next argues that the trial court abused its discretion by improperly allowing the State to make a closing argument that appealed to the jury's passion and prejudice without intervening *ex mero motu*. This argument likewise lacks merit.

"The standard of review when a defendant fails to object at trial [to statements in a closing argument] is whether the argument complained of was so grossly improper that the trial court erred in failing to intervene *ex mero motu*." *State v. Trull*, 349 N.C. 428, 451 509 S.E.2d 178, 193 (1998), *cert. denied*, 528 U.S. 835, 145 L.Ed.2d 80 (1999).

> In other words, the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made.

Id. "Statements or remarks in closing argument must be viewed in context and in light of the overall factual circumstances to which they refer." *State v. Phillips*, 365 N.C. 103, 135, 711 S.E.2d 122, 145 (2011) (citation and internal quotation marks omitted), *cert. denied*, ___ U.S. ___, 182 L.Ed.2d 176 (2012).

Consequently, "statements contained in closing arguments to the jury are not to be placed in isolation or taken out of context on appeal." *State v. Murrell*, 362 N.C. 375, 394 665 S.E.2d 61, 74 (2008) (citations and internal quotation marks omitted). Our Supreme Court has further held that "[t]o merit a new trial, the prosecutor's remarks must have perverted or contaminated the trial such that they rendered the proceedings fundamentally unfair." *Phillips*, 365 N.C. at 136, 711 S.E.2d at 146.

Here, Defendant contends that the State's closing argument was improper because it "sought pity and passion for victim's family, tried to make the jury share the responsibility of the prosecutor for prosecuting this case, and sought to convict Defendant for not cooperating with law enforcement." Specifically, he appears to be challenging the prosecutor's statement that "[t]his community deserves to be safe from a murderer."

Our Supreme Court has held that "it is not improper for the State to remind the jurors that they are the voice and conscience of the community." *State v. Garcell*, 363 N.C. 10, 63, 678 S.E.2d 618, 651 (2009) (citation

and internal quotation marks omitted). Therefore, we do not believe that this statement when viewed in the overall context of the closing argument in its totality required intervention *ex mero motu* by the trial court.

Defendant also appears to be contending the trial court should have intervened when the prosecutor made a comment that

> this is still somebody's child, and he didn't deserve to die like that, and his Momma didn't deserve to endure that loss, and his son from last night all the way for the rest of his life will not have his father to take him trick-or-treating, to buy his Christmas or be there for Easter or spend summer vacations, and that matters, and the State values that life, and you, the jury, values (sic) that life, and justice cries out that the person who did it be prosecuted. How many times could you have ever imagined that this case, the person who pulled the trigger and killed this young man, this father, in this room right now, in this moment there is one person in here who knows who did it, and it's the defendant. Right now. The pain and suffering that could be released. The justice that could be done, but instead of that, not once, not twice, not three times, not four times, 5, 6, 7 times over the span of seven years this man chose to lie about it in detail.

This portion of the State's argument sought to convey the notion that Defendant's pattern of false and misleading statements to investigators had prevented Mebane's family from learning the identity of his killer. "The admissibility of victim impact testimony is limited by the requirement that the evidence not be so prejudicial it renders the proceeding fundamentally unfair. Victim impact testimony is admissible to show the effect the victim's death had on friends and family members." *State v. Raines*, 362 N.C. 1, 15, 653 S.E.2d 126, 135 (2007) (internal citations and quotation marks omitted), *cert. denied*, 557 U.S. 934, 174 L.Ed.2d 601 (2009).

After reviewing the entirety of the State's closing argument and considering the context in which the challenged statements were made, we hold once again that Defendant has failed to carry his burden of demonstrating that the trial court had a duty to intervene *ex mero motu*. Therefore, we reject Defendant's arguments on this issue.

IV. Double Jeopardy

[5] Defendant's final argument is that the trial court erred in sentencing Defendant for two crimes — felonious obstruction of justice and

accessory after the fact — arising out of the same transaction, thereby violating his constitutional rights by subjecting him to double jeopardy. This argument likewise lacks merit.

Our Supreme Court has stated that "[b]oth the fifth amendment to the United States Constitution and article I, section 19 of the North Carolina Constitution prohibit multiple punishments for the same offense absent clear legislative intent to the contrary." *State v. Etheridge*, 319 N.C. 34, 50, 352 S.E.2d 673, 683 (1987).

> Where, as here, a single criminal transaction constitutes a violation of more than one criminal statute, the test to determine if the elements of the offenses are the same is whether each statute requires proof of a fact which the others do not. *Blockburger v. United States*, 284 U.S. 299, 76 L.Ed. 306 (1932); *State v. Perry*, 305 N.C. 225, 287 S.E. 2d 810 (1982). By definition, all the essential elements of a lesser included offense are also elements of the greater offense. Invariably then, a lesser included offense requires no proof beyond that required for the greater offense, and the two crimes are considered identical for double jeopardy purposes. *Brown v. Ohio*, 432 U.S. 161, 53 L.Ed. 2d 187 (1977); *State v. Revelle*, 301 N.C. 153, 270 S.E. 2d 476 (1980). If neither crime constitutes a lesser included offense of the other, the convictions will fail to support a plea of double jeopardy. *See State v. Walden*, 306 N.C. 466, 293 S.E. 2d 780 (1982).

Id.

The Supreme Court further clarified the double jeopardy analysis in *State v. Tirado*, 358 N.C. 551, 579, 599 S.E.2d 515, 534 (2004), *cert. denied sub nom. Queen v. N.C.*, 544 U.S. 909, 161 L.Ed.2d 285 (2005):

> Even where evidence to support two or more offenses overlaps, double jeopardy does not occur unless the evidence required to support the two convictions is identical. If proof of an additional fact is required for each conviction which is not required for the other, even though some of the same acts must be proved in the trial of each, the offenses are not the same.

Id. at 579, 599 S.E.2d at 534, (internal citation and brackets omitted).

In *Tirado*, the Supreme Court determined that the charges of attempted first-degree murder and assault with a deadly weapon with

intent to kill inflicting serious injury are not comprised of the same elements in that each requires an additional element not included in the other offense. *Id.* at 579, 599 S.E.2d at 534. Therefore, even though the crimes charged in *Tirado* arose from the exact same underlying transaction, the Court held that "[b]ecause each offense contains at least one element not included in the other, defendants have not been subjected to double jeopardy." *Id. See State v. Mulder*, No. COA13-672, ___ N.C. App. ___, ___, ___ S.E.2d. ___, ___ (filed Mar. 18, 2014) ("[A] defendant convicted of multiple criminal offenses in the same trial is only protected by double jeopardy principles if (1) those criminal offenses constitute the same offense . . . ; and (2) the legislature did not intend for the offenses to be punished separately. . . . [T]he applicable test to determine whether double jeopardy attaches in a single prosecution is whether each statute requires proof of a fact which the others do not." (internal citations and quotation marks omitted)).

The elements of common law felonious obstruction of justice are: (1) the defendant unlawfully and willfully; (2) obstructed justice; (3) with deceit and intent to defraud. *In re Kivett*, 309 N.C. 635, 670, 309 S.E.2d 442, 462 (1983); *State v. Clemmons*, 100 N.C. App. 286, 292-93, 396 S.E.2d 616, 619 (1990). The elements of accessory after the fact are: "(1) the felony has been committed by the principal; (2) the alleged accessory gave personal assistance to that principal to aid in his escaping detection, arrest, or punishment; and (3) the alleged accessory knew the principal committed the felony." *Duvall*, 50 N.C. App. at 691, 275 S.E.2d at 849.

Therefore, the elements of these two crimes are clearly not identical. Obstruction of justice, unlike accessory after the fact, requires deceit and intent to defraud. Accessory after the fact, unlike obstruction of justice, requires that the defendant personally assisted the principal who committed the crime in escaping detection, arrest, or punishment. The two offenses are distinct, and neither is a lesser included offense of the other. Consequently, because the charges of felonious obstruction of justice and accessory after the fact contain separate and distinct legal elements, Defendant has failed to show a double jeopardy violation.

Conclusion

For the reasons stated above, we hold that Defendant received a fair trial free from prejudicial error.

NO PREJUDICIAL ERROR.

Judges ELMORE and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
KEVIN McDONALD HENDERSON

No. COA13-1228

Filed 15 April 2014

Sexual Offenses—second-degree—sufficient evidence

The trial court did not err by denying defendant's motion to dismiss the charge of second-degree sexual offense. The evidence was sufficient to show that defendant acted by force and against the will of the victim, a necessary element of second-degree sexual offense.

Appeal by Defendant from Judgment entered 28 February 2013 by Judge Michael J. O'Foghludha in Wake County Superior Court. Heard in the Court of Appeals 19 March 2014.

Attorney General Roy Cooper, by Assistant Attorney General Daphne D. Edwards, for the State.

Jon W. Myers for Defendant.

STEPHENS, Judge.

Procedural History and Evidence

Defendant Kevin McDonald Henderson was charged with second degree sexual offense on 19 January 2012. The trial began on 20 February 2013 and concluded the following day. The evidence at trial tended to show the following:

Sandra[1] was walking through a Target store in Raleigh on 17 September 2011 with her young child. She was wearing a knee-length denim skirt with a slit in the back. While perusing the candle section, Sandra noticed a man, who was later determined to be Defendant, standing nearby. Sandra moved on to the cosmetics area and gave her child permission to explore the candy section, which was located "a few aisles down."

1. Defendant notes in his brief that, while N.C.R. App. P. 3.1(b) does not apply to adults, it is the policy of the North Carolina Indigent Defense Services "[to shield] the identities of victims of sexual crimes in appellate filings" regardless of age. We commend the policy of Indigent Defense Services and use a pseudonym for that purpose here. We recommend that the State also observe such a policy.

Sandra began looking at makeup. Another woman was standing about two feet away. As Sandra bent down to pick something off the bottom shelf, she felt fingers "coming up between the slit in my skirt, parting between my buttocks, and touching in between my vaginal lips."

> And I was, like — [the] first thing I thought was, like, my brain was trying to process something. And I don't know if anyone's ever had the experience of being in a grocery store aisle and, like, a three-year-old kid reaches up your skirt, but they don't mean it, you know, when a little kid does it. So the first thing my brain is trying to process is what was happening, was there a kid? And, like, my brain is, "Okay. No kid is going to do that." It was almost that feeling of, like, you know, something inappropriate. And I guess my brain was just grasping for it being a kid or something.

At that point, Sandra turned around and saw Defendant. "He was very close to me. His face was there. I saw him. He looked at me, and he ran. He ran right away." As Defendant left, Sandra heard the other woman say, "What did he do to you? What did he do to you?"

Sandra reported the incident to Target, and the police were called. In the meantime, Sandra met with a Target employee and explained the situation. According to the employee, Sandra was "very startled, shaken, not to the point she was in tears, but she was very upset. You could tell she was angry."

Testifying in his own defense, Defendant admitted "plac[ing his] right hand . . . on the top of [Sandra's] backside, her butt — buttocks . . . two inches above the split [in her skirt]." According to Defendant, he noticed her skirt "and was enticed by looking at that." When he saw her bend over to get something from a lower shelf, Defendant "wanted to touch her . . . backside because . . . the skirt was form fitting." Hoping to make it appear as if he accidentally brushed her, Defendant touched Sandra on the buttocks. When Sandra stood up, Defendant realized he had gone too far and left.

Defendant moved to dismiss the charges against him at the close of the State's evidence. That motion was denied, and Defendant renewed his motion to dismiss at the close of all the evidence. The motion was again denied, and Defendant was found guilty by unanimous jury verdict on 21 February 2013. One week later, on 28 February 2013, the trial court sentenced Defendant to 69 to 92 months in prison with credit for 264 days served. Defendant appeals.

Standard of Review

> Upon [the] defendant's motion for dismissal, the question for the [appellate c]ourt is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of [the] defendant's being the perpetrator of such offense. If so, the motion is properly denied.

State v. Fritsch, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation and internal quotation marks omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

Discussion

On appeal, Defendant contends that the trial court erred in denying his motion to dismiss because the evidence is insufficient to show that he acted "by force and against the will of [Sandra]," a necessary element of second-degree sexual offense. Specifically, Defendant argues that the touching occurred by surprise and, thus, did not "afford[Sandra] the opportunity to consent" or resist. This argument is entirely without merit.

Under section 14-27.5 of the North Carolina General Statutes, a person may be found guilty of a sexual offense in the second degree if that person engages in a sexual act with another person "[b]y force and against the will of the other person[.]" N.C. Gen. Stat. § 14-27.5 (2013).

> The statutory requirement that the act be committed by force and against the will of the victim may be established by either actual, physical force, or by constructive force in the form of fear, fright, or coercion. . . . "Physical force" means force applied to the body.

In re Clapp, 137 N.C. App. 14, 24, 526 S.E.2d 689, 696–97 (2000) (citations and certain internal quotation marks omitted). The actual force element "is present if the defendant uses force sufficient to overcome any resistance the victim *might* make." *State v. Brown*, 332 N.C. 262, 267, 420 S.E.2d 147, 150 (1992) (citations omitted; emphasis added).

With regard to the offense of rape, our courts have historically

> implied in law the elements of force and lack of consent so as to make the crime of rape complete upon the mere showing of sexual intercourse with a person who is asleep and therefore could not resist or give consent. The phrase "by force and against the will" used in the first and second-degree rape statutes and the first and second-degree sexual

> offense statutes means the same as it did at common law when it was used to describe some of the elements of rape. *It makes no difference* in the case of a sleeping *or similarly incapacitated* victim whether the State proceeds on the theory of a sexual act committed by force and against the victim's will or whether it alleges an incapacitated victim; *force and lack of consent are implied in law.*

State v. Dillard, 90 N.C. App. 318, 322, 368 S.E.2d 442, 445 (1988) (citations, certain internal quotation marks, certain brackets, and ellipsis omitted; emphasis added).

Here, as discussed above, Defendant argues that the State failed to present sufficient evidence that he acted by force and against Sandra's will because she did not have time to decide whether to consent or object to the touching.[2] Thus, Defendant suggests that individuals may lawfully commit acts similar to the one committed here as long as they do so by surprise. This argument borders on the absurd. As quoted above, we have already stated that an individual may be guilty of second-degree sexual offense when the victim is *sleeping* or *similarly incapacitated. Id.*

The touching in this case was clearly against Sandra's will. To the extent that Sandra was not aware of the touching before it occurred or did not understand the exact nature of the touching at the moment it occurred, lack of consent is implied in law. *See, e.g.*, *Brown*, 332 N.C. at 274, 420 S.E.2d at 154 (holding that the State introduced substantial evidence of the defendant's use of force, even though the victim initially believed the assailant was a nurse, when the defendant entered the victim's hospital room, pulled away her bed clothing and gown, pushed her panties aside, and touched her vagina). Whether Sandra was "surprised" by Defendant's actions has no bearing on the applicability of the second-degree sexual offense statute. Defendant's argument is overruled.

NO ERROR.

Judges GEER and ERVIN concur.

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2. Defendant's argument appears to be rooted in a misreading of the *Brown* case, cited above. In that case, Justice Frye wrote a concurring opinion expressing his wish that the Court had taken more time to "say explicitly what I believe is already implicit in our law: the elements of force and lack of consent in rape and sexual offense cases may be satisfied when the [State] demonstrates, as in this case, that the attack was carried out by surprise." *Brown*, 332 N.C. at 274, 420 S.E.2d at 154 (Frye, J., concurring). Defendant's brief indicates that he erroneously believes Justice Frye was *dissenting* and not concurring in that opinion. As a result, Defendant inaccurately argues that the trial court incorrectly "followed Justice Frye's dissent in *Brown* and applied the law as he wanted it to be." In fact, the trial court applied the law as it is.

STATE OF NORTH CAROLINA
v.
KENNETH CARROLL MEE

No. COA13-1035

Filed 15 April 2014

Constitutional Law—right to counsel—forfeited—defendant's behavior

Defendant forfeited his right to the assistance of counsel where he first waived his right to appointed counsel, retained and then fired counsel twice, was briefly represented by an assistant public defender, and refused to state his wishes with respect to representation, instead arguing that he was not subject to the court's jurisdiction and would not participate in the trial, and ultimately chose to absent himself from the courtroom during the trial.

Appeal by defendant from judgments entered 27 March 2013 by Judge Michael J. O'Foghludha in Wake County Superior Court. Heard in the Court of Appeals 4 February 2014.

Attorney General Roy Cooper by Special Deputy Attorney General David Efird for the State.

W. Michael Spivey for defendant-appellant.

STEELMAN, Judge.

Where defendant waived the right to appointed counsel, retained and then fired counsel twice, was briefly represented by an assistant public defender, and refused to state his wishes with respect to representation, instead arguing that he was not subject to the court's jurisdiction and would not participate in the trial, and ultimately chose to absent himself from the courtroom during the trial, defendant forfeited his right to the assistance of counsel.

I. Factual and Procedural Background

On 5 January 2012 defendant was arrested for trafficking in cocaine by possession of more than 28 but less than 200 grams of cocaine, possession of 573 grams of marijuana, and maintaining a dwelling for keeping and selling controlled substances. He was indicted for these offenses on 9 July 2012. Defendant appeared before at least four superior court

judges for pretrial proceedings and made inconsistent statements regarding his representation by counsel, including waiver of appointed counsel, hiring and then discharging counsel on two occasions, representation by an assistant public defender, and asserting an unsupported legal theory that he was not subject to the court's jurisdiction.

On 25 March 2013, defendant was before the trial court for trial. He refused to state a clear position regarding counsel and told the trial court that he did not want his retained counsel to represent him at trial, did not want to represent himself at trial, did not want standby counsel to take any role in the trial, and would not remain in the courtroom or otherwise "participate" in his trial. Defendant refused to remain in the courtroom and was confined to a holding cell near the courtroom during trial.

The State's evidence generally showed that law enforcement officers arrested defendant at his home on 5 January 2012 for possession of cocaine, marijuana, drug paraphernalia, and firearms. Defendant waived his *Miranda* rights, and gave a statement confessing to the charged offenses.[1] Defendant did not question the State's witnesses or offer any evidence. On 26 March 2013 the jury returned verdicts finding him guilty of trafficking in cocaine by possession of more than 28 but less than 200 grams of cocaine, possession of 573 grams of marijuana, and maintaining a dwelling for keeping and selling controlled substances.

The trial court sentenced defendant to a term of 35 to 51 months imprisonment for trafficking in cocaine, to begin at the expiration of three consecutive sentences of thirty days for contempt of court. The trial court imposed concurrent sentences of 6 to 17 months for the remaining offenses, and suspended each sentence, with concurrent terms of 30 months' probation to begin when defendant was released from prison. On 30 April 2013 the trial court corrected defendant's sentence for trafficking in cocaine to a term of 35 to 42 months in prison.

Defendant appeals.

II. Standard of Review

Defendant argues on appeal that his constitutional right to the assistance of counsel was violated. "The right to counsel is guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I of the North Carolina Constitution." *State v. Montgomery*,

1. The sole issue raised on appeal concerns the circumstances under which defendant proceeded to trial *pro se*. Given that defendant does not otherwise challenge the conduct of the trial or the factual basis for the charges, we find it unnecessary to set out further facts of the case in detail.

138 N.C. App. 521, 524, 530 S.E.2d 66, 68 (2000) (citing *State v. McFadden*, 292 N.C. 609, 234 S.E.2d 742 (1977)). The "standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citation omitted), *disc. review denied*, 363 N.C. 857, 694 S.E.2d 766 (2010).

III. Forfeiture of the Right to Counsel

A. Standard of Review

" '[A]n accused may lose his constitutional right to be represented by counsel of his choice when he perverts that right to a weapon for the purpose of obstructing and delaying his trial.' " *Montgomery*, 138 N.C. App. at 524, 530 S.E.2d at 69 (quoting *McFadden* 292 N.C. at 616, 234 S.E.2d at 747).

> Although the loss of counsel due to defendant's own actions is often referred to as a waiver of the right to counsel, a better term to describe this situation is forfeiture. "Unlike waiver, which requires a knowing and intentional relinquishment of a known right, forfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right."

Montgomery at 524-25, 530 S.E.2d at 69 (quoting *United States v. Goldberg*, 67 F.3d 1092, 1100 (3d. Cir. 1995)). In Montgomery, this Court held that the defendant's "purposeful conduct and tactics to delay and frustrate the orderly processes of our trial courts simply cannot be condoned. Defendant, by his own conduct, forfeited his right to counsel[.]" *Id.* at 525, 530 S.E.2d at 69 (citation omitted).

B. Analysis

Review of the defendant's actions during the fourteen months between his arrest and trial reveals that he engaged in behavior which resulted in the forfeiture of the right to counsel. At his first appearance in district court on 6 January 2012, defendant signed a waiver of appointed counsel. On 6 June 2012 defendant was again in district court, where he refused to check any of the options on a waiver of counsel form and signed the form "All rights reserved UCC-1-300 Kenneth Mee Bey." Handwritten notes on the waiver form indicate that defendant "refused to address [the] court about counsel," and stated that "he did not recognize the Court." The notes also indicate that defendant previously had retained attorney Alton Williams to represent him, but that Mr. Williams

was allowed to withdraw because he "could not ethically proceed" to pursue motions that defendant had filed.

On 30 July 2012 defendant appeared in superior court for arraignment before Judge Donald W. Stephens. Initially, he denied being Kenneth Mee, and stated that he was "Kenneth Mee Bey, a prior person" who was a "sovereign from [Moorish] descent" and was "not a Fourteenth Amendment citizen." However, Judge Stephens ruled that if defendant would not acknowledge his identity his bond would be revoked. Defendant then verified for the court that he was Kenneth Mee. Defendant told the court that he did not have an attorney, did not intend to hire one, and did not want the court to appoint a lawyer, but that he did not intend to proceed *pro se* because he was "improper personnel." Defendant refused to enter a plea and Judge Stephens entered a plea of not guilty on his behalf, prompting defendant to ask for the judge's "oath of office" and "bonding number" so that he could file "a counterclaim in Federal Court." When defendant continued to argue with Judge Stephens, the judge revoked his bond and ruled that, because defendant would not sign a waiver of the right to counsel, he was appointing the public defender's office to represent him.

On 22 August 2012, defendant was again before Judge Donald Stephens. At this hearing he was represented by Stephanie Davis, an assistant public defender, who asked Judge Stephens to reconsider defendant's bond. However, the court ruled that, after reading defendant's *pro se* filings, he was concerned that, given defendant's contention that the laws of North Carolina and of the United States did not apply to him, defendant would not appear for trial. Defendant would not allow his attorney to enter a plea on his behalf and informed the court that he objected to the court's jurisdiction. When defendant refused to enter a plea, Judge Stephens entered a plea of not guilty on his behalf, and denied defendant's request to modify the conditions of release.

On 25 October 2012, Mr. Williams filed a notice of representation indicating that defendant had again retained him as counsel, and Ms. Davis was permitted to withdraw. On 29 October 2012 defendant was in court before Judge Paul Gessner, at which time Mr. Williams entered "a general appearance on [defendant's] behalf[.]" The prosecutor informed Judge Gessner that defendant had previously submitted "filings where the defendant was invoking the UCC and claiming he was not a citizen of the State of North Carolina and not subject to the laws of this state and the jurisdiction of the court." Mr. Williams responded that defendant was "submitting himself to the jurisdiction of the court" and would withdraw

his motions challenging the court's jurisdiction. Judge Gessner declined to modify the conditions of defendant's bond.

Mr. Williams filed a motion for continuance on 30 November 2012, which was granted by Judge Howard E. Manning, Jr., on 12 December 2012. However, when defendant was next in court on 4 February 2013, before Judge G. Wayne Abernathy, the prosecutor informed the court that defendant had revived his challenge to the court's jurisdiction. When Mr. Williams stated that he was "ready to proceed" and "prepared to represent" defendant at trial, defendant objected:

> THE COURT: What's the objection?
>
> DEFENDANT: I'm the proper person. I'm defending myself. He is not my attorney. I'm a sovereign nation. He is not my attorney.
>
> THE COURT: So you're telling me that you do not want Mr. Williams to represent you in this matter?
>
> DEFENDANT: I'm telling you the only issue for me today is my personal jurisdiction. I'm making a special appearance. I'm showing the Court the sole reason for my appearance is to establish personal jurisdiction. . . .
>
> . . .
>
> THE COURT: . . . The first question is are you representing to me that Mr. Williams is not your lawyer?
>
> DEFENDANT: Yes, sir.
>
> . . .
>
> THE COURT: So that means that you are discharging Mr. Williams?
>
> DEFENDANT: I am not contracting with the State of North Carolina. He's an agent of the State so he's not –
>
> THE COURT: He's your attorney right now.
>
> DEFENDANT: No, sir, he's not.
>
> . . .
>
> THE COURT: . . . Anyway, you understand you're charged with trafficking in cocaine by possession?

DEFENDANT: No, sir, I do not understand that charge. No, sir, I do not.

THE COURT: What is it you do not understand?

DEFENDANT: I do not understand what you're trying to charge me with. The only reason I'm here for is the jurisdiction.

THE COURT: I'm going to get to the jurisdiction.

DEFENDANT: I don't understand none of the charges . . . Nothing you're saying to me that pertains to whatever you're trying to pertain to, I'm not in that jurisdiction so, no, sir, I don't understand none of that.

THE COURT: Well, sir, the charge is of trafficking cocaine by possession –

DEFENDANT: I don't know what you're talking about.

THE COURT: You're charged with possession and intent to sell and deliver marijuana.

DEFENDANT: The only thing I'm here for is the jurisdiction.

THE COURT: You're also charged with maintaining a dwelling place for keeping and selling of a controlled substance. And, apparently, you have confessed to those crimes or there's certainly evidence that you have–

DEFENDANT: No, sir. It wasn't me.

. . .

THE COURT: So you're charged with three felonies. And one of them is extraordinarily serious because there's a minimum sentence that I cannot go below. And I will tell you that most people who choose to represent themselves make a serious mistake. Very rarely are they found not guilty. I just want you to be aware of that. You don't have to agree with that. I just want you to be aware of that. So it's your position you want to represent yourself, and I will allow you to do that. Are you willing to sign a waiver of counsel?

DEFENDANT: No, sir. I will not sign any contracts. I will not take any oaths.

THE COURT: All right. I'm going to appoint Mr. Williams as standby counsel just in case you have any questions, but you're responsible for your own case. . . .

DEFENDANT: I'm only here for jurisdiction. I don't know what you're talking about when you say trial.

THE COURT: Your trial.

DEFENDANT: No, sir.

THE COURT: But I will entertain your motion . . . to dismiss for lack of jurisdiction.

DEFENDANT: . . . I filed three motions that were never answered. Are you answering here in the courtroom? They have to be answered in writing. . . . I object to this whole proceeding, sir. . . . [T]he only reason I'm here is, like I said, the jurisdiction. . . . Anything else you say, I object.

THE COURT: Well, you can object. I note your objection. I want you to understand that if you're not ready to participate we can send you back to jail and sit there until you're ready.

DEFENDANT: Well, send me back to jail because I'm not - I will never participate in this - what is your status? Who are you? What is your nationality?

THE COURT: Do you want to argue a motion on lack of jurisdiction?

DEFENDANT: No. . . . I would like to get that information.

THE COURT: I've asked you –

DEFENDANT: No, sir, . . . [O]n the record and for the record I have asked for the judge – What'd say your name was?

THE COURT: Abernathy.

DEFENDANT: - for his oath of office, his bonding license, and what nationality he is. And you're saying now you're not going to tell me?

THE COURT: I'm saying that you don't get to ask me questions.

. . .

DEFENDANT: . . . [A]s far as your proceedings go, you're talking about sending me back to jail. That's what you will have to do because I will object, and I will not contract under UCC 1-308-1. I will not contract. And all law is contract. . . . I object on the grounds I am Alique Mee Bey, executive beneficiary on behalf of Kenneth Mee. I am a free indigenous man in full life and peacefully inhabited which duly arise under the United Nations Declaration of Rights of Indigenous People . . . Once jurisdiction is challenged, the Court cannot proceed when it clearly appears that the court lacks jurisdiction[.] . . .

THE COURT: All right. You have argued I do not have jurisdiction over you[.] . . . U.C.C. law is a civil contract issue. It does not apply in criminal court. I have read all of your motions, and, sir, each and every one of them is denied. . . . Are you prepared to go forward with your trial?

THE DEFENDANT: No, sir. We will not go forward. I told you I understand no trial. I'm only here for jurisdiction. That's the only reason I'm here. I'm not here to try no case. I'm not here for no understanding, no charges. I don't even know what you're talking about. I'm here for one reason.

THE COURT: Mr. Williams, have you presented copies of his indictments to him?

MR. WILLIAMS: He's seen everything.

THE COURT: He's informed of the charges?

DEFENDANT: No, sir. I object.

THE COURT: . . . [Y]our objection is noted.

DEFENDANT: I will keep objecting. Sir, I'm only here for jurisdiction. That's it.

THE COURT: And your motion to deny jurisdiction is denied.

. . .

DEFENDANT: Like I said, I object to anything you say about a charge. I don't know what you're talking about.

THE COURT: That's fine. Your objection's in the record. Now we're going to move on.

DEFENDANT: We ain't going to move on. I'm not going to proceed.

THE COURT: You understand you'll sit in jail until you're ready to proceed?

DEFENDANT: You do what you have to.

. . .

PROSECUTOR: Just so we're clear, Judge, the case is continued off this calendar. Mr. Mee has fired his attorney, Mr. Williams, and is proceeding *pro se*.

THE COURT: He's proceeding *pro se*. The Court makes a finding of fact that the Court tried to get Mr. Mee to sign a waiver of counsel. He refused to do so, and he is now proceeding *pro se*. The Court appointed Mr. Williams as standby counsel. The Court explained to him that Mr. Williams does not conduct the trial but would be available for questions or advice from him. And the Court therefore orders that Mr. Williams is relieved as counsel of record, but he is reserved as standby counsel and that the - the Court finds that the defendant has knowingly and intelligently waived his right to counsel, chooses not to use counsel, and has stated a number of times that he represents himself and he contests the jurisdiction of the Court. The Court also notes that the defendant's conduct is somewhat contemptuous, but the Court took no action on that at this time.

. . .

THE COURT: We're back on the record in the matter of the State versus Kenneth Carroll Mee[.] . . . [A]ny time from today until the defendant is ready to be tried is to be excluded . . . in calculating any times for a speedy trial motion because the State was ready to proceed, his lawyer was ready to proceed, and the defendant prohibited the trial of this case by refusing to accede to the jurisdiction

> of the Court and stated unequivocally that he was going to keep objecting and made it impossible for the Court to try the case.

Defendant appeared for trial on 25 March 2013, before Judge Michael J. O'Foghludha. The prosecutor summarized the procedural history of the case and informed the trial court that the State was prepared to proceed. The trial court tried unsuccessfully to determine whether defendant wished to appear *pro se* or with the assistance of counsel:

> THE COURT: . . . Mr. Mee, what's the status of your attorney situation right now, sir, are you representing yourself?
>
> DEFENDANT: I am myself. I'm an improper person, sir, so I have no attorney. I'm talking for myself.
>
> THE COURT: Thank you. So you're representing yourself as far as this proceeding.
>
> DEFENDANT: I'm an improper person. I am myself. I don't have to represent myself. I'm talking for myself.
>
> THE COURT: . . . Mr. Williams, let me ask you, sir. I just noted in the file that you have a general appearance back in October 15th of 2012.
>
> MR. WILLIAMS: That's correct.
>
> THE COURT: But you are not representing Mr. Mee at the moment; is that correct?
>
> MR. WILLIAMS: No, Judge. I was appointed standby counsel by Judge Abernathy.
>
> . . .
>
> DEFENDANT: I want to object to the charges that Mr. Wilson has brung against me. The only reason I'm here, sir, is for a special appearance for jurisdiction, showing up for this Court for the sole purpose of contesting the Court's jurisdiction over me. My status shows evidence contrary to this Court's presumption, therefore, this Court's presumption of assertion of jurisdiction over me disappears[.] . . .
>
> . . .
>
> DEFENDANT: For the record and on the record, the only reason why I'm here is for personal jurisdiction. . . . This

Court has no jurisdiction. . . . Furthermore for the record and on the record, I am . . . Malik Bey, executive beneficiary on behalf of the trust of Kenneth Mee. I am an indigenous man in full light. I will not participate in any proceedings brought against me by this fictitious corporation which is the State of North Carolina. . . . [N]or will I stand under any fictitious contracts forced against me. I will not take any oaths, but I will affirm the truth. . . .

. . .

THE COURT: Yes, sir. Mr. Wilson, I was looking at the indictment, and it appears that Mr. Mee is indicted under 90 -

DEFENDANT: I object.

THE COURT: I understand, sir, overruled. . . . If you wouldn't mind, just let me talk, and I'll be happy to let you talk.

DEFENDANT: I'm going to object to anything that doesn't perceive jurisdiction. So I'm not going to participate in anything. . . . I have a writ of *habeas corpus* claim on the State, and he has a copy there. . . . [Y]ou might as well send me back to jail. Because what I'm going to do is just include you . . . in the federal claim that I'm going to file against Mr. Williams.

THE COURT: That's fine. Let me just stop you. Mr. Mee appears to be indicted under 90-95(h)(3) for 28 grams or more, but less than 200 grams –

DEFENDANT: I object.

THE COURT: Sir, I'm going to give you a little warning here. I don't mind listening to you, and I will let you talk, but please don't interrupt me, because I'm trying to talk. . . . Mr. Wilson, Mr. Mee appears to be indicted under 90-95(h)(3)(a), more than 28 grams, less than 200, punished as a class G felon, sentenced to a minimum term of 35 and a maximum of 42, with a fine of $50,000 as a minimum maximum term of that statute. . . .

. . .

THE COURT: . . . Mr. Mee, you may object, sir, now.

DEFENDANT: Yes, I object to what he's talking about.

THE COURT: All right, sir. That's overruled. Let me ask you a question, sir. . . . I understand you object to the jurisdiction of the Court, but you are indicted under three separate indictments. One is trafficking and possession of less than -

DEFENDANT: Sir –

THE COURT: Let me just finish talking and then we'll - trafficking by possession of less than 28 but more than 200, which is a class G felony. Carries a minimum of 35 and a maximum of 50, and a mandatory minimum fine of $50,000. Your other two charges are possession with intent to sell and deliver marijuana greater than one and one half ounces, which is a class I felony with a maximum possible punishment of a minimum of 12 and a maximum of 24. And a third indictment of intentionally maintaining a dwelling for the keeping or selling of controlled substances, which is also a class I felony, with a minimum of 12 and a maximum of 24. And the reason I'm telling you this, Mr. Mee, is that if you would like to be represented by a court-appointed counsel to represent you in this matter –

DEFENDANT: I'm not going to –

THE COURT: - I will do that.

DEFENDANT: Okay. I understand what you're saying. But I'm saying I'm not going to accept these proceedings. I'm not going to be in this proceeding. I'm not going to take count in these proceedings.

. . .

THE COURT: But I just want to inform you that I would appoint counsel to represent you.

DEFENDANT: The only thing that I'm here for is personal jurisdiction, and the Court doesn't have it over me. . . . So as far as the charges or whatever you're talking about, I don't even know what you're talking about.

THE COURT: But you don't want me to give you an appointed attorney, you want to just object to the jurisdiction of the Court; is that correct?

DEFENDANT: Jurisdiction of the Court, and . . . this fictitious corporation, which is North Carolina, bringing charges against me[.] . . .

. . .

THE COURT: What we're going to do, how we're going to proceed is that there are these charges that have been brought and we're going to --

DEFENDANT: By who?

THE COURT: By the State of North Carolina. . . . And we're going to bring them to trial.

DEFENDANT: No, I object.

THE COURT: I understand, and that objection is overruled. But let me tell you this. We're going to have a trial --

DEFENDANT: No, sir.

THE COURT: - and we're going to bring a jury into the courtroom. And you –

DEFENDANT: You cannot proceed --

THE COURT: Sir, I'm talking now. So I'm warning you, I don't want to be interrupted. If you'll just let me finish, and I'll let you talk too.

DEFENDANT: Okay.

THE COURT: So what we're going to do is, in a bit we're going to call for people who have been called for jury service, and about 40 or 50 people are going to come into the room. Twelve of them are going to be placed randomly into the box. . . . And the District Attorney is going to have a chance to ask them some questions. And you're going to have a chance to ask them some questions.

DEFENDANT: No, I'm not. I'm not going to - I'm not going to be with these proceedings, Your Honor. If you're telling me you're going to do what you're going to do, you're going to violate my United States, United Nation rights. The best thing you can do right now is send me back to jail. All I'm going to do is object to any time you ask me something. . . . I will not participate in this contract in any kind of way. . . .

THE COURT: Mr. Mee, I want you to understand, yes, you're correct –

DEFENDANT: I'm not understanding anything you're talking about.

THE COURT: Sir, please don't interrupt me, one human being to another. . . . What we're going to do is, we're going to bring a jury in here. And you're right, we are going to proceed . . . whether you like it or not.

DEFENDANT: That's fine. . . . I won't be a part of the proceedings, is what I'm saying.

THE COURT: That's fine. Let me just explain to you what's going to happen, because you have a right to know it. So we're going to bring 40, 50 people into this room. Twelve of them are going to be put in the box. The District Attorney is going to have a chance to ask them questions. You're going to have a chance to ask them some questions.

DEFENDANT: No, I'm not.

THE COURT: Then 12 people are going to be selected.

DEFENDANT: No, sir.

THE COURT: Then after that, Mr. Wilson here as the State is going to put his evidence on. And he's going to have a chance to ask some questions, and you're going to have a chance to ask some questions.

DEFENDANT: I will not.

THE COURT: That's fine. But you have a right to be here, is what I'm trying to tell you.

DEFENDANT: It's participating. I done told you I'm not going to participate.

THE COURT: So are you telling me you want to go back –

. . .

DEFENDANT: What I'm saying, anyway, you can sit there . . . Mr. Administrator. Because since 1789, there's been no Judges. You're just an administrator of the court anyway. That's all you are, with your yellow fringe. . . . My First Amendment right has been violated. My Eighth Amendment right and Fourteenth[.] . . .

. . .

THE COURT: Sir, you have a right to participate in this trial. And if you don't want to take it, you don't have to.

DEFENDANT: I've already told you. I will not participate in any of the fictitious contracts that the State of North Carolina are bringing. So if you're telling me you're going to send me back and proceed, then you do so. . . . I'm going to object. I'm going to object to everything that happens. So if you're saying for me to stay here is participating, take me back, because I'm not going to participate.

THE COURT: So you don't want to sit here during this trial.

DEFENDANT: I will not participate in any trial, anything, no, sir.

THE COURT: You will not exercise your right to sit here and have Mr. Williams help you.

DEFENDANT: I will not participate with anything with the fictitious State of North Carolina. . . . The trial is going to happen without me. . . .

THE COURT: Well, you have a right to sit here and listen to the evidence against you -

DEFENDANT: No.

THE COURT: - and consult with Mr. Williams. And I'm also - you also have the right to take court-appointed counsel, to have an attorney represent you, to see if a jury will find you not guilty.

DEFENDANT: I will not take a court-appointed attorney. An agent of the State. He's representing the State. He's with you, he's not with me. . . . I've told you I will not participate in anything dealing with the Court trying to forcibly make me stand to trial. I'm not going to participate in it. . . . And if you're saying you're going to proceed without me, then that's what you need to do. But I won't participate in it. I won't consent to it. No, sir.

THE COURT: If you don't want to sit here in this trial, I'm going to try to get it hooked up so that you can at least see the proceedings.

DEFENDANT: No, no, I'm not going to participate in them at all. . . . I'm not going to take part in this, Your Honor. . . . I will not watch a video. . . . My sole purpose here is for jurisdiction. You're saying you overruled that[.] . . . The holder in due course has to press charges. Who is the holder in due course? UCC 3-308. All law is contract. . . . Therefore, the Uniform Commercial Code applies. . . . I'm not going to participate in this. I'm protected under international law of the United States Republic Peace Treatise of 1787[.]. . .

. . .

DEFENDANT: . . . I put on the record where I stand with the jurisdiction, that this Court lacks jurisdiction. I put on the record that I will not participate in these proceedings.

. . .

THE COURT: So let me try to just give you a little information.

DEFENDANT: Okay.

THE COURT: So I understand what you're saying, that you're not going to participate. . . . I suppose it's your right really, not to participate. . . . But if you continue to say you won't participate, then I am going to proceed. . . . A jury is going to rule on your guilt or innocence, based on the evidence that's presented. . . . And if you're not here, and there's no defense presented and you're not participating, the chances of the jury acquitting you are . . . kind of lessened. . . . And if you don't participate, one thing that Mr. Williams could do, is that Mr. Williams could ask questions on your behalf to try to -

DEFENDANT: No, sir.

. . .

THE COURT: And you don't want Mr. Williams to ask questions of the witnesses on your behalf?

DEFENDANT: There's nobody to talk to. There's nobody here. If you're going to proceed, then you do what you have to do, without my consent. You do what you have to do. But no, I don't have counsel. I don't want counsel.

. . .

> THE COURT: And you don't want Mr. Williams to do anything on your behalf?
>
> DEFENDANT: Nobody do nothing on my behalf. . . .

The trial court attempted unsuccessfully to obtain defendant's cooperation in remaining in the courtroom when the jury venire was brought in, to ascertain that defendant had no prior acquaintance with the any of the prospective jurors. Defendant refused to be seated or stay in the courtroom, despite being held in contempt three times. After defendant was taken to a holding cell, the trial court stated that:

> THE COURT: The Court finds that Mr. Mee was removed from the courtroom because he was brought in for approximately an hour. The Court attempted to give him the right to proceed to trial, either *pro se* or with appointed counsel, or with standby counsel, and that Mr. Mee continually interrupted the Court and . . . the Prosecutor, and stated emphatically over and over . . . again that he would not participate in this trial. So the Court finds that his behavior is willfully disruptive, disrespectful of the Court, and the trial may proceed in his absence, since he has stated that he will not participate.
>
> . . .
>
> THE COURT: . . . [He] appeared to me to be competent too. And he certainly has filed a lot of paperwork in the file, which indicates that he is a very intelligent person. . . . [H]e's unequivocally stated over and over again that he won't participate and doesn't recognize the jurisdiction of the Court[.] . . . There's a number of things I'd like Mr. Williams to do at every break. And one is, is to inform Mr. Mee of his right to be present. . . . And I would like Mr. Williams to request Mr. Mee to allow him to make objections, address the Court, and cross examine witnesses on his behalf. . . .

At appropriate intervals during the trial, defendant's standby counsel spoke with defendant, informing him of his right to be present in court and asking if he had changed his mind about participating in the trial. Defendant consistently refused to participate, on one occasion asking standby counsel "to inform the Court that he's not going to participate,

that he does not know who the State of North Carolina is, and he does not understand the proceedings." In response, the trial court stated:

> THE COURT: . . . [T]he Court finds as a fact that Mr. Mee is intentionally disrupting these proceedings and intentionally trying to impede his trial. And that was apparent from his demeanor yesterday when I saw him. . . . [T]he Court notes from the court file that Mr. Mee had at least one court-appointed attorney that he fired. Then he retained Mr. Williams; he fired Mr. Williams. Then he came in front of Judge Abernathy and said he wanted to proceed pro se. He told Judge Abernathy [and] Judge Stephens . . . that he would not recognize this Court. . . . [H]e refused to participate yesterday and would not sit and would not recognize the Court's contempt powers. So despite Mr. Mee's protestations that he does not understand these proceedings, the Court is of the opinion that he understands these proceedings very well, and just is not recognizing the Court[.] . . . He's obstructing these proceedings.

To summarize the procedural background:

> 5 January 2012: Defendant was arrested.
>
> 6 January 2012: Defendant appeared in district court and signed a waiver of his right to appointed counsel.
>
> 6 June 2012: Defendant appeared in district court, refused to check any of the options on a waiver of counsel form, and signed the form as "Kenneth Mee Bey." Handwritten notes state that defendant refused to address the court regarding counsel, and that he had previously hired an attorney, Alton Williams, who had been permitted to withdraw due to ethical concerns.
>
> 30 July 2012: Defendant appeared in superior court before Judge Stephens and refused to enter a plea or to clearly state his wishes regarding counsel, instead making statements regarding his legal status and demanding to see the court's oath of office so that he could file "a counterclaim." Judge Stephens entered a plea of not guilty, appointed the public defender to represent him, and revoked defendant's bond.
>
> 22 August 2012: Defendant appeared before Judge Stephens, represented by assistant public defender

Stephanie Davis. He allowed Ms. Davis to request a bond reduction, but would not allow her to enter a plea on his behalf, and stated that he objected to the court's jurisdiction. Judge Stephens entered a plea of not guilty and denied defendant's request for a modification of bond.

25 October 2012: Mr. Williams filed a notice of representation. Ms. Davis's motion to withdraw was allowed.

29 October 2012: Mr. Williams represented defendant in superior court before Judge Paul Gessner, where he made a "general appearance" on defendant's behalf and told the court that defendant was "submitting himself" to the court's jurisdiction and would withdraw his *pro se* motions challenging the jurisdiction of the North Carolina courts. Mr. Williams asked for a bond reduction, assuring the court that defendant's objection to the court's jurisdiction was no longer an issue.

30 November 2012: Mr. Williams filed a motion for continuance, which was granted by Judge Howard Manning.

4 February 2013: Defendant appeared before Judge Abernathy. The prosecutor stated that defendant had resumed his challenge to the court's jurisdiction. When Mr. Williams said he was ready to proceed, defendant objected, insisting he was present only to challenge jurisdiction and that Mr. Williams was not his attorney. Defendant asserted that he was not subject to the court's jurisdiction, and the court denied his motions to dismiss for lack of jurisdiction. In response to the court's statements on any subject other than jurisdiction, defendant claimed that he did "not understand" what was said, without identifying the source of his confusion, and objected to the court speaking on any subject other than jurisdiction. He refused to sign a waiver of counsel or state his wishes regarding representation and informed the court that he would "never participate" in a trial. Judge Abernathy appointed Mr. Williams as standby counsel and found that defendant waived the right to counsel and was proceeding *pro se*.

25 March 2013: Defendant was in court for trial and engaged in an extensive colloquy with the trial court, during which he refused to state his wishes regarding counsel, alleged that he did "not understand" any subject other

> than jurisdiction, argued with the trial court, repeatedly insisted that he would not participate in the trial, and was held in contempt three times for refusing to sit down. Defendant left the courtroom and was not present during his trial.

In sum, defendant appeared before at least four different judges over a period of fourteen months, during which time he hired and then fired counsel twice, was briefly represented by an assistant public defender, refused to indicate his wishes with respect to counsel, advanced unsupported legal theories concerning jurisdiction, and claimed not to understand anything that was said on a subject other than jurisdiction. When the case was called for trial, defendant refused to participate in the trial. "Such purposeful conduct and tactics to delay and frustrate the orderly processes of our trial courts simply cannot be condoned. Defendant, by his own conduct, forfeited his right to counsel and the trial court was not required to determine, pursuant to G.S. § 15A-1242, that defendant had knowingly, understandingly, and voluntarily waived such right before requiring him to proceed *pro se*." *Montgomery* at 525, 530 S.E.2d at 69 (citing *McFadden*).

Defendant acknowledges the extensive procedural history of this case and concedes that defendant was "disagreeable, suspicious, and obsessed with legally irrelevant matters." He argues, however, that defendant should not be held to have forfeited his right to counsel because he "did not threaten counsel or court personnel" and "was not abusive." Defendant contends that forfeiture requires evidence that he "asserted his position by means of serious misconduct that prevented the court from making a determination about whether he was competent and wanted to make a knowing and understanding waiver of his right to counsel." Defendant thus posits that, unless a defendant is physically abusive or prevents the court from informing him of his right to counsel, the defendant's behavior cannot support a finding that he forfeited the right to counsel.[2] Defendant cites no authority for this position, and we know of none. "Any willful actions on the part of the defendant that result in the absence of defense counsel constitutes a forfeiture of the right to counsel." *State v. Quick*, 179 N.C. App. 647, 649-50, 634 S.E.2d 915, 917 (2006) (citing *Montgomery* at 524, 530 S.E.2d at 69). Moreover,

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2. Defendant also makes generalized references to the possibility that he "asserted his position because of ignorance, [or] some form of limited mental capacity or [mental] illness[.]" However, defendant does not identify any evidence that raises an issue concerning defendant's competence, and we discern none.

defendant was held in contempt three times by the trial court, which indicates that his behavior was somewhat disruptive.

We also note that in *State v. Leyshon*, 211 N.C. App. 511, 710 S.E.2d 282, *appeal dismissed*, 365 N.C. 338, 717 S.E.2d 566 (2011), we held in a similar factual context that the defendant had forfeited his right to counsel. In *Leyshon*, as in the present case, the defendant "refused to answer whether he waived or asserted his right to counsel," "made contradictory statements about his right to counsel," and contended that he was not subject to the court's jurisdiction. *Leyshon*, 211 N.C. App. at 517, 710 S.E.2d at 287. We held that he had forfeited the right to counsel:

> [The defendant] obstructed and delayed the trial proceedings. The record shows that Defendant refused to sign the waiver of counsel form filed on 19 July 2007 after a hearing before the trial court. At the 7 January 2008 hearing, the court . . . repeatedly asked if Defendant wanted an attorney. Defendant refused to answer, arguing instead, "I want to find out if the Court has jurisdiction before I waive anything." . . . Likewise, at the 14 July 2008 hearing, Defendant would not respond to the court's inquiry regarding whether he wanted an attorney. . . . At the next hearing on 13 July 2009, Defendant continued to challenge the court's jurisdiction and still would not answer the court's inquiry regarding whether he wanted an attorney or would represent himself. . . . Based on the evidence in the record, we conclude Defendant willfully obstructed and delayed the trial court proceedings by continually refusing to state whether he wanted an attorney or would represent himself when directly asked by the trial court at four different hearings. Accordingly, Defendant forfeited his right to counsel[.]

Leyshon at 518-19, 710 S.E.2d at 288-89. Based on *Leyshon* and similar cases, we hold that defendant engaged in "purposeful conduct and tactics to delay and frustrate the orderly processes of our trial courts" that resulted in a forfeiture of his right to counsel. *Montgomery*, *id.* "Because forfeiture does not require a knowing and voluntary waiver of the right to counsel, the inquiry pursuant to section 15A-1242 is not required in such cases." *State v. Boyd*, 200 N.C. App. 97, 102, 682 S.E.2d 463, 467 (2009) (citing *Montgomery*), *disc. review denied*, __ N.C. __, 691 S.E.2d 414 (2010). Accordingly, we need not address defendant's argument that the trial court failed to conduct the inquiry required under N.C. Gen. Stat. § 15A-1242.

We conclude that the defendant had a fair trial, free of error.

NO ERROR.

Judges McGEE and ERVIN concur.

STATE OF NORTH CAROLINA
v.
ANTONIO ALONZO MONROE

No. COA13-954

Filed 15 April 2014

Firearms and Other Weapons—possession by felon—self-defense instruction—denied

The trial court did not err by refusing defendant's request for a special instruction on self-defense in a prosecution for possession of a firearm by a felon. Defendant did not make the requisite showing of each element of the justification defense, even assuming that the rationale in *U.S. v. Deleveaux*, 205 F.3d 1292 (11th Cir.), applied in North Carolina.

Judge STROUD dissenting.

On writ of certiorari from judgment entered 11 April 2013 by Judge Yvonne Mims Evans in Superior Court, Gaston County. Heard in the Court of Appeals 25 February 2014.

Attorney General Roy Cooper, by Assistant Attorney General LaShawn S. Piquant, for the State.

Mark Hayes for Defendant.

McGEE, Judge.

Antonio Alonzo Monroe ("Defendant") was indicted for first-degree murder of Mario Davis ("Davis"), possession of a firearm by a felon, and for attaining the status of an habitual felon. A jury found Defendant not guilty of first-degree murder but guilty of possession of a firearm by a felon and of attaining the status of an habitual felon on 10 April 2013. Defendant appeals from judgments entered upon his convictions.

The night before the offenses at issue, Defendant and Davis had an argument at the residence of Defendant's uncle. Antwan Cobb ("Cobb"), a witness to the events, testified that "as we unlock the door to leave out, [Davis and another man] barge in[.]" An argument resulted, the police arrived, and the argument ended. The following day, 17 June 2011, Defendant and Davis had another brief argument outside the residence of Jah'Kwesi Gordon ("Gordon"). Davis told Defendant he was going to "turn the heat up on" him, and Davis then left with O'Brian Smith ("Smith").

Shortly thereafter, Davis returned to the front yard of Gordon's residence, along with Smith. There was conflicting evidence as to whether Davis had a gun when he returned. Cobb testified that Davis said he was "going to stay out here until the door come open." Gordon retrieved a gun from his bedroom in the back of the house. While Defendant and Gordon were inside the house, Defendant took the gun from Gordon.

Gordon went outside the house to ask Davis to leave. Defendant remained in the house with the gun. Gordon testified that he was outside talking to Davis for less than five or ten minutes before Defendant came to the doorway. Gordon further testified that, when Defendant came to the doorway, "[h]e had a couple more words and then [Davis] hit" Defendant "towards the facial area." Defendant then shot Davis five times. Defendant and Cobb left in Cobb's car.

At trial, during the charge conference, Defendant asked the trial court to instruct the jury on self-defense as to the charge of possession of a firearm by a felon. Defendant submitted the requested instruction in writing in a document titled "Request for Special Jury Instruction on Duress or Justification." The trial court denied Defendant's request for the special instruction.

Defendant argues on appeal that the trial court erred by failing to instruct the jury on self-defense as to the charge of possession of a firearm by a felon. This Court addressed this argument in *State v. Craig*, 167 N.C. App. 793, 606 S.E.2d 387 (2005), in which we noted that "[f]ederal courts have recently recognized justification as an affirmative defense to possession of firearms by a felon." *Id.* at 795, 606 S.E.2d at 389 (citing *U.S. v. Deleveaux*, 205 F.3d 1292 (11th Cir. 2000)).

I. The *Deleveaux* Test

"[T]he *Deleveaux* court limited the application of the justification defense to 18 U.S.C. § 922(g)(1) cases (federal statute for possession of a firearm by a felon) in 'only extraordinary circumstances.' " *Craig*, 167 N.C. App. at 796, 606 S.E.2d at 389 (quoting *State v. Napier*, 149 N.C. App.

462, 465, 560 S.E.2d 867, 869 (2002)). In *Deleveaux*, the United States Court of Appeals for the Eleventh Circuit cited three cases from other circuits, *U.S. v. Paolello*, 951 F.2d 537 (3rd Cir. 1991), *U.S. v. Singleton*, 902 F.2d 471 (6th Cir. 1990); *cert denied*, 498 U.S. 872, 112 L. Ed. 2d 158 (1990), and *U.S. v. Perez*, 86 F.3d 735 (7th Cir. 1996), to illustrate that the defense is available only in extraordinary circumstances. *Deleveaux*, 205 F.3d at 1297.

In *Paolello*, the United States Court of Appeals for the Third Circuit observed that the "restrictive approach is sound" and required that "the defendant meet a high level of proof to establish the defense of justification." *Paolello*, 951 F.2d at 542. In *Singleton*, the United States Court of Appeals for the Sixth Circuit held that "a defense of justification may arise in rare situations" in prosecutions for possession of a firearm by a felon. *Singleton*, 902 F.2d at 472. The Court observed that, although the language of 18 U.S.C. § 922 "gives no hint of an affirmative defense of justification, Congress enacts criminal statutes 'against a background of Anglo-Saxon common law.' " *Id.* (quoting *U.S. v. Bailey*, 444 U.S. 394, 415, 62 L. Ed. 2d 575, 594 n.11 (1980)).

"In *Bailey*, the Supreme Court held that prosecution for escape from a federal prison, despite the statute's absolute language and lack of a *mens rea* requirement, remained subject to the common law justification defenses of duress and necessity." *Singleton*, 902 F.2d at 472. "Similarly, the Congressional prohibition of possession of a firearm by a felon does not eliminate the possibility of a defendant being able to justify the possession through duress or necessity." *Id.*

"Common law historically distinguished between the defenses of duress and necessity." *Bailey*, 444 U.S. at 409, 62 L. Ed. 2d at 590. "Duress was said to excuse criminal conduct where the actor was under an unlawful threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law." *Id.* "While the defense of duress covered the situation where the coercion had its source in the actions of other human beings, the defense of necessity, or choice of evils, traditionally covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils." *Id.* at 409-10, 62 L. Ed. 2d at 590. "Modern cases have tended to blur the distinction between duress and necessity." *Id.* at 410, 62 L. Ed. 2d at 590.

"[I]f a previously convicted felon is attacked by someone with a gun, the felon should not be found guilty for taking the gun away from the attacker in order to save his life." *Singleton*, 902 F.2d at 472. The Court

held that the "justification defense for possession of a firearm by a felon should be construed very narrowly" and emphasized "that the keystone of the analysis is that the defendant must have no alternative—either before or during the event—to avoid violating the law." *Id.* at 472-73.

In *Perez*, the United States Court of Appeals for the Seventh Circuit observed that the "defense of necessity will rarely lie in a felon-in-possession case unless the ex-felon, not being engaged in criminal activity, does nothing more than grab a gun with which he or another is being threatened (the other might be the possessor of the gun, threatening suicide)." *Perez*, 86 F.3d at 737. The Court held that "the defendant may not resort to criminal activity to protect himself or another if he has a legal means of averting the harm." *Id.*

Under *Deleveaux*, "a defendant must show four elements to establish justification as a defense" to the charge of possession of a firearm by a felon:

> (1) that the defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury;
>
> (2) that the defendant did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct;
>
> (3) that the defendant had no reasonable legal alternative to violating the law; and
>
> (4) that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

Craig, 167 N.C. App. at 796, 606 S.E.2d at 389 (quoting *Deleveaux*, 205 F.3d at 1297); *see also U.S. v. Crittendon*, 883 F.2d 326, 330 (4th Cir. 1989).

II. Standard for Reviewing the Evidence

Defendant argues that, when deciding whether to give a requested instruction, the trial court must consider the evidence in the light most favorable to the movant. As support, Defendant cites *Long v. Harris*, 137 N.C. App. 461, 467, 528 S.E.2d 633, 637 (2000), wherein the appeal arose from the denial of a requested instruction on a "sudden emergency" in a civil negligence action. The present appeal, by contrast, arises from the denial of a requested instruction on self-defense in a

criminal prosecution. We examine *Napier*, *Craig*, and other cases that have considered this issue for guidance.

In *Napier*, this Court stated only that the trial court must give the requested instruction, "at least in substance, if [it is] proper and supported by the evidence." *Napier*, 149 N.C. App. at 463, 560 S.E.2d at 868. This Court did not state that the trial court must consider the evidence in the light most favorable to the movant. In *Craig*, this Court considered only the uncontroverted evidence. *Craig*, 167 N.C. App. at 796, 606 S.E.2d at 389.

In *State v. Boston*, 165 N.C. App. 214, 222, 598 S.E.2d 163, 167 (2004), this Court made no statement as to how the evidence must be viewed. In our analysis, we considered what the evidence tended to show and referred to what the State's evidence tended to show. *Id.* Also, in *State v. McNeil*, 196 N.C. App. 394, 406, 674 S.E.2d 813, 821 (2009), this Court considered only that the evidence showed that the defendant "possessed the shotgun inside his home . . . at which time there was no imminent threat of death or serious bodily injury."

Thus, the only guidance from this Court is that the instruction must be "supported by the evidence." *Napier*, 149 N.C. App. at 463, 560 S.E.2d at 868. This Court has never stated that, in prosecutions for possession of a firearm by a felon, the evidence must be viewed in the light most favorable to a defendant.

However, in an appeal from a conviction for driving while impaired, this Court stated that "there must be substantial evidence of each element of the defense when 'the evidence [is] viewed in the light most favorable to the defendant'" to entitle the defendant to a necessity instruction. *State v. Hudgins*, 167 N.C. App. 705, 709, 606 S.E.2d 443, 446 (2005) (quoting *State v. Ferguson*, 140 N.C. App. 699, 706, 538 S.E.2d 217, 222 (2000) (regarding an instruction on manslaughter)). Thus, we review the evidence in the present case in the light most favorable to Defendant, in order to determine whether there is substantial evidence of each element of the defense.

Though the case is not binding, we note that in *Perez*, the United States Court of Appeals for the Seventh Circuit stated that a "criminal defendant is entitled to an instruction on any defense for which there is some support in the evidence[.]" *Perez*, 86 F.3d at 736. The Court further stated that the United States "Supreme Court has made clear that the evidence must be sufficient to allow a reasonable jury to find the defense proved." *Id.* (citing *Mathews v. U.S.*, 485 U.S. 58, 99 L. Ed. 2d 54 (1988)).

III. North Carolina Cases Applying *Deleveaux* By Assuming *Arguendo* That It Applies In North Carolina

In *Napier*, this Court noted that "the courts of this State have not recognized justification as a defense to a charge of possession of a firearm by a felon." *Napier*, 149 N.C. App. at 464, 560 S.E.2d at 869. Nevertheless, the defendant in that case asked "this Court to expand the necessity defense and adopt the test for justification" set forth in *Deleveaux*. *Id.* (internal quotation marks omitted). This Court assumed, without deciding, that the *Deleveaux* rationale applied, but concluded that the evidence in *Napier* did "not support a conclusion that [the] defendant was under a present or imminent threat of death or injury." *Id.* at 465, 560 S.E.2d at 869.

The evidence in *Napier* was that the defendant, a convicted felon who was involved in an on-going dispute with his neighbor and his neighbor's son, "voluntarily walked across the street" to his neighbor's property, while armed with a handgun. *Id.* The defendant stayed there for several hours and eventually shot the neighbor's son in the arm. *Id.* This Court disregarded evidence of the neighbor's son's drug and alcohol use, his threats to the defendant, and recent shootings into the air by him over the defendant's property in deciding whether the defendant was entitled to an instruction on justification. *Id.*

In *Craig*, the defendant continued to hold the firearm after leaving the altercation, while "not under any imminent threat of harm." *Craig*, 167 N.C. App. at 796-97, 606 S.E.2d at 389. This Court concluded that "the evidence did not support giving a special instruction on justification because there was a time period where [the] [d]efendant was under no imminent threat while possessing the gun." *Id.* at 797, 606 S.E.2d at 389.

In *Boston*, the evidence tended to show that the defendant and the victim "were engaged in an on-going conflict whereby in the week prior to the shooting, [the victim] threatened to kill [the] defendant, and on at least one prior occasion [the victim] fired a gun at [the] defendant." *Boston*, 165 N.C. App. at 222, 598 S.E.2d at 167. This Court held that the trial court did not err in failing to instruct the jury on justification because the defendant "was observed walking through the apartment complex carrying a pistol." *Id.* There was "no evidence to support the conclusion that [the] defendant was under an imminent threat of death or injury when he made the decision to carry the gun." *Id.* at 222, 598 S.E.2d at 167-68.

In *McNeil*, this Court held that the evidence did not support giving a special instruction on justification where the evidence showed that the

defendant "possessed the shotgun inside his home and away from" the victim, "at which time there was no imminent threat of death or serious bodily injury." *McNeil*, 196 N.C. App. at 406-07, 674 S.E.2d at 821.

Although unpublished, the analysis in *State v. Ponder*, ___ N.C. App. ___, 725 S.E.2d 674 (2012) (unpublished) (COA 11-1365) is instructive. This Court held that the defendant was "not under an imminent threat when he acquired the gun" in *Ponder*. *Id.*, slip op. at 4. The defendant "chose to leave the residence and stand in the field, waiting to confront [the victim]. [The] [d]efendant could have telephoned the police before obtaining the weapon." *Id.*, slip op. at 5.

IV. Application To The Present Case

Consistent with the precedent from this Court, we assume *arguendo*, without deciding, that the *Deleveaux* rationale applies in North Carolina prosecutions for possession of a firearm by a felon. Nevertheless, the evidence in the present case, even when viewed in the light most favorable to Defendant, does not support a conclusion that Defendant, upon possessing the firearm, was under unlawful and present, imminent, and impending threat of death or serious bodily injury.

The evidence showed there had been an on-going dispute between Defendant and Davis. Defendant was at Gordon's house on 17 June 2011. Davis and Smith later arrived at Gordon's house, and Defendant and Davis subsequently argued outside Gordon's house. The argument did not last long. Cobb, who witnessed the events on 17 June 2011, testified that Davis told Defendant he was going to "turn the heat up on" him. Cobb testified that the phrase meant: "I guess I'm going to shoot you, anything." Cobb further testified that after Davis said that, Davis and Smith left and were gone for fifteen or twenty minutes.

Davis and Smith returned to Gordon's house. Inside the house, Gordon retrieved a gun from his bedroom in the back of the house. While inside the house, Defendant took the gun from Gordon. Gordon went outside to ask Davis to leave. Defendant followed Gordon to the door and stood in the doorway of the residence. Gordon testified that he was outside talking to Davis for less than five or ten minutes before Defendant came to the doorway. Gordon further testified that, when Defendant came to the doorway, "[h]e had a couple more words and then [Davis] hit" Defendant "towards the facial area." Defendant then shot Davis five times.

The uncontroverted evidence at trial showed that Defendant was inside Gordon's house when Defendant took possession of a firearm.

Defendant's primary support for his argument that the trial court erred in failing to give a special instruction is that the jury found Defendant not guilty of first-degree murder "under a theory of perfect self-defense." However, the record does not indicate why the jury acquitted Defendant of first-degree murder—whether on the basis of self-defense or that the jury found that the State failed to carry its burden to prove beyond a reasonable doubt that Defendant murdered Davis. The record is silent as to this issue. Any speculation by this Court as to the reason or reasons for the jury's decision to acquit Defendant of first-degree murder is therefore baseless.

Furthermore, the offenses of murder and possession of a firearm by a felon are separate and distinct criminal offenses. They share no elements in common. *See* N.C. Gen. Stat. §§ 14-415.1; 14-17 (2013); *State v. Vance*, 328 N.C. 613, 621-22, 403 S.E.2d 495, 501 (1991). Murder is a crime, defined as at common law. *See Vance*, 328 N.C. at 622, 403 S.E.2d at 501 ("as N.C.G.S. § 14-17 does not define the crime of murder, the definition of that crime remains the same as it was at common law"). By contrast, possession of a firearm by a felon is a statutory criminal offense of relatively recent vintage. The offenses are related in the present case only by the fact that the State sought to prove that Defendant used a firearm to shoot Davis.

Defendant's subsequent contentions are that Davis "had instigated violence against [Defendant] before," and that remaining inside Gordon's residence would have been "no protection" because Davis had previously "barged in" to a residence where Defendant was located. However, the evidence does not compel a conclusion that, while inside the residence, Defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury. As previously discussed, this Court has disregarded evidence of the victim's drug and alcohol use, threats, and recent shooting over the defendant's property in *Napier*, 149 N.C. App. at 465, 560 S.E.2d at 869.

We thus cannot rely on the mere possibilities that (1) Davis may have been about to enter the residence and (2) that Davis then would have threatened death or serious bodily injury to Defendant. Defendant has failed to show that he was under " 'unlawful and present, imminent, and impending threat of death or serious bodily injury' " at the time he took possession of the firearm. *Craig*, 167 N.C. App. at 796, 606 S.E.2d at 389 (quoting *Deleveaux*, 205 F.3d at 1297).

Although the failure to make this showing is alone sufficient to hold that the trial court did not err in denying Defendant's request for the

instruction, we note that Defendant also failed to show that he "had no reasonable legal alternative to violating the law[.]" *Id.* It was uncontroverted that Defendant voluntarily armed himself and then walked to the doorway of the residence. Defendant has not shown there was no acceptable legal alternative other than arming himself with a firearm, in violation of N.C.G.S. § 14-415.1, and walking to the doorway of Gordon's house.

Even viewing the evidence in the light most favorable to Defendant, we conclude that Defendant has not made the requisite showing of each element of the justification defense. Thus, even assuming *arguendo*, without deciding, that the rationale in *Deleveaux* applies in North Carolina prosecutions, the trial court did not err in refusing Defendant's request to give a special instruction on self-defense as to the charge of possession of a firearm by a felon.

No error.

Judge STEELMAN concurs.

STROUD, Judge, dissenting.

Because I believe that the evidence would permit a jury to find that defendant was justified in possessing the firearm under the *Deleveaux* test, I dissent, and I would reverse defendant's conviction for possession of a firearm by a felon and remand for a new trial on these charges.

The majority opinion summarizes the evidence presented at trial quite well, but draws a different conclusion from it than I would; a properly instructed jury may also. First, I would hold that the *Deleveaux* test does apply in North Carolina. Our cases have relied upon it several times, although only assuming *arguendo* that it would apply because the facts in those cases did not satisfy the test. The test is entirely consistent with North Carolina's common law defenses of justification and necessity and provides useful guidance to the trial courts for instructing juries. In the cases discussed by the majority opinion, different factual situations were presented and, in those cases, the jury instruction was not supported by the evidence under the *Deleveaux* test. The factual situation here is different and presents a question of fact that I believe a jury should have the opportunity to resolve.

In *Napier*, the defendant possessed a gun when he went to the victim's property, where he stayed several hours and only then shot the

victim. *State v. Napier*, 149 N.C. App. 462, 463, 560 S.E.2d 867, 868 (2002). Thus, the defendant possessed the gun well before he was potentially under any sort of threat which would justify possession of the gun. In addition, the jury's assessment of the facts in *Napier* was quite different than in this case. The *Napier* defendant was charged with

> (1) discharging a firearm into occupied property, (2) assault with a deadly weapon with intent to kill inflicting serious injury, (3) conspiracy to discharge a firearm into occupied property, (4) conspiracy to commit an assault with a deadly weapon, (5) possession of a firearm by a felon on 4 July 1999, and (6) possession of a firearm by a felon on 3 July 1999.

Id.

The jury deadlocked and a mistrial was declared on the first two charges. *Id.* The jury found defendant not guilty of conspiracy and possession on 4 July and found defendant guilty only of the charge of possession on 3 July. *Id.* This Court noted that the evidence did not support defendant's claim of justification due to the lapse of time between when defendant went to the victim's property while carrying a gun and the shooting: "[D]efendant asked Robert Ford and Brad Ford if they wanted him to take the gun home; and defendant, while armed, stayed on Robert Ford's premises for several hours talking to Robert Ford before the fight ensued." *Id.* at 465, 560 S.E.2d at 869. Under these circumstances, defendant was not entitled to an instruction on justification. *Id.*

In *Craig*, the defendant was charged with assault with a deadly weapon inflicting serious injury and possession of a firearm by a felon. *State v. Craig*, 167 N.C. App. 793, 795, 606 S.E.2d 387, 388 (2005). An instruction as to self-defense was given, but the trial court did not give the requested instruction as to justification for possession of the gun.[1] *Id.* at 794, 606 S.E.2d at 388. The jury found defendant guilty of both charges. *Id.* at 795, 606 S.E.2d at 388. On appeal, failure to give an instruction as to justification for possession of the firearm was the only issue raised by defendant. *Id.* The Court noted that the

> uncontroverted evidence in this case shows that after leaving the altercation, Defendant kept the gun and took it with him to a friend's house on Dana Road. He continued to hold it and carry it while speaking with Hamilton. At

1. Although not clear from the opinion, the record from *Craig* shows that a self-defense instruction was given.

> that time, Defendant was not under any imminent threat of harm. Thus, the evidence did not support giving a special instruction on justification because there was a time period where Defendant was under no imminent threat while possessing the gun.

Id. at 796-97, 606 S.E.2d at 389 (citation omitted).

In *Boston*, the defendant was charged with and convicted of second-degree trespassing and possession of a firearm by a felon. *State v. Boston*, 165 N.C. App. 214, 215, 598 S.E.2d 163, 164 (2004). The evidence showed that the

> defendant and Daniels were engaged in an on-going conflict whereby in the week prior to the shooting, Daniels threatened to kill defendant, and on at least one prior occasion Daniels fired a gun at defendant. However, the evidence also tends to show that on the day of the shooting, defendant was observed walking through the apartment complex carrying a pistol. The State's evidence also tended to show that defendant chased Daniels around a parked car with the gun in hand. Therefore, we hold that, as in *Napier*, there is no evidence to support the conclusion that defendant was under an imminent threat of death or injury when he made the decision to carry the gun. Accordingly, the trial court did not err in failing to instruct the jury on justification as an affirmative defense.

Id. at 222, 598 S.E.2d at 167-68. Again, regardless of whether defendant may have been justified in possessing the gun at the moment of the shooting, the evidence showed that defendant possessed the gun at a time entirely separate from the altercation—when he was "walking through the apartment complex carrying a pistol." *Id.* at 222, 598 S.E.2d at 167.

In *McNeil*, the defendant was charged with and found guilty of "first degree murder and possession of a firearm by a felon." *State v. McNeil*, 196 N.C. App. 394, 396, 674 S.E.2d 813, 815 (2009). As in this case, defendant did request and the trial court gave an instruction on self-defense. *Id.* at 400, 674 S.E.2d at 817. Unlike the present case, the jury found defendant guilty on all charges and rejected defendant's claims of self-defense. *Id.* The evidence as to the defendant's possession of the firearm in *McNeil* was as follows:

> On 15 March 2007, William Frederick Barnes ("Barnes") rode his bicycle up to the passenger side window of

> Vashawn Tomlin's ("Tomlin") car at approximately 10:00 a.m. Tomlin testified that Barnes wanted to wash Tomlin's car. Approximately five minutes later, Tomlin saw Defendant walk out of Defendant's house by Tomlin's car and then walk into another house. Defendant walked out of the second house and spoke to Tomlin and Barnes. Barnes asked Defendant, "What's up[?]" to which Defendant replied, "You got a nerve speaking to me, I ain't forgot what you did, I was going with her then." Barnes asked Tomlin what Defendant was talking about. Defendant tried to argue with Barnes, and " kept saying . . . 'I'll burn your ass[.]' " Defendant also told Barnes he would "put a hot one in him."
>
> Tomlin testified that Defendant walked back into the first house and returned carrying a shotgun. Defendant walked from his porch toward Barnes, who was still sitting on a bicycle and leaning against the door of Tomlin's car, and Defendant shot Barnes with the shotgun. Tomlin testified Defendant walked back toward his house, then turned and walked into the street, stood over Barnes, aimed the shotgun at Barnes and fired. After shooting Barnes the second time, Defendant walked back to his house and stood in the doorway "looking crazy."

Id. at 396-97, 674 S.E.2d at 815-16.

As to the defendant's request for an instruction on justification, the *McNeil* court stated that

> As in *Craig* and *Napier*, the evidence in the present case shows that Defendant possessed the shotgun inside his home and away from Barnes, at which time there was no imminent threat of death or serious bodily injury. Without deciding the availability of the justification defense in possession of a firearm by a felon cases in North Carolina, we hold that the evidence in this case did not support giving a special instruction on justification.

Id. at 406-07, 674 S.E.2d at 821 (citation omitted).

Overall, these cases support, rather than defeat, defendant's argument that the jury should have been instructed on justification. The most significant difference between this case and all of those above is that in those cases, there was an obvious time period when the defendant

possessed a gun but was not under any imminent threat of death or great bodily harm. Even if the those defendants may have been justified in possessing a gun at the exact moment of the altercation—which the juries all found they were not, by rejecting the self-defense theory—they would still be guilty of possessing the gun at a time completely separate from the altercation with the victim.

Here, by contrast, the evidence, taken in the light most favorable to defendant, showed that the entire time that defendant possessed the gun Mr. Davis was standing outside of the house with a gun, posing an imminent threat. One witness testified that Mr. Davis said he was "going to stay out here until the door come open." Therefore, there was evidence from which a jury could reasonably conclude that defendant's possession of the firearm was justified for the entire time he possessed it.

Moreover, unlike in the prior cases, the jury acquitted the defendant of all homicide charges based upon self-defense. Defendant was charged with first degree murder, but the jury was presented with issues as to first degree murder, second degree murder, and voluntary manslaughter and found defendant not guilty of all of these. I disagree with the majority's statement that "the record does not indicate why the jury acquitted Defendant of first-degree murder—whether on the basis of self-defense or that the jury found that the State failed to carry its burden to prove beyond a reasonable doubt that Defendant murdered Davis."

To the contrary, it is not disputed that defendant shot Davis, and the jury acquitted defendant of first degree murder as well as all lesser-included offenses. The only logical inference we can draw from the jury's verdict is that the jury relied upon defendant's claim of perfect self-defense. In none of the cases discussed above did the jury believe the defendants' claims of self-defense, where that issue was presented. It is true that the facts presented might have permitted a jury to reject a claim of self-defense, and that a jury might have found that defendant could have used some other means to protect himself or to avoid a confrontation with Davis, but the jury has already considered that evidence and found in favor of defendant. This means that the jury found that:

(1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and

(2) defendant's belief was reasonable in that the circumstances as they appeared to him at that time were sufficient to create such a belief in the mind of a person of ordinary firmness; and

> (3) defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and
>
> (4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

State v. Lyons, 340 N.C. 646, 661, 459 S.E.2d 770, 778 (1995) (citation and quotation marks omitted).

Given the jury's determination as to self-defense as to the shooting here, it is entirely possible, and indeed probable, that the jury would have also found, if properly instructed, that the four elements of the justification defense were established:

> (1) that the defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury; (2) that the defendant did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) that the defendant had no reasonable legal alternative to violating the law; and (4) that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

United States v. Deleveaux, 205 F.3d 1292, 1297, *cert. denied*, 530 U.S. 1264, 147 L.Ed. 2d 988 (2000).

The elements of perfect self-defense and justification are slightly different, but not much, particularly under the facts as presented in this case. The gun defendant used was not his own; he got it from Gordon just prior to the shooting—not hours or days before, but minutes—while Davis was just outside the house, threatening defendant. The issue of the timing of defendant's possession of the gun is crucial. It is possible that a jury could find that he possessed it longer than necessary for his own protection, but the facts certainly present a jury question in that regard, and that is sufficient for defendant to be entitled to the instruction.[2]

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2. *See State v. Bush*, 307 N.C. 152, 160, 297 S.E.2d 563, 569 (1982) ("A defendant is entitled to an instruction on self-defense if there is any evidence in the record from which it can be determined that it was necessary or reasonably appeared to be necessary for him to kill his adversary in order to protect himself from death or great bodily harm.").

This case presents one of those "most extraordinary circumstances" where the justification defense is applicable. It is odd that a man could be acquitted for all forms of homicide based on the theory that he had a clear right of self-defense, but he would be convicted for using the gun that the jury found to be necessary under the circumstances to protect himself from "death or great bodily harm." *Lyons*, 340 N.C. at 661, 459 S.E.2d at 778. This is not one of those cases where the jury already evaluated any claims of self-defense and rejected them, as all of the prior cases from this court cited by the majority were. Indeed, it is difficult to imagine a situation in which a defendant would be entitled to an instruction on justification for possession of a firearm if defendant here was not. I would therefore specifically adopt the justification defense as laid out in *Deleveaux*, reverse defendant's convictions for possession of a firearm by a felon and habitual felon, and remand for a new trial on these matters. Therefore, I respectfully dissent.

STATE OF NORTH CAROLINA
v.
SUSAN LYNETTE PARKER, DEFENDANT

No. COA13-757

Filed 15 April 2014

1. Embezzlement—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of embezzlement. The State's evidence of atypical food and item purchases and numerous forged signatures was sufficient evidence from which a jury could infer defendant's intent to commit embezzlement.

2. Evidence—prior crimes or bad acts—misappropriation of church funds

The trial court did not abuse its discretion in an embezzlement case by admitting evidence under N.C.G.S. § 8C-1, Rule 404(b) that defendant also misappropriated funds from her church. The evidence was used to show motive, intent and common plan or scheme. Further, the probative value of such evidence outweighed its prejudicial effect.

STATE v. PARKER

[233 N.C. App. 577 (2014)]

Appeal by defendant from judgment entered 28 January 2013 by Judge Christopher W. Bragg in Union County Superior Court. Heard in the Court of Appeals 19 February 2014.

Attorney General Roy Cooper, by Assistant Attorney General Katherine A. Murphy, for the State.

Leslie C. Rawls for defendant-appellant.

BRYANT, Judge.

Where the State presents substantial evidence of each element of the charge of embezzlement, defendant's motion to dismiss the charge is properly denied. Where evidence of prior bad acts admitted pursuant to Rule 404(b) is used to show, *inter alia*, motive, intent and common plan or scheme, and where the probative value of such evidence outweighs its prejudicial effect, the trial court has neither erred nor abused its discretion by admitting the evidence.

In 2008, defendant Susan Lynette Parker began work as a secretary in the Union County Public Schools (the "school system"). Defendant's job responsibilities included purchasing food and non-food items for school meetings, training sessions, and programs. Purchases were typically conducted with a school system credit card. The school system would also reimburse employees such as defendant for purchases made using personal funds and for any mileage expenses incurred.

Also beginning in 2008, defendant worked as the bookkeeper for the Centerview Baptist Church. As church bookkeeper, defendant was responsible for paying the church's bills, keeping all financial records, and providing the church with quarterly financial reports.

In 2010, after noticing irregularities in the church's finances, the pastor of Centerview Baptist Church contacted the Union County Sheriff's Office. A police investigation and audit revealed that defendant had used the church's checking account to pay personal debts. Defendant subsequently apologized to the church and repaid the misappropriated funds.

The school system was notified of the police investigation into defendant's misappropriation of funds from the Centerview Baptist Church. Shortly thereafter, defendant's supervisor discovered her name had been forged on reimbursement forms submitted by defendant to the school system. After a police investigation of purchases defendant made using the school system credit card, defendant was arrested for embezzlement of school funds.

On 7 November 2011, a grand jury indicted defendant on one count of embezzlement. On 28 January 2013, a jury convicted defendant of embezzlement. Defendant appeals.

On appeal, defendant argues that the trial court erred in (I) denying her motion to dismiss and (II) admitting evidence pursuant to Rule 404(b).

I.

[1] Defendant first argues that the trial court erred in denying her motion to dismiss. We disagree.

A motion to dismiss is properly denied where there is substantial evidence of each element of the offense charged and of defendant being the perpetrator of that offense. *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980) (citations omitted). Evidence should be viewed in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom. *State v. McKinney*, 288 N.C. 113, 117, 215 S.E.2d 578, 581 (1975) (citation omitted). Where the State offers substantial evidence of each essential element of the crime charged, defendant's motion to dismiss must be denied. *State v. Porter*, 303 N.C. 680, 685, 281 S.E.2d 377, 381 (1981) (citation omitted). We review a denial of a motion to dismiss *de novo*. *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007).

Defendant contends the trial court erred in denying her motion to dismiss because the State failed to prove embezzlement. Specifically, defendant argues that the State failed to offer substantial evidence that defendant used the school system's property for a wrongful purpose.

> N.C. Gen. Stat. § 14-90 defines the offense of embezzlement and requires the State to present proof of the following essential elements: (1) that the defendant, being more than 16 years of age, acted as an agent or fiduciary for his principal, (2) that he received money or valuable property of his principal in the course of his employment and by virtue of his fiduciary relationship, and (3) that he fraudulently or knowingly misapplied or converted to his own use such money or valuable property of his principal which he had received in his fiduciary capacity.

State v. Rupe, 109 N.C. App. 601, 608, 428 S.E.2d 480, 485 (1993) (citations omitted). In establishing the third element of embezzlement, a fraudulent or knowing misapplication of property, the State can show such intent by direct or circumstantial evidence. *State v. McLean*, 209 N.C. 38, 40, 182 S.E. 700, 702 (1935) (citations omitted). The State does not need to show that the agent converted his principal's property to the agent's own use, only that the agent fraudulently or knowingly and willfully misapplied it, or that the agent intended to fraudulently or knowingly and willfully misapply it. *State v. Smithey*, 15 N.C. App. 427, 429–30, 190 S.E.2d 369, 370–71 (1972) (citations omitted).

Here, the State presented evidence that defendant was an employee of the school system who used a school system credit card to make food purchases. For example, defendant was instructed to purchase snack items such as pre-cut cheese, pre-cut fruit and grapes, and crackers, and other food items such as premade sandwiches and doughnuts to be served at teachers' conferences and events; defendant would then use the school system credit card to purchase these items at Harris Teeter, Krispy Kreme or McAllister's Deli. Each time defendant was asked to make food purchases for the school system, defendant was required to submit a request form indicating when, where, and why the credit card was to be used. Once the purchase was completed, defendant would submit the request form with receipts for final approval by a school administrator.

The State presented evidence and testimony that numerous food purchases made by defendant were questionable because they consisted of items that would not be purchased by or served at school system events. Items flagged as questionable included: a mop, beef tortelloni, marinara sauce, hash browns, chicken, chewing gum, blocks of cheese, oatmeal, and hot sauce. Defendant also purchased coffee, creamer, sugar, and cups using the school system's credit card, products which school administrators testified defendant would not need to buy because they were provided through an outside vendor. Further, evidence showed that defendant had forged her supervisors' signatures and/or changed budget code information on credit card authorization forms and reimbursement forms at least 29 times, and submitted forms for reimbursement with unauthorized signatures totaling $6,641.02. As such, the State presented sufficient evidence of each element of the charge of embezzlement to survive a motion to dismiss.

Defendant further argues that the State failed to meet its burden of proving each element of embezzlement because some witness testimony was contradictory as to whether certain food items were served at school events, and because purchase and reimbursement forms do not

constitute embezzlement simply because the authorizing signatures are not authentic. We find defendant's argument to lack merit, as the State's evidence – of atypical food and item purchases and numerous forged signatures – presents sufficient evidence by which a jury could infer defendant's intent to commit embezzlement. *See State v. Sutton*, 53 N.C. App. 281, 287, 280 S.E.2d 751, 755 (1981) (holding that evidence that the defendant exceeded his authority in issuing himself coupons "permitted the inference" that the defendant had the fraudulent intent necessary for embezzlement); *State v. Helsabeck*, 258 N.C. 107, 128 S.E.2d 205 (1962) (holding that fraudulent intent, as required in the charge of embezzlement, can be inferred from the facts proven; direct evidence of such intent is not necessary). Accordingly, defendant's argument is overruled.

II.

[2] Defendant next argues that the trial court erred by admitting evidence pursuant to Rule 404(b). We disagree.

> When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling, as it did here, we look to whether the evidence supports the findings and whether the findings support the conclusions. We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion.

State v. Beckelheimer, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012).

North Carolina Rules of Evidence, Rule 404(b), holds 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. Gen. Stat. § 8C-1, Rule 404(b) (2013). Rule 404(b) is "subject to but *one exception* requiring its exclusion if its only probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 279, 389 S.E.2d 48, 54 (1990).

> It is not required that evidence bear directly on the question in issue, and evidence is competent and relevant if it

> is one of the circumstances surrounding the parties, and necessary to be known, to properly understand their conduct or motives, or if it reasonably allows the jury to draw an inference as to a disputed fact.

State v. Stager, 329 N.C. 278, 302, 406 S.E.2d 876, 890 (1991) (citations omitted). The admissibility of evidence under Rule 404(b) is further constrained by the requirements of similarity and temporal proximity. *State v. Al-Bayyinah*, 356 N.C. 150, 154–55, 567 S.E.2d 120, 123 (2002) (citations omitted).

The trial court conducted a hearing on the admissibility of the State's Rule 404(b) evidence during the trial, outside the presence of the jury. The State presented four witnesses who testified as to defendant's misappropriation of funds from Centerview Baptist Church, arguing that such evidence was permissible under Rule 404(b) to show an absence of mistake, opportunity, motive, intent, and/or common plan or scheme by defendant to embezzle from the school system. The trial court announced its findings of fact and conclusions of law in open court and admitted the evidence. Defendant does not contest the trial court's findings of fact; therefore, these findings are presumed to be supported by competent evidence and are binding on this Court. *See State v. Phillips*, 151 N.C. App. 185, 190–91, 565 S.E.2d 697, 701 (2002). Thus, we review the trial court's conclusions of law based on its findings of fact. *Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159.

In making its Rule 404(b) ruling, the trial court stated the following:

> The Court would review this issue and find that there are six different factors that the Court must consider before 404(B) evidence is admitted.
>
> First, that the State must identify specific purpose[s] in which to use this 404(B) evidence, and the Court is finding that the State is seeking to admit this evidence to show absence of mistake, opportunity, motive, intent, and a similar pattern of conduct.
>
> Next, the Court must consider whether or not this evidence is logically relevant to the evidence in the main case in chief. The Court would note that the dates of employment for Ms. Parker at both Union County Public Schools and Centerview Baptist Church do overlap. In a review of the case files, would also find that the dates of the offenses overlap almost to the day. Case number 11 CRS 54880,

> which is our current case, alleges an offense date of on or between August 24th of 2007 and August 10th of 2010, and the case with Centerview Baptist Church, which is 10 CRS 54380 alleged dates of offense of 1 September of 2007 through 9 August of 2010. Would also find that based on the testimony and evidence presented that the defendant was in similar positions of trust where she had access to funds or credit cards, checking accounts for both the church and the school system.
>
> The third factor the Court is to consider is, is there sufficient evidence to prove the extrinsic act, and those are the acts at Centerview Baptist Church [which] were committed by the defendant. The Court[,] based on the testimony specifically of the pastor and the accountant, Mr. Helms, would find that there is sufficient evidence to show that Ms. Parker embezzled from Centerview Baptist Church as her -- in her duties as the bookkeeper.

The trial court went on to find that the probative value of the evidence outweighed the danger of unfair prejudice, and admitted the Rule 404(b) evidence.

Defendant contends the trial court erred in admitting the Rule 404(b) evidence because defendant's acts of misappropriating Centerview Baptist Church funds and of embezzling from the school system are "sufficiently distinct" and, thus, are not permissible under Rule 404(b). Specifically, while defendant concedes that these two acts are "overlapping in time" (and thus, satisfy the requirement of temporal proximity), she contends they are not similar because misappropriation of the church funds was for personal purposes while the school system embezzlement involved "large or bulk quantity items suitable for use at various school events."

The record supports the trial court's conclusion of similarity and temporal proximity. Here, the Rule 404(b) evidence showed that the misappropriation of church funds occurred about the same time as the embezzlement of school funds; that defendant held a similar position of trust in each setting which allowed her access to funds — checking account for the church, credit cards for the school; and that defendant abused that position of trust through the unauthorized use of funds and property. The only distinction is that defendant admitted to the misappropriation of the church funds and was allowed to repay the money. In the instant case, defendant exercised her right to a jury trial, requiring

the State to set forth proof — substantial evidence by which a jury could find beyond a reasonable doubt that her misappropriation of school funds was intentional and constituted the crime of embezzlement. "Where specific mental intent or state of mind is an essential element of the offense charged, evidence of similar acts are admissible to prove defendant's intent or state of mind." *State v. Whitted*, 99 N.C. App. 502, 506, 393 S.E.2d 590, 593 (1990) (citation omitted). Accordingly, where, as here, the findings of fact support the trial court's conclusions of law, evidence of defendant's misappropriation of funds from the Centerview Baptist Church was properly admitted under Rule 404(b).

Defendant further argues that the admission of the Rule 404(b) evidence was unfairly prejudicial to her as "[e]vidence of the Centerview events was prejudicial [on the] jury and not probative on any issue in the case at bar." We disagree.

Rule 404(b) is "a clear general rule of *inclusion*." *State v. Coffey*, 326 N.C. 268, 278–79, 389 S.E.2d 48, 54 (1990). Rule 404(b) evidence must meet Rule 403's balancing test which requires the exclusion of relevant evidence only where its probative value "is substantially outweighed by the danger of unfair prejudice." *State v. Jacobs*, 363 N.C. 815, 823, 689 S.E.2d 859, 864 (2010) (citing N.C. Gen. Stat. § 8C-1, Rule 403). However, any potential prejudicial effect caused by the admission of 404(b) evidence can be constrained by a limiting instruction to the jury. *See Beckelheimer*, 366 N.C. at 133, 726 S.E.2d at 160–61.

As previously discussed, the admission of evidence concerning the Centerview Baptist Church was proper under Rule 404(b). The trial court conducted a Rule 403 balancing test and gave an appropriate limiting instruction to the jury. We see nothing in the record indicating that the trial court abused its discretion in admitting the Rule 404(b) evidence against defendant. *See id.* (finding no abuse of discretion where the trial court conducted a hearing out of the presence of the jury, made findings of fact and conclusions of law as to the admissibility of the evidence and its potential probative vs. prejudicial effect, and gave the jury a limiting instruction as to this evidence); *see also State v. Jones*, ___ N.C. App. ___, ___, 734 S.E.2d 617, 621—22 (2012) (State's use of Rule 404(b) evidence was proper to show element of intent in a charge of embezzlement against the defendant, and the defendant was not overly prejudiced where the trial court gave a limiting instruction to the jury); *State v. McDowell*, No. COA05-424, 2006 N.C. App. LEXIS 1871 (Sept. 5, 2006) (the defendant failed to show prejudice where the admission of Rule 404(b) evidence which tended to show the defendant's intent

and knowledge for the charge of embezzlement was proper pursuant to Rules 403 and 404(b)). Accordingly, defendant's argument is overruled.

No error.

Judges STEPHENS and DILLON concur.

STATE OF NORTH CAROLINA
v.
ERADIO VELAZQUEZ-PEREZ AND EDGAR AMPELIO-VILLALVAZO

No. COA13-694

Filed 15 April 2014

1. Drugs—trafficking cocaine—possession with intent to sell or deliver cocaine—motion to dismiss—sufficiency of evidence

The trial court erred by denying defendant Villalvazo's motions to dismiss two counts of trafficking cocaine based upon possession and transportation, and one count of possession with intent to sell or deliver cocaine. The State failed to produce substantial evidence of each essential element of those charges.

2. Drugs—conspiracy to traffic in cocaine by transporting—possession of cocaine in excess of 400 grams—motion to dismiss—sufficiency of evidence

The State failed to present substantial evidence in support of the charges of conspiracy to traffic in cocaine by transporting and possessing cocaine in excess of 400 grams.

3. Search and Seizure—traffic stop—amount of time—routine check of relevant documentation

The trial court did not err by denying defendant Perez's motion to suppress cocaine seized based upon his argument that the traffic stop was unconstitutionally extended. Perez provided no citation to authority to support the proposition that the purpose of the stop was completed once the citation for the infraction justifying the stop had been given to the person who committed the infraction. Further, law enforcement officers routinely check relevant documentation while conducting traffic stops.

4. Constitutional Law—effective assistance of counsel—failure to renew objection

Defendant Perez's trial counsel was not ineffective due to a failure to renew an objection to the admission of evidence that was allegedly fruits of the improper extension of a traffic stop. The Court of Appeals has already rejected this argument.

5. Costs—lab fees—fingerprint examination—statutory violation

The trial court erred by ordering costs for fingerprint examination as lab fees as part of defendant Perez's sentence. N.C.G.S. § 7A-304(a)(8) does not allow recovery of lab costs for fingerprint analysis, and therefore the State did not object to Perez's request that $600 be vacated from the $1,200 costs ordered by the trial court.

Appeal by Defendants from order entered 16 October 2012 and judgments entered 13 November 2012 by Judge Marvin P. Pope in Superior Court, Buncombe County. Heard in the Court of Appeals 7 January 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Phillip K. Woods and Assistant Attorney General Stuart M. (Jeb) Saunders, for the State.

Anne Bleyman for Defendant-Appellant Eradio Velazquez-Perez.

Goodman Carr, PLLC, by W. Rob Heroy, for Defendant-Appellant Edgar Ampelio-Villalvazo.

McGEE, Judge.

Henderson County Sheriff's Deputy David McMurray ("Deputy McMurray") was working with a special unit that involved both Henderson and Buncombe Counties along Interstate 40 on 4 September 2011. That day he was working in Buncombe County. Defendant Edgar Ampelio-Villalvazo ("Villalvazo") was driving a tractor-trailer ("the truck") on 4 September 2011 that was owned by Defendant Eradio Velazquez-Perez ("Perez") (together, "Defendants"). Perez was also in the truck at the time. Deputy McMurray was sitting in an unmarked SUV ("the SUV") parked at a commercial vehicle weigh station, facing the exit ramp, when he observed the truck exiting Interstate 40 headed into the weigh station. Deputy McMurray, who had been trained in visual estimation of speed, testified that he estimated the truck to be travelling at approximately fifty miles per hour where the posted recommended speed was thirty miles per hour.

After the truck had exited the scales, Deputy McMurray stopped the truck at the weigh station. Deputy McMurray positioned his SUV facing the truck and activated the SUV's dashboard camera. The camera simultaneously recorded video of the truck and the interior of Deputy McMurray's SUV. The camera also recorded audio inside the SUV, and had the capability to record audio from a receiver that Deputy McMurray could wear on his person, but Deputy McMurray either forgot to wear the receiver or failed to activate it. Deputy McMurray approached the cab of the truck, spoke with Defendants, and returned to his SUV with some documentation. Villalvazo then exited the truck and walked back to the SUV with additional documentation. Villalvazo sat in the passenger seat of the SUV for approximately forty-nine minutes, while Deputy McMurray wrote a warning citation and conducted certain records checks related to the stop, including checking the driver's licenses of Villalvazo and Perez, the truck registration, insurance information, log books, and other documentation related to the load then being transported on the truck.

During the stop, Deputy McMurray asked Villalvazo a number of questions, and on several occasions left the SUV, returning to the truck to ask Perez additional questions. Deputy McMurray completed the warning citation and handed it to Villalvazo approximately twelve minutes into the stop and informed Villalvazo that the documentation check was ongoing, and so Villalvazo remained in the SUV.

During this process, Deputy McMurray became suspicious that criminal activity, such as drug trafficking, might be occurring. Deputy McMurray's suspicions were based on a number of observations, including concerns he had about the log books, what he perceived as nervous behavior on the part of Villalvazo, and certain discrepancies between answers given by Villalvazo and Perez. Both Villalvazo and Perez told Deputy McMurray that Villalvazo had not been working for Perez for very long. Villalvazo told Deputy McMurray that he had not known Perez before he began working for him, and that this was Villalvazo's first out-of-state trip since he began working for Perez. The log books were consistent with this statement.

Once Deputy McMurray completed checking the documents, he returned the documents to Villalvazo and Perez, and asked them both if they would consent to a search of the truck. Both agreed and signed voluntary consent forms authorizing a search of the truck. Deputy McMurray used a hammer to tap on various areas of the interior of the cab, and located several places that he believed might contain hidden compartments. Deputy McMurray used a knife to cut through or remove

upholstery, and to remove sheet metal beneath the upholstery. In so doing, Deputy McMurray uncovered several hidden compartments, two of which contained a combined twenty-four kilograms of cocaine. Only one fingerprint was recovered from inside the hidden compartments, and it matched neither Villalvazo nor Perez. A duffel bag containing Perez's clothes and personal items was also located inside the cab of the truck and $5,000.00 in cash was recovered from inside the lining of that duffel bag. Several mobile phones belonging to Perez were also recovered. Villalvazo had one mobile phone with him, and only a small amount of cash.

Villalvazo and Perez were arrested and tried together. Each was found guilty of two counts of trafficking cocaine in excess of 400 grams (based upon possession and transportation), one count of possession with intent to sell or deliver cocaine, and one count of conspiracy to traffic in cocaine by transporting and possessing cocaine in excess of 400 grams. Both Defendants appealed, and we address both of their appeals in this opinion.

I.

[1] In Villalvazo's first argument, he contends the trial court erred in denying his motions to dismiss the two counts of trafficking cocaine (based upon possession and transportation), and the one count of possession with intent to sell or deliver cocaine, because the State failed to produce substantial evidence of each essential element of those charges. We agree.

> A motion to dismiss is properly denied if "there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." "When ruling on a motion to dismiss, all of the evidence should be considered in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence." If substantial evidence exists, whether direct, circumstantial, or both, supporting a finding that the offense charged was committed by the defendant, the case must be left for the jury.

State v. Tisdale, 153 N.C. App. 294, 296-97, 569 S.E.2d 680, 682 (2002) (citations omitted). "Trafficking in cocaine by possession and trafficking in cocaine by transportation, in violation of N.C. Gen. Stat. § 90–95(h)

(3) (2001), require the State to prove that the substance was knowingly possessed and transported." *State v. Baldwin*, 161 N.C. App. 382, 391, 588 S.E.2d 497, 504 (2003) (citation omitted).

> "[I]n a prosecution for possession of contraband materials, the prosecution is not required to prove actual physical possession of the materials." Proof of nonexclusive, constructive possession is sufficient. Constructive possession exists when the defendant, "while not having actual possession, . . . has the intent and capability to maintain control and dominion over" the narcotics. "Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession." "However, unless the person has exclusive possession of the place where the narcotics are found, the State must show other incriminating circumstances before constructive possession may be inferred."

Tisdale, 153 N.C. App. at 297, 569 S.E.2d at 682 (citations omitted). Knowledge of the existence of the contraband was necessary to prove the trafficking and possession charges. *State v. Wiggins*, 185 N.C. App. 376, 386, 648 S.E.2d 865, 872 (2007).

The State argues that the facts in this case regarding Villalvazo's knowledge of the cocaine are analogous to those in *Tisdale* and *State v. Munoz*, 141 N.C. App. 675, 541 S.E.2d 218 (2001). We disagree. In *Tisdale*, this Court found sufficient additional incriminating circumstances where the defendant was driving alone in an automobile that had been rented by another person, Harold Leak ("Leak"). *Tisdale*, 153 N.C. App. at 295, 569 S.E.2d at 681.

> Just before defendant was pulled over, he had accelerated from 0 to 60 miles per hour in a 35 mile per hour speed zone with a police officer directly behind him. The officer noticed the cocaine in *plain view* in the car door handle on the driver's side of the vehicle, well within reach of defendant. While talking with the officer, defendant was "sweating profusely" and was nervous. In the officer's opinion, defendant "was under the influence of something[,]" although the officer did not consider defendant to be so impaired that he could not drive. A subsequent search of the vehicle uncovered more cocaine located

> under the driver's seat. This second baggie of cocaine was also well within defendant's reach. Although Cosby [a carwash employee], [and] an admitted cocaine addict, testified he placed or dropped cocaine in the car while cleaning it, Leak testified he did not notice any cocaine in the vehicle following the cleaning. Taken in the light most favorable to the State, this evidence supports a reasonable inference that defendant was aware of the presence of cocaine in the vehicle and had the power and intent to control its disposition.

Tisdale, 153 N.C. App. at 298-99, 569 S.E.2d at 683.

In *Munoz*, regarding the defendant's knowledge of cocaine recovered from a vehicle the defendant had been driving, this Court held that "it could be inferred [from the attendant circumstances] that defendant had knowledge of the presence of [] cocaine." *Munoz*, 141 N.C. App. at 686, 541 S.E.2d at 224.

> An inference that defendant had knowledge of the presence of the cocaine can be drawn from defendant's power to control the Sentra. The Sentra had been under defendant's exclusive control since it was loaded onto the car carrier in Houston, Texas six days prior to defendant's arrest, and Trooper Gray testified that he had to obtain keys from defendant to unlock the cars to be able to search them. In addition, the State presented other evidence from which an inference of defendant's knowledge could be drawn. First, defendant presented the troopers with bills of lading for the Aerostar and the other vehicles which he had transported, but had no such document for the Sentra. Each bill of lading contained an inspection checklist. Defendant explained that he had no such inspection checklist for the Sentra because it was raining when he picked up the car in Houston, Texas; however, a certified copy of a report by the National Climatic Data Center was introduced into evidence showing that there was no precipitation in the Houston area on that date. Trooper Gray's testimony regarding the lack of rear tags, the absence of a trunk lock, the grease-like odor and the displacement of the rear seat indicates that defendant could have found the cocaine had he inspected the Sentra in a manner consistent with the inspection he conducted on the Aerostar. Second, the FAX indicated that the Sentra was to be shipped to Junior City,

> New Jersey and provided a contact number with an area code of 917. Agents from the State Bureau of Investigation testified that Junior City, New Jersey does not exist and that 917 is a New York City area code. Finally, defendant told the agents that he did not know Mr. Angel and that Mr. Angel would not be able to contact defendant directly; however, a call was received on defendant's pager from the number identified as Mr. Angel's on the FAX. Taking the facts in the light most favorable to the State and leaving discrepancies and inconsistencies in the testimony for the jury to resolve, we conclude there was sufficient evidence from which it could be inferred that defendant had knowledge of the presence of the cocaine.

Id. at 685-86, 541 S.E.2d at 224.

We note that not only was Villalvazo's control over the truck not exclusive, the owner of the truck was Perez, the co-driver. The cocaine was secreted in hidden compartments that were not accessible to Villalvazo. Because the truck belonged to Perez, Perez was the one with the authority to cut open the truck, hide the cocaine, and seal the compartments with sheet metal and upholstery. The State argues there were other incriminating circumstances sufficient to submit to the jury the charges of trafficking and possession against Villalvazo. Specifically, the State cites Deputy McMurray's "review of the logbooks and other documentation [that] caused him to question the economic feasibility of the trip, which supported his overall suspicion of illegal narcotics activity." If, in fact, Perez's trucking company was operating in an economically unsound manner, that would be evidence the jury could consider in its deliberations concerning Perez. Evidence suggested Villalvazo had not been working very long for Perez, there was no evidence that Villalvazo had any stake or control in Perez's trucking company, or any authority to countermand Perez's authority. Deputy McMurray's suspicions concerning the logbooks and other documentation are not particularly relevant to Villalvazo in this matter.

The State contends that "as the driver of the vehicle, [Villalvazo] had the power to control the contents of the vehicle." No evidence was presented that Villalvazo had the power to control the cocaine hidden inside secret compartments that Deputy McMurray had to cut through upholstery and sheet metal to discover. The State also argues: "[Villalvazo] did not testify, and indeed presented no evidence as to his lack of access." It is improper for the State to base arguments at trial on a defendant's decision not to testify, and it is at least inappropriate to do so on appeal. The

State contends Villalvazo "was in essence the borrower of the vehicle" which, based upon *State v. Glaze*, 24 N.C. App. 60, 210 S.E.2d 124 (1974), allowed

> an inference of knowledge and possession which may be sufficient to carry the case to the jury. The inference is rebuttable, and if the owner of a vehicle loans it to an accused without telling him what is contained within the vehicle, the accused may offer evidence to that effect and thereby rebut the inference.

Id. at 64, 210 S.E.2d at 127. We disagree with the State that a hired employee of a trucking company, who has been instructed to drive by his employer, is "in essence the borrower of the vehicle[.]" We find this analogy especially tenuous when the employer and owner of the vehicle was in the vehicle and would have been driving the vehicle had it been stopped at another time during the trip.

The State also refers to Deputy McMurray's "many suspicions" concerning Villalvazo. These suspicions included Villalvazo clearing his throat and "kind of coughing" several times during the approximately fifty minutes Villalvazo was sitting in Deputy McMurray's SUV, Deputy McMurray's testimony that Villalvazo sometimes avoided eye contact, and that Villalvazo's "heart" was beating in his neck. In its order denying Defendants' motions to suppress, the trial court found as fact: "The Court observed the demeanor of [Villalvazo] in the video to be somewhat apprehensive and nervous during the investigation by Officer McMurray[.]" We agree with the trial court that Villalvazo's demeanor could be characterized as "somewhat apprehensive and nervous during the investigation[.]"

The State contends that Villalvazo "presented no evidence as to his lack of access [to the hidden compartments]." However, on cross-examination of the State's witnesses, the defense attorneys elicited testimony that none of Villalvazo's fingerprints were recovered from inside the compartments or from the packaged cocaine, that cutting and removing upholstery and sheet metal to uncover the compartments was labor intensive, and that the compartments would not have been visible "to the average-civilian naked eye." When Deputy McMurray was asked how Villalvazo reacted to hearing there had been cocaine recovered from the truck, Deputy McMurray testified that Villalvazo was "surprised," and that Villalvazo responded: "Cocaine? Cocaine in the truck?"

The State's evidence in support of the required element that Villalvazo had knowledge of the cocaine hidden within the structure

of the truck was that Villalvazo was in the truck, was driving the truck at the time of the stop, and that Deputy McMurray believed Villalvazo showed some signs of nervousness during the stop. The State presented no evidence that Perez actually communicated with Villalvazo in any manner concerning hidden compartments or any cocaine within the hidden compartments. The evidence presented — that Villalvazo knew Perez only because Perez had hired Villalvazo as a driver and they had only known each other only for a short period of time — does not establish a relationship between the two as indicative of the trust one would expect when admitting to a serious felony. We can think of no good reason why Perez would want, or need, to share that information with one in Villalvazo's position. The level of nervousness demonstrated by Villalvazo in this instance is also of limited value to the State's case. As our Supreme Court has stated: "[M]any people do become nervous when stopped by [a law enforcement officer]." *State v. McClendon*, 350 N.C. 630, 638, 517 S.E.2d 128, 134 (1999). Some degree of nervousness is common when a person is stopped and detained by law enforcement, even for minor traffic violations.

We hold that the evidence presented to support the required element that Villalvazo knew there was cocaine secreted within the body of the truck was not substantial, in that it did not constitute " 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Tisdale*, 153 N.C. App. at 296, 569 S.E.2d at 682 (citation omitted). We make this holding even considering "all of the evidence . . . in the light most favorable to the State[.]" *Id.* at 296-97, 569 S.E.2d at 682 (citation omitted). We vacate Villalvazo's convictions for trafficking in cocaine by transportation, trafficking in cocaine by possession, and possession of cocaine with intent to sell or deliver.

II.

[2] Both Villalvazo and Perez argue the State failed to present substantial evidence in support of the charges of "conspir[acy] to traffic in cocaine . . . by transporting and possessing [cocaine] in excess of 400 grams[.]" We agree.

> A criminal conspiracy is an agreement between two or more people to do an unlawful act or to do a lawful act in an unlawful manner. In order to prove conspiracy, the State need not prove an express agreement; evidence tending to show a mutual, implied understanding will suffice. Nor is it necessary that the unlawful act be completed. "As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is completed."

State v. Morgan, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991) (citations omitted).

> While conspiracy can be proved by inferences and circumstantial evidence, it "cannot be established by a mere suspicion, nor does a mere relationship between the parties or association show a conspiracy." Instead "[i]f the conspiracy is to be proved by inferences drawn from the evidence, such evidence must point unerringly to the existence of a conspiracy."

State v. Benardello, 164 N.C. App. 708, 711, 596 S.E.2d 358, 360 (2004) (citations omitted). Though not dispositive, the fact we held above that there was not substantial evidence indicating Villalvazo knew there was cocaine secreted in the truck factors into our analysis. The State submitted no evidence directly implicating Villalvazo and Perez in a conspiracy. The only evidence presented was that Villalvazo worked for Perez, and that they were both involved in driving the truck while it contained the cocaine. In the present case, "[t]he evidence . . . does not point unerringly toward conspiracies [to traffic in cocaine by transporting and possessing cocaine in excess of 400 grams] and is insufficient to support convictions on those charges." *Id.* We hold there was not substantial evidence of a conspiracy presented at trial, and we vacate Villalvazo's and Perez's convictions for conspiracy to traffic in cocaine by transporting and possessing.

III.

Because our holdings above result in vacating all four convictions against Villalvazo, we do not address Villalvazo's remaining arguments.

IV.

[3] In Perez's second argument, he contends the trial court erred in denying his motion to suppress the cocaine seized based upon his argument that the stop was unconstitutionally extended. We disagree.

Perez contends:

> Once Deputy McMurray issued the warning citation to . . . Villalvazo for speeding, the justification for the initial stop was completed. Deputy McMurray then told . . . Villalvazo he was going to run more checks. Deputy McMurray had not obtained any evidence up to that point that would justify prolonging the detention beyond the time it took to investigate the initial traffic stop.

Perez's argument is limited to contending that, once Deputy McMurray handed Villalvazo the warning citation, the purpose of the stop was over, and anything that occurred after that time constituted an unconstitutional prolongation of the stop. However, Perez provides no citation to authorities upon which he relies in support of the proposition that the purpose of the stop was necessarily completed once the citation for the infraction justifying the stop had been given to the person who committed the infraction. Failure to cite to supporting authority is a violation of Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure, and constitutes abandonment of this argument. N.C.R. App. P. 28(b)(6).

In addition, we find no such authority. Law enforcement officers routinely check relevant documentation while conducting traffic stops. This Court has recognized that

> an initial traffic stop concludes and the encounter becomes consensual only after an officer returns the detainee's driver's license and registration. *See State v. Kincaid*, 147 N.C. App. 94, 100, 555 S.E.2d 294, 299 (2001) (holding that because a reasonable person would have felt free to leave when his documents were returned, the initial seizure concluded when the officer returned the documents to defendant)[.]

State v. Jackson, 199 N.C. App. 236, 243, 681 S.E.2d 492, 497 (2009).

In the present case, though Deputy McMurray had completed writing the warning citation, he had not completed his checks related to the licenses, registration, insurance, travel logs, and invoices of Perez's commercial vehicle. Perez does not argue that investigation into any of these documents was improper. The purpose of the stop was not completed until Deputy McMurray finished a proper document check and returned the documents to Villalvazo and Perez. Because Perez does not argue this issue, we do not make any holding regarding which documents may be properly investigated during a routine commercial vehicle stop.

The trial court found as fact that: "The actual time for this traffic stop of [] Defendants was approximately 53 minutes[;]" that Deputy McMurray asked both Villalvazo and Perez for consent to search the truck, and consent was given by both; that both Villalvazo and Perez signed consent to search forms; and that "[d]uring the course of the consent search," the hidden compartments were located, and the cocaine was recovered from two of those compartments. Perez does not challenge these findings of fact, and they are therefore binding on appeal. *State v. McLeod*, 197 N.C. App. 707, 711, 682 S.E.2d 396, 398 (2009).

The trial court concluded that Villalvazo and Perez "voluntarily consented and agreed to additional questioning once the purpose of the traffic stop was completed." Because these unchallenged findings of fact support the trial court's conclusion that Villalvazo and Perez voluntarily consented to the search of the truck after the approximately fifty-three minute stop concluded, we have nothing further to review.

> "An appellate court accords great deference to the trial court's ruling on a motion to suppress because the trial court is entrusted with the duty to hear testimony (thereby observing the demeanor of the witnesses) and to weigh and resolve any conflicts in the evidence." " 'Our review of a trial court's denial of a motion to suppress is strictly limited to a determination of whether it's [sic] findings are supported by competent evidence, and in turn, whether the findings support the trial court's ultimate conclusion.' "

State v. Hernandez, 170 N.C. App. 299, 303-04, 612 S.E.2d 420, 423 (2005) (citations omitted). The fact that the trial court also included findings of fact and conclusions of law relating to Defendants' reasonable suspicion argument at the hearing is of no moment. The 16 October 2012 order contains unchallenged findings of fact supporting the trial court's conclusion that the search was a legal search based on the voluntary consent of both Villalvazo and Perez. This argument is without merit.

V.

[4] In Perez's third argument, he contends his trial counsel was ineffective due to his "failure to renew the objection to the admission of evidence that was fruits of the improper extension of the traffic stop." Having held that Perez's argument in Section IV. fails, this argument also fails.

VI.

[5] In Perez's fourth argument, he contends the trial court erred "in ordering costs for fingerprint examination as lab fees as part of [Perez's] sentence in violation of a statutory mandate." We agree.

N.C. Gen. Stat. § 7A-304 (2013) covers costs in criminal prosecutions, and allows certain lab costs to be assessed to a defendant who is convicted.

> For the services of any crime laboratory facility operated by a local government or group of local governments, the district or superior court judge shall, upon conviction,

> order payment of the sum of six hundred dollars ($600.00) to be remitted to the general fund of the local governmental unit that operates the laboratory to be used for law enforcement purposes. The cost shall be assessed only in cases in which, as part of the investigation leading to the defendant's conviction, the laboratory has performed DNA analysis of the crime, test of bodily fluids of the defendant for the presence of alcohol or controlled substances, or analysis of any controlled substance possessed by the defendant or the defendant's agent.

N.C. Gen. Stat. § 7A-304(a)(8) (2013).

The State agrees with Perez that N.C.G.S. § 7A-304(a)(8) does not allow recovery of lab costs for fingerprint analysis, "and therefore the State does not object to [Perez's] request that $600 be vacated from the $1,200 costs ordered by the trial court." The trial court erred in assessing $600.00 for fingerprint analysis done by the Charlotte-Mecklenburg Police Department. We reverse and remand for correction of this error.

VII.

In conclusion, we vacate all four of Villalvazo's convictions. We vacate Perez's conviction for conspiracy to traffic in cocaine. We find no error related to Perez's remaining convictions. We reverse and remand for the trial court to delete the $600.00 it assessed as costs for fingerprint examination as lab fees as part of Perez's sentence, and enter a corrected judgment.

Vacated in part, no error in part, reversed and remanded in part.

Judges HUNTER, Robert C. and ELMORE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 15 APRIL 2014)

ANDERSON v. AURORA LOAN SERVS., LLC No. 13-844	Pender (12CVS1082)	Affirmed
BENJAMIN v. CITY OF DURHAM No. 13-909	Durham (12CVS4537)	Affirmed
BENTLEY v. REVLON, INC. No. 13-932	N.C. Industrial Commission (609188) (X22096)	Affirmed
BRYANT/SUTPHIN PROPS. v. HALE No. 13-1189	Guilford (13CVS5523)	Affirmed
CAMPBELL v. CAMPBELL No. 13-1133	Wake (09CVD17335)	Affirmed
DAVIS v. DAVIS No. 13-984	Davidson (10CVD3929)	Vacated and Remanded
IN RE A.F. No. 13-565	Mecklenburg (11JB212)	Affirmed
IN RE A.M.M. No. 13-936	Guilford (11JT327-328)	Affirmed
IN RE H.L.M. No. 13-1027	Caldwell (12JT146) (12JT147)	Vacated and Remanded
IN RE H.R. No. 13-1277	Randolph (11JT92-95)	Affirmed
IN RE J.M.M. No. 13-1263	Sampson (11JT09) (11JT9)	Affirmed
IN RE P.V.M. No. 13-1155	Guilford (11JT163)	Affirmed
IN RE REED No. 13-1163	Catawba (12SP582)	Affirmed
IN RE S.A.A. No. 13-1357	Durham (11J108)	Affirmed

IN RE T.S. No. 13-1380	Mecklenburg (13JA260-261)	Affirmed
IN RE W.J.W. No. 13-1129	Buncombe (10JB283)	Affirmed
KENNEDY v. RAMIREZ No. 13-927	Mecklenburg (07CVS7515)	Dismissed
STATE v. BANNER No. 13-563	Mecklenburg (11CRS233836)	No Error
STATE v. BARNETTE No. 13-1076	Rowan (11CRS51850-51)	No Error
STATE v. DICKENSON No. 13-1106	Mecklenburg (10CRS200906-07)	Affirmed
STATE v. FARRIS No. 13-702	Burke (11CRS52086)	No Error
STATE v. FERRELL No. 13-917	Wayne (10CRS55383)	No error in part; vacated in part and remanded for resentencing
STATE v. GERARD No. 13-1120	Mecklenburg (10CRS218127-30) (10CRS218132) (10CRS218134)	Dismissed
STATE v. LINDLEY No. 13-944	Mecklenburg (10CRS225348)	No Error
STATE v. MCLENDON No. 13-915	Iredell (11CRS50709)	No Prejudicial Error
STATE v. MITCHELL No. 13-645	Columbus (11CRS53725-27) (11CRS53760)	No Error
STATE v. MORAN No. 13-1046	Forsyth (11CRS62670) (11CRS62672)	No error in part; dismissed in part
STATE v. RUSSELL No. 13-1308	Buncombe (11CRS63119)	No prejudicial error
STATE v. SMITH No. 13-1000	Person (12CRS1794-95)	No Error

STATE v. TAYLOR No. 13-988	Catawba (11CRS5731)	No Error
STATE v. WOOD No. 13-1187	Johnston (11CRS56615)	Remanded for re-sentencing

BURAKOWSKI v. BURAKOWSKI

[233 N.C. App. 601 (2014)]

SUZIE JANE BURAKOWSKI, PLAINTIFF
v.
STEVEN ALLEN BURAKOWSKI, DEFENDANT

No. COA13-986

Filed 6 May 2014

Reformation of Instruments—separation agreement—interpretation of terms—basic annuity—issue fully litigated and decided previously—law of the case

The trial court erred in a case involving the interpretation of terms of an amended separation agreement by ordering defendant to pay plaintiff one-half of his monthly basic retirement annuity because plaintiff was barred from raising this issue in her 2012 motion for contempt. The issue of whether plaintiff was entitled to receive one half of the defendant's monthly basic annuity was fully litigated and decided at a prior hearing and the trial court had already denied this same relief in its order. That order was not appealed by either party and thus was the law of the case. Furthermore, the trial court also erred in finding defendant in contempt for failing to pay plaintiff one-half of his monthly basic retirement annuity because he had never been ordered to do so. The matter was remanded to the trial court for consideration of defendant's motion for sanctions based on the issue of the basic annuity in light of the Court of Appeals' opinion.

Appeal by defendant from contempt order entered 25 March 2013 by Judge Eula E. Reid in District Court, Gates County. Heard in the Court of Appeals 9 January 2014.

Mitchell S. McLean, for plaintiff-appellee.

Davis Law Office, by Mary Elizabeth Davis, for defendant-appellant.

STROUD, Judge.

Defendant appeals order allowing plaintiff's motion for contempt, awarding plaintiff certain annuity payments, and denying defendant's motion for sanctions. For the following reasons, we reverse and remand in part.

I. Background

In 2008, plaintiff and defendant were divorced in Kentucky by a decree of dissolution of marriage which incorporated a separation agreement. The separation agreement, entered on 8 October 2008, included a provision regarding the division of defendant's retirement benefits as follows:

> Parties agree that wife is entitled to one half of the husband's retirement account, which specifically is TSP and FERS accounts, as of the date of the entrance of the final decree of dissolution in this case. Wife shall execute any orders as directed by the Court to effectuate said division including but not limited to any QDROs.[1]

Thereafter, on 19 November 2008, the parties entered into an Amended Separation Agreement ("Amended Agreement") which was also incorporated into the decree of dissolution of marriage. The Amended Agreement further addressed defendant's retirement benefits as follows:

> The parties agree that wife is entitled to one half (½) of husband's Retirement Accounts, more specifically his TSP account and FERS account. His TSP account shall be divided, with wife to receive ½ the value thereof as of the date of the entrance of the Final Decree of Dissolution in this case. Wife shall execute any orders as directed by the Court to effectuate said division, including but not limited to any Qualified Domestic Relations Order (QDRO). Husband's *FERS account* shall be divided, with wife to receive ½ of the amount in said account as of the date of the entrance of the Final Decree in this case. Both parties understand that wife will not receive payment of this amount until husband retires. Wife shall execute any Orders necessary to effectuate division of the same. Wife shall also receive ½ of the *supplemental annuity* to be received by husband from the date of his retirement or when he reaches age 57, whichever shall come earlier[.]

(Emphasis added.) Thus, the Amended Agreement provided additional details as to the portions of the defendant's retirement benefits that plaintiff would receive and how the distributions would be accomplished.

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1. The original agreement is not in our record but this provision was read out loud at a hearing by defendant's attorney and plaintiff testified that this was what the separation agreement stated. There is no dispute about this provision, which was later amended.

In 2010, a North Carolina trial court entered a consent order which domesticated the Kentucky modified decree of dissolution of marriage making it "enforceable as a valid Order of the State of North Carolina, so the terms of the Amended Agreement became enforceable as a court order. Later in 2010[2], plaintiff filed a verified "MOTION IN THE CAUSE AND FOR CONTEMPT" ("2010 Motion") seeking to hold defendant in contempt under the terms of the Amended Agreement regarding her health insurance benefits, which are not at issue in this appeal, and also seeking "clarification" of the provisions of the Amended Agreement as to defendant's retirement benefits. Plaintiff alleged:

> 7. That the Amended Separation Agreement provided for the plaintiff to receive one half of the defendant's FERS retirement benefits, upon his retirement. A problem has arisen regarding the Office Of Personal Management's interpretation of the provision of the Amended Separation Agreement that divides defendant's FERS retirement annuity. The OPM has interpreted the wording of the Amended Separation Agreement contrary to the clear intent of the parties, because the term "retirement account" was used rather than the term "retirement annuity." The intent of the parties was clearly for the plaintiff to receive one half of the monthly annuity payments that defendant is entitled to receive, pursuant to his FERS retirement benefit/annuity. However, because the Amended Separation Agreement did not us[e] the specific word "annuity", OPM has construed the Amended Separation Agreement as only giving her a one half interest in the set contributions that were made to the FERS account after the date of the October 10, 2008 Decree, which was only for a one year period, as indicated in document attached hereto as "Exhibit 2".
>
> 8. That the court should clarify the wording of the Amended Separation Agreement to conform with the clear intentions of the parties and should specify that the OPM shall divide and apportion the defendant's monthly FERS retirement annuity payment so that the plaintiff

2. Both parties state that plaintiff's motion was made in 2011; however, the file stamp is illegible and the date written in by plaintiff's attorney indicates the motion was made in 2010. As such, we will refer to this motion as the 2010 Motion noting that whether it was filed in 2010 or 2011 is irrelevant to the issues on appeal. There is no doubt that it preceded the motion and order at issue here.

> shall begin receiving one half of these monthly annuity payments. The court should also require that the defendant reimburse the plaintiff for the plaintiff's one half share of each monthly FERS annuity payment that she has not received since the date the defendant retired and began receiving his FERS annuity monthly payment.
>
> . . . .
>
> 11. That the plaintiff has requested and demanded of the defendant that he comply with the health insurance provisions of the Amended Separation Agreement and has requested and demanded of the defendant that he cooperate in amending the prior Amended Separation Agreement to specify that plaintiff is entitled to receive one half of the defendant's monthly FERS retirement annuity. However, the defendant has failed and refused to abide or comply with these requests and demands, which has required the plaintiff to initiate this Motion to enforce the defendant's compliance with the health insurance provision and to clarify the FERS annuity provision, to conform with the clear intent of the parties.

Plaintiff then specifically requested that the trial court "clarif[y]" the Amended Agreement to provide specifically that she would receive one half of the defendant's monthly "FERS retirement annuity payment" and that OPM be ordered to pay this directly to plaintiff:

> 4. That the retirement provision of the Amended Separation Agreement be clarified to specify that the plaintiff is entitled to receive one half of the defendant's monthly FERS retirement annuity payment, and to order the OPM to begin directing one half of each monthly annuity payment to the plaintiff. Also, the defendant be ordered to reimburse the plaintiff for the plaintiff's one half share of each monthly FERS retirement annuity payment that the defendant has received since his retirement.

In other words, because the Amended Agreement referred specifically only to the defendant's "FERS account" and "supplemental annuity[,]" the OPM had taken the position that the Amended Agreement did not permit it to pay the *basic annuity* benefits to plaintiff. Plaintiff testified at the hearing on her 2010 Motion that defendant had already retired and one-half of his TSP or Thrift Savings Plan, had been paid to her in the lump sum of $119,030.00, and an additional $7,400.00 had been paid

over the course of six months as her one-half interest from the FERS account.[3] However, plaintiff was not being paid a one-half share of the *basic annuity*, so she requested the trial court to "clarif[y]" that the parties actually meant for the term "FERS account" to include the *basic annuity* so that the OPM would pay one-half of the *basic annuity* benefits to her. Plaintiff also requested that defendant be required to pay to her the arrearages of her one-half of the *basic annuity* payments that had accrued up to that time.

In 2011, the trial court entered an order ("2011 Order") after a hearing on plaintiff's 2010 Motion and found:

> 11. That the defendant currently receives a *gross regular monthly FERS annuity of $2,327.00. He also receives an additional FERS supplemental annuity of $915.00 per month.* The defendant is also gainfully employed at Fort Lee and testified that he earns $80,000.00 per year from his employment, and began his employment in June, 2010.
>
> . . . .
>
> 22. That the plaintiff contends that the Amended Separation Agreement should be modified and clarified to require the defendant to pay her ½ of his FERS regular retirement benefits. However, the court deems that the Amended Separation Agreement is unambiguous in regards to the plaintiff's right concerning the defendant's retirement benefits and will not modify or supplement the provisions contained therein.
>
> 23. *That the specific wording of the Amended Separation Agreement, as agreed to and admitted by each party in open court, provides that the plaintiff is entitled to receive ½ of the defendant's monthly FERS supplemental annuity payments, less ½ of the taxes.*
>
> 24. That the defendant started receiving his monthly FERS supplemental annuity payments on March 1, 2010.

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3. The parties' use of informal terminology to identify the TSP retirement account, FERS retirement account, and the two FERS annuities, in the Amended Agreement, before the trial court, and in their briefs before this Court has made it challenging to determine at times exactly which asset the parties are referring to, but ultimately the accounts and annuities as identified in this opinion are consistent with those found by the trial court, and these particular findings are not challenged.

> 25. That the defendant currently receives the sum of $915.00 per month as FERS supplemental annuity payments. The amount of taxes are deducted is $269.60 per month. Therefore, the plaintiff's net ½ share of the current monthly supplemental annuity payment is $322.70. For the 13 months that the defendant received this supplemental annuity payment up to the March 25, 2011 court date, the total net payment due to the plaintiff from the defendant, for her share of the supplemental annuity payments, is $4,195.10.
>
> 26. That the total amount of the plaintiff's share of the defendant's monthly supplemental annuity payments, as of July 31, 2011, will be $5,485.90.
>
> 27. That the defendant should be ordered to directly pay the plaintiff, each month, her ½ share of his supplemental annuity payment, less taxes, the current net monthly amount due plaintiff being $322.70, by the 5th day of each month, beginning August 5, 2011.
>
> 28. That the defendant has the present financial ability to pay the plaintiff the reimbursement/arrearage that he owes her for her ½ share of his supplemental annuity payments, dating back to March 1, 2010. The amount of the arrearage/reimbursement owed by the defendant to the plaintiff, through July 31, 2011, is $5,485.90. The defendant has the present financial ability to pay to the plaintiff, provided that he is allowed to pay this reimbursement/arrearage amount in 6 equal monthly installments, with the first installment being due and payable by September 5, 2011.

(Emphasis added.)

The trial court concluded that plaintiff would receive one-half of the *supplemental annuity* payments, past and future:

> 16. That the plaintiff's share of the defendant's monthly FERS *supplemental annuity* payments that he has received since March 1, 2010, through the March 25, 2011 court date, is $4,195.10. The total amount of plaintiff's share of the defendant's monthly supplemental annuity payments through July 31, 2011, will be $5,485.90.

> 17. That the defendant has the present financial ability to reimburse the plaintiff for her ½ share of the *supplemental annuity* payments defendant has received since March 1, 2010, provided that he is allowed to pay this reimbursement/arrearage total in 6 equal installments, payable monthly, with the first installment payment being due September 5, 2011.

(Emphasis added.)

The trial court thus ordered payment of the *supplemental annuity* benefits, including arrearages as well as future payments:

> 9. . . . The total *supplemental annuity* reimbursement that the defendant owes the plaintiff, through July 31, 2011, is $5,485.90. The total arrearage/reimbursement that the defendant owes the plaintiff, through July 31, 2011, is $13,041.56. Defendant shall pay plaintiff the full sum of $13,041.56 in six monthly installments, beginning with a first monthly installment due September 5, 2011, in the amount of $2,173.59. The defendant shall make an equal payment of $2,173.59 to the plaintiff on October 5, 2011, November 5, 2011, December 5, 2011, and January 5, 2012. The defendant shall make a final arrearage installment payment of $2,173.61 to plaintiff on February 5, 2012.
>
> 10. That willful violation of the provisions of this Order shall be punishable by the contempt of court sanctions of this court.

(Emphasis added.) In sum, the 2011 Order did not "clarif[y]" the Amended Agreement as plaintiff requested nor did it order defendant to pay any *basic annuity* payments, but instead only ordered payments as to the "*supplemental annuity*[.]" (Emphasis added.) The record does not indicate that either party appealed from this order.

In 2012, plaintiff filed a verified "MOTION FOR CONTEMPT" ("2012 Motion") which requested that defendant be held in contempt for failure to pay her one-half of his *basic annuity* payments under the Amended Agreement, alleging:

> 6. That the defendant should be found to be in willful contempt of court for his willful violation of the provisions of the aforesaid Amended Separation Agreement,

which has been incorporated into the Divorce Decree entered in this cause, in that:

A. The Amended Separation Agreement provided for the plaintiff to receive one half of the defendant's FERS retirement account, upon his retirement.

B. The defendant's FERS retirement account encompasses the retirement annuity that provides defendant with monthly annuity payments.

C. The intent of the parties was clearly for the plaintiff to receive one half of the monthly annuity payments that defendant is entitled to receive, pursuant to his FERS retirement account.

D. The defendant has willfully failed and refused to pay plaintiff one half of his monthly retirement annuity payment since his retirement, as required by the aforesaid Amended Separation Agreement, despite demand from the plaintiff.

E. The only portion of the defendant's FERS retirement account that plaintiff has received is one half of the direct contributions that were made by the defendant into his FERS account after the date of the October 10, 2008 Decree, and prior to the retirement date of the defendant.

F. The specific wording of the Amended Separation Agreement, that was incorporated into the October 10, 2008 Decree, provided for the plaintiff to receive one half of the defendant's "retirement account", not just one half of the direct contributions made between October 10, 2008 and the date of the defendant's retirement. The said Amended Separation Agreement, as incorporated into the Decree, required the defendant to provide plaintiff with one half of his full "retirement account" upon retirement, which emcompasses and includes the monthly FERS retirement annuity payment received by the defendant.

G. The purposes of the Amended Separation Agreement can still be accomplished by the court entering an Order finding the defendant to be in willful

contempt of court and imposing such sanctions against the defendant as deemed appropriate.

H. An appropriate sanction against the defendant for his willful violation of the provisions of the Amended Separation Agreement, due to his willful failure and refusal to provide the plaintiff with one half of his FERS retirement account since his date of retirement, would be for the court to specifically order the defendant to do the following:

1. Order the defendant to reimburse the plaintiff for plaintiff's one half share of each monthly FERS annuity payment that he has received since the date the defendant retired and began receiving his FERS annuity monthly payment.

2. Order the defendant to directly forward the plaintiff her one half share of each prospective monthly FERS annuity payment that he receives.

3. Order the defendant to pay the plaintiff an award of reasonable attorney fees to reimburse her for her costs and attorney fees incurred in connection with the enforcement of the retirement account provisions of the aforesaid Amended Separation Agreement and Decree.

7. That the Amended Separation Agreement had a "default" provision that required that in the event either party defaults in or breaches any of his or her respective obligations and duties as contained in the Agreement, the defaulting or breaching party shall be responsible for and pay the injured party, in addition to such damages as any court may award, all of his or her attorney fees, court costs and other related expenses incurred to enforce the provisions contained in the Amended Separation Agreement against the defaulting party.

8. That the defendant has defaulted on his obligations pursuant to the Amended Separation Agreement by his willful failure to abide and comply with the retirement account provisions of said Agreement, by his failure and refusal to separate and apportion the plaintiff's one half of his monthly FERS retirement annuity payment

to plaintiff. Therefore, the defendant should be required to reimburse the plaintiff for all of her attorney fees, court costs and other related expenses connected with this proceeding.

9. That the plaintiff has requested and demanded of the defendant that he comply with the retirement account provisions of the Amended Separation Agreement and has requested and demanded of the defendant that he provide her with her one half share of his monthly FERS retirement annuity payment. However, the defendant has failed and refused to abide or comply with these requests and demands, which has required plaintiff to initiate this Motion to enforce the defendant's compliance with the retirement account provisions and to secure plaintiff's receipt of her one half share of the defendant's monthly FERS retirement annuity payment, retroactive to the date of the defendant's retirement.

Plaintiff requested that defendant be held in contempt "for his willful violation of the provisions of the aforesaid Amended Separation Agreement" and that he be requiredin order to purge himself of contempt, to do the following:

A. Reimburse the plaintiff for her one half share of each monthly FERS retirement annuity payment that the defendant has received since his date of retirement.

B. The defendant be required to henceforth directly pay plaintiff her one half share of each monthly FERS retirement annuity payment that he receives.

C. The defendant be required, in order to purge himself of contempt, to pay the plaintiff an award of reasonable attorney fees to defray her costs and attorney fees incurred in connection with this Motion, consistent with the "default" provision of the Amended Separation Agreement, as incorporated into the said Decree.

Thus, plaintiff again requested one half of defendant's *basic annuity* payment, based on the provisions of the Amended Agreement. Plaintiff's motion was not based upon the 2011 Order, nor did it mention this order in which the trial court had already denied this same substantive relief.

Defendant responded to plaintiff's 2012 Motion with "NOTICE AND MOTION FOR RULE 11 SANCTIONS" arguing that

> Plaintiff's current Motion for Contempt is barred by collateral estoppel and/or Res Judicata, said matter having been subject to previous litigation . . . [in] 2011. The matters raised in Plaintiff's Motion are substantially identical to matters ruled upon by the . . . [trial court's 2011 Order]. Defendant avers that Plaintiff should be responsible for his attorneys fees in defending against her currently pending Motion.
>
> WHEREFORE, Defendant respectfully requests that this Court dismiss with prejudice Plaintiff's Motion and the Order to Show Cause set for . . . 2012.

On 25 March 2013, the trial court entered a "CONTEMPT ORDER" ("2013 Order") finding defendant in willful contempt based on his failure to comply with the Amended Separation Agreement, for the following reasons:

> A. The Amended Separation Agreement provided for the plaintiff to receive one half of the defendant's FERS retirement accounts, upon his retirement.
>
> B. Based upon the testimony of the plaintiff and defendant at trial, it was clear understanding of each party that the FERS accounts included the defendant's basic annuity payments as well as the supplemental annuity payments.
>
> C. Based upon the Amended Separation Agreement and the understanding of each party, as testified to at trial, the plaintiff was to receive from the defendant one half of the monthly FERS basic annuity payments that the defendant received.
>
> D. Despite the provisions of the Amended Separation Agreement, and the understanding of the defendant that the plaintiff was to receive one half of his monthly FERS basic annuity, he has failed and refused to pay plaintiff one half of his monthly FERS basic annuity payment since his retirement, despite demand from the plaintiff that he do so.

E. The plaintiff has received one half of the direct contributions that were made by the defendant into his FERS accounts after the date of the October 10, 2008 Decree, and prior to the retirement date of the defendant, and one half of the FERS supplemental annuity, per prior Order of this court entered March 25, 2011[.]

F. The specific wording of the Amended Separation Agreement, that was incorporated into the October 10, 2008 Decree, provided for the plaintiff to receive one half of the defendant's "retirement accounts", not just one half of the direct contributions made between October 10, 2008 and the date of the defendant's retirement. The said Amended Separation Agreement, as incorporated into the Decree, required the defendant to provide plaintiff with one half of his full "retirement accounts" upon retirement, which encompasses and includes the monthly FERS basic annuity payments received by the defendant.

G. The defendant began receiving his monthly FERS basic annuity payments on March 1, 2010 and has continued to receive these monthly payments. Plaintiff was entitled to receive one half of the defendant's monthly FERS basic annuity payments from the March 1, 2010 date that the defendant began receiving these payments; however, the defendant has not provided the plaintiff with any portion of the monthly FERS basic annuity payments that he has received since March 1, 2010.

H. The defendant has received a gross monthly basic FERS annuity payment of $2,327.00. The plaintiff is entitled to one half of each monthly payment, related back to March 1, 2010, when the defendant began receiving his monthly FERS basic annuity payments.

I. The defendant willfully failed and refused to abide by the terms of the Amended Separation Agreement by failing and refusing to pay the plaintiff her one half portion of his monthly FERS basic annuity payments that he has received since March 1, 2010.

J. The plaintiff has requested and demanded of the defendant that he comply with the retirement account provision of the Amended Separation Agreement and has requested and demanded of the defendant that he provide her with her one half share of his monthly FERS basic retirement annuity payments. However, despite these requests, and the defendant's knowledge that the monthly FERS basic annuity payments were included in, and a part of, his FERS accounts that the plaintiff was entitled to receive one half of, he failed and refused to pay her any portion of the monthly basic annuity payments since March 1, 2010, thereby requiring the plaintiff to initiate this motion to enforce the defendant's compliance.

K. The purpose of the Amended Separation Agreement can still be accomplished by the court entering an Order finding the defendant to be in willful contempt of court and imposing the sanctions against the defendant as set forth in the Decree of this Order.

9. That the defendant has the current financial ability to pay the plaintiff one half of his monthly FERS basic annuity payments and has the present financial ability to reimburse the plaintiff for her share of the past due basic annuity payments that he failed and refused to pay her since March 1, 2010, based upon the repayment schedule as set forth in the Decree of this Order.

10. That the defendant receives a gross monthly basic FERS annuity payment of $2,327.00. He also receives an additional monthly FERS supplemental annuity payment of $915.00, but of this amount he pays $322.70 per month to the plaintiff, pursuant to the prior Order of this court. The defendant is also gainfully employed and earns an annual income of approximately $80,000.00 per year.

11. That an appropriate sanction against the defendant for his willful violation of the provisions of the Amended Separation Agreement, due to his willful failure and refusal to pay the plaintiff her one half share of his monthly FERS basic annuity since the date of his retirement, would be for the defendant to directly pay the plaintiff for her one half share of each prospective monthly

FERS basic annuity payment that he receives, within five days of the date that he receives each monthly payment.

12. That an additional appropriate sanction against the defendant for his willful violation of the provisions of the Amended Separation Agreement would be for the court to order the defendant to reimburse the plaintiff for her one half share of each monthly FERS basic annuity payment that he has received since the defendant began receiving his payments on March 1, 2010, pursuant to the repayment schedule as set forth in the Decree of this Order.

13. That the defendant has received his $2,327.00 per month FERS basic annuity payment since March 1, 2010. The plaintiff's one half share of each of these monthly payments is $1,163.50. As of April 30, 2013, the defendant will owe the plaintiff an arrearage of $45,376.50 for the plaintiff's one half share of the defendant's monthly FERS basic annuity payments since March 1, 2010.

14. That as a sanction against the defendant for his willful violation of the provisions of the Amended Separation Agreement, he should be required to directly pay the plaintiff the sum of $500.00 per month, beginning May 1, 2013, to be applied toward the defendant's arrearage, in addition to the $1,163.50 that the defendant is to pay to the plaintiff each month for her one half share of the ongoing monthly FERS basic annuity payments.

15. That the defendant has the present financial ability to pay the plaintiff the sum of $500.00 per month to be applied toward his aforesaid arrearage owed to the plaintiff, and has the present financial ability to pay the plaintiff the sum of $1,163.50 per month, as plaintiff's one half share of his ongoing monthly FERS basic annuity payments.

16. That the plaintiff has waived and abandoned her claim against the defendant for attorney fees in this proceeding.

17. That the defendant's Motion For Sanctions should be denied in that the prior Order of this court did not serve as res judicata for the issues determined in this proceeding. The issue of whether or not the plaintiff is entitled to

receive one half of the defendant's monthly FERS basic annuity was not fully litigated and decided at the prior hearing in this cause on March 25, 2011.

The trial court concluded:

3. That the defendant is in willful contempt of court for his willful violation of the provisions of the aforesaid Amended Separation Agreement, which has been incorporated into the Divorce Decree entered in this cause, due to his willful failure to pay the plaintiff her one half share of his monthly FERS basic annuity payments that he has received since March 1, 2010.

4. That the purposes of the Amended Separation Agreement can still be accomplished by the court entering an Order finding the litigated or decided as a result of the court's prior ruling in the hearing in this matter on March 25, 2011.

The trial court ordered:

1. That the defendant is in willful contempt of court for his willful noncompliance with the provisions of the Amended Separation Agreement, due to his willful failure to pay the plaintiff her one half share of his monthly FERS basic annuity payments that he has received since March 1, 2010.

2. That as a sanction against the defendant, in order for him to purge himself of contempt, he shall pay directly to the plaintiff one half of his gross monthly FERS *basic annuity* payments within five days of the date that he receives each payment. The defendant's initial payment to the plaintiff shall be paid on or before five days from the date he receives his FERS *basic annuity* payment for May, 2013, and he shall continue to pay the plaintiff her one half share of each *basic annuity* payment within five days of the date he receives each monthly payment thereafter.

3. That the current monthly amount that the defendant shall pay the plaintiff, as the plaintiff's one half share of defendant's monthly FERS *basic annuity*, shall be $1,163.50. However, said monthly payment shall increase or decrease accordingly due to any increases or decreases

in the monthly FERS *basic annuity* payments that the defendant receives.

4. That as a further sanction against the defendant, in order for him to purge himself of contempt, he shall pay the plaintiff the sum of $45,376.50, which represents the plaintiff's one half share of the defendant's monthly FERS *basic annuity* payments that he has received since March 1, 2010 through April 30, 2013. The defendant shall pay this arrearage directly to the plaintiff at the rate of $500.00 per month, until the full arrearage has been paid. The initial $500.00 monthly arrearage payment shall be due and payable from the defendant to the plaintiff on or before May 1, 2013 with an equal $500.00 arrearage payment being due on or before the first day of each month thereafter, until the full $45,376.50 arrearage has been paid.

5. That the plaintiff's claim against the defendant for attorney fees in this proceeding has been waived and abandoned.

6. That the defendant's Motion For Sanctions against the plaintiff is denied.

7. That willful violation of the provisions of this Order shall be punishable by the contempt of court sanctions of this court.

8. That this cause is retained by the court for such other and further Orders as may be deemed just and proper.

(Emphasis added.) Thus, based upon the Amended Agreement, the trial court ordered defendant be held in contempt for failing to pay plaintiff one-half of payments received from the *basic annuity* since his retirement, ordered defendant to begin paying plaintiff one-half of his *basic annuity* payments, ordered defendant to pay arrearages based on his previous failure to pay plaintiff the *basic annuity* payment, and denied defendant's motion for sanctions.[4] Defendant appeals the 2013 Order.

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4. In denying defendant's motion for sanctions the trial court also found that "[t]he issue of whether or not the plaintiff is entitled to receive one half of the defendant's monthly FERS basic annuity was not fully litigated and decided at the prior hearing in this cause on March 25, 2011."

II. 2013 Order

Both plaintiff and defendant have inaccurately labeled various requests and claims both before the trial court and this Court. For example, plaintiff requested that the trial court "clarify the wording of the" Amended Agreement, although her motion would more properly be called a request for reformation, *see Metropolitan Property and Cas. Ins. Co. v. Dillard*, 126 N.C. App. 795, 798, 487 S.E.2d 157, 159 (1997) ("Reformation is a well-established equitable remedy used to reframe written instruments where, through mutual mistake or the unilateral mistake of one party induced by the fraud of the other, the written instrument fails to embody the parties' actual, original agreement. . . . Negligence on the part of one party which induces the mistake does not preclude a finding of mutual mistake. In other words, the fact that the mistake arises because the party who is seeking the reformation supplied the incorrect information does not make the mistake unilateral." (citations, quotation marks, and brackets omitted)), and defendant sought a form of relief that is not even available when he requested a dismissal of a motion, rather than a denial of said motion. *See generally* N.C. Gen. Stat. § 1A-1, Rule 12(b) (2011) (regarding the dismissal of claims, not other motions). Yet it is clear that both parties knew and understood the substantive requests or challenges the other was making and both parties have addressed these issues, so we will simply address the issues on appeal in substance, rather than attempting to use the titles which the parties proposed in their arguments both before the trial court and this Court. *See generally In re Testamentary Tr. of Charnock*, 158 N.C. App. 35, 39, 579 S.E.2d 887, 890 (2003) ("It is the substance of the application, or petition, and the relief which is sought thereunder that determines its true nature, not the title appended thereto by the petitioner. It has long been the law that the nature of the action is not determined by what either party calls it, but by the issues arising on the pleadings and by the relief sought. We will, therefore, undertake our own inquiry into the . . . issues arising on the pleadings and the relief sought in appellants' petition." (citation, quotation marks, and brackets omitted)), *aff'd*, 358 N.C. 523, 597 S.E.2d 706 (2004).

In substance, defendant contends that the trial court erred in ordering him to pay plaintiff one-half of his *basic annuity* because plaintiff was barred from raising that issue in her 2012 Motion since the trial court had already denied this same relief in the 2011 Order; in addition, the trial court also erred in finding defendant to be in contempt for failing to do something he had never been ordered to do and in denying defendant's motion for sanctions based on the issue of the *basic annuity*.

Plaintiff contends that her 2010 and 2012 Motions are substantively different, mainly because the 2010 Motion was a motion to "clarif[y]" wording of the Amended Agreement as to the retirement benefits to reflect the "the clear intentions of the parties" for plaintiff to receive one-half of defendant's *basic annuity* payments, while, in contrast, the 2012 Motion was a motion for contempt for defendant's failure to pay plaintiff her one-half of the *basic annuity*. We agree with defendant.

Contrary to the trial court's finding of fact that "[t]he issue of whether or not the plaintiff is entitled to receive one half of the defendant's monthly FERS basic annuity was not fully litigated and decided at the prior hearing in this cause on March 25, 2011[,]" we find, based upon consideration of the motions, the transcript from the 2011 hearing, and the 2011 Order, that the issue was quite fully litigated and decided. In plaintiff's 2010 Motion, she very specifically requested that the trial court order defendant to pay of one-half of the *basic annuity* payments, including both reimbursement of past sums due and continued payment in the future. Plaintiff contends she was seeking to "clarif[y]" the Amended Agreement, but legally, what she sought would more properly be termed reformation of the Amended Agreement. *See Metropolitan Property and Cas. Ins. Co.*, 126 N.C. App. at 798, 487 S.E.2d at 159.

But in its 2011 Order, the trial court denied reformation of the Amended Agreement, although it did not use this terminology.[5] The trial court found that the Amended Agreement was "unambiguous" and that it would not "modify or supplement" the Amended Agreement, and the trial court quite specifically awarded plaintiff payment of one-half of the *supplemental annuity* only and not the *basic* annuity. We know that this issue was litigated and that the trial court did not overlook the *basic annuity* or confuse it with the *supplemental annuity*, because the trial court also found that defendant was already receiving *basic annuity* payments and plaintiff had requested that she receive half of both the *basic* and *supplemental* annuities. Yet in plaintiff's 2012 Motion, she again requested that defendant be required to pay her one-half of the *basic annuity* payments, past and future.

While the 2011 Order did not explicitly state that it was denying plaintiff's request for the *basic annuity*, in that order the trial court made numerous and detailed findings regarding *both* the basic annuity and the supplemental annuity but ultimately awarded plaintiff only a portion of the *supplemental annuity*. In the 2011 Order, the trial court

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5. As the 2011 Order was not appealed, we express no opinion as to whether the trial court could have or should have granted reformation of the Amended Agreement in 2011.

found that while "plaintiff contend[ed] that the Amended Separation Agreement should be modified and clarified to required the defendant to pay her ½ of his" *basic annuity* . . . "the court deems that the Amended Separation Agreement is unambiguous in regards to the plaintiff's right concerning the defendant's retirement benefits and will not modify or supplemental the provisions contained therein." The trial court then found that plaintiff was "entitled to receive ½ of the defendant's" *supplemental annuity*. The trial court's conclusions of law and decree are supported by the findings of fact as the trial court did not award plaintiff payment for one-half of the *basic annuity*, as it stated it would "not modify or supplement" the Amended Agreement to grant plaintiff these payments as she requested, but the trial court did order that plaintiff should receive one-half of the *supplemental annuity* which was specifically provided for in the Amended Agreement. The 2011 Order was not appealed by either party and thus is the law of the case. *See Wellons v. White*, ___ N.C. App. ___, ___, 748 S.E.2d 709, 720 (2013) ("The law of the case doctrine provides that when a party fails to appeal that order, the decision below becomes the law of the case and cannot be challenged in subsequent proceedings in the same case." (citation, quotation marks, and brackets omitted)). The question of plaintiff's entitlement to one-half of the *basic annuity* payments was decided in 2011 and the 2011 Order was not appealed. As such, plaintiff's 2012 Motion which again requested payment for one-half of the *basic annuity* had no legal basis in either the Amended Agreement or the 2011 Order, and the trial court should not have allowed such a request. *See id.*

We also agree with defendant that he cannot be held in contempt for something he was never ordered to do. In the 2012 Order, all of the findings of fact and conclusions of law regarding why the trial court found defendant to be in contempt were regarding his failure to pay the *basic annuity* payment, not the *supplemental annuity* payment. But because defendant was under no obligation to pay plaintiff one-half of the *basic annuity* payments, under either the Amended Agreement, as decided in the 2011 Order, or under the 2011 Order itself, which ordered only payment of the *supplemental* annuity, he could not be held in contempt on this issue. As failure to pay one half of the *basic annuity* payment was the only basis upon which plaintiff sought for defendant to be held in contempt, and that basis is improper, the trial court should not have found defendant to be in contempt.

Lastly, because the trial court ultimately determined that plaintiff had not erred in bringing the *basic annuity* payment issue before the court again, it denied defendant's request to sanction plaintiff. But as noted above, this was error on the part of the trial court. As such, on

remand the trial court should reconsider defendant's motion for sanctions in light of this opinion, although we express no opinion on whether the trial court should or should not sanction plaintiff.

III. Conclusion

In conclusion, we reverse the trial court's determination that plaintiff is entitled to receive payment from defendant's *basic annuity*; we reverse the trial court's determination that defendant was in contempt, and we reverse and remand the trial courts determination denying defendant's motion for sanctions.

REVERSED and REMANDED in part.

Judges HUNTER, JR., Robert N. and DILLON concur.

CITY OF ASHEVILLE, PETITIONER
v.
ROGER S. ALY, RESPONDENT

No. COA13-720

Filed 6 May 2014

1. Public Officers and Employees—wrongful termination of city employee—police officer—Civil Service Act

The trial court did not err by finding that the termination of respondent police officer from his employment with the city police department was not justified. A fact finder could rationally have found that respondent was discharged for conduct amounting to mere negligence in failing to "wipe" his personal use rented computer before its return.

2. Public Officers and Employees—wrongful termination of city employee—police officer—reinstatement to former rank and back pay

The trial court did not exceed its authority in a wrongful termination case by ordering that respondent city police officer be fully reinstated to his former rank and receive all back pay due.

Appeal by petitioner from order entered 4 January 2013 by Judge James U. Downs in Buncombe County Superior Court. Heard in the Court of Appeals 20 November 2013.

Ward and Smith, P.A., by Rendi L. Mann-Stadt, and Office of the City Attorney, by Kelly Whitlock, for petitioner-appellant.

Adams, Hendon, Carson, Crow and Saenger, P.A., by Robert C. Carpenter and John C. Hunter, for respondent-appellee.

DAVIS, Judge.

Petitioner City of Asheville ("the City") appeals from the trial court's order finding that the termination of Respondent Roger S. Aly ("Respondent") from his employment with the City of Asheville Police Department ("APD") was not justified. After careful review, we affirm the trial court's order.

Factual Background

In July 2009, while employed by the APD as a police officer, Respondent rented a laptop computer for his personal use from a rental store called Aaron's. The rental agreement stated the computer was "rent to own," meaning that after a certain number of payments, Respondent would have the option of purchasing the computer. During the rental period, Respondent used the computer to access his personal email, download photographs, and back up his Blackberry cell phone.

In December 2009, Respondent returned the computer to Aaron's. He testified that before doing so, he attempted to remove the files that he had downloaded onto the computer by highlighting the files, moving them into the "recycling bin," and selecting "empty." He further testified that, unbeknownst to him, this procedure failed to remove the files that Respondent had imported from his cell phone and downloaded onto the computer. These files contained, in part, various pictures of Respondent's family, friends, pets, and fellow APD officers in uniform. However, other files contained pictures of nude women and racially offensive images.

In March 2010, Janice Farmer ("Ms. Farmer") went to Aaron's to rent a computer for her son. The computer that Ms. Farmer rented was the computer that had previously been rented by Respondent. While using the computer's webcam to post a picture on a website, Ms. Farmer's son discovered the images that Respondent had downloaded, including the pictures of nude women and the racially offensive images. Ms. Farmer contacted the Buncombe County Sheriff's Office and was referred to Detective Jeff Sluder ("Detective Sluder"). She described to Detective Sluder the offensive images her son had found on the computer and then turned the computer over to him.

Detective Sluder proceeded to extract the images from the computer and recognized some of the pictures as depicting APD officers. Because of this, he notified the APD. Detective Anthony Johnson ("Detective Johnson"), the computer crimes investigator for the APD, retrieved the computer from Detective Sluder and conducted a forensic analysis of the computer's hard drive, discovering approximately 360 images on the computer. Out of these 360 images, Detective Johnson found 16 to be offensive. None of these 16 images depicted officers of the APD. Detective Johnson also determined that none of the images were illegal.

On 9 April 2010, Lieutenant Sean Pound ("Lt. Pound") of the APD Office of Professional Standards notified Respondent that an employee misconduct complaint had been filed against him and that an internal investigation would ensue. He then provided Respondent with a copy of an APD internal incident report and a letter evidencing the complaint.

At the conclusion of the investigation, Lt. Pound found "no indication that [Respondent] had distributed the [offensive] photos to anyone else" and forwarded the results of the internal investigation to APD Chief William Hogan ("Chief Hogan"). On 1 June 2010, Chief Hogan conducted a pre-disciplinary conference with Respondent. At the conference, Respondent explained that the computer had been solely for personal use and that the inappropriate images were from emails and texts sent to him by friends. At the conclusion of the pre-disciplinary conference, Chief Hogan placed Respondent on suspension with pay.

On 10 June 2010, Chief Hogan terminated Respondent's employment with the APD. Respondent appealed his termination to the Asheville City Manager, who upheld the termination. Respondent then appealed to the Asheville Civil Service Board ("the Board") pursuant to his rights under the Asheville Civil Service Act, 2009 N.C. Sess. Laws ch. 401, § 8. ("the Civil Service Act").

On 20 September 2010, the Board held a hearing to determine whether Respondent's termination was justified. Following the hearing, the Board found that Respondent's failure to "prevent the inappropriate images from becoming public through the return of the computer to Aaron's . . . violated one or more of the City's policies and the rules of conduct of the APD, but [that] the violations were not so severe as to warrant termination." Based on this finding, the Board concluded that "the termination of [Respondent] by the City of Asheville was not justified and should be rescinded and the City should take such steps as are necessary for a just conclusion of the matter before the board."

The City appealed the decision of the Board to Buncombe County Superior Court for a trial *de novo* as provided for under § 8(g) of the Civil Service Act. In its petition for review of the Board's decision, the City did not request a jury trial, and on 10 December 2012, a bench trial took place before the Honorable James U. Downs.

At the conclusion of the trial, Judge Downs issued an order (1) finding that the termination of Respondent's employment was not justified; and (2) ordering that Respondent "be immediately reinstated as Senior Police Officer of the Asheville Police Department with the restoration of all back pay due and all other rights as if the termination had not occurred." The City filed a timely notice of appeal to this Court.

Analysis

I. Overview of the Civil Service Act

Originally enacted by the General Assembly in 1953, the Civil Service Act provides a system of civil service protection for employees of the City, establishing the Board and charging it with the duty to make rules for "the appointment, promotion, transfer, layoff, reinstatement, suspension and removal of employees in the qualified service." 1953 N.C. Sess. Laws ch. 757, § 4. While the Civil Service Act — as originally enacted — did not provide a mechanism for judicial review of the Board's decisions, *Jacobs v. City of Asheville*, 137 N.C. App. 441, 443-44, 528 S.E.2d 905, 907 (2000), our Supreme Court held in 1964 that:

> [i]n view of the provisions of the statute creating the Civil Service Board of the City of Asheville, and the procedure outlined in Section 14 thereof, we hold that a hearing pursuant to the provisions of the Act with respect to the discharge of a classified employee of the City of Asheville by said Civil Service Board, is a quasi-judicial function and is reviewable upon a writ of certiorari issued from the Superior Court.

In re Burris, 261 N.C. 450, 453, 135 S.E.2d 27, 30 (1964). In 1977, the General Assembly formally amended the Civil Service Act to authorize an appeal of the Board's decisions to superior court for a trial *de novo*. *Jacobs*, 137 N.C. App. at 444-45, 528 S.E.2d at 907-08; see also 1977 N.C. Sess. Laws ch. 415, §8.

Section 8 of the Civil Service Act provides, in pertinent part, as follows:

(a) Whenever any member of the classified service of the City is discharged . . . that member shall be entitled to a hearing before the Civil Service Board to determine whether or not the action complained of is justified. . . .

(b) Any member of the classified service of the City who desires a hearing shall file his or her request for hearing with the City Clerk within 10 days after learning of the act or omission of which he or she complains but not before the member shall have exhausted his or her remedy provided by the grievance procedures established by ordinance or policy of the City and the grievance procedure shall be concluded within 30 days. . . . Upon receipt of notice as required in this section, the City Clerk shall set the matter for hearing before the Civil Service Board at a date not less than five nor more than fifteen days from the Clerk's receipt of such notice. . . .

. . . .

(e) At such hearing, the burden of proving the justification of the act or omission complained of shall be upon the City . . . .

(f) The Civil Service Board shall render its decision in writing within ten days after the conclusion of the hearing. If the Board determines that the act or omission complained of is not justified, the Board shall order to rescind [sic] whatever action the Board has found to be unjustified and may order the City to take such steps as are necessary for a just conclusion of the matter before the Board. Such decision shall contain findings of fact and conclusions, and shall be based on competent, material, and substantial evidence in the record. Upon reaching its decision, the Board shall, in writing, immediately inform the City Clerk and the member requesting the hearing of the Board's decision.

(g) Within ten days of the receipt of notice of the decision of the Board, either party may appeal to the Superior Court Division of the General Court of Justice for Buncombe County for a trial de novo. The appeal shall be effected by filing with the Clerk of the Superior Court of Buncombe County a petition for trial in superior court, setting out the fact[s] upon which the petitioner relies for relief. If the

> petitioner desires a trial by jury, the petition shall so state. Upon the filing of the petition, the Clerk of the Superior Court shall issue a civil summons as in [a] regular civil action, and the sheriff of Buncombe County shall serve the summons and petition on all parties who did not join in the petition for trial. . . . Therefore, the matter shall proceed to trial as any other civil action.

2009 N.C. Sess. Laws ch. 401, § 8 (alterations in original).

II. Standard of Review

In this appeal, we are reviewing the judgment entered by the trial court following a *de novo* trial conducted pursuant to § 8(g) of the Civil Service Act. "A *de novo* proceeding pursuant to a specific statutory mandate requires [the] judge or jury to disregard the facts found in an earlier hearing or trial and engage in independent fact finding." *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 661, 599 S.E.2d 888, 895 (2004). A trial *de novo* is a "new trial on the entire case — that is, on both questions of fact and issues of law — conducted as if there had been no trial in the first instance." *Id.*

This Court has previously explained the scope of a *de novo* trial under the Civil Service Act as follows:

> [T]rial *de novo* vests a court with full power to determine the issues and rights of all parties involved, and to try the case as if the suit had been filed originally in that court. . . . *This means that the court must hear or try the case on its merits from beginning to end as if no trial or hearing had been held by the Board and without any presumption in favor of the Board's decision.*

Jacobs, 137 N.C. App. at 445, 528 S.E.2d at 908 (internal citations and quotation marks omitted).

Therefore, "[t]he applicable standard of review on appeal where, as here, the trial court sits without a jury, is whether competent evidence exists to support the trial court's findings of fact and whether the conclusions reached were proper in light of the findings. Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *In re Adams*, 204 N.C. App. 318, 320–21, 693 S.E.2d 705, 708 (2010) (citation omitted). " '[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.' " *Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010) (quoting *Tillman*

v. Commercial Credit Loans, Inc., 362 N.C. 93, 100-01, 655 S.E.2d 362, 369 (2008)). "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).

III. Application of § 8 of the Civil Service Act

[1] As noted above, § 8(a) of the Civil Service Act states in pertinent part as follows: "Whenever any member of the classified service of the City is discharged, . . . that member shall be entitled to a hearing before the Civil Service Board to determine whether or not the action complained of is *justified*." 2009 N.C. Sess. Laws ch. 401, § 8 (emphasis added).

The essence of the parties' dispute in this appeal centers on how the term "justified" — which is undefined in the Act — should be construed. Our appellate courts have on several prior occasions determined whether the termination of an employee of the City was justified under the Civil Service Act.

In *In re Burris*, 263 N.C. 793, 140 S.E.2d 408 (1965), our Supreme Court addressed the issue of whether the discharge of an employee in Asheville's Tax Department was justified by the fact that he had acquired an interest in real property which the City was attempting to purchase for its own use in association with its airport. *Id.* at 794, 140 S.E.2d at 409. Our Supreme Court upheld the dismissal, holding that "[w]here an employee deliberately acquires an interest adverse to his employer, he is disloyal, and his discharge is justified." *Id.* at 794, 140 S.E.2d at 410.

In *Warren v. City of Asheville*, 74 N.C. App. 402, 328 S.E.2d 859, *disc. review denied*, 314 N.C. 336, 333 S.E.2d 496 (1985), a police officer employed by the City was accused of making a homosexual advance towards a fellow officer while off duty. The accused officer was ordered to take a polygraph examination. After he refused, he was terminated by the chief of police. *Id.* at 403-04, 328 S.E.2d at 861.

He appealed his termination under the Civil Service Act, and a jury ultimately rendered a verdict in his favor. The trial court denied the City's motion for a directed verdict, motion for judgment notwithstanding the verdict, and motion for a new trial. *Id.* at 405, 328 S.E.2d at 861-62. We affirmed the trial court's ruling, holding that the jury could have rationally concluded the firing was not justified in light of evidence that the department planned to inquire during the polygraph test into highly personal topics about the employee that were not specifically related to the charges against him. *Id.* at 408, 328 S.E.2d at 863.

However, in neither of these cases were we called upon to provide a definition of the term "justified" as used in § 8 of the Civil Service Act. "The primary objective of statutory interpretation is to ascertain and effectuate the intent of the legislature." *McCracken & Amick, Inc. v. Perdue*, 201 N.C. App. 480, 485, 687 S.E.2d 690, 694 (2009), *disc. review denied*, 364 N.C. 241, 698 S.E.2d 400 (2010). Thus, as a general rule, courts should give "the language of the statute its natural and ordinary meaning unless the context requires otherwise." *Turlington v. McLeod*, 323 N.C. 591, 594, 374 S.E.2d 394, 397 (1988).

Respondent argues that in order for a termination to be "justified" under the Civil Service Act, "just cause" must exist under the standard set out by the General Assembly in the State Personnel Act, which governs the dismissal of State employees. *See* N.C. Gen. Stat. § 126-35(a) ("No career State employee . . . shall be discharged . . . except for just cause."). However, nowhere in the Civil Service Act has the General Assembly expressly indicated that the term "justified" was intended to be synonymous with "just cause." Therefore, principles of statutory construction require that we assume the General Assembly would have made clear in the Civil Service Act its intent that the "just cause" standard be utilized had it intended for that standard to apply. *See* 3A Norman J. Singer, *Sutherland Statutory Construction* § 66:3 at 3 (7th ed. Supp. 2013) ("When the legislature uses a term or phrase in one statute or provision but excludes it from another, courts do not imply an intent to include the missing term in that statute or provision where the term or phrase is excluded.").

The City, conversely, urges us to apply an interpretation of the term "justified" that is far more deferential to its personnel decisions. It argues that "[t]he only job protection intended in the 'justified' standard is the assurance that the employee will not be disciplined for an arbitrary reason based on politics or membership in a particular class."

We likewise reject this proposed definition. Nothing in the language of § 8 suggests a legislative intent to confer upon the City such broad authority to discharge its employees. Moreover, the City's proposed definition is inconsistent with this Court's recognition in *Jacobs* that the Civil Service Act "recognizes the interest of the employee in [his] continued employment, and guarantees full protection of [his] due process rights prior to termination of that employment." *Jacobs*, 137 N.C. App. at 449, 528 S.E.2d at 910.

It is well established that "[i]n the absence of a contextual definition, courts may look to dictionaries to determine the ordinary meaning

of words within a statute." *Perkins v. Arkansas Trucking Servs., Inc.*, 351 N.C. 634, 638, 528 S.E.2d 902, 904 (2000). The American Heritage Dictionary defines "justify" as "to demonstrate or prove to be just, right, or valid." American Heritage Dictionary 738 (3rd ed. 1993). We believe that this definition is consistent with the Legislature's use of the term "justified" in § 8(a) of the Civil Service Act. Therefore, we must now apply this definition in reviewing the trial court's order. In its order, the trial court made the following findings of fact:

> 1. Prior to his termination the respondent, Roger Aly, was a Senior Ashville Police Department officer working as a patrol officer.
>
> 2. During 2009 the respondent rented a computer on a rent to own basis; however, since he could no longer afford the payments, he returned the computer without wiping the computer clean of any and all images from the computer.
>
> 3. Thereafter in early 2010, an [individual] rented the same computer and while using it found numerous unidentified nude images and images that were racially insensitive, offensive and inflammatory. There were in addition many images of the respondent, his family and friends that were not offensive or illegal in any way.
>
> 4. The [individual] and his mother referred the images to the Buncombe County Sheriff's Department who conducted an investigation which eventually led to the respondent because many of the un-offensive images showed the respondent and others in a police uniform.
>
> 5. During all aspects of any investigation, including internal affairs, the respondent freely admitted all images were his, the nudes and racial ones having been sent to him unsolicited on his blackberry by friends. The respondent neither solicited nor ask [sic] his friends to stop sending them; however, while the respondent did transfer the said images to the rented computer, he did not ever forward them on to anyone else. The respondent did not approve of the images in controversy, but he took no steps to erase them or wipe them off the computer when he returned it.
>
> 6. In addition a computer forensic specialist who performed a forensic analysis on the computer found 360

images in the "documents" folder which included images of the respondent in uniform, family photos, and the pornographic and racially inflammatory pictures and cartoons, which Detective Johnson concluded were intentionally and purposely saved on the computer; however, a fact finder could also conclude that all such images were negligently kept and saved since none had been forwarded to anyone else.

7. After all intradepartmental investigations were completed the then Chief of Police, William A. Hogan, essentially concluded that the respondent had violated the Asheville Police Department personnel policy, same said department's code of conduct, and the City's Ethics Policy because the respondent had "neglectfully" failed to prevent the inappropriate images from becoming public. As a result the respondent's employment with Asheville Police Department was terminated.

The trial court then made the following conclusions of law:

1. The respondent's conduct of failing to take all appropriate measures to erase the inappropriate images as opposed to keeping them on a rented computer amounted to negligence as opposed to violating any law.

2. While the respondent's conduct of opening each one of the images in question, presumably viewing it or them, not erasing any of them and not requesting the sender(s) to refrain from sending him anymore, none of the aforesaid actions amounted to the respondent violating any law.

3. While the Respondent's conduct taken as a whole or in segments with regard to the inappropriate images could have been deemed to having been a violation of the Asheville Police Department's personnel policy, the code of conduct and/or the City's Ethics Policy, such was not so severe as to warrant the Respondent being terminated from employment.

4. The City was not justified in terminating the Respondent's employment.

Petitioner only challenges the trial court's finding of fact 6. Thus, findings of fact 1-5 and 7 are binding on appeal. *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.")

Specifically, Petitioner challenges the portion of finding of fact 6 stating that "a fact finder could also conclude that all such images were negligently kept and saved," claiming that this aspect of the finding is unsupported by the evidence. The City points to Detective Johnson's testimony stating his belief that the images he found on the computer were "intentionally saved" in that (1) they were saved to a specific folder; and (2) based on Detective Johnson's training and experience, it was a "very active thing to save pictures from the BlackBerry to the computer." The City also argues that the only evidence supporting the proposition that the images were not intentionally saved was Respondent's own testimony in responding "no" when asked if he knew "how those images ended up on [his] computer."

We are satisfied that competent evidence existed to support the challenged portion of finding of fact 6. Respondent testified that he would "back up his personal phone to the desktop" in order to save his contacts and information in the event they were accidently deleted because of a previous Blackberry "catastrophic failure [where he] lost a lot of information that took [him] a great deal of time to get back." He also testified that he was unaware that the offensive images and emails at issue were being copied to his rental computer as a result of the backup. He stated that the only images he intentionally saved were "photographs of [his] kids or [himself] or events, parties, that kind of thing . . . ." In addition, he answered in the negative when asked if he "intentionally saved any emails containing pictures of naked women . . . pornographic images . . . or racist images on the computer."

It is well-settled that "[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." *Sisk*, 364 N.C. App. at 179, 695 S.E.2d at 434 (internal citations and quotation marks omitted). Accordingly, Respondent's testimony on this issue serves as competent evidence to support the trial court's finding that a fact finder could conclude that the inappropriate photographs and images remained stored on the computer at the time he returned it as a result of negligence rather than intent on his part. Therefore, the trial court's finding on this issue is binding on appeal.

The City then challenges the trial court's conclusion of law 4 that "[t]he City was not justified in terminating the Respondent's employment." The City argues that the termination was, in fact, justified based

on its determination that Respondent's actions had violated various policies issued by the City of Asheville and affected the City's credibility, reputation, image, and effectiveness in the community. However, our only task is to determine whether the trial court's findings of fact support its conclusions of law. *Woodring v. Woodring*, 164 N.C. App. 588, 590, 596 S.E.2d 370, 372 (2004). It "is not the function of this Court to reweigh the evidence on appeal." *Garrett v. Burris*,___ N.C. App. ___, ___, 735 S.E.2d 414, 418 (2012), *aff'd per curiam*, 366 N.C. 551, 742 S.E.2d 803 (2013).

We believe the trial court's conclusion that Respondent's termination was not justified is supported by its findings of fact. First, Respondent rented a personal computer that was never used for work or during work hours. Second, with regard to the offensive images found on the computer, the undisputed evidence was that he only came into possession of the inappropriate pictures and images through unsolicited emails received from others. Third, he testified that he did not intend to save the offensive images on the computer. Fourth, the investigation completed by Detective Johnson revealed no criminal activity by Respondent resulting from his possession of these images. Finally, there was no evidence that Respondent disseminated the photos or intentionally sought to have them viewed by a third party.

Based on these facts, a fact finder could rationally have found that he was discharged for conduct amounting to mere negligence in failing to "wipe" his rented computer before its return. Therefore, we conclude the trial court's findings of fact support its ultimate conclusion that the City was not justified in terminating Respondent's employment.[1]

IV. Award of Reinstatement and Benefits

[2] In its final argument, the City contends that the trial court exceeded its authority in ordering that Respondent be fully reinstated to his former rank and receive all back pay due. We disagree.

Section 8(f) of the Civil Service Act provides broad authority for the award of a remedy to an employee of the City who has been the subject of unjustified personnel action:

> . . . If the Board determines that the act or omission complained of is not justified, the Board shall order to rescind [sic] whatever action the Board has found to be unjustified

1. We also note that our review of the APD Personnel Ordinance reveals no policy that specifically governs the use of an employee's personal computer. Nor does the City contend that any such policy existed.

> and may order the City to take such steps as are necessary for a just conclusion of the matter before the Board. . . .

2009 N.C. Sess. Laws ch. 401, § 8(f).

We believe this broad conferral of power to the Board in crafting a remedy for an unjustified termination encompasses the power to award reinstatement and back pay. Moreover, the City has failed to make any persuasive argument as to why a superior court conducting a *de novo* hearing pursuant to the Civil Service Act does not possess this same authority.

We also note that in *Warren* the trial court ordered the plaintiff to be "reinstated with full back pay and benefits" after concluding that his discharge had not been justified. *Warren*, 74 N.C. App. at 405, 328 S.E.2d at 861. We affirmed the trial court's order in its entirety, *id.* at 410, 328 S.E.2d at 864, thereby implicitly upholding the trial court's award of back pay.

While the authority of the trial court in *Warren* to award reinstatement and back pay was not expressly discussed in our decision, we believe — as explained above — that the trial court's award of these remedies is not inconsistent with the language utilized by the General Assembly in the Civil Service Act.

Thus, we hold that the trial court here likewise acted within its authority in ordering the City to reinstate Respondent to his former rank with full back pay. Accordingly, the City's argument on this issue is overruled.

Conclusion

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

AFFIRMED.

Judges ELMORE and McCULLOUGH concur.

GECMC 2006 C1 CARRINGTON OAKS, LLC, PLAINTIFF
v.
SAMUEL WEISS AND EZRA BEYMAN, DEFENDANTS

No. COA13-1030

Filed 6 May 2014

Jurisdiction—personal—consent to jurisdiction provision

The trial court did not err in a case involving default on a guaranty agreement when it concluded that it had personal jurisdiction over defendant. There was competent evidence to support the court's finding that defendant signed and executed the guaranty that contained a consent to jurisdiction provision that expressly submitted defendant to the jurisdiction of the State of North Carolina.

Appeal by defendant Samuel Weiss from order entered 17 April 2013 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 3 February 2014.

McGuireWoods, LLP, by William O. L. Hutchinson, Steven N. Baker, and T. Richmond McPherson, III, for plaintiff–appellee.

Copeland, Richards & Anderson, PLLC, by Shawn A. Copeland and Michael F. Anderson, for defendant–appellant Samuel Weiss.

MARTIN, Chief Judge.

Defendant Samuel Weiss ("defendant Weiss") appeals from an order denying his motion to dismiss the Verified Amended Complaint ("the Complaint") filed by plaintiff GECMC 2006-C1 Carrington Oaks, LLC ("GECMC") pursuant to N.C.G.S. § 1A 1, Rule 12(b)(2). We affirm.

GECMC, a North Carolina-based limited liability company, filed the Complaint in Mecklenburg County Superior Court against defendant Weiss and against Ezra Beyman ("defendant Beyman"), both citizens of Monsey, New York. In its Complaint, GECMC alleged that it was the holder of a promissory note ("the Note") for $28,290,000.00 made by Empirian at Carrington Place, LLC ("Empirian") to Deutsche Bank Mortgage Capital, LLC and its successors and assigns. Defendant Beyman signed the Note as president of Empirian, which is a Delaware-based limited liability company with its principal place of business in

Montvale, New Jersey. The Note was secured by a deed of trust "covering certain real property located in Mecklenburg County, North Carolina."

Attached to the Complaint was a Guaranty and Indemnity ("the Guaranty") which expressly references the Note executed by defendant Beyman as President of Empirian. The Complaint alleged that such Guaranty was signed by defendants Beyman and Weiss. The document expressly provides that defendants Beyman and Weiss individually "unconditionally and irrevocably guarantee[] up to $6,240,000.00 of the principal balance of the Loan," until such time as certain specified conditions are met, as when there is no event of default continuing. The Guaranty also contains the following provision, entitled "Submission To Jurisdiction":

> EACH GUARANTOR, TO THE FULL EXTENT PERMITTED BY LAW, HEREBY KNOWINGLY, INTENTIONALLY AND VOLUNTARILY, WITH AND UPON THE ADVICE OF COMPETENT COUNSEL, (A) SUBMITS TO PERSONAL JURISDICTION IN THE STATE IN WHICH THE PROPERTY IS LOCATED OVER ANY SUIT, ACTION OR PROCEEDING BY ANY PERSON ARISING FROM OR RELATING TO THIS GUARANTY, (B) AGREES THAT ANY SUCH ACTION, SUIT OR PROCEEDING MAY BE BROUGHT IN ANY STATE OR FEDERAL COURT OF COMPETENT JURISDICTION SITTING IN THE COUNTY AND STATE IN WHICH THE PROPERTY IS LOCATED, (C) SUBMITS TO THE JURISDICTION OF SUCH COURTS, AND (D) AGREES THAT NEITHER OF THEM WILL BRING ANY ACTION, SUIT OR PROCEEDING IN ANY OTHER FORUM (BUT NOTHING HEREIN SHALL AFFECT THE RIGHT OF LENDER TO BRING ANY ACTION, SUIT OR PROCEEDING IN ANY OTHER FORUM).

According to the Complaint, Empirian defaulted under the terms of the Note and GECMC demanded payment for the indebtedness due, but Empirian refused and still refuses to pay, and defendants Beyman and Weiss defaulted "for failure to pay the amounts due under the Note and the Empirian Guaranty." GECMC claimed that defendants breached their commercial guaranty agreement with GECMC and sought to recover the principal amount of $6,240,000.00, as well as interest accrued, reasonable costs, and attorney's fees.

Defendant Weiss moved to dismiss the Complaint pursuant to N.C.G.S. § 1A 1, Rules 12(b)(2), (b)(4), and (b)(5), for lack of personal

jurisdiction, insufficiency of process, and insufficiency of service of process, respectively. After conducting a hearing, the court denied defendant Weiss's motion to dismiss "to the extent that it [sought] dismiss[al] for insufficiency of process and service of process," but deferred ruling on the motion to dismiss for lack of personal jurisdiction to allow GECMC to "take jurisdictional discovery of [d]efendant Weiss."

In his affidavit and in his briefs submitted in support of his motion to dismiss for lack of personal jurisdiction, defendant Weiss asserted that, although the Guaranty is signed by what "appears to be [his] signature" underneath the word "GUARANTOR" and above the words "SAMUEL WEISS, an individual," defendant Weiss attested that he "was never presented with this Guaranty Agreement," and that he "did not sign and would not have signed this Guaranty Agreement" because he "had no intent to expose [him]self in a manner greater than [his] capital contribution."

In its briefs submitted in support of its opposition to defendant Weiss's motion to dismiss, GECMC acknowledged that defendant Weiss "admitted in his deposition testimony that he did not know the contents of all the documents he executed in connection with [this] transaction," but argued that defendant Weiss's "failure to exercise diligence in executing the loan documents does not provide [defendant Weiss] with a shield to avoid liability on the Guaranty Agreement after he benefitted financially from the loan transaction before the loan went into default." GECMC also submitted an affidavit from Dmitry Sulsky, an asset manager of a limited liability company, the sole non member manager of GECMC, and special servicer of the loan that is the subject of this action. Mr. Sulsky's affidavit also included as exhibits documents that he attests "are maintained in the course of the regularly conducted business activities" of his company, which include opinion letters from counsel involved in the transaction at issue that repeatedly refer to defendants Beyman and Weiss as the "Guarantors" of the transaction.

After conducting a hearing and considering the parties' briefs and corresponding affidavits, on 17 April 2013, the trial court entered an order in which it found that, "[a]s a condition of making the loan to Empirian, Deutsche Bank required that [d]efendant Samuel Weiss and [d]efendant Ezra Beyman execute a guaranty agreement," that "[d]efendant Weiss signed and executed a guaranty agreement guaranteeing $6,240,000 of the principal balance of the loan made to Empirian," and that "[t]he guaranty agreement executed by Weiss contains a 'consent to jurisdiction' clause whereby [d]efendant Samuel Weiss 'voluntarily . . . submit[ted] to personal jurisdiction in the State in which the property

is located.' " The court then concluded that it had personal jurisdiction over defendant Weiss "by virtue of the agreement in which [d]efendant Weiss expressly submitted to jurisdiction in the state where the underlying property is situated, North Carolina." The trial court also concluded that its exercise of personal jurisdiction of defendant Weiss "comports with Due Process and [that] the maintenance of suit against Samuel Weiss in North Carolina does not offend traditional notions of fair play and substantial justice." Defendant Weiss appeals from the trial court's 17 April 2013 denial of his motion to dismiss the Complaint pursuant to N.C.G.S. § 1A 1, Rule 12(b)(2). Defendant Beyman, against whom the court entered a default judgment upon GECMC's motion, is not a party to this appeal.

Defendant Weiss first contends the trial court erred when it concluded that it had personal jurisdiction over him because he asserts that the court did not consider competent evidence when it found that defendant Weiss "signed and executed a guaranty agreement guaranteeing $6,240,000 of the principal balance of the loan made to Empirian." Thus, defendant Weiss argues that the court erred by concluding that he "expressly submitted to jurisdiction in the state where the underlying property is situated, North Carolina," "by virtue of the agreement." We disagree.

Although defendant Weiss's appeal is from an interlocutory order, a defendant has "an immediate right of appeal from the denial of their motion to dismiss for lack of personal jurisdiction." *Retail Investors, Inc. v. Henzlik Inv. Co.*, 113 N.C. App. 549, 552, 439 S.E.2d 196, 198 (1994); *see also* N.C. Gen. Stat. § 1 277(b) (2013) ("Any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant or such party may preserve his exception for determination upon any subsequent appeal in the cause.").

The general rule requires that the trial court, "as a prerequisite to exercising jurisdiction," *Retail Investors, Inc.*, 113 N.C. App. at 552, 439 S.E.2d at 198, make two basic inquiries: "(1) whether any North Carolina statute authorizes the court to entertain an action against the defendant and if so, (2) whether defendant has sufficient minimum contacts with the state so that considering the action does not conflict with 'traditional notions of fair play and substantial justice.' " *Id.* (quoting *Johnston Cnty. v. R.N. Rouse & Co.*, 331 N.C. 88, 96, 414 S.E.2d 30, 35 (1992)).

"A defendant may, however, consent to personal jurisdiction and in such event, the two step inquiry is unnecessary to the exercise of personal jurisdiction over the defendant." *Id.* "One method of consenting to personal jurisdiction is the inclusion in a contract of a consent to jurisdiction provision." *Id.* "This type of provision does not violate the Due Process Clause and is valid and enforceable unless it is the product of fraud or unequal bargaining power or unless enforcement of the provision would be unfair or unreasonable." *Id.*

"The standard of review to be applied by a trial court in deciding a motion under Rule 12(b)(2) depends upon the procedural context confronting the court." *Banc of Am. Sec. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 693, 611 S.E.2d 179, 182 (2005). When, as here, "both the defendant and the plaintiff submit affidavits addressing the personal jurisdiction issues," *see id.*, "the court may hear the matter on affidavits presented by the respective parties, . . . [or] the court may direct that the matter be heard wholly or partly on oral testimony or depositions." *Id.* at 694, 611 S.E.2d at 183 (alteration and omission in original) (internal quotation marks omitted). "If the trial court chooses to decide the motion based on affidavits, [t]he trial judge must determine the weight and sufficiency of the evidence [presented in the affidavits] much as a juror." *Id.* (alterations in original) (internal quotation marks omitted). "When this Court reviews a decision as to personal jurisdiction, it considers only whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court." *Id.* (internal quotation marks omitted).

In the present case, at the hearing on defendant Weiss's motion to dismiss, the court was presented with evidence consisting of defendant Weiss's affidavit, Mr. Sulsky's affidavit, and defendant Weiss's deposition, as well as the exhibits accompanying each. In his deposition, defendant Weiss admitted that he did "about 15, 16 deals" involving real estate in different states with defendant Beyman's company, one of which was the deal at issue in the present case concerning the Carrington Oaks property in Mecklenburg County, North Carolina. Defendant Weiss, who has between 20 and 25 years of experience in real estate management and ownership, said that all of his deals with defendant Beyman's company would follow a particular pattern:

> [T]his is the same example which I used with all the investments that we did with [Empirian] which related to property. Let's assume [a member of defendant Beyman's company] would say that we are about to approach to buy

> a particular property in a particular state for $30 million, the cost to buy the property. Of the $30 million, he will probably get from the bank approximately 20 to 22 million, about two-thirds, maybe a little bit more. Then the cash equity required to establish such a deal would be let's say $8 million. From the $8 million, we put up 75 percent, "we" meaning our family, Beyman puts up 25 percent. We get a return on the 75 percent first, and we have a 25 percent upside after everybody's paid back—only if there's an upside. If there's a certain return of 9 percent, 10 percent, 11 percent on the money, then there's an upside, so if there's an upside. That's a generalization of it. Now, if we take $8 million, 75 percent of that is approximately 6 million, then I would call my family partners, I would tell them the deal's coming up now, 6 million equity is required, how much do you feel you want to invest in a particular deal. They would give me the numbers, I would put together the numbers. Sometimes it would be more than enough, sometimes it's a little less, we'd ask somebody else to substitute. That's how the deal was structured. . . . Once that was established, $6 million came out of the closing and was sent to one of the accounts which Beyman established. The documents would be drafted by Beyman's lawyer and reviewed by our lawyer, Elliot Gross. Once the documents were signed, they could give fund instructions, and the funding instructions would follow via a wire.

Defendant Weiss also said that, when he was notified that documents were ready for him to sign regarding a transaction with Beyman's company, he went to a small conference room off of the main lobby of the Dreier Law Firm, where he was met by someone from the firm who "came out with approximately sometimes 30, 40, 45 signature pages" and told him that the papers were "for the transaction," and he would sign those papers. Defendant Weiss said that, in these interactions at the firm, he would be presented with signature pages for multiple documents for a particular deal and it would take him about five to ten minutes to sign all of the papers presented to him at that time. He said he "understood that these were the documents which the law firm prepared on behalf of the bank [responsible for giving the loan] at the time," and that he did not ask anyone at the firm for copies of any of the documents he signed.

Here, as indicated above, defendant Weiss admitted that, of the "15, 16 deals" he did with defendant Beyman's company, he "did one

in North Carolina," and agreed it was the Carrington Oaks property in Mecklenburg County. Defendant Weiss also admitted that his company "[h]ad a loan for [Empirian], and the loan was established as, you know, Carrington Place [sic]." Additionally, defendant Weiss indicated that the procedure he followed to execute the paperwork related to this transaction was consistent with the procedure from his other dealings with defendant Beyman's company. First, defendant Weiss was told by his secretary to go to the Dreier Law Firm to sign documents regarding the transaction. Then, upon his arrival, the firm's receptionist called someone, who met him and escorted him into a small room off of the lobby and presented him with "a bunch of papers" that he was asked to sign. After spending between five and ten minutes signing between 25 to 35 documents, defendant Weiss then left without asking any questions about the contents of the documents he was signing and without requesting copies of the documents he was signing. Defendant Weiss then admitted in his deposition that the signature that appeared on the signature page of the Guaranty—which had "GUARANTOR" typed above the signature and "SAMUEL WEISS, an individual" typed below it—"appear[ed] to be [his] signature." Perhaps because defendant Weiss would not definitively admit or deny that he signed the signature page of the Guaranty, plaintiff's counsel questioned defendant Weiss further. When asked whether he was claiming that the document contained a forged signature, whether someone else signed his name, or whether the signature on the Guaranty was an authentic copy of his signature, defendant Weiss repeatedly responded, "I did not say that." Since it is the responsibility of the trial court to determine the weight and sufficiency of this evidence, based on our review of the record, we conclude that there was competent evidence to support the court's finding that defendant Weiss signed and executed the Guaranty that contained the consent to jurisdiction provision that expressly submitted defendant Weiss to the jurisdiction of the State of North Carolina.

We note that defendant Weiss purports to argue that he cannot be bound to the consent to jurisdiction provision of the Guaranty because he cannot be bound to the terms of an agreement that he signed but did not read. However, it has long been held in this State that "one who signs a paper writing is under a duty to ascertain its contents," *Williams v. Williams*, 220 N.C. 806, 809, 18 S.E.2d 364, 366 (1942), and "in the absence of a showing that he was willfully misled or misinformed by the defendant as to these contents, or that they were kept from him in fraudulent opposition to his request, he is held to have signed with full knowledge and assent as to what is therein contained." *Id.* at 809–10, 18 S.E.2d at 366. Defendant Weiss does not bring forward any argument in his brief

that he was "willfully misled or misinformed" about the contents of the documents that comprised the transaction at issue, and suggests only in a footnote and without support that, because he "did not have a contract before him to read" during the five to ten minutes that he chose to spend signing between 25 to 35 signature pages of legal documents in the lobby of a law firm, the proposition that he is charged with knowledge of the contents of the contract at issue is misplaced. However, in the absence of any allegation that the contents of the Guaranty were "kept" from him in fraudulent opposition to his request, we find defendant Weiss's suggestion unpersuasive.

Accordingly, we hold that the trial court did not err when it concluded that it had personal jurisdiction over defendant Weiss "by virtue of the agreement in which [d]efendant Weiss expressly submitted to jurisdiction in the state where the underlying property is situated, North Carolina." Moreover, because we have determined that defendant Weiss consented to personal jurisdiction by agreement, we need not consider the arguments in his brief concerning whether the court correctly determined that he had sufficient contacts with North Carolina to allow the court to exercise personal jurisdiction over him in this matter. *See Retail Investors, Inc.*, 113 N.C. App. at 552, 439 S.E.2d at 198. Our disposition renders it unnecessary to consider defendant Weiss's remaining arguments on appeal and we decline to do so.

Affirmed.

Judges ELMORE and HUNTER, JR. concur.

IN RE J.C.B.

[233 N.C. App. 641 (2014)]

IN THE MATTER OF J.C.B.

No. COA13-1112

Filed 6 May 2014

1. Appeal and Error—standing—child abuse, dependency, and neglect

Respondent father's argument that the trial court erred by adjudicating R.R.N. an abused juvenile was dismissed because respondent lacked standing to appeal the adjudication of abuse. Respondent did not fall 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.

2. Child Abuse, Dependency, and Neglect—substantial risk of abuse of neglect—insufficient findings of fact

The trial court erred by adjudicating J.C.B., C.R.R., and H.F.R. neglected juveniles. The findings of fact did not support a conclusion that respondent father's conduct created a "substantial risk" that abuse or neglect of the juveniles might occur.

3. Appeal and Error—untimely notice of appeal—writ of certiorari denied—desire to pursue appeal

Respondent mother's argument that the trial court erred by entering a civil custody order transferring the cases of C.R.R. and H.F.R. to a Chapter 50 action was dismissed. Respondent failed to give proper notice of appeal from this order and her petition for writ of *certiorari* was denied where the Court of Appeals could not infer from her notice of appeal from the order of adjudication and disposition that she desired to pursue an appeal from the civil custody order.

Appeal by respondents from orders entered 22 July 2013 by Judge Pell C. Cooper in Wilson County District Court. Heard in the Court of Appeals 27 March 2014.

Stephen L. Beaman for petitioner-appellee Wilson County Department of Social Services.

Richard Croutharmel for respondent-appellant mother.

Michael E. Casterline for respondent-appellant father.

Parker, Poe, Adams & Bernstein, by Sarah F. Hutchins and Ashley A. Edwards, for guardian ad litem.

ELMORE, Judge.

Respondents, the parents of the juvenile J.C.B. and custodians of their nieces C.R.R. and H.F.R., appeal from orders entered 22 July 2013 adjudicating J.C.B., C.R.R., and H.F.R. neglected juveniles. After careful review, we reverse in part, and dismiss, in part.

I. Facts

This case is related to *In The Matter of R.R.N.*, ___ N.C. App. ___, ___ S.E.2d ___ (COA13-947) (2014). R.R.N. is the step-daughter of respondent-father's cousin. On 30 November 2012, the Wilson County Department of Social Services ("DSS") filed a petition alleging that R.R.N. was an abused and neglected juvenile. DSS stated that it received a Child Protective Services report on 20 August 2012 claiming that R.R.N. had been sexually abused by respondent-father during an overnight visit to respondents' home on 18 August 2012. J.C.B., C.R.R., and H.F.R. were all present in the home at the time of the alleged sexual abuse. Accordingly, on 30 November 2012, DSS filed petitions alleging that J.C.B., C.R.R., and H.F.R. were neglected in that they lived in an environment injurious to their welfare because they resided in a home where another juvenile had been sexually abused.

DSS additionally alleged that C.R.R. and H.F.R. were dependent juveniles. C.R.R. and H.F.R. are respondents' nieces and respondents shared custody of the juveniles with the juveniles' maternal grandmother. C.R.R. and H.F.R. were residing with respondents and unable to return to their parents' home due to their parents' continuing issues with domestic violence and substance abuse. The plan at the time of the filing of the petitions was for C.R.R. and H.F.R. to move into the residence of their maternal grandmother.

Adjudicatory hearings were held on 13, 14, 15, and 29 March 2013. The trial court concluded that respondent-father abused R.R.N. and found that J.C.B., C.R.R., and H.F.R. resided in the home when the abuse occurred. Accordingly, on 22 July 2013, the trial court adjudicated J.C.B., C.R.R., and H.F.R. as neglected juveniles. The trial court declined to adjudicate C.R.R. and H.F.R dependent as alleged in the petitions. The trial court ordered that custody of J.C.B. remain with respondents while custody of C.R.R. and H.F.R. be granted to their maternal grandmother. Respondent-father was ordered to have no unsupervised

contact with C.R.R. and H.F.R. The trial court also entered a written order initiating a Chapter 50 civil custody action as to C.R.R. and H.F.R. Respondents appeal.

II. Analysis

[1] Respondent-father first argues that the trial court erred by adjudicating R.R.N. an abused juvenile. Respondent-father contends that the trial court failed to make appropriate findings of fact to support a conclusion that R.R.N. was the victim of a sexual offense. We decline, however, to review respondent-father's argument because he has no right to appeal the adjudication of abuse.

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 (2013); *see* N.C. Gen. Stat. § 7B–1001 (2013). Respondent-father does not fall within any category of persons afforded a statutory right to appeal from a juvenile matter pursuant to N.C. Gen. Stat. §§ 7B–1001 and 7B–1002 (2013). Thus, he lacks standing to appeal the trial court's 22 July 2013 order adjudicating R.R.N. an abused juvenile.

[2] We next consider respondents' arguments that the trial court erred by adjudicating J.C.B., C.R.R., and H.F.R. neglected juveniles. Respondents both argue that the trial court erred in adjudicating J.C.B., C.R.R., and H.F.R. neglected juveniles because its findings are insufficient to support the conclusion that they were harmed by respondent-father's actions or exposed to a substantial risk of harm. We agree.

"The role of this Court in reviewing a trial court's adjudication of neglect [] 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) (quoting *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000)), *aff'd as modified*, 362 N.C. 446, 665 S.E.2d 54 (2008). "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).

The statutory definition of neglect provides that "[i]n determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile . . . lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home." N.C. Gen. Stat. § 7B–101(15) (2013). This Court has acknowledged, however, that "the fact of prior abuse, standing alone, is not sufficient to support an adjudication of neglect." *In re N.G.*, 186 N.C. App. 1, 9, 650 S.E.2d 45, 51 (2007), *aff'd per curiam*, 362 N.C. 229, 657 S.E.2d 355 (2008). Instead, this Court has generally required the presence of other factors to suggest that the neglect or abuse will be repeated. *See, e.g.*, *In re C.M.*, 198 N.C. App. 53, 66, 678 S.E.2d 794, 801-02 (2009) (affirming adjudication of neglect based upon prior abuse of another child and a history of domestic violence between the parents); *In re A.S.*, 190 N.C. App. 679, 690-91, 661 S.E.2d 313, 320-21 (2008), *aff'd per curiam*, 363 N.C. 254, 675 S.E.2d 361 (2009) (affirming adjudication of neglect of a child based upon mother's act of intentionally burning another child's foot and falsely claiming that the burning was accidental); *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005) (affirming adjudication of neglect of one child based on prior adjudication of neglect with respect to other children and parent's lack of acceptance of responsibility).

Even if we assume *arguendo* that respondent-father abused R.R.N., a juvenile, in the home where J.C.B., C.R.R., H.F.R., and respondent-father lived, this fact alone does not support a conclusion that J.C.B., C.R.R., and H.F.R. were neglected. *In re N.G.*, *supra*. The trial court made virtually no findings of fact regarding J.C.B., C.R.R., or H.F.R., and wholly failed to make any finding of fact that J.C.B., C.R.R., and H.F.R. were either abused themselves or were aware of respondent-father's inappropriate relationship with R.R.N. Additionally, the trial court failed to make any findings of fact regarding other factors that would support a conclusion that the abuse would be repeated. As a result, the findings of fact do not support a conclusion that respondent-father's conduct created a "substantial risk" that abuse or neglect of J.C.B., C.R.R.,

and H.F.R. might occur. *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901–02 (1993) (citation omitted). Accordingly, we reverse the trial court's adjudications of neglect.

[3] Lastly, respondent-mother argues that the trial court erred by entering a Juvenile Court Order Initiating Civil Action For Custody (the civil custody order), transferring the cases of C.R.R. and H.F.R. to a Chapter 50 action. We note, however, that respondent-mother failed to give proper notice of appeal from this order and has filed a petition for writ of certiorari. She avers that we should grant the writ of certiorari because her untimely appeal from the civil custody order "stems from her court-appointed trial attorney's failure to do so and not because of any lack of desire on her part to appeal that order."

N.C. Appellate Procedure Rule 3.1(a) provides:

> Any party entitled by law to appeal from a trial court judgment or order rendered in a case involving termination of parental rights and issues of juvenile dependency or juvenile abuse and/or neglect, appealable pursuant to N.C.G.S. § 7B-1001, may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties in the time and manner set out in Chapter 7B of the General Statutes of North Carolina.

N.C.R. App. P. 3.1(a). Pursuant to N.C. Gen. Stat. § 7B-1001 (2013), "[n]otice of appeal and notice to preserve the right to appeal shall be given in writing . . . within 30 days after entry and service of the order[.]" An appellant's failure to give timely notice of appeal "is jurisdictional, and an untimely attempt to appeal must be dismissed." *In re I.T.P-L.*, 194 N.C. App. 453, 459, 670 S.E.2d 282, 285 (2008) (citation and quotations omitted). However, writ of certiorari "may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals[.]" N.C.R. App. P. 21. This Court has held that an appropriate circumstance to issue writ of certiorari occurs when an 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*, ___ N.C. ___, 749 S.E.2d 859 (2013). In such cases, the evidence indicated the appellant's "desire[] to pursue the appeal" despite the attorney's error. *I.T.P-L.*, 194 N.C. App. at 460, 670 S.E.2d at 285; *see In re I.S.*, 170 N.C. App. 78, 84, 611 S.E.2d 467, 471 (2005) (granting writ of certiorari where appellant's notice of appeal incorrectly stated that it was from a January order but it was clear from the circumstances that appellant intended to appeal

from an April order); *see also State v. Hammonds*, ___ N.C. App. ___, ___, 720 S.E.2d 820, 823 (2012) ("[A] mistake in designating the judgment . . . should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be *fairly inferred* from the notice and the appellee is not misled by the mistake[.]").

Here, respondent-mother concedes that she did not file timely notice of appeal from the civil custody order that transferred the cases of C.R.R. and H.F.R. to a Chapter 50 action. The only timely notice of appeal filed by respondent-mother was "from the Order of Adjudication and Disposition signed on 19 July 2013, filed on 22 July 2013." This notice of appeal was worded clearly and properly filed by her attorney. However, the notice of appeal makes no reference to the civil custody order nor does it describe any decision embodied in that order. Thus, we cannot infer from the notice of appeal that respondent-mother desired to pursue an appeal from the civil custody order. Accordingly, we deny her petition for writ of certiorari and dismiss this portion of her argument on appeal. *See In re H.S.F.*, 182 N.C. App. 739, 744, 645 S.E.2d 383, 386 (2007) (dismissing appellant's argument on appeal as to the trial court's error in a civil custody order because her notice of appeal was from the trial court's review order and not from the civil custody order itself).

III. Conclusion

In sum, we decline to address respondent-father's argument that the trial court erred by adjudicating R.R.N. an abused juvenile because he lacks standing to challenge this issue on appeal. We dismiss respondent-mother's argument pertaining to the alleged erroneous entry of the civil custody order because she failed to give proper notice of appeal. However, we reverse the trial court's adjudications of neglect because its findings of fact do not support its conclusion of law that J.C.B., C.R.R., and H.F.R. were neglected.

Reversed, in part; dismissed, in part.

Judge CALABRIA and Judge STEPHENS concur.

IN RE R.R.N.

[233 N.C. App. 647 (2014)]

IN THE MATTER OF R.R.N.

No. COA13-947

Filed 6 May 2014

Child Abuse, Dependency, and Neglect—sexual assault—family member—perpetrator not the caretaker

The trial court erred by adjudicating a minor child as abused and neglected. The family member who sexually assaulted the minor child was not the minor child's caretaker, even though the child was under his temporary supervision. Further, not every child who is the victim of a crime where the perpetrator is a family member requires the protection of the Juvenile Code.

Appeal by respondent from order entered 22 July 2013 by Judge Pell C. Cooper in Wilson County District Court. Heard in the Court of Appeals 27 March 2014.

Stephen L. Beaman for petitioner-appellee Wilson County Department of Social Services.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Annick Lenoir-Peek for respondent-appellant.

Administrative Office of the Courts, by Appellate Counsel Tawanda N. Foster, for guardian ad litem.

ELMORE, Judge.

Respondent, the mother of the juvenile, appeals from an order adjudicating R.R.N. an abused and neglected juvenile. After careful review, we reverse.

I. Background

On 30 November 2012, the Wilson County Department of Social Services ("DSS") filed a petition alleging that R.R.N. was an abused and neglected juvenile. DSS amended the petition on 11 December 2012. DSS stated that it received a Child Protective Services report on 20 August 2012 claiming that R.R.N. had been sexually abused. R.R.N. had visited the home of her alleged abuser ["Mr. B."], who was her stepfather's cousin, on 18 August 2012. Following the visit, the juvenile disclosed to respondent that she had been having a relationship with Mr. B., which

included him fondling her breasts and kissing her. Respondent reported the alleged abuse to DSS. Subsequently, during an interview with a social worker, the juvenile stated that she had performed oral sex on Mr. B., he had digitally penetrated her, and she and Mr. B. had originally planned to have sexual intercourse during her visit on 18 August 2012. DSS alleged that Mr. B. and his wife had been "acting as caretakers for [R.R.N.] that evening and were providing care to her in their home." After the disclosure of the abuse, respondent and the juvenile's stepfather did not allow any further contact between R.R.N. and Mr. B. and sought counseling for the juvenile. R.R.N. underwent a Child Medical Evaluation on 10 September 2012. The juvenile's statements during the interview were consistent with the disclosures made to the social worker.

On 30 January 2013, respondent moved to dismiss DSS' petition pursuant to Rule 12(b)(6). Specifically, respondent argued that the Juvenile Code did not apply because Mr. B. was not a parent, guardian, custodian, or caretaker for the juvenile as defined by the Juvenile Code. The trial court denied the motion.

Adjudicatory hearings were held on 13, 14, 15, and 29 March 2013. The trial court found as fact that the juvenile had (1) performed oral sex on Mr. B., (2) they had engaged in kissing, (3) Mr. B. had touched the juvenile's breasts and digitally penetrated her, and (4) that Mr. B. acted as a caretaker for the juvenile on 18 August 2012. Accordingly, the trial court adjudicated R.R.N. as an abused and neglected juvenile. The court ordered that custody of R.R.N. should remain with respondent, closed the case and terminated further review. Respondent appeals.

II. Analysis

Respondent argues that R.R.N. was not an abused or neglected juvenile because Mr. B. was not a caretaker. More specifically, respondent contends that the trial court erred in finding that Mr. B. was "entrusted" with R.R.N.'s care as required by N.C. Gen. Stat. § 7B-101(3). We agree and note that this issue is one of first impression for our courts.

"The role of this Court in reviewing a trial court's adjudication of neglect and abuse [and 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) (internal quotations and citation 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). "The trial court's

'conclusions of law are reviewable *de novo* on appeal.' " *In re D.H.*, 177 N.C. App. 700, 703, 629 S.E.2d 920, 922 (2006).

The Juvenile Code includes in its definition of abuse and neglect those juveniles who have been abused or neglected by a "caretaker." N.C. Gen. Stat. § 7B-101(1) (2013).

Caretaker is defined as:

> Any person other than a parent, guardian, or custodian who has responsibility for the health and welfare of a juvenile in a residential setting. A person responsible for a juvenile's health and welfare means a stepparent, foster parent, an adult member of the juvenile's household, [or] an adult relative entrusted with the juvenile's care[.]

N.C. Gen. Stat. § 7B-101(3) (2013).

The primary purpose of the "caretaker" statute, N.C. Gen. Stat. § 7B-101(3), is to protect the juvenile from abuse and neglect inflicted by an adult member of the juvenile's household. In addition, the statute serves to protect the juvenile from abuse and neglect inflicted by an adult relative who has been entrusted with responsibility for the health and welfare of the child. These relatives include persons related to the juvenile by blood as well as marriage, including step-parents and extended step-relatives.[1] The trial court must consider the totality of the circumstances to discern whether the relative has been "entrusted" with the juvenile's care under N.C. Gen. Stat. § 7B-101(3).

Generally, an adult relative is not "entrusted" with a juvenile's care for the purposes of being a caretaker unless an extended-care situation is in play. Such situations may include a prolonged visit by the juvenile to a relative's residence during which time the relative gains apparent or actual authority over the juvenile's health and welfare. Alternatively, a relative may inadvertently become entrusted with the child's care. For example, and assuming this issue was presented in *In re P.L.P.*, we would support a determination that P.L.P.'s uncle became her caretaker when P.L.P.'s mother left her in the uncle's care "for the night and had not returned for a few weeks." 173 N.C. App. 1, 3, 618 S.E.2d 241, 243 (2005) *aff'd*, 360 N.C. 360, 625 S.E.2d 779 (2006). By the mother's extended absence, the uncle became entrusted with P.L.P.'s care. However, had

1. *See* North Carolina DSS On-line Manual, Chapter VIII: Protective Services 1407. http://info.dhhs.state.nc.us/olm/manuals/dss/csm-60/man/CS1407-01.htm.

P.L.P.'s mother returned the following day, the uncle would have been responsible for P.L.P.'s temporary supervision.

Here, the basis of the petition filed by DSS was that Mr. B. satisfied the definition of "caretaker" because: (1) he was a step-cousin, and (2) he was entrusted with the juvenile's care when her parents permitted her to sleep over at his home on 18 August 2012. Specifically, the petition alleges that R.R.N. is an abused juvenile because her "parent, guardian or caretaker" "created or allowed to be created serious emotional damage" to the juvenile on 18 August 2012. The petition also alleges that R.R.N. is a neglected juvenile because she "lived" in an environment injurious to her welfare on 18 August 2012, the evening that R.R.N. slept at Mr. B.'s residence. The trial court concluded that Mr. B. was the juvenile's "caretaker," finding: (1) Mr. B. and the juvenile's stepfather were first cousins; (2) Mr. B. "acknowledged that he and his wife . . . were responsible for the care and supervision of [R.R.N.] when she was left with them overnight on August 18, 2012;" and (3) the sexual contact occurring between Mr. B. and the juvenile occurred at Mr. B.'s residence.

We disagree with the trial court's interpretation of the term "caretaker" on these facts. The situation before us did not come within the purview of the Juvenile Code until R.R.N. spent the night at Mr. B.'s residence. Had Mr. B. simply been the father of the juvenile's friend, the Juvenile Code would not apply. Alternatively, had the abuse occurred absent the sleepover situation, the Juvenile Code would similarly not apply. Regardless, and despite a familial relationship, Mr. B. was not R.R.N.'s caretaker because he was not "entrusted" with her care by virtue of supervising the sleepover.

When a parent or guardian allows a child to attend a sleepover, the parent does not relinquish responsibility over the child's health and welfare. This is evidenced by the following two situations. First, should R.R.N. have needed medical treatment during the night, it would be respondent, not Mr. B., who would have had the authority to make R.R.N.'s health-related decisions. Respondent was in town and could easily have been contacted by physicians or by Mr. B. Second, if R.R.N. became scared to sleep away from home, R.R.N. would likely have been returned to respondent's care that same evening. As such, and given the temporary nature of a sleepover, the adult supervisor, whether a relative or not, is not "entrusted" with the child's care as contemplated by N.C. Gen. Stat. § 7B-101(c). The adult supervisor must only attempt to ensure the visiting child's safety. Respondent, not Mr. B., was responsible for R.R.N.'s health and welfare on 18 August 2012.

In its petition, DSS does not allege that respondent or R.R.N.'s stepfather, the two adults with whom R.R.N. resided, were aware of or contributed to R.R.N.'s abuse or neglect. In fact, the petition provides that respondent insured R.R.N.'s safety "by not allowing any further contact with Mr. and Mrs. [B.]" and by "making sure [R.R.N.] attends counseling on a consistent basis." Further, there is no indication that the trial court was concerned for R.R.N.'s safety in respondent's home. This is evidenced by the fact that the trial court released R.R.N. into respondent's custody after adjudicating her abused and neglected.

One intended purpose of juvenile proceedings for abuse, neglect, and dependency as expressed in N.C. Gen. Stat. § 7B-100(3), is "[t]o provide for services for the protection of juveniles by means that respect both the right to family autonomy and the juveniles' needs for safety, continuity, and permanence[.]" In adjudicating R.R.N. abused and neglected on these facts, the trial court failed to account for the intention of the Juvenile Code to respect family autonomy. R.R.N.'s needs for safety, continuity, and permanence were at all relevant times sufficiently met by respondent.

III. Conclusion

In concluding that Mr. B. was R.R.N.'s caretaker, the trial court stretched N.C. Gen. Stat. § 7B-101(3) beyond its intended scope. Mr. B. was simply a relative who sexually assaulted R.R.N. while she was under his temporary supervision. At no time was Mr. B. responsible for R.R.N.'s health and welfare. Further, not every child who is the victim of a crime where the perpetrator is a family member requires the protection of the Juvenile Code. Our legal system has appropriate mechanisms in place to handle perpetrators of such crimes. In sum, the trial court erred in applying the Juvenile Code on these facts and in subsequently adjudicating R.R.N. abused and neglected. Accordingly, we reverse. Respondent's remaining argument is now moot.

Reversed.

Judges CALABRIA and STEPHENS concur.

INTEGON NATIONAL INSURANCE COMPANY, PLAINTIFF
v.
HELPING HANDS SPECIALIZED TRANSPORT, INC. AND LESLIE TAYLOR, EXECUTOR OF THE ESTATE OF MARY LEWIS FAGGART SMITH, DEFENDANTS

No. COA13-1266

Filed 6 May 2014

Insurance—automobile liability policy coverage—accident—causal connection—reformation—declaratory judgment

The trial court did not err in a declaratory judgment action by holding that plaintiff Integon's automobile liability policy provided coverage in the full amount of the policy limits to defendant Helping Hands for its liability, if any, with respect to the accident. There was a sufficient "causal connection" between the van's use and Ms. Smith's injury requiring Integon's policy to provide coverage. Nothing in the record showed that plaintiff argued reformation of the policy before the trial court.

Appeal by plaintiff from order entered 12 August 2013 by Judge A. Moses Massey in Forsyth County Superior Court. Heard in the Court of Appeals 7 April 2014.

Bennett & Guthrie, P.L.L.C., by Roberta King Latham, for plaintiff-appellant.

Mills & Levine, by Michael J. Greer, for defendant-appellee Leslie Taylor.

MARTIN, Chief Judge.

Plaintiff Integon National Insurance Company filed this action seeking a declaration of its obligations to provide coverage pursuant to a business automobile liability insurance policy issued to defendant Helping Hands Specialized Transport, Inc. for the alleged personal injuries and death of Mary Lewis Faggart Smith which arose out of an incident on 24 May 2010. Defendant Leslie Taylor is Ms. Smith's niece and the executor of Ms. Smith's estate. Ms. Taylor, through counsel, accepted service of process and filed an answer. Helping Hands was served with process, but failed to answer or otherwise respond to the complaint, and its default was entered by the Clerk of Superior Court. After discovery, both Integon and Ms. Taylor filed motions for summary judgment.

The materials before the trial court at the summary judgment hearing tended to show that at the time of Ms. Smith's injury, Helping Hands had a business automobile insurance policy with Integon which insured against liability for damages "caused by an accident and resulting from the ownership, maintenance or use of a covered" vehicle.

The materials also disclosed that prior to 24 May 2010, Ms. Smith had been hospitalized at Carolinas Medical Center and her treating physician had determined that she was nearing the end of her life and recommended to Ms. Taylor that she arrange for palliative care for her aunt. Ms. Taylor contracted with Hospice of Cabarrus County to provide hospice care for Ms. Smith at Ms. Smith's home. Hospice arranged for Helping Hands to transport Ms. Smith from the hospital to her home on May 24th. A Helping Hands handicapped accessible van, driven by Helping Hands driver Robert Brennan, went to the hospital on that date. Ms. Smith, who was seated in a Geri-chair, was loaded into the van and Mr. Brennan transported her safely to her residence, where Ms. Taylor was waiting.

There was also evidence tending to show that prior to the van's arrival, Ms. Taylor had received two telephone calls asking whether a ramp would be needed to negotiate the steps to Ms. Smith's home, and she responded that a ramp would be needed. The record is unclear as to whether these inquiries were made by Helping Hands or Hospice. Nevertheless, when the van arrived with Ms. Smith, there was no ramp.

Mr. Brennan used the van's hydraulic lift to lower Ms. Smith, in the Geri-chair, from the van to the driveway and removed the Geri-chair from the van's lift. Shortly thereafter, it began to rain. Mr. Brennan rolled Ms. Smith up a sidewalk to the house's front steps. Although the Geri-chair had wheels, it was not appropriate for transporting Ms. Smith up the steps and into the house, so Mr. Brennan asked Ms. Taylor if she had a wheelchair. Ms. Taylor went into the house and rolled a wheelchair onto the porch and Mr. Brennan carried it down the steps. Ms. Smith was transferred from the Geri-chair to the wheelchair without sustaining any injury. Mr. Brennan then proceeded to ascend the steps backwards and pull the wheelchair, facing backwards, up the steps. After going up the first step, Ms. Smith started sliding out of the wheelchair; Ms. Taylor grabbed one of her legs to keep her from sliding out of the chair, and Mr. Brennan put his arm around Ms. Smith and pulled the wheelchair up the second step. Once they were on the porch, Ms. Taylor discovered that Ms. Smith had sustained a gash on her leg. Ms. Smith passed away two days later. Neither Ms. Taylor nor Mr. Brennan recall whether the van's engine was running while Ms. Smith was unloaded from the van,

transferred to the wheelchair, and taken up the porch steps. The series of events from the time Ms. Smith arrived at her home until the injury lasted approximately five minutes.

Ms. Taylor has filed an action seeking damages in Cabarrus County Superior Court entitled *Leslie Taylor, Executor of the Estate of Mary Lewis Faggart Smith v. Hospice of Cabarrus County, Inc. and Helping Hands Specialized Transport, Inc.*, 12 CVS 1741, asserting that the alleged negligence, on the part of the named defendants, proximately resulted in Ms. Smith's injuries and death.

The trial court denied Integon's motion for summary judgment and granted Ms. Taylor's motion for summary judgment, holding that Integon's policy provides coverage in the full amount of the policy limits to Helping Hands for its liability, if any, with respect to the incident, and that Integon is obligated to provide a defense to Helping Hands for the claim. Integon appeals.

"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)). A question of fact

> 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. The issue is denominated "genuine" if it may be maintained by substantial evidence.

Koontz v. City of Winston-Salem, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972).

In this case, while there may be genuine issues of fact which are material to the issues of negligence and the liability of Helping Hands for the injuries and death of Ms. Smith, none of those factual issues are material to the issue of whether Integon's policy of insurance provides coverage to Helping Hands for any such liability. Thus, summary judgment is an appropriate procedure for the resolution of this declaratory judgment action. *See Pine Knoll Ass'n v. Cardon*, 126 N.C. App. 155, 158, 484 S.E.2d 446, 448, *disc. review denied*, 347 N.C. 138, 492 S.E.2d 26 (1997).

While Integon's policy insured Helping Hands against liability for damages "caused by an accident and resulting from the ownership, maintenance or use of a covered" vehicle, N.C.G.S. § 20-279.21 requires that an automobile liability insurance policy provide coverage for damages "arising out of the ownership, maintenance or use of" the covered vehicle. N.C. Gen. Stat. § 20-279.21(b)(2) (2013). Our case law has established that this statute is written into every automobile liability policy. *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 441, 238 S.E.2d 597, 604 (1977), *appeal after remand*, 298 N.C. 246, 258 S.E.2d 334 (1979).

In *Fidelity & Casualty Co. of New York v. North Carolina Farm Bureau Mutual Insurance Co.*, 16 N.C. App. 194, 198–99, 192 S.E.2d 113, 117–18, *cert. denied*, 282 N.C. 425, 192 S.E.2d 840 (1972), this Court defined the meaning of the language "arising out of the ownership, maintenance and use" of a vehicle as used in an automobile liability insurance policy. The Court stated:

> The policy provision in question speaks of liability "arising out of the ownership, maintenance or use" of the truck. The words "arising out of" are not words of narrow and specific limitation but are broad, general, and comprehensive terms effecting broad coverage. They are intended to, and do, afford protection to the insured against liability imposed upon him for all damages caused by acts done in connection with or arising out of such use. They are words of much broader significance than "caused by." They are ordinarily understood to mean "originating from," "having its origin in," "growing out of," or "flowing from," or in short, "incident to," or "having connection with" the use of the automobile. The act of loading and unloading a truck is not an act separate and independent of the use and *is an act necessary to accomplish the purpose of using the truck.*
>
> The parties do not, however, contemplate a general liability insurance contract. There must be a causal connection between the use and the injury. This causal connection may be shown to be an injury which is the natural and reasonable incident or consequence of the use, though not foreseen or expected, but the injury cannot be said to arise out of the use of an automobile if it was directly caused by some independent act or intervening cause wholly disassociated from, independent of, and remote from the use of the automobile.

Id. (emphasis added) (citations omitted).

Citing the foregoing, the North Carolina Supreme Court, in *State Capital Insurance Co. v. Nationwide Insurance Co.*, 318 N.C. 534, 539–40, 350 S.E.2d 66, 69 (1986) stated: "In short, the test for determining whether an automobile liability policy provides coverage for an accident is not whether the automobile was a proximate cause of the accident. Instead, the test is whether there is a causal connection between the use of the automobile and the accident."

In *State Capital*, two men traveled together in a pickup truck to survey some hunting land. *Id.* at 536, 350 S.E.2d at 67. The truck contained three guns, a rifle and shotgun in the gun rack and another rifle on the floor behind the seat. *Id.* The men stopped at a tract of land and got out of the truck to survey the area. *Id.* Thereafter, the passenger returned to the truck and, a short time later, the driver saw a deer and returned to the truck to retrieve his rifle. *Id.* As he moved the seat and reached for the rifle, it discharged, striking the passenger. *Id.* at 536, 350 S.E.2d at 68. The Supreme Court held that a causal connection existed between the use of the vehicle and the injury to the passenger because "the transportation and unloading of firearms are ordinary and customary uses of a motor vehicle" and the accident was a reasonable consequence of such use. *Id.* at 540, 350 S.E.2d at 70.

Since the decision in *State Capital*, this Court has been liberal in its application of the principle that a motor vehicle liability insurance policy will provide coverage if an injury is caused by an activity that is necessarily or ordinarily associated with the use of the insured vehicle. In *Nationwide Mutual Insurance Co. v. Davis*, 118 N.C. App. 494, 498, 455 S.E.2d 892, 895, *disc. review denied*, 341 N.C. 420, 461 S.E.2d 759 (1995), this Court held that an automobile liability policy provided coverage for injuries to a child who was struck by another motor vehicle after getting out of the insured vehicle, driven by her grandmother, and crossing a roadway to go to a store. The Court reasoned that the grandmother was "purposefully using" the insured vehicle to go to the store, so that the vehicle "was instrumental in the trip" to the store, and that because the grandmother had parked the van where the child had to cross a roadway to get to the store, there was a causal connection between its use and the child's injury. *Id.*

Also, in *Integon National Insurance Co. v. Ward ex rel. Perry*, 184 N.C. App. 532, 535, 646 S.E.2d 395, 397 (2007), this Court held that an automobile liability policy provided coverage to a minor child who had accompanied the owner of the insured vehicle to an automobile repair shop. While the insured vehicle was undergoing repairs, the child was struck by another vehicle in the shop. *Id.* This Court relied on *State*

Capital and *Davis* to hold that because the insured driver, accompanied by the child, used the insured vehicle to go to the repair shop so that the vehicle could be repaired, a sufficient causal connection existed between the vehicle's use and the child's injuries to require coverage for the child's injuries. *Id.* at 534–35, 646 S.E.2d at 397.

In the present case, the insured vehicle was intended for use, on the date of the occurrence of Ms. Smith's injury, to transport her from the hospital to her residence for palliative care. Because she was unable to ambulate, application of the logic contained in *Davis* and *Ward* leads to the inference that the use of the insured van included moving Ms. Smith into her residence as a part of the transport service. Since we are unable to draw any meaningful distinction between the *Davis* and *Ward* facts and the facts of the instant case, and even though we might believe that the extension of coverage in those cases goes beyond the common-sense application of the principles of a causal connection, we are bound to follow them and hold that there is a sufficient "causal connection" between the van's use and Ms. Smith's injury requiring Integon's policy to provide coverage.[1] Our decision is not to be construed as an indication that we express any opinion as to the liability of any party to the underlying civil action.

Finally, plaintiff argues that after the trial court found that the insurance policy covered Ms. Smith's injury, the trial court should have reformed the policy to require payment of only the statutorily mandated minimum coverage amount. We do not reach this argument.

North Carolina Rule of Appellate Procedure 10 requires:

> In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C.R. App. P. 10(a)(1).

Integon's complaint did not seek reformation of the insurance contract, only a declaration that its policy provided no coverage to Helping

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1. Our Supreme Court has stated: "While we recognize that a panel of the Court of Appeals may disagree with . . . an opinion by a prior panel and may duly note its disagreement . . . in its opinion, the panel is bound by that prior decision until it is overturned by a higher court." *State v. Jones*, 358 N.C. 473, 487, 598 S.E.2d 125, 134 (2004).

Hands for Ms. Smith's injuries. Nothing in the record before us shows affirmatively that plaintiff argued reformation of the policy before the trial court. Therefore, we will not review this argument because it was not properly preserved for appeal.

Also, to the extent that plaintiff asserts the reformation argument is part of the declaratory judgment action, that argument fails. "The purpose of the Declaratory Judgment Act is, to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." *Nationwide Mut. Ins. Co. v. Roberts*, 261 N.C. 285, 287, 134 S.E.2d 654, 657 (1964) (internal quotation marks omitted). While the Declaratory Judgment Act should be liberally construed the Act applies "only when the pleadings and evidence disclose the existence of a genuine controversy between the parties to the action, arising out of conflicting contentions as to their respective legal rights and liabilities under a deed, will, contract, statute, ordinance, or franchise." *Id.* at 287, 134 S.E.2d at 656–57. Thus, a declaratory judgment action is appropriate when it will "alleviat[e] uncertainty in the interpretation of [a] written instrument[]." *Danny's Towing 2, Inc. v. N.C. Dep't of Crime Control & Pub. Safety*, 213 N.C. App. 375, 382, 715 S.E.2d 176, 181 (2011). However, our courts have held that a declaratory judgment action is inappropriate when used as "a vehicle for the nullification of [written] instruments." *Farthing v. Farthing*, 235 N.C. 634, 635, 70 S.E.2d 664, 665 (1952).

While none of the previously cited cases directly address plaintiff's argument, they do provide a framework for when a declaratory judgment action is appropriate. Plaintiff seems to assert that the trial court should have reformed the terms of the automobile liability policy because the language of the policy was intended to apply to a narrower scope of causation than N.C.G.S. § 20-279.21, and therefore, plaintiff should have to pay only the statutorily mandated minimum coverage and not the minimum coverage stated in the policy. Plaintiff's argument asserts that this Court should change the terms of the policy based on the interaction between the language of the parties' agreement and the requirements of statutory law. The Declaratory Judgment Act, however, applies to the *interpretation* of written instruments. Therefore, we find that this type of determination is beyond the scope of the Declaratory Judgment Act.

For the reasons stated above we affirm.

Affirmed.

Judges McGEE and CALABRIA concur.

WILLIE B. JOHNSON, EMPLOYEE, PLAINTIFF
v.
SOUTHERN TIRE SALES AND SERVICE, INC., EMPLOYER, AND N.C. INSURANCE GUARANTY ASSOCIATION, CARRIER, DEFENDANTS

No. COA13-1074

Filed 6 May 2014

1. Workers' Compensation—reinstatement of vocational rehabilitation efforts—disability not established

The Full Industrial Commission did not err in a workers' compensation case by declining to order reinstatement of vocational rehabilitation efforts for plaintiff. A disability must be shown before vocational rehabilitation services can be awarded or reinstated as part of a workers' compensation claim. Competent evidence supported the Full Commission's findings of fact, and those findings supported the conclusions of law, that plaintiff failed to carry the burden of establishing disability during the relevant time period.

2. Workers' Compensation—time-barred—further compensation

The Full Industrial Commission did not err in a workers' compensation case by ruling that plaintiff was time-barred by N.C.G.S. § 97-47 from seeking further compensation because the two-year limitation began upon receipt of final payment and had since run.

Appeal by plaintiff from opinion and award entered 21 June 2013 by the North Carolina Industrial Commission. Heard in the Court of Appeals 5 February 2014.

Oxner Thomas & Permar, PLLC, by John R. Landry, Jr., for plaintiff-appellant.

Young Moore and Henderson, P.A., by Joe E. Austin, Jr., for defendants-appellees.

HUNTER, Robert C., Judge.

Willie B. Johnson ("plaintiff") appeals from an opinion and award entered by the Full Commission of the North Carolina Industrial Commission ("the Commission") denying his request to reinstate vocational rehabilitation efforts and ruling that plaintiff is time-barred from recovering any further compensation. On appeal, plaintiff argues that:

(1) he offered proof of his ongoing disability as the result of his compensable injury; (2) he has offered proof of his willingness to comply with vocational rehabilitation efforts; and (3) the Full Commission applied erroneous legal standards in its opinion and award.

After careful review, we affirm the Full Commission's opinion and award.

Background

The facts of this case have previously been addressed at length, twice by this Court and once by our Supreme Court. *See Johnson v. S. Tire Sales & Serv.*, 152 N.C. App. 323, 567 S.E.2d 773 (2002) ("*Johnson I*"), *rev'd*, 358 N.C. 701, 599 S.E.2d 508 (2004) ("*Johnson II*"); *Johnson v. S. Tire Sales & Serv.*, No. COA10-770, 2011 WL 2848842 (N.C. Ct. App. July 19, 2011) ("*Johnson III*"). We need not restate the full factual history here. The facts relevant to this appeal are as follows: Plaintiff was previously employed by Southern Tire Sales and Service, Inc. ("Southern Tire") as a shop mechanic, and he sustained a work-related back injury on 24 October 1996. Southern Tire was insured by Casualty Reciprocal Exchange at the time of plaintiff's injury but is now insured by North Carolina Insurance Guaranty Association (with Southern Tire, "defendants"). Defendants filed a Form 63 and paid plaintiff medical and indemnity compensation. Defendants later accepted liability for plaintiff's injury by failing to contest the compensability of plaintiff's claim or their liability therefor within the statutory period.

As part of the compensation, defendants provided vocational rehabilitation services to assist plaintiff in locating suitable employment. Ronald Alford ("Mr. Alford"), a Certified Rehabilitation Counselor, arranged multiple job interviews for plaintiff and registered him for the Johnston County Industries program, which provided potential jobs that comported with plaintiff's work restrictions. However, plaintiff refused to participate in the Johnston County Industries program and either failed to attend the interviews that Mr. Alford had scheduled or sabotaged them through "extreme pain behavior."

Effective 9 February 1999, former Deputy Commissioner Theresa B. Stephenson authorized defendants to suspend payment of compensation due to plaintiff's unjustified refusal to cooperate with the vocational rehabilitation program defendants had assigned. That decision was appealed to the Full Commission, which reversed Deputy Commissioner Stephenson's opinion and award and ordered defendants to pay temporary total disability compensation from 27 January 1997. The Full Commission's opinion and award was affirmed by this Court in *Johnson I*.

However, on discretionary review, the Supreme Court ruled that the Full Commission had erroneously operated under a presumption of continuing disability in plaintiff's favor and applied an incorrect legal standard in determining whether plaintiff had constructively refused suitable employment. *Johnson II*, 358 N.C. at 706, 709, 599 S.E.2d at 512, 514. Thus, the Supreme Court reversed the Court of Appeals decision in *Johnson I* and ordered remand back to the Commission for entry of findings regarding the existence and extent of plaintiff's disability and the suitability of alternative employment. *Id.* at 711, 599 S.E.2d at 515.

After the Supreme Court's ruling in *Johnson II*, there was an unexplained six-year delay in the proceedings.[1] Ultimately the Full Commission entered a revised opinion and award on 9 March 2010 ("the 9 March 2010 opinion and award"), in which it found that plaintiff was not permanently and totally disabled and concluded that plaintiff had failed to establish disability for any time after 9 February 1999 due to his unjustifiable refusal to cooperate with defendants' vocational rehabilitative efforts. It further ordered that defendants overpaid plaintiff for any compensation for disability paid after 9 February 1999 and were entitled to a credit to offset this overpayment. After appeal from both plaintiff and defendants, the *Johnson III* Court affirmed the 9 March 2010 opinion and award, holding in relevant part that there was no inconsistency in the Full Commission's conclusions as to disability. *See Johnson III*, at *9.

On 4 August 2011, plaintiff filed a Form 33, arguing that he was entitled to temporary total disability compensation from 9 February 1999 onward. Plaintiff then filed a motion to compel vocational rehabilitation on 1 September 2011. On 9 November 2012, Deputy Commissioner Mary C. Vilas entered an opinion and award allowing plaintiff's motion to compel vocational rehabilitation and ordering defendants to authorize vocational rehabilitation efforts for plaintiff. Defendants filed notice of appeal to the Full Commission on 26 November 2012. After a hearing on 1 May 2013, the Full Commission entered an opinion and award denying plaintiff's request for additional vocational rehabilitation services, denying plaintiff's request for a hearing to the extent that plaintiff

1. As the *Johnson III* Court explained: "The record in this case is an oddity. There are copies of several letters written by counsel for the parties, addressed to the Commission and various representatives thereof. These letters contain references to various filings and occasionally contain requests to the Commission such as 'I would appreciate a ruling in this case.' However, there is nothing in the record . . . that informs this Court as to why the Commission delayed from 2004 until 2010 in making the additional findings ordered by the Supreme Court." *Johnson III*, at *5.

sought additional compensation, and awarding defendants a credit of $21,812.45 against any future indemnity compensation due plaintiff. The Full Commission entered the following relevant findings of fact:

> 31. With respect to job search efforts, Plaintiff acknowledged that the 11 employers listed in his responses to Defendants' 2010 Interrogatories were contacted at the time he was working with Mr. Alford, which was from 1997 through 1999. The only evidence Plaintiff provided that could be construed as job search efforts following 1999 was his testimony that, "I've talked with Stephanie. She's a — you know, finds jobs and stuff.... we're supposed to meet next week about some interviews for jobs."
>
> 32. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiff has failed to produce any medical evidence that, since February 9, 1999, he has been unable to work as a result of his injury of October 24, 1996. Plaintiff has also failed to produce sufficient evidence that, since February 9, 1999, he has made a reasonable effort to find work, that it would have been futile for him to seek employment, or that he has returned to work earning lower wages than he was earning at the time of the aforementioned injury.

Based on these findings, the Full Commission entered the following conclusions of law:

> 2. No presumption of continuing disability is created when a Form 63 is executed followed by payments by the employer to the employee beyond the statutory time period contained in N.C. Gen. Stat. § 97-18(d) without contesting the compensability of or liability for a claim. As such, Plaintiff in the instant case bears the burden of proving the existence and degree of disability.
>
> 3. In order to meet this burden of proof, Plaintiff must prove that he was incapable of earning pre-injury wages in either the same or in any other employment and that the incapacity to earn pre-injury wages was caused by Plaintiff's injury. . . .
>
> 4. In its March 9, 2010 Opinion and Award on Remand, the Full Commission determined that Plaintiff met his burden of proving disability under the first prong of *Russell*

through April 23, 1997, and under the second prong of *Russell* until February 9, 1999. The Full Commission further determined that, as of February 9, 1999, Defendants had successfully rebutted Plaintiff's evidence of disability through the presentation of evidence that suitable work was available to Plaintiff, and that plaintiff was capable of obtaining a suitable job taking into account both his physical and vocational limitations.

5. . . . Following its analysis of the March 9, 2010 Opinion and Award on Remand, the [Court of Appeals] ultimately concluded that there was no inconsistency in the Full Commission's findings on disability and affirmed the Full Commission's March 9, 2010 Opinion and Award on Remand.

6. . . . Accordingly, the Court of Appeals'. determination that the Full Commission resolved the disability issue in its March 9, 2010 Opinion and Award on Remand is law of the case and is binding on the parties and the Commission going forward.

7. Plaintiff has failed to meet his burden of proving disability at any time on or after February 9, 1999. As such, plaintiff is not entitled to additional vocational rehabilitation services as he has not proven a period of disability which such services could serve to lessen.

8. Because Plaintiff filed his Industrial Commission Form 33 indicating he believed he was entitled to additional compensation on August 4, 2011, over two years since the final payment of compensation on April 27, 2000, Plaintiff is precluded from seeking additional compensation. N.C. Gen. Stat. § 97-47.

Plaintiff filed timely notice of appeal to this Court on 25 June 2013.

Discussion

I. Reinstitution of Vocational Rehabilitation Efforts

[1] Plaintiff's first argument on appeal is that the Full Commission erred by declining to order reinstatement of vocational rehabilitation efforts. We disagree.

The Commission has exclusive original jurisdiction over workers' compensation proceedings. *Thomason v. Red Bird Cab Co.*, 235 N.C.

602, 604, 70 S.E.2d 706, 708 (1952). It is required to hear the evidence and file its award, "together with a statement of the findings of fact, rulings of law, and other matters pertinent to the questions at issue." N.C. Gen. Stat. § 97-84 (2013). "The reviewing court's inquiry is limited to two issues: whether the Commission's findings of fact are supported by competent evidence and whether the Commission's conclusions of law are justified by its findings of fact." *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 379 (1986). The Commission's findings of fact are conclusive on appeal when supported by competent evidence even though evidence exists that would support a contrary finding. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982). "[F]indings of fact which are left unchallenged by the parties on appeal are presumed to be supported by competent evidence and are, thus conclusively established on appeal." *Chaisson v. Simpson*, 195 N.C. App. 463, 470, 673 S.E.2d 149, 156 (2009) (citation and quotation marks omitted).

First, we affirm the Full Commission's legal conclusions that support its denial of plaintiff's request for reinstatement of vocational rehabilitation. Plaintiff argues that, in order for the Full Commission to address whether he is entitled to future disability compensation, defendants must be ordered to reinstate vocational rehabilitation efforts, after which point plaintiff will be given the opportunity to offer evidence of his substantial compliance. We disagree with plaintiff's analysis. Pursuant to N.C. Gen. Stat. § 97-25(a) (2013), "medical compensation shall be provided by the employer" under the Workers' Compensation Act. As defined in N.C. Gen. Stat. § 97-2(19) (2013), "medical compensation" includes "vocational rehabilitation." However, services only fall under the definition of "medical compensation" if they "effect a cure or give relief" or "will tend to lessen the period of disability." N.C. Gen. Stat. § 97-2(19). The Full Commission correctly reasoned that because vocational rehabilitation by its nature cannot effect a cure or give relief in a medical sense, it must lessen the period of disability in order to meet the statutory definition of medical compensation. "Under the . . . Compensation Act disability refers not to physical infirmity but to a diminished capacity to earn money." *Mabe v. Granite Corp.*, 15 N.C. App. 253, 255, 189 S.E.2d 804, 806 (1972). To meet the standard of tending to lessen the period of disability, a vocational rehabilitation service must reduce "the period of [the employee's] diminished capacity to work." *Peeler v. State Highway Comm'n*, 48 N.C. App. 1, 6-7, 269 S.E.2d 153, 157 (1980). Thus, we agree with the Full Commission that a disability, or a "diminished capacity to earn money," must be shown before vocational rehabilitation services can be awarded or reinstated as part of a

worker's compensation claim. *See Powe v. Centerpoint Human Servs.*, __ N.C. App. __, __, 742 S.E.2d 218, 223 (2013) ("[T]he impact of an employee's refusal to cooperate with vocational rehabilitation services on that employee's right to indemnity compensation arises only after she has met her burden of establishing disability. . . . If the Commission determines that [p]laintiff has not met her burden of proving disability during the contested periods, then the issues regarding [p]laintiff's cooperation with vocational rehabilitation efforts will be moot.").

As the *Johnson II* Court noted in its opinion remanding for a determination as to the extent of plaintiff's disability, "a determination of whether a worker is disabled focuses upon impairment to the injured employee's earning capacity rather than upon physical infirmity." *Johnson II*, 358 N.C. at 707, 599 S.E.2d at 513. An employee may carry the burden of proving the existence of a disability by producing evidence of one of the following: (1) medical evidence that he is physically or mentally, as a result of the work-related injury, incapable of work in any employment; (2) evidence that he is capable of some work, but that he has, after a reasonable effort, been unsuccessful in his efforts to obtain employment; (3) evidence that he is capable of some work, but that it would be futile because of preexisting conditions, such as age, inexperience, or lack of education, to seek employment; or (4) evidence that he has obtained other employment at wages less than his pre-injury wages. *Russell v. Lowes Prod. Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993).

Here, competent evidence supports the Full Commission's findings of fact, and those findings support the conclusions of law, that plaintiff has failed to carry the burden of establishing disability for any time after 9 February 1999. First, it is the law of the case that plaintiff failed to establish disability from 9 February 1999 through the entry of the 9 March 2010 opinion and award. "[O]nce an appellate court has ruled on a question, that decision becomes the law of the case and governs the question both in subsequent proceedings in a trial court and on subsequent appeal." *Prior v. Pruett*, 143 N.C. App. 612, 618, 550 S.E.2d 166, 170 (2001) (citation and quotation marks omitted). The *Johnson III* Court affirmed the Full Commission's 9 March 2010 opinion and award, which concluded that plaintiff only established disability through 9 February 1999 and after that date had failed to carry his burden of establishing disability. *Johnson III*, at *9. Thus, because the issue of whether plaintiff established disability was presented and affirmatively addressed by this Court, the law of the case doctrine applies, and we are bound to conclude that plaintiff failed to establish disability from 9 February 1999 through entry of the 9 March 2010 opinion and award.

Second, there is competent evidence to support the Full Commission's finding of fact that plaintiff failed to establish disability under *Russell* at any time after entry of the 9 March 2010 opinion and award. Plaintiff does not challenge the Full Commission's finding of fact that the only effort he put forth in attempting to find work after 9 February 1999 was talking to an individual named "Stephanie," with whom he was scheduled to meet after the 14 October 2011 hearing before Deputy Commissioner Vilas. Because this finding is unchallenged, it is presumed to be supported by competent evidence and is binding on appeal. *Chaisson*, 195 N.C. App. at 470, 673 S.E.2d at 156. This finding further supports the Full Commission's conclusion that plaintiff failed to put forth a "reasonable effort" to find employment, and therefore did not establish disability under the second prong of the *Russell* test. *See Russell*, 108 N.C. App. at 766, 425 S.E.2d at 457. Furthermore, competent evidence supports the Full Commission's findings that plaintiff also fails to establish disability under the other three prongs of the *Russell* test. There is evidence to support, and plaintiff does not contest, that: (1) he is capable of some employment, albeit with physical limitations; (2) it would not be futile for plaintiff to return to work due to a preexisting condition such as age or lack of education; and (3) he has not taken employment that paid a lesser wage than he earned before his injury. *See id.*

Accordingly, because no period of disability existed when plaintiff filed his request to reinstate vocational rehabilitation, we affirm the Full Commission's denial of plaintiff's request, as those efforts could not serve to lessen a period of disability.

II. Section 97-47

[2] Plaintiff next argues that the Full Commission erred by ruling that he is time-barred by N.C. Gen. Stat. § 97-47 from seeking further compensation. We disagree and affirm the Full Commission's opinion and award.

First, plaintiff contends that the issue of whether he is time-barred by section 97-47 from seeking additional compensation was not properly presented to the Commission for determination, and therefore the portions of the opinion and award that address this argument must be vacated with leave for either party to raise such issues pursuant to a Form 33 request for a new hearing. We disagree. Here, Deputy Commissioner Vilas limited the issue for determination at the initial hearing solely to whether defendants should be ordered to reinstate vocational rehabilitation efforts for plaintiff. However, defendants filed motions to dismiss plaintiff's requests, arguing that plaintiff was time-barred by section 97-47

from receiving any further compensation. "[T]he [F]ull Commission has the duty and responsibility to decide all matters in controversy between the parties . . . even if those matters were not addressed by the deputy commissioner." *Perkins v. U.S. Airways*, 177 N.C. App. 205, 215, 628 S.E.2d 402, 408 (2006). "Thus, the mere fact that a particular issue was not raised before a deputy commissioner does not, standing alone, obviate the necessity for the Commission to consider that issue." *Bowman v. Scion*, __ N.C. App. __, __, 737 S.E.2d 384, 388 (2012). Here, given that plaintiff requested further compensation in his Form 33 and requested compensation in the form of vocational rehabilitation, we hold that it was proper for the Full Commission to consider whether plaintiff is time-barred by section 97-47 from receiving further compensation in its opinion and award.

Pursuant to section 97-47:

> Upon its own motion or upon the application of any party in interest on the grounds of a change in condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded, subject to the maximum or minimum provided in this Article, and shall immediately send to the parties a copy of the award. No such review shall affect such award as regards any moneys paid but *no such review shall be made after two years from the date of the last payment of compensation pursuant to an award under this Article*[.]

N.C. Gen. Stat. § 97-47 (emphasis added). "The time limitation [in section 97-47] commences to run from the date on which [the] employee received the last payment of compensation[.]" *Sharpe v. Rex Healthcare*, 179 N.C. App. 365, 372, 633 S.E.2d 702, 706 (2006).

Plaintiff and defendants are in disagreement as to the grounds upon which the Full Commission suspended plaintiff's compensation in the 9 March 2010 opinion and award, and both contend that this distinction is dispositive as to the applicability of the two-year limitation in section 97-47. Plaintiff argues that compensation was suspended under section 97-25 for his refusal to accept vocational rehabilitation. Thus, under *Scurlock v. Durham Cnty. Gen. Hosp.*, 136 N.C. App. 144, 147, 523 S.E.2d 439, 441 (1999), plaintiff contends the question of whether he is entitled to future benefits hinges on the opportunity to comply with further vocational rehabilitation efforts once they are provided by defendants, and section 97-47 is not implicated. *See id.* (concluding that

where a case was "pending under section 97-25," it was not a "change-of-condition case under section 97-47," and the two-year statute of limitation did not apply). Defendants, on the other hand, contend that compensation was suspended not under section 97-25, but under N.C. Gen. Stat. § 97-32 (2013), based on plaintiff's failure to accept suitable employment. *See* N.C. Gen. Stat. § 97-32 ("If an injured employee refuses suitable employment . . . the employee shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified."). Citing *Sharpe*, defendants argue that plaintiff's failure to accept suitable employment under section 97-32 triggered the time-bar of section 97-47, and therefore the Full Commission properly determined that plaintiff is foreclosed from seeking further compensation. *See Sharpe*, 179 N.C. App. at 372-73, 633 S.E.2d at 706-07 (holding that where an employee's compensation was suspended for her unjustified refusal to return to suitable employment under section 97-32, the time-bar of section 97-47 ran upon last payment of compensation).

We agree with defendants that the Full Commission terminated compensation under section 97-32 because plaintiff refused suitable employment without justification. In *Johnson II*, the Supreme Court cited section 97-32 for the proposition that "[i]f the employer successfully rebuts the employee's evidence of disability by producing evidence that the employee has refused suitable employment without justification, compensation can be denied." *Johnson II*, 358 N.C. at 709, 599 S.E.2d at 514. It further noted that the Full Commission's previous opinion and award "should have contained specific findings as to what jobs plaintiff is capable of performing and whether jobs are reasonably available for which plaintiff would have been hired had he diligently sought them." *Id.* at 710, 599 S.E.2d at 514. On remand, the Full Commission cited section 97-32 and concluded that plaintiff "unjustifiably refused to cooperate with defendants' vocational rehabilitative efforts," and as a result, ordered that defendants "are entitled to suspend payment of compensation to plaintiff effective 9 February 1999." In his arguments before this Court in *Johnson III*, plaintiff himself characterized the 9 March 2010 opinion and award as a "decision to suspend [his] receipt of temporary total disability compensation pursuant to N.C. Gen. Stat. § 97-32 . . . ." *Johnson III*, at *3. Based on the foregoing, we conclude that compensation was suspended by the Full Commission in its 9 March 2010 opinion and award pursuant to section 97-32, not section 97-25. Accordingly, under *Sharpe*, the time limitation in section 97-47 began to run upon receipt of plaintiff's final payment of compensation on 27 April 2000. Because plaintiff requested additional compensation based on a

change of condition more than two years after the final payment of compensation, we affirm the Full Commission's conclusion of law that plaintiff is time-barred by section 97-47 from receiving such compensation.

Conclusion

Because plaintiff has failed to establish any period of disability after 9 February 1999, we affirm the Full Commission's denial of his request to reinstate vocational rehabilitation efforts. Furthermore, plaintiff is time-barred from seeking additional compensation under section 97-47 because the two-year limitation began upon receipt of final payment and has since run.

AFFIRMED.

Judges GEER and McCULLOUGH concur.

THE NORTH CAROLINA STATE BAR, Plaintiff
v.
GEOFFREY H. SIMMONS, Attorney, Defendant

No. COA13-1140

Filed 6 May 2014

1. Attorneys—disciplinary action—embezzlement of client funds—sufficient evidence—knowingly and willfully

The State Bar did not fail to present clear, cogent, and convincing evidence that defendant knowingly and willfully misappropriated or embezzled client funds. There was substantial evidence in the record upon which the Disciplinary Hearing Commission could find that defendant intended to embezzle client funds.

2. Attorneys—disciplinary action—embezzlement of client funds—conviction of crime not required

The Disciplinary Hearing Commission did not erroneously discipline defendant and impose disbarment from the practice of law as a sanction for defendant's embezzling client funds where defendant had not been convicted of embezzlement in criminal court. Conviction of a crime is not a necessary element in a disciplinary proceeding and defendant need only have committed the crime to be disciplined.

3. Attorneys—disciplinary action—disbarment—adequate factual support

The Disciplinary Hearing Commission's (DHC) order imposing disbarment as a sanction for defendant's misconduct conformed to the requirements of *N.C. State Bar v. Talford*, 356 N.C. 626. The DHC provided support for its decision by including adequate and specific findings that addressed the two key statutory considerations.

Appeal by defendant from order of discipline entered 19 April 2013 by the Disciplinary Hearing Commission of the North Carolina State Bar. Heard in the Court of Appeals 17 February 2014.

The North Carolina State Bar, by Deputy Counsel David R. Johnson and Counsel Katherine Jean, for plaintiff-appellee.

Poyner Spruill LLP, by M. Jillian DeCamp and Carrie V. McMillan, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Geoffrey H. Simmons ("Defendant") appeals from a final order of the Disciplinary Hearing Commission ("DHC") disbarring him from the practice of law for embezzling client funds. Defendant contends (1) that there was insufficient evidence before the DHC that he intended to embezzle client funds, (2) that the DHC could not impose discipline based on embezzlement without a criminal conviction, and (3) that the DHC's order failed to conform to the requirements of *N.C. State Bar v. Talford*, 356 N.C. 626, 576 S.E.2d 305 (2003), for disbarring attorneys. For the following reasons, we disagree and affirm the DHC's order.

I. Factual & Procedural History

Defendant was licensed to practice law by the North Carolina State Bar in 1977 and practiced law for over thirty years. Defendant's career was, in many respects, a decorated one. After graduating from Duke University School of Law, Defendant worked for the General Assembly and in the administration of former Governor James B. Hunt. Defendant engaged in significant pro bono work during his career. In 1987, the North Carolina Bar Association named Defendant the Pro Bono Lawyer of the year. In 1990, Defendant was elected the first black President of the Wake County Bar Association and the Tenth Judicial District Bar. During his career, Defendant established a reputation for good character, veracity, and truthfulness in both social and legal communities. Notwithstanding Defendant's accomplishments, however, the

allegations in the State Bar's complaint against Defendant are serious, and are based on the following facts gleaned from the record.

From 1985 until his disbarment, Defendant was a solo-practitioner focusing on criminal and personal injury work, with an office in Raleigh. The record reflects that Defendant had an assistant on his payroll, who performed paralegal work. During the course of his law practice, Defendant maintained a trust account on behalf of his clients.

In March 2012, a medical provider filed a complaint with the State Bar alleging that Defendant had not paid one of his client's bills. A subsequent audit of Defendant's trust account by the State Bar revealed disbursements made by Defendant from 2010–2012 to himself and his assistant for which Defendant had no supporting documentation. The investigation also revealed instances of insufficient client funds to cover disbursements to those clients and their medical providers.

As a result of the investigation, the State Bar filed a complaint alleging, *inter alia*, misappropriation of entrusted funds with respect to eight of Defendant's clients. On 15 March 2013, the DHC held a hearing to determine if Defendant's alleged misconduct warranted disciplinary action. At the hearing, documentary exhibits were received into evidence and testimony was heard from, among others, the State Bar's investigator, two of the eight clients who were named in the complaint, and Defendant.

The State Bar's investigator testified concerning Defendant's trust account activity and bookkeeping for the eight clients. His testimony, along with accompanying documentary exhibits, established undocumented disbursements to Defendant and Defendant's assistant, as well as occasions where disbursements were made from insufficient client funds. In those instances where Defendant disbursed funds from the trust account to himself and/or his assistant, a pattern was observed. Once Defendant received personal injury settlement proceeds on behalf of a client, Defendant deposited those proceeds into his trust account. Afterwards, Defendant withdrew his one-third contingency fee and paid the client a one-third share. The remaining funds were intended to satisfy medical liens and obligations. However, in addition to paying on the medical liens, Defendant wrote additional checks to himself and his assistant in varying amounts between $200 and $600. As a result, some medical providers with statutory liens against client funds were not paid in full for their share of the recovery. To cover shortfalls, Defendant used trust account funds belonging to others and not identified to the client to cover checks written to that client or the client's medical providers.

In his defense, Defendant admitted to poor record keeping practices but denied misappropriating client funds. Defendant attributed the undocumented disbursements to expenses, additional legal work, accounting mistakes, and, in some cases, Defendant claimed the disbursements were at the behest of his clients. Both clients who testified at the hearing indicated that Defendant did not tell them about any additional disbursements made from their account. One of the clients, after being contacted by the State Bar, filed a Client Security Fund Application against Defendant claiming he took an additional disbursement dishonestly.[1]

On 19 April 2013, the DHC entered a written order of discipline. The order's findings of fact recite the transactions made for each of the eight clients, including the disbursements at issue. After reciting each undocumented disbursement made to Defendant and his assistant, the DHC found that Defendant and his assistant were "not entitled" to the additional disbursements and concluded that Defendant "misappropriated" these funds. The DHC's order also concludes that Defendant misappropriated each disbursement made from insufficient funds and each disbursement made from funds owed to medical providers with statutory liens. Furthermore, the order states:

> 91. The misappropriations . . . were committed knowingly and willfully.
>
> 92. The misappropriations . . . were not authorized by the parties for whom [Defendant] was holding the funds in trust.
>
> 93. The Hearing Panel specifically finds that [Defendant's] testimony at this hearing was not credible. [Defendant's] testimony was inconsistent with other testimony of his at the hearing and at his deposition. [Defendant's] testimony was also inconsistent with the documentation and with the testimony given by the other witnesses at the hearing.

Based on its findings, the DHC concluded, *inter alia*, that Defendant "committed the crime of embezzlement" and was subject to discipline pursuant to N.C. Gen. Stat. § 84-28(b)(2) (2013). After making additional findings of fact and conclusions of law regarding discipline, the DHC ordered Defendant disbarred from the practice of law. Defendant filed timely notice of appeal.

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1. Defendant reimbursed the client during the pendency of the State Bar's investigation.

II. Jurisdiction

"There shall be an appeal of right by either party from any final order of the Disciplinary Hearing Commission to the North Carolina Court of Appeals." N.C. Gen. Stat. § 84-28(h) (2013); *accord* N.C. Gen. Stat. § 7A-29(a) (2013). Thus, Defendant's appeal is properly before this Court.

III. Analysis

Defendant's appeal presents three questions for our review: (1) whether there was sufficient evidence upon which the DHC could find that Defendant intended to embezzle client funds; (2) whether the DHC could impose discipline based on the embezzlement of client funds without a criminal conviction; and (3) whether the DHC's order conforms to the requirements of *Talford* for imposing disbarment as a sanction for attorney misconduct. We address each in turn.

A. Sufficiency of the Evidence Regarding Intent

[1] Defendant challenges the sufficiency of the evidence regarding his intent to embezzle client funds. Specifically, Defendant contends that the State Bar failed to present "clear, cogent, and convincing" evidence that Defendant knowingly and willfully misappropriated or embezzled client funds.

By statute, our review of the DHC's disciplinary order is limited to "matters of law or legal inference." N.C. Gen. Stat. § 84-28(h). In examining the record, we apply the whole record test. *N.C. State Bar v. Hunter*, ___ N.C. App. ___, ___, 719 S.E.2d 182, 188 (2011). "Under the whole record test there must be substantial evidence to support the findings, conclusions, and result. The evidence is substantial if, when considered as a whole, it is such that a reasonable person might accept as adequate to support a conclusion." *Id.* (quotation marks, citations, and alteration omitted); *see also Talford*, 356 N.C. at 632, 576 S.E.2d at 309–10 (describing this task as determining whether the DHC's decision "has a rational basis in the evidence" (quotation marks and citations omitted)). In engaging in this inquiry, we consider the evidence supporting the DHC's findings as well as evidence tending to contradict those findings. *Hunter*, ___ N.C. App. at ___, 719 S.E.2d at 188. However, "the mere presence of contradictory evidence does not eviscerate challenged findings, and [this Court] may not substitute its judgment for that of the [DHC]." *Id.* Moreover, the evidence used by the DHC to support its findings must rise to the standard of "clear, cogent, and convincing." *Talford*, 356 N.C. at 632, 576 S.E.2d at 310.

In *Talford*, our Supreme Court set forth a three-step process to determine if the DHC's decision has a rational basis in the evidence:

> (1) Is there adequate evidence to support the order's expressed finding(s) of fact?
>
> (2) Do the order's expressed finding(s) of fact adequately support the order's subsequent conclusion(s) of law? and
>
> (3) Do the expressed findings and/or conclusions adequately support the lower body's ultimate decision?

Id. at 634, 576 S.E.2d at 311. This three-step process "must be applied separately" to both the adjudicatory phase of the DHC's proceedings ("Did the defendant commit the offense or misconduct?") and to the dispositional phase of the DHC's proceedings ("What is the appropriate sanction for committing the offense or misconduct?"). *Id.*

With our standard of review precisely defined, we now consider Defendant's first argument on appeal.

As an initial matter, we note that in Defendant's principal brief to this Court, no specific findings of fact were referenced as being in error. Nevertheless, we agree with Defendant that assignments of error to specific findings of fact are not required to properly challenge those findings. "The scope of review on appeal is limited to issues so presented in the several briefs." N.C. R. App. P. 28(a). Accordingly, because Defendant's arguments concerning the sufficiency of the evidence address, in substance, the DHC's finding that Defendant "knowingly and willfully" misappropriated or embezzled client funds, we review the DHC's findings related to Defendant's intent.

The crime of embezzlement is defined by N.C. Gen. Stat. § 14-90 (2013) and requires a showing of the following four elements:

> (1) the defendant was the agent or fiduciary of the complainant;
>
> (2) pursuant to the terms of the defendant's engagement, he was to receive property of the complainant;
>
> (3) he did receive such property in the course of his engagement; and
>
> (4) *knowing the property was not his*, the defendant either converted it to his own use or fraudulently misapplied it.

State v. Tucker, ___ N.C. App. ___, ___, 743 S.E.2d 55, 59 (2013) (emphasis added). "The intent necessary to convict on a charge of embezzlement is an intent of the agent to embezzle or otherwise willfully and corruptly use or misapply the property of the principal for purposes for which the property is not held." *State v. Britt*, 87 N.C. App. 152, 153, 360 S.E.2d 291, 292 (1987). "Such intent may be shown by direct evidence, or by evidence of facts and circumstances from which it may reasonably be inferred." *State v. McLean*, 209 N.C. 38, 40, 182 S.E. 700, 702 (1935); *N.C. State Bar v. Ethridge*, 188 N.C. App. 653, 660, 657 S.E.2d 378, 383 (2008). "In addition, a person who deposits funds into a personal account knowing that the money belongs to others is sufficient evidence to show embezzlement." *Ethridge*, 188 N.C. App. at 660, 657 S.E.2d at 383. Furthermore, "[t]he intent element for misappropriation is essentially the same as the crime of embezzlement." *Id.* Indeed, misappropriation is a synonym for embezzlement. *Id.* Thus, we examine the whole record to determine whether there is "substantial" or "clear, cogent, and convincing" evidence to support the finding that Defendant knowingly and willfully misappropriated client funds.

Our review of the record in this case reveals substantial evidence from which Defendant's intent to misappropriate client funds can be reasonably inferred.

First, Defendant knew the correct way to document and maintain his trust account yet failed to do so. Defendant testified that he had previously been on the Trust Account Committee of the State Bar, had attended Continuing Legal Education workshops regarding trust accounting, and had been audited by the State Bar on prior occasions.[2]

Second, Defendant made numerous disbursements from his trust account for which he had no supporting documentation.[3]

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2. The State Bar provides resources and support to ensure that lawyers manage trusts accounts properly. The *Lawyer's Trust Account Handbook* examines the Rules of Professional Conduct pertinent to trust accounting and contains best practices for North Carolina attorneys. *See Lawyer's Trust Account Handbook*, The North Carolina State Bar (Revised May 2011), http://www.ncbar.com/PDFs/Trust%20Account%20Handbook.pdf.

3. The *Lawyer's Trust Account Handbook* indicates that a client's file should contain documentation supporting disbursements and identifies poor bookkeeping as a means of concealing embezzlement of client funds. *Id.* at 48. As a best practice for bookkeeping, "[a] copy of the client's ledger card may be provided to the client as a written accounting of the receipt and disbursement of funds. When this is done, the client should sign and date the original to show that the client was given a written accounting of his or her funds . . . ." *Id.* at 30.

Third, both clients who testified at the hearing indicated that Defendant did not tell them about taking an additional disbursement from their account, and the clients were never informed concerning the amount of the disbursement or its purpose.

Fourth, one of these clients filed a Client Security Fund Application with the State Bar alleging that Defendant took an additional disbursement from his account dishonestly. Testimony revealed that Defendant reimbursed the client in question after learning that the client was going to be deposed in the State Bar's investigation "so that [the client] would have good feelings towards [him]."

Fifth, the additional disbursements were often made when Defendant was in financial need.

Sixth, Defendant's attribution of the additional disbursements to expenses, additional legal work, accounting mistakes, and compliance with client requests is inconsistent with the other record evidence. For example, for the first client named in the State Bar's complaint, Defendant took an additional disbursement of $250 on 12 March 2010. Defendant testified that this additional disbursement was for additional legal services, namely, drafting a complaint. However, the client testified that she was unaware of this additional fee and the memo line of the check indicated that the disbursement was for "Office Expenses Reimbursement."

Likewise, for the second client named in the State Bar's complaint, Defendant took an additional disbursement of $250 for himself and another $200 for his assistant on 14 and 19 January 2011, respectively. Defendant testified that his disbursement was for work on an unrelated criminal case the client asked Defendant to handle and that the disbursement to his assistant was made at the client's request. However, there was no evidence of the other criminal case in the record and the memo line on Defendant's disbursement check read "fee to collect MedPay." The memo line on the check to Defendant's assistant indicated that the check was for "office expenses."

As a final example, for the third client named in the State Bar's complaint, Defendant took an additional disbursement of $500 on 20 June 2011. Defendant testified that this disbursement was for travel expenses. Defendant also testified that the client consented to the payment. However, the client denied consenting to the payment and the memo line of the check indicates the additional disbursement was for "legal fees."

Based on the foregoing evidence, as well as the other record evidence presented to this Court, we hold that there was "substantial" or

"clear, cogent, and convincing" evidence to support the DHC's finding that Defendant knowingly and willfully misappropriated client funds. While Defendant points to his own testimony to negate this inference of intent, the DHC found that Defendant's testimony was not credible based on its inconsistency with other evidence presented at the hearing. Our review has confirmed those inconsistencies. Accordingly, Defendant's argument regarding the sufficiency of the evidence, on balance, lacks credibility.

B. The Absence of a Criminal Conviction

[2] Defendant's second argument on appeal challenges the DHC's decision to discipline Defendant and impose disbarment as a sanction for Defendant's misconduct without a criminal embezzlement conviction. Defendant contends that the State Bar's rules forbid the DHC from concluding that Defendant "committed" a felony without first being charged and convicted of a felony in criminal court.

Questions concerning the construction and interpretation of the State Bar's rules are questions of law that are reviewed *de novo* on appeal. *N.C. State Bar v. Brewer*, 183 N.C. App. 229, 233, 644 S.E.2d 573, 576 (2007). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (quotation marks and citation omitted).

Here, the DHC's order concludes as a matter of law that "[Defendant] committed the crime of embezzlement." As a result of this conduct, the DHC concluded that Defendant was subject to discipline pursuant to N.C. Gen. Stat. § 84-28(b)(2), which provides for attorney discipline when there has been a "violation of the Rules of Professional Conduct adopted and promulgated by the [State Bar] Council in effect at the time of the act." One of those rules, found to have been violated here, states "[i]t is professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." N.C. R. Prof'l Conduct 8.4(b). The official commentary to the rule states:

> The purpose of professional discipline for misconduct is not punishment, but to protect the public, the courts, and the legal profession. Lawyer discipline affects only the lawyer's license to practice law. It does not result in incarceration. For this reason, to establish a violation of paragraph (b), the burden of proof is the same as for any other violation of the Rules of Professional Conduct: it must be shown by clear, cogent, and convincing evidence that the

> lawyer committed a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer. Conviction of a crime is conclusive evidence that the lawyer committed a criminal act although, to establish a violation of paragraph (b), it must be shown that the criminal act reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer. *If it is established by clear, cogent, and convincing evidence that a lawyer committed a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer, the lawyer may be disciplined for a violation of paragraph (b) although the lawyer is never prosecuted or is acquitted or pardoned for the underlying criminal act.*

Id. cmt. 3; *see also N.C. State Bar v. Rush*, 121 N.C. App. 488, 490, 466 S.E.2d 340, 341–42 (1996) ("The rule does not require a conviction, only that a criminal act be committed. . . . Therefore, conviction of a crime is not a necessary element in a disciplinary proceeding.").

Defendant does not call our attention to this rule, rather, Defendant cites 27 N.C. Admin. Code 1B.0114(w)(2)(D) (2012) to support his claim that a criminal conviction is required. That rule requires the DHC to consider disbarment as a possible sanction if the defendant is found to engage in the "commission of a felony." *Id.* Defendant argues that "the plain language of the State Bar's Rule contemplates a felony conviction." However, we cannot agree with Defendant's interpretation given the fact that the rule uses "commission" rather than "conviction" and given the clear mandate found in the State Bar's commentary and our caselaw interpreting N.C. R. Prof'l Conduct 8.4(b). The rationale for not requiring a criminal conviction under N.C. R. Prof'l Conduct 8.4(b) is equally persuasive when interpreting 27 N.C. Admin. Code 1B.0114(w)(2)(D). Thus, because clear, cogent, and convincing evidence supports the DHC's conclusion that Defendant committed the crime of embezzlement in violation of N.C. R. Prof'l Conduct 8.4(b), the DHC was required to consider disbarment as a possible sanction pursuant to 27 N.C. Admin. Code 1B.0114(w)(2)(D).[4] Defendant's second argument on appeal is without merit.

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4. Notably, the DHC also considered disbarment as a possible sanction pursuant to 27 N.C. Admin. Code 1B.0114(w)(2)(C), which states that "[d]isbarment shall be considered where the defendant is found to engage in: . . . (C) misappropriation or conversion of assets of any kind to which the defendant or recipient is not entitled, whether from a client or any other source." Like 27 N.C. Admin. Code 1B.0114(w)(2)(D), the plain language of this provision does not suggest that a criminal conviction is required.

C. The DHC's Order and *Talford*

Defendant's third argument on appeal is that the DHC's order failed to conform to the requirements of *Talford* for imposing disbarment as a sanction for attorney misconduct.

In *Talford*, our Supreme Court held that

> in order to merit the imposition of "suspension" or "disbarment," there must be a clear showing of how the attorney's actions resulted in significant harm or potential significant harm to [a client, the administration of justice, the profession, or members of the public], and there must be a clear showing of why "suspension" and "disbarment" are the only sanction options that can adequately serve to protect the public from future transgressions by the attorney in question.

Talford, 356 N.C. at 638, 576 S.E.2d at 313. "Thus, upon imposing a given sanction against an offending attorney, the DHC must provide support for its decision by including adequate and specific findings that address these two key statutory considerations." *Id.*

Here, after concluding that Defendant's conduct warranted discipline in the adjudicative part of the order, the DHC reincorporated its previous findings of fact and made 16 additional findings of fact regarding discipline. Defendant has not challenged these additional findings with argument on appeal, we therefore consider them binding before this Court. *Hunter*, ___ N.C. App. at ___, 719 S.E.2d at 188–89. Moreover, because we have determined that the DHC's finding concerning Defendant's intent to misappropriate client funds is supported by substantial evidence, we consider that fact established as well.

With respect to the first inquiry, *i.e.*, whether the order clearly shows how Defendant's actions resulted in significant harm or potential significant harm, we hold that the DHC's order is sufficient. Implicit in the DHC's conclusion that Defendant violated N.C. R. Prof'l Conduct 8.4(b) and (c) "is a determination that his misconduct poses a *significant* potential harm to clients." *N.C. State Bar v. Leonard*, 178 N.C. App. 432, 446, 632 S.E.2d 183, 191 (2006). Furthermore, we find the following findings of fact in the DHC's disciplinary order compelling:

> 2. Defendant put his own personal interests ahead of his clients' interests.
>
> . . . .

> 7. Defendant, by engaging in conduct involving misappropriation, misrepresentation and deceit over a number of years and by making false statements about his conduct, has shown himself to be untrustworthy.
>
> 8. Defendant, through his misappropriation, misrepresentation, and deceit, has caused harm to the standing of the legal profession, by undermining trust and confidence in lawyers and the legal system.
>
> 9. Defendant's misappropriation has caused significant harm to his clients and to third parties, namely the medical providers of his clients.
>
> 10. Defendant misappropriated funds for his own benefit that should have been used for the benefit of his clients, either by payment to the client or payment to the client's medical provider(s).
>
> . . . .
>
> 13. . . . [Defendant] has not otherwise made any restitution for amounts misappropriated from clients. [Defendant] has not rectified the deficit in his trust account.
>
> . . . .
>
> 15. Defendant has failed to acknowledge that he misappropriated client funds. Defendant has provided explanations that are not consistent with the evidence received at the hearing in this matter.

Based on these and other findings, the DHC concluded:

> 3. Defendant caused significant harm to his clients by misappropriating their funds.
>
> 4. Defendant caused significant harm to medical providers who should have received payments from funds Defendant misappropriated.
>
> 5. Defendant has caused significant harm and potential harm to clients whose funds he should have in his trust account but for whom he has insufficient funds in his trust account.
>
> 6. Defendant's repeated commission of criminal acts reflecting adversely on his honesty, trustworthiness or fitness as a lawyer, his dishonest and deceitful conduct in

> placing false information on trust account checks to disguise his misappropriation, and the presentation of testimony that conflicted with the credible evidence received in the case caused significant harm to the legal profession by undermining trust and confidence in lawyers and the legal system.

We believe that in light of these findings and conclusions, the DHC's order clearly shows how Defendant's actions resulted in significant harm to his clients, the administration of justice, the profession, and members of the general public.

Likewise, with respect to the second inquiry, *i.e.*, whether the order contains a clear showing of why disbarment is the only sanction option that can adequately serve to protect the public, we hold that the DHC's order is sufficient. In addition to considering and reciting all applicable factors relevant to attorney discipline found in 27 N.C. Admin. Code 1B.0114(w)(1), (2), and (3), the DHC's order stated:

> 7. The Hearing Panel has considered lesser alternatives and finds that disbarment is the only sanction that can adequately protect the public. An attorney's duty to preserve funds entrusted to the attorney is one of the most sacred that an attorney undertakes. The attorney should never violate that duty of trust.
>
> 8. The Hearing Panel considered lesser alternatives and finds that suspension of Defendant's license or a public censure, reprimand, or admonition would not be sufficient discipline because of the gravity of the actual and potential harm to his clients, the public, and the legal profession caused by Defendant's conduct, and the threat of potential significant harm Defendant poses to the public. The Hearing Panel has considered the evidence of Defendant's good character and pro bono service. However, given the repeated acts of dishonesty, misrepresentation, and deceit by [Defendant] established by the evidence presented at hearing and the significant harm and potential harm caused by [Defendant] established by the evidence . . . , the evidence of Defendant's good character and pro bono service does not warrant imposition of a lesser discipline.
>
> 9. The Hearing Panel has considered all lesser sanctions and finds that discipline short of disbarment would not adequately protect the public for the following reasons:

a. Defendant engaged in misconduct constituting felonies and violations of the trust of his clients and the public;

b. Entry of an order imposing less serious discipline would fail to acknowledge the seriousness of the offenses Defendant committed and would send the wrong message to attorneys and the public regarding the conduct expected of members of the Bar of this State[.]

We believe these entries clearly establish that the DHC considered all lesser sanctions and explain why the DHC felt disbarment was the only adequate sanction in this case. Accordingly, we hold that the DHC's ultimate decision to disbar Defendant has a rational basis in the evidence and is consistent with our Supreme Court's decision in *Talford*.

IV. Conclusion

For the foregoing reasons, we affirm the order of discipline disbarring Defendant from the practice of law.

AFFIRMED.

Chief Judge MARTIN and Judge ELMORE concur.

RODNEY WILSON SOREY, PLAINTIFF
v.
MELISSA LYNN SOREY, DEFENDANT

No. COA13-987

Filed 6 May 2014

1. Appeal and Error—interlocutory orders and appeals—denial of post-separation support—affects substantial right

Defendant's appeal from the denial of her request for post-separation support was heard on the merits. While orders for post-separation support are not immediately appealable, orders denying post-separation support affect a substantial right and are immediately appealable.

2. Divorce—post-separation support—abandonment—sufficient evidence

The trial court did not err by denying defendant's request for post-separation support because its finding that she abandoned her husband was supported by the evidence, as was its finding that plaintiff did not consent to defendant's abandonment. These findings support the trial court's conclusion that defendant had committed marital misconduct and its ultimate decision to deny defendant post-separation support.

Appeal by defendant from Order entered 13 May 2013 by Judge Darrell B. Cayton, Jr. in District Court, Beaufort County. Heard in the Court of Appeals 23 January 2014.

Hassell, Singleton, Mason & Jones, P.A., by Sid Hassell, Jr., for plaintiff-appellee.

Windy H. Rose, for defendant-appellant.

STROUD, Judge.

Melissa Sorey ("defendant") appeals from an order entered 13 May 2013 denying her request for post-separation support on the basis of marital misconduct. We affirm.

I. Background

Rodney Sorey ("plaintiff") and defendant were married on 11 July 1987 and separated on 27 August 2011. The parties have four adult children and one minor niece whom they have raised as one of their children. Plaintiff filed an action for absolute divorce in Beaufort County on 28 December 2012. Defendant answered and raised a counterclaim for post-separation support and alimony. Plaintiff then replied, alleging that defendant had committed marital misconduct prior to the date of separation in that she had "constructively abandoned the Plaintiff by dumping his clothes on the front porch of his son's residence and by repeated illicit liaisons with various men" and that she "has engaged in illicit sexual behavior during the marriage and before the separation with other men."

The trial court held a hearing on the issue of post-separation support on 29 April 2013. At the hearing, the trial court took evidence and heard testimony by the parties and two of their adult sons. By order entered 13 May 2013, the trial court denied defendant's request for post-separation

support because it found that defendant had committed two forms of marital misconduct: illicit sexual behavior and abandonment. Defendant filed written notice of appeal from the trial court's order on 17 May 2013.

II. Appellate Jurisdiction

[1] Defendant appeals from the trial court's denial of her motion for post-separation support. Post-separation support orders are interlocutory. *Stephenson v. Stephenson*, 55 N.C. App. 250, 251, 285 S.E.2d 281, 281 (1981). Although orders *allowing* post-separation support do not affect a substantial right, *see, e.g.*, *Rowe v. Rowe*, 131 N.C. App. 409, 411, 507 S.E.2d 317, 319 (1998), that rule does not apply where the dependent spouse's request for post-separation support was *denied* by the trial court, *Mayer v. Mayer*, 66 N.C. App. 522, 525, 311 S.E.2d 659, 662, *disc. rev. denied*, 311 N.C. 760, 321 S.E.2d 140 (1984).

Here, the trial court denied defendant's request for post-separation support. Defendant asserts that the trial court's order affects a substantial right. Plaintiff does not contend otherwise. Under *Mayer*, we hold that the trial court's order affects a substantial right and that defendant's appeal is properly before this Court.

III. Post-separation Support

A. Standard of Review

[2] In reviewing an order concerning post-separation support we must consider "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." *Oakley v. Oakley*, 165 N.C. App. 859, 861, 599 S.E.2d 925, 927 (2004) (citation and quotation marks omitted). "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." *Peltzer v. Peltzer*, ___ N.C. App. ___, ___, 732 S.E.2d 357, 359 (citations and quotation marks omitted), *disc. rev. denied*, 366 N.C. 417, 735 S.E.2d 186 (2012).

B. Analysis

Defendant argues that the trial court erred in denying her request for post-separation support because its finding that she abandoned her husband was unsupported by the evidence. We disagree.

> Post-separation support is "spousal support to be paid until the earlier of either the date specified in the order

> of postseparation support, or an order awarding or denying alimony." N.C. Gen. Stat. § 50–16.1A(4) (2003). A depend[e]nt spouse is entitled to post-separation support if the court finds "the resources of the dependent spouse are not adequate to meet his or her reasonable needs and the supporting spouse has the ability to pay." N.C. Gen. Stat. § 50–16.2A(c) (2003). Factors such as the parties' standard of living, income, income earning abilities, debt, living expenses and legal obligations to support other persons are considered in determining the financial needs of the parties. N.C. Gen. Stat. § 50–16.2A(b) (2003). In addition, the judge shall consider marital misconduct by the dependent spouse, occurring prior to or on the date of separation, and also any marital misconduct by the supporting spouse. N.C. Gen. Stat. § 50–16.2A(d) (2003). Acts of "marital misconduct" include sexual acts, N.C. Gen. Stat. § 14–27.1(4) (2003), voluntarily engaged in with someone other than a spouse, N.C. Gen. Stat. § 50–16.1A(3)(a) (2003) and "[i]ndignities rendering the condition of the other spouse intolerable and life burdensome." N.C. Gen. Stat. § 50-16.1A(3)(f)(2003).

Evans v. Evans, 169 N.C. App. 358, 364-65, 610 S.E.2d 264, 270 (2005). If the trial court finds that the dependent spouse committed marital misconduct, that finding alone may be sufficient reason for the trial court to conclude the supporting spouse is not entitled to post-separation support and deny such a request. *Id.* at 365, 610 S.E.2d at 270.

One form of marital misconduct is abandonment. N.C. Gen. Stat. § 50-16.1A(3)(c) (2013). "Abandonment occurs where one spouse brings the cohabitation to an end (1) without justification, (2) without consent, and (3) without intention of renewing the marital relationship." *Hanley v. Hanley*, 128 N.C. App. 54, 56, 493 S.E.2d 337, 338 (1997).

Here, the trial court specifically found that defendant "abandoned the Plaintiff by discontinuing the marital cohabitation without just cause or excuse." The trial court based its ultimate finding on the following findings:

> 15. Some time prior to August 27, 2011 the Plaintiff advised the Defendant that she wanted them to move to the residence which she now occupies . . . and the Plaintiff told her that he did not wish the family to move to this location.

> 16. On August 27, 2011, while the Plaintiff was at work, the Defendant moved to [the residence she now occupies], and also moved the Plaintiff's clothes to the front porch and in the front yard of the residence [of the parties' son] . . . .
>
> 17. The Plaintiff learned of this move through a phone call from a friend which he received at work, and he returned to North Carolina the next day to find his clothes on the porch and in the front yard of the [son's] residence . . . .
>
> 18. The Defendant advised the Plaintiff by telephone that she had decided to move, that she had found someone else and that she did not want him anymore.
>
> 19. The Plaintiff did not provoke or condone the actions of the Defendant set forth above.

Defendant contends that the trial court's finding of abandonment was unsupported by competent evidence. She argues that the actual date she left the marital residence was in September 2011, after the date of separation, which the trial court found to be 27 August 2011. She also challenges finding 17 as unsupported by competent evidence. Finally, defendant contends that because she told plaintiff in advance that she was moving and plaintiff said he did not want to move with her, he consented to the separation.

"When an application is made for postseparation support, the court may base its award on a verified pleading, affidavit, or other competent evidence." N.C. Gen. Stat. § 50-16.8 (2013). "The trial court is in the best position to weigh the evidence, determine the credibility of witnesses and the weight to be given their testimony." *Goodson v. Goodson*, 145 N.C. App. 356, 362, 551 S.E.2d 200, 205 (2001) (citation and quotation marks omitted). "It is elementary that the fact finder may believe all, none, or only part of a witness' testimony. *In re T.J.C.*, ___ N.C. App. ___, ___, 738 S.E.2d 759, 765 (citation, quotation marks, and brackets omitted), *disc. rev. denied*, ___ N.C. ___, 743 S.E.2d 194, 194, 642 (2013).

Each of the trial court's findings of fact was supported by plaintiff's testimony at the hearing. Plaintiff testified to the facts as recited by the trial court. Although there was conflicting evidence on a number of points and the evidence regarding the timing of these events was unclear, it is the trial court's duty to resolve such conflicts and ambiguity in its findings. "While contrary inferences might have been drawn from this same evidence, it was the trial judge's prerogative to determine

which inferences should be drawn and which inferences should not be." *In re Estate of Trogdon*, 330 N.C. 143, 152, 409 S.E.2d 897, 902 (1991). The inferences drawn here by the trial court were reasonable and supported by evidence introduced at the hearing.

We also disagree with defendant's assertion that the trial court's findings show that plaintiff consented to the separation. Defendant informed plaintiff that she was moving. Plaintiff responded that he did not want to move. As a result, defendant left the marital home, deposited plaintiff's belongings at their son's house, and told plaintiff that she did not want him anymore. The trial court clearly disbelieved defendant's testimony that plaintiff had been abusive, severely abused alcohol, had engaged in numerous adulterous relationships, or otherwise behaved in a manner which might justify defendant's abandonment of the marital home.

> Mere acquiescence in a wrongful and inevitable separation, which the complaining spouse could not prevent after reasonable efforts to preserve the marriage, does not make the separation voluntary or affect the right to divorce or alimony. Nor, under such circumstances, is the innocent party obliged to protest, to exert physical force or other importunity to prevent the other party from leaving.
>
> . . . .
>
> The trial court's findings are conclusive if supported by any competent evidence, even when the record contains evidence to the contrary. Moreover, since there is no all-inclusive definition as to what will justify abandonment, each case must be determined in large measure upon its own circumstances.

Hanley, 128 N.C. App. at 57, 493 S.E.2d at 339 (citations and quotation marks omitted).

Plaintiff was under no obligation to explicitly protest defendant's decision to leave the marital home, and his failure to object does not necessarily constitute consent. Plaintiff testified, and the trial court found, that he only became aware that defendant was leaving the marital home while he was away on work. When he found out, he called her and she informed him that she no longer wanted him and that she had found someone else.

We conclude that the trial court's finding that defendant had abandoned the marital home was supported by competent evidence. We further conclude that the trial court's finding that plaintiff did not consent

to defendant's abandonment was supported by competent evidence. These findings support the trial court's conclusion that defendant had committed marital misconduct and its ultimate decision to deny defendant post-separation support. Accordingly, we affirm the trial court's order denying defendant's request for post-separation support.[1]

IV. Conclusion

We affirm the trial court's order denying defendant post-separation support because its findings on abandonment are supported by competent evidence, those findings support its conclusions of law, and its ultimate decision to deny defendant post-separation support.

AFFIRMED.

Judges HUNTER, Jr., Robert N. and DILLON concur.

STATE OF NORTH CAROLINA
v.
SHAWN RONDEL BAILEY

No. COA13-132

Filed 6 May 2014

Firearms and Other Weapons—possession of firearm by felon—constructive possession—insufficient evidence

The trial court erred by denying defendant's motion to dismiss the charge of possession of a firearm by a convicted felon for insufficiency of the evidence. The State failed to produce circumstantial evidence that defendant constructively possessed the firearm.

Appeal by defendant from judgment entered 17 September 2013 by Judge Henry W. Hight, Jr. in Person County Superior Court. Heard in the Court of Appeals 18 March 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General E. Burke Haywood, for the State.

Winifred H. Dillon for defendant.

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1. As the findings on abandonment are sufficient to support the trial court's order, we need not address defendant's arguments regarding the findings on illicit sexual behavior.

HUNTER, Robert C., Judge.

Defendant Shawn Bailey appeals the judgment entered after a jury convicted him of possession of a firearm by a convicted felon. On appeal, defendant argues that the trial court erred in denying his motion to dismiss for insufficiency of the evidence.

After careful review, because the State failed to produce circumstantial evidence that defendant constructively possessed the firearm, we reverse the order denying his motion to dismiss.

Background

On 25 November 2011, Deputy Dustin Harris ("Deputy Harris") and Deputy Adam Norris ("Deputy Norris") of the Person County Sheriff's office were standing outside the law enforcement center in Roxboro when they heard multiple, rapidly-fired gunshots coming from the Harris Gardens Apartments ("the apartments"). Deputies Harris and Norris responded to the scene of the gunshots. As Deputy Harris entered the apartment complex, he saw a dark-colored, four-door sedan leaving. A female was driving the car, and defendant was in the passenger seat. The driver was later identified as Sherika Torrain ("Ms. Torrain"), defendant's girlfriend. The car was registered to defendant. Deputy Harris turned his car around, followed the sedan briefly, and then stopped it. Deputy Harris asked if there were any weapons in the car; according to Deputy Harris, defendant replied "yes" and told him that there was a gun on the floor in the back. Deputy Norris saw the weapon, which was later identified as an AK-47 assault rifle ("the rifle"). The rifle was warm and had been recently fired, with the magazine still in the gun. Later, investigators determined that the rifle was registered to Ms. Torrain.

Corporal Pam Ferstenau ("Corp. Ferstenau") of the Roxboro Police Department also responded to the scene. When she arrived, she saw Deputy Harris and Deputy Norris with the sedan. Corp. Ferstenau took custody of the rifle and an empty magazine found on the center console of the car. Sergeant Will Dunkley ("Sgt. Dunkley"), a patrol supervisor with the Roxboro Police Department, also responded to the scene. Sgt. Dunkley, along with another officer, searched the road near the apartments for evidence and found a spent shell case. Sgt. Dunkley testified that the casing is known as an "SKS round or AK round" which could be used in either an SKS or AK weapon.

During an interview at the Roxboro Police Department, defendant told police that he and his girlfriend were at the apartment complex when they heard shots. Defendant claimed that they left after the shots,

but he denied possessing or firing the rifle. A gunshot residue test taken of defendant's hands was inconclusive.

Defendant testified in his own defense at trial. He claimed that he had spent the day at the apartment complex. After the shooting, he called Ms. Torrain to pick him up. She arrived, and defendant got in the passenger seat. Because he helped her buy the car, defendant admitted it was titled in his name; however, he contended that she was the one who used and controlled the vehicle.

According to defendant, after Deputy Harris stopped the car and asked if there were any weapons in it, Ms. Torrain said "yes." Defendant denied knowing there was a gun in the car and denied telling Deputy Harris where it was located.

Defendant was indicted for possession of a firearm by a felon ("possession of a firearm"), going armed to the terror of the people, and discharging a firearm within city limits. Defendant's trial began 16 September 2013. The jury convicted defendant of possession of a firearm and acquitted him on the other charges. The trial court sentenced defendant to a minimum term of twelve months to a maximum term of fifteen months imprisonment. Defendant timely appealed.

Argument

Defendant's sole argument on appeal is that the trial court erred in denying his motion to dismiss the possession of a firearm charge for insufficiency of the evidence. Specifically, defendant contends that the State failed to present sufficient incriminating evidence that defendant constructively possessed the firearm. We agree.

"This Court reviews the trial court's denial of a motion to dismiss de novo." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000) (internal quotation marks omitted). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

Here, defendant was charged with possession of a firearm by a felon in violation of N.C. Gen. Stat. § 14-415.1. Pursuant to section 14-415.1(a) (2013), it is "unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm[.]" Defendant does not challenge his status as a convicted felon; therefore, the only element of the offense we must consider on appeal is possession.

With regard to possession, our Supreme Court has noted that:

> In a prosecution for possession of contraband materials, the prosecution is not required to prove actual physical possession of the materials. Proof of nonexclusive, constructive possession is sufficient. Constructive possession exists when the defendant, while not having actual possession, has the intent and capability to maintain control and dominion over the narcotics. Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession. However, unless the person has exclusive possession of the place where the narcotics are found, the State must show other incriminating circumstances before constructive possession may be inferred.

State v. Matias, 354 N.C. 549, 552, 556 S.E.2d 269, 270-71 (2001) (internal citations and quotation marks omitted). Whether constructive possession exists is based on the totality of the circumstances. *State v. Butler*, 147 N.C. App. 1, 11, 556 S.E.2d 304, 311 (2001).

In this case, it is undisputed that defendant did not actually possess the rifle nor was he the only occupant in the car where it was found. Therefore, he did not have "exclusive possession" of the car, *Matias*, 354 N.C. at 552, 656 S.E.2d at 270, and the mere fact that defendant was in the car where the firearm was found does not, by itself, establish constructive possession, *State v. Weems*, 31 N.C. App. 569, 571, 230 S.E.2d 193, 194 (1976). Accordingly, the State was required to show "other incriminating circumstances" linking defendant to the rifle. *Matias*, 354 N.C. at 552, 556 S.E.2d at 271.

A review of decisions by this Court establishes that when evidence presented definitively links a defendant to a weapon, we have found that the circumstantial evidence of constructive possession was sufficient to withstand a defendant's motion to dismiss. For example, in *State*

v. Glasco, 160 N.C. App. 150, 157, 585 S.E.2d 257, 262, this Court held that the trial court's denial of the defendant's motion to dismiss was proper where the evidence "tended to show" that the defendant had "discharged a gun." Specifically, the evidence showed that: (1) the defendant was seen jumping over a fence of a yard near the shooting; (2) the gun was recovered in that same yard; (3) the defendant was found carrying a bag with gunshot residue on it; and (4) the garbage bag had holes in it consistent with a firearm being fired inside the bag. *Id.*

Similarly, in *State v. Mitchell*, __ N.C. App. __, __, 735 S.E.2d 438, 440 (2012), *appeal dismissed*, __ N.C. __, 740 S.E.2d 466 (2013), police stopped the defendant, who was driving a rental car, for speeding. The defendant's girlfriend, Ms. Harris, was a passenger in the car. *Id.* The defendant "indicated" that there was a gun in the glove compartment. *Id.* Police found the gun inside Ms. Harris's purse which was being kept in the glove compartment. *Id.* Although the defendant denied telling the police about the gun, this Court found that the circumstances were sufficient to establish the defendant's constructive possession of the gun because the defendant was driving the vehicle—thus, he "controlled" it—and he was "aware" of the gun's presence in the glove compartment. *Id.* at ___, 735 S.E.2d at 443.

In contrast, however, this Court has found the evidence insufficient to go to the jury when there is no link between the defendant and the firearm besides mere presence. For example, in *State v. Alston*, 131 N.C. App. 514, 515, 508 S.E.2d 315, 316 (1998), the defendant was a passenger in a car driven by his wife. A handgun was found on the console of the automobile, with the defendant and his wife having equal access to it. *Id.* The handgun was registered to his wife, and the car was registered to the defendant's brother. *Id.* at 516, 508 S.E.2d at 317. Although a child in the car told police that "Daddy's got a gun[,]" this evidence was not admitted for the truth of the matter asserted, so the trial court could not consider it as substantive proof of possession. *Id.* Because the evidence showed no more than mere presence, this Court held that there was insufficient evidence to support an inference of possession. *Id.* at 519, 508 S.E.2d at 319.

We find the facts of this case closer to those of *Alston* than *Glasco* or *Mitchell*. Like *Alston*, the rifle was registered to Ms. Torrain, defendant's girlfriend, who was driving the car when the rifle was found. Defendant was a passenger in the vehicle, not the driver. Moreover, the rifle was found in a place where Ms. Torrain and defendant had equal access. In addition, unlike *Glasco*, there was no physical evidence tying defendant to the rifle. Specifically, defendant's fingerprints were not found on the rifle, the magazine on the console, or the spent casing on the road which

may have come from an AK firearm. Although the gun was warm and appeared to have been recently fired, there was no evidence that defendant had actually discharged the rifle because the gunshot residue test was inconclusive. Although it is undisputed that the sedan was registered to defendant, he was not driving it at the time. Therefore, despite having legal ownership of the vehicle, defendant exercised no control over the car at the time the rifle was found.

Finally, although defendant allegedly admitted he knew that the rifle was in the car to Deputy Harris, awareness of the weapon is not enough to establish constructive possession. In *Mitchell*, __ N.C. App. __, 735 S.E.2d at 443-43, awareness was one of the factors the Court noted; however, its conclusion that there was sufficient incriminating evidence to submit the issue to the jury was predicated on both the defendant's awareness of the gun and the fact that he was driving the vehicle, noting that because "[a] driver generally has power to control the vehicle he is driving[,]" the defendant had the "power to control" the vehicle. Unlike *Mitchell*, defendant was not driving and, thus, not "controlling" the vehicle where the rifle was found. Therefore, defendant's knowledge or awareness of the rifle in and of itself did not constitute sufficient incriminating evidence to submit the issue to the jury.

While the State argues that the fact that the rifle was registered to defendant's girlfriend constitutes substantial evidence of constructive possession, the *Alston* Court specifically rejected a similar argument, noting "we are not persuaded that the purchase and ownership of the handgun by [the] [d]efendant's wife is sufficient other incriminating evidence linking [the] [d]efendant to the handgun." *Alston*, 131 at 519, 508 S.E.2d at 319.

In summary, the only evidence linking defendant to the rifle was his presence in the vehicle and his knowledge that the gun was in the backseat. Consequently, the State failed to present sufficient "other incriminating circumstances," *Matias*, 354 N.C. at 552, 556 S.E.2d at 271, from which the jury could infer constructive possession. Accordingly, we reverse the trial court's order denying his motion to dismiss for insufficiency of the evidence.

Conclusion

Because the State failed to present substantial evidence of constructive possession, we reverse the trial court's order denying defendant's motion to dismiss the charge of possession of a firearm by a felon.

REVERSED.

Judges BRYANT and STEELMAN concur.

STATE OF NORTH CAROLINA
v.
COREY DINAN

No. COA13-1022

Filed 6 May 2014

1. Appeal and Error—statement of grounds for appellate review

Appellate defense counsel violated N.C. R. App. P. 28(b) by failing to include a statement of the grounds for appellate review.

2. Appeal and Error—argument abandoned—no clear or reasoned argument

Defendant's argument that the trial court erred in a child abuse case by admitting testimony relating to his uncharged prior bad acts under Rule 404(b) was not addressed and was deemed abandoned. Defendant offered no clear or reasoned argument in support of his position as required by N.C. R. App. P. 28(b)(6).

3. Appeal and Error—preservation of issues—failure to object at trial—failure to allege plain error on appeal

Defendant failed to preserve for appellate review his argument that the trial court erred in a child abuse case by admitting unfavorable character evidence. Defendant failed to object to the evidence at trial and failed to specifically allege plain error on appeal.

4. Criminal Law—prosecutor's cross-examination—not inappropriate

Defendant's argument in a child abuse case that the prosecutor's improper cross-examination deprived him of a fair trial was without merit. The Court of Appeals was not persuaded that the prosecutor questioned defendant in an unreasonable manner.

5. Constitutional Law—effective assistance of counsel—dismissed without prejudice

Defendant's argument that he received ineffective assistance of counsel was dismissed without prejudice to defendant to bring these claims in post-conviction proceedings, rather than on direct appeal.

Appeal by defendant from judgments entered 8 March 2013 by Judge Jack W. Jenkins in Onslow County Superior Court. Heard in the Court of Appeals 17 February 2014.

Attorney General Roy Cooper, by Assistant Attorney General David Gordon, for the State.

James Goldsmith, Jr. for defendant.

ELMORE, Judge.

Corey Dinan (defendant) appeals his convictions of intentional child abuse resulting in serious bodily injury under N.C. Gen. Stat. § 14-318.4(a3) and of assault on a child under the age of twelve in violation pursuant to N.C. Gen. Stat. § 14-33(c)(3). We hold that defendant received a trial free from error in part. Defendant's final issue is dismissed without prejudice and allows defendant the opportunity to file appropriate motions with the trial court.

I. Factual Background

Abby[1], the victim in this case, is the biological daughter of defendant and Sarah F., defendant's now ex-wife. Abby was born 17 February 2010 and was approximately six-weeks-old at the time of the requisite child-abuse incident. At defendant's trial, Ms. F. testified that on 4 April 2010, defendant gave Abby her early-morning bottle. When Ms. F. woke, she went to the family room and saw Abby in her "princess swing" and defendant sitting "Indian style" on the floor. Abby was struggling to breathe. Ms. F. asked, "what's wrong with my baby?" Defendant responded, "I don't know. I don't know. She's been like that all morning." Ms. F. demanded that they take Abby to Onslow Memorial Hospital (Onslow). Abby was kept over-night at Onslow before being transferred to Pitt Memorial Hospital (now Vidant) for additional treatment.

Dr. Coral Steffey (Dr. Steffey), pediatrician and expert in the field of pediatrics and child abuse, testified that on 5 April 2010 she was called to Vidant to consult on Abby's condition. She testified that Abby was transferred from Onslow to Vidant for additional treatment after physicians discovered that Abby's oxygen saturations were low, that she was having difficulty breathing, that she was dehydrated, and that x-rays showed multiple rib fractures and a hemothorax. In fact, Abby had 24 identifiable rib fractures, both new and healing. X-rays taken of Abby's ribs 17 days prior did not reveal any rib fractures. Accordingly, Dr. Steffey opined that between 18 March and 4 April 2010, someone injured

1. Pseudonyms are used throughout the opinion to protect the identities of minors and other persons involved in this action.

Abby on at least two occasions to the point that she sustained multiple rib fractures. Dr. Steffey read the opinion from her medical report into the record, as follows: "There is no medical explanation for Abby's constellation of injuries, which include healing and acute rib fractures with hemothorax, intra-cranial hemorrhage, subconjunctival hemorrhages and bruising to her ankle. No history of trauma has been provided to explain Abby's injuries. The constellation of inexplicable injuries is consistent with a diagnosis of child physical abuse with inflicted injuries, on more than one occasion."

Elizabeth Pogroszewski, social worker for Onslow County Department of Social Services, testified that on 4 April 2010 she asked defendant his opinion as to what contributed to Abby's injuries. He responded, "[I] must have held her too tight." Additionally, four officers with the Jacksonville Police Department testified at trial. Officer Timothy Sawyer testified that defendant made a written statement in which he admitted to holding Abby too tight. Detective Anthony Ramirez testified that defendant demonstrated for him how he picked up Abby and held her with his elbows locked. Detective Trudy Allen testified that when she asked defendant how Abby was injured, he made "a shaking motion, just as if he would shake up the contents of a canister." At that point, she arrested defendant for felony child abuse. Officer Jason Lagana testified that defendant made the following spontaneous statement to him: "I guess you get charged for holding your kid too tight."

At trial, defendant sought to exclude the testimony of Brent Cross, defendant's friend and fellow Marine, and Megan Dinan, defendant's former ex-wife. After *voir dire*, the trial court denied defendant's motions *in limine*, finding that the proffered testimony was relevant as it went to the issue of "knowledge, absence of mistake and intent." Further, the trial court found that the probative value of the 404(b) testimony was not substantially outweighed by its prejudicial effect.

Brent Cross testified that in 2006 he was helping defendant with a home-improvement project when defendant's then wife, Megan Dinan, left the couple's napping infant son in defendant's care. When the baby woke crying, Mr. Cross testified that defendant became "agitated." Defendant went to the baby's room and, through the monitor, told Mr. Cross, "I got the baby now. You can go ahead and shut the baby monitor off. I got it." Mr. Cross had an "instinct" to keep the monitor on. When the baby was picked up, Mr. Cross testified that he heard the baby's cry become "hysterical" and he heard defendant's tone change from "upset" to "just anger."

Megan Dinan testified that she and defendant had two biological sons together, Ian and Sam. However, after divorcing, defendant relinquished his parental rights. She testified that when Ian was approximately eight-weeks old, he woke one morning with "one tiny little bruise" on his chest. Defendant was responsible for feeding Ian during the night. The following morning, Ian woke "covered in bruises, head to toe. He was so bruised that his earlobes were bruised." Ian was hospitalized and diagnosed as having a virus, which doctors thought could account for his severe bruising. After Ian was released from the hospital, Ms. Dinan noted subsequent bruising in the shape of finger prints on Ian. Ms. Dinan testified that when she confronted defendant, he responded, "it is my handprint, [] I was holding him last night and I think I held him too tight."

Defendant testified on his own behalf at trial. He alleged that he never "mistreated" Abby on 4 April 2010 or any time prior. He admitted to accidentally treating her like a one-year old instead of a six-week old. After the defense rested, the jury found defendant guilty of intentional child abuse resulting in serious bodily injury and of assault on a child under the age of twelve. The trial court sentenced defendant on 8 March 2013 to a term of 73 months to 97 months imprisonment, plus 60 days.

II. Analysis

A. Rule Violation

[1] Initially, we direct defense counsel's attention to Rule 28 of the North Carolina Rules of Appellate Procedure. Rule 28(b)(4) requires counsel to include "a statement of the grounds for appellate review. Such statement shall include citation of the statute or statutes permitting appellate review." N.C.R. App. P. 28(b)(4). In his brief, defense counsel provides:

> This Court is called upon to determine whether [defendant] was deprived of his fundamental right to a fair trial where evidence of uncharged prior bad acts were introduced to establish criminal propensity, and where the trial court failed to make a determination that the probative value outweighed any prejudice. . . . Further, this Court is called upon to determine whether [defendant] received ineffective assistance of counsel[.]

Defense counsel has violated Rule 28(b)(4). The above "statement" fails to reference any statute which would allow for appellate review—defense counsel has merely reiterated the issues he raises on appeal. Here, defense counsel is licensed in Florida. Nevertheless,

we urge defense counsel and all counsel to be mindful of our Rules of Appellate Procedure.

[2] Defendant first argues that the trial court erred in admitting testimony relating to his "uncharged prior bad acts" under Rule 404(b). We are unable to address the merits of this issue because defendant offers no clear or reasoned argument in support of his position as required by Rule 28(b)(6). *See* N.C.R. App. P. 28(b)(6). Specifically, in defendant's first issue he fails to direct us to the testimony that he argues it was error for the trial court to admit. We assume that defendant challenges the testimony of Mr. Cross and Ms. Dinan pursuant to Rules 404(b) and 403, as these witnesses are referenced in this issue. Further, defendant's argument is presented in a nonsensical manner. At the very least, defendant is required to direct us to the challenged testimony—it is not this Court's duty to craft defendant's argument for him. Accordingly, defendant's first argument is abandoned on appeal pursuant to Rule 28(b)(6).

B. Admission of 404(b) Evidence

[3] Alternatively, based on defendant's recitation of the facts and a review of the transcript, we assume *arguendo* that in his first issue, defendant is objecting to the admission of the unfavorable character evidence offered by Mr. Cross and Ms. Dinan. Nevertheless, we remain unable to address the merits as defendant has failed to preserve this issue for our review.

"[T]o preserve for appellate review a trial court's decision to admit testimony, objections to [that] testimony must be contemporaneous with the time such testimony is offered into evidence and not made only during a hearing out of the jury's presence prior to the actual introduction of the testimony." *State v. Ray*, 364 N.C. 272, 277, 697 S.E.2d 319, 322 (2010) (citations and quotations marks omitted). At trial, defendant did not object to the admission of what we believe constitutes the challenged testimony of Mr. Cross and Ms. Dinan. Therefore, he did not preserve the issue of the admissibility of this testimony for our review. *Id.*

Failure to properly preserve an argument restricts this Court's review on appeal to plain error. However, Rule 10(a)(4) states that such review is only available "when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(a)(4). In his brief, defendant does not ask this Court to review the issue under the plain error standard. When the State noted defendant's failure to argue plain error in the State's brief, defendant attempted to cure this deficiency by mentioning plain error in defendant's reply brief. However, a reply brief is not an avenue to correct the deficiencies contained in

the original brief. *See* N.C.R. App. P. 28(b)(6); *see also State v. Davis*, 202 N.C. App. 490, 497, 688 S.E.2d 829, 834 (2010) ("[B]ecause [d]efendant did not 'specifically and distinctly' allege plain error as required by [our appellate rules], [d]efendant is not entitled to plain error review of this issue.").

C. Scope of Prosecutor's Cross-Examination

[3] Defendant next contends that the prosecutor's improper cross-examination deprived him of a fair trial. We are not persuaded that the prosecutor questioned defendant in an unreasonable manner.

Generally, "[t]he scope of cross-examination . . . is within the sound discretion of the trial court, and its ruling thereon will not be disturbed absent a showing of abuse of discretion." *State v. Herring*, 322 N.C. 733, 743, 370 S.E.2d 363, 370 (1988) (citation omitted). However, here defendant argues that we should review this issue under the plain error standard of review. We agree. As such, defendant "must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "To show that an error was fundamental, a defendant must establish prejudice that, after examination of the entire record, the error had a probable impact on the jurys finding that the defendant was guilty." *Id.* (citation and quotation omitted).

In the instant case, defendant takes issue with the prosecutor's line of questioning in three specific instances[2]. First, he contends that the prosecutor inappropriately tried to "place him at odds" with Sarah F. by asking, "[y]ou don't believe Sarah caused these injuries at all, do you?" and "[d]o you believe that Sarah F. caused these injuries to Abby?" Second, defendant argues that it was error for the prosecutor to "challenge[] defendant to call [Detective Allen] a liar[.]" We assume that defendant is referencing the following question: "So Detective Allen, then, is lying about you [showing her how you shook Abby]?" Defendant replied, "I wouldn't say lie, just changing facts about who said what." Third, defendant argues that it was inappropriate for the prosecutor to ask, "how long are you going to wait with that infant before you begin holding him or her too tightly?" However, as to this last question, the record shows that the trial judge sustained defense counsel's objection to the question and instructed the jury to disregard it. In addition, the prosecutor withdrew the question. Thus, defendant's argument as to this question is moot.

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2. Defendant also argues that the prosecutor improperly questioned Megan Dinan. However, we cannot address the merits of this argument as counsel's argument lacks sufficient specificity.

Further, defendant makes no argument as to how he was prejudiced by these questions; he merely contends that he was "highly prejudiced by this impossible questioning[.]" Without a showing of prejudice, defendant cannot establish that any alleged error was a fundamental error. *See State v. Cummings*, 352 N.C. 600, 637, 536 S.E.2d 36, 61 (2000), *cert. denied*, 532 U.S. 997, 121 S. Ct. 1660, 149 L. Ed. 2d 641 (2001) ("[An] empty assertion of plain error, without supporting argument or analysis of prejudicial impact, does not meet the spirit or intent of the plain error rule."). Therefore, defendant's argument must be overruled. Assuming *arguendo* that defendant made a showing of prejudice, defendant has not convinced this Court that absent the prosecutor's questions, the jury probably would have reached a different verdict. The record contains additional evidence of defendant's guilt.

D. Ineffective Assistance of Counsel

[5] Lastly, defendant contends that defense counsel was ineffective because he 1) completely misapprehended the law with respect to the element of "intent," 2) elicited damaging testimony from the State's witnesses and defendant, and 3) permitted "prosecutorial misconduct" by failing to object to the prosecutor's questions. Given our conclusion in section "C," defendant's third contention moot. We dismiss defendant's remaining arguments without prejudice to defendant's right to file appropriate motions in the trial court.

When raising claims of ineffective assistance of counsel, the "accepted practice" is to bring these claims in post-conviction proceedings, rather than on direct appeal. *State v. Dockery*, 78 N.C. App. 190, 192, 336 S.E.2d 719, 721 (1985). Here, defendant has "prematurely asserted his ineffective assistance of counsel claim" by directly appealing to this Court. *State v. Stroud*, 147 N.C. App. 549, 556, 557 S.E.2d 544, 548 (2001) (quotation and citation omitted).

Defendant raises potential questions regarding defense counsel's trial strategy. However, it is unclear from defendant's brief what specific conduct he challenges as being ineffective. As such, we are unable to address the merits of defendant's argument. To best resolve this issue, an evidentiary hearing available through a motion for appropriate relief is our suggested mechanism. *Id.*; *see also State v. Ware*, 125 N.C. App. 695, 697, 482 S.E.2d 14, 16 (1997) (dismissing the defendant's appeal where the issues could not be determined from the record and concluding that "[t]o properly advance these arguments, defendant must move for appropriate relief pursuant to G.S. 15A–1415[ ] and G.S. 15A-1420[ ]"). "Upon the filing of a motion for appropriate relief, the trial court will

determine the motion and make appropriate findings of fact." *Ware*, 125 N.C. App. at 697, 482 S.E.2d at 16.

III. Conclusion

In sum, we deem defendant's first issue abandoned on appeal. Assuming *arguendo* that it is not abandoned, defendant failed to properly preserve it for our review. We overrule defendant's second issue that he was prejudiced by the prosecutor's line of questioning. Finally, defendant's ineffective assistance of counsel claim is dismissed without prejudice so that he may file appropriate motions in the trial court.

No error in part; dismissed in part.

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

STATE OF NORTH CAROLINA
v.
NICHOLAS JAMES JACOBS

No. COA13-1159

Filed 6 May 2014

Constitutional Law—right to counsel—waiver—knowing, voluntary, and intelligent—not established

The trial court erred in a probation violation hearing by allowing defendant to represent himself without establishing that defendant's waiver of his right to counsel was knowing, voluntary, and intelligent as prescribed by N.C.G.S. § 15A-1242.

On a writ of certiorari by defendant from judgment entered 8 May 2013 by Judge Douglas B. Sasser in Columbus County Superior Court. Heard in the Court of Appeals 17 February 2014.

Attorney General Roy Cooper, by Assistant Attorney General Jason R. Rosser, for the State.

Edward Eldred for defendant.

ELMORE, Judge.

On 15 November 2013, Nicholas James Jacobs (defendant) filed a petition for writ of certiorari in this Court, seeking review of the trial court's order revoking his probation and activating his prison sentence. This case arose after defendant pled guilty to five counts of obtaining property by false pretenses and five counts of breaking or entering a motor vehicle, which were consolidated into five sentences. This Court will hear defendant's appeal pursuant to his petition for writ of certiorari for the purpose of reviewing the criminal judgment. After careful consideration, we reverse the trial court's judgment and remand for further action consistent with this opinion.

I. Factual Background

On 25 April 2012, defendant pled guilty to the above mentioned offenses. Pursuant to defendant's plea, the trial court sentenced defendant to one term of 6 to 8 months active time; four consecutive, suspended 8 to 10 months sentences; and probation for 36 months. On 4 January 2012, defendant's probation officer filed notices of probation violations against defendant in Columbus County. The notices alleged that defendant failed (1) to attend a scheduled appointment, (2) to make required payments to the Clerk of Superior Court, (3) to obtain approval before moving, (4) to remain within the jurisdiction of the court, (5) attend TASC (Treatment Accountability for Safer Communities), and (6) was charged with criminal offenses that could result in probation violations.

On 8 May 2013, a probation violation hearing was held in Columbus County Superior Court. Defendant proceeded *pro se* at the hearing. The trial court revoked defendant's probation and activated his sentences. That same day, defendant filed a written notice of appeal. However, the record shows that defendant's notice of appeal was defective. Accordingly, defendant's appeal is before us on writ of certiorari.

II. Analysis

Defendant's sole argument on appeal is that the trial court erred by allowing him to represent himself without establishing that defendant's waiver of his right to counsel was knowing, voluntary, and intelligent as prescribed by N.C. Gen. Stat. § 15A-1242. We agree.

"It is well[-]settled that an accused is entitled to the assistance of counsel at every critical stage of the criminal process as constitutionally required under the Sixth and Fourteenth Amendments to the United States Constitution." *State v. Taylor*, 354 N.C. 28, 35, 550 S.E.2d 141, 147 (2001), *cert. denied*, 535 U.S. 934, 122 S Ct. 1312, 152 L. Ed. 2d 221 (2002).

Specifically, a defendant is entitled to be represented by counsel at a probation revocation hearing and, if indigent, to have counsel appointed for him. N.C. Gen. Stat. § 15A-1345(e) (2013). A defendant also has the right to refuse the assistance of counsel and proceed *pro se*. *State v. Gerald*, 304 N.C. 511, 516, 284 S.E.2d 312, 316 (1981).

"Before a defendant is allowed to waive in-court representation by counsel, the trial court must insure [sic] that constitutional and statutory standards are satisfied." *State v. Carter*, 338 N.C. 569, 581, 451 S.E.2d 157, 163 (1994) (citation omitted). To satisfy the trial court, a defendant must first " 'clearly and unequivocally' waive his right to counsel and instead elect to proceed *pro se*." *Id.* Second, the trial court must determine whether the defendant knowingly, intelligently, and voluntarily waived his right to in-court representation by counsel." *Id.* "A signed written waiver is presumptive evidence that a defendant wishes to act as his or her own attorney. However, the trial court must still comply with N.C. Gen. Stat. § 15A-1242[.]" *State v. Whitfield*, 170 N.C. App. 618, 620, 613 S.E.2d 289, 291 (2005) (internal citation omitted).

N.C. Gen. Stat. § 15A-1242 allows a defendant to proceed without counsel if the trial judge makes a thorough inquiry and is satisfied that defendant:

> 1. Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> 2. Understands and appreciates the consequences of this decision; and
>
> 3. Comprehends the nature of the charges and proceedings and the range of permissible punishments.

In the instant case, defendant's appointed counsel withdrew at the outset of defendant's revocation hearing due to a conflict in representation. In an attempt to appoint defendant new counsel, the trial judge asked the clerk, "[h]ow about Mr. Bill Gore?" Before the clerk responded, defendant interrupted and the following colloquy occurred:

> DEFENDANT: This case has been continued since January. It's the fourth—this will be the fifth time it's [sic] been continued. I'm not happy about that. I have numerous co-defendants in this case.
>
> . . .

THE COURT: You understand if you want a lawyer, I will be happy to appoint another for you, you understand. If you go forward with it today without an attorney, you are held to the same standard. The Court can't walk you through it, you are held to the same standard and I assume the State is seeking revocation.

. . .

P.O.: Yes, your Honor.

THE COURT: You understand they are going to ask me to put you in prison on this, so it may be you will want to wait at this point and have it continued for another 30 days and have a lawyer come in and help out on it as opposed to doing it yourself.

DEFENDANT: If they're going to violate me, they're going to violate me anyway with a lawyer or without a lawyer.

THE COURT: If you are in violation, the Court could find that and there's a chance you might be violated anyway. What's the underlying sentence?

THE STATE: There's four, boxcar(ed), eight to ten.

THE COURT: If he takes care of it himself today and admits and I take one of those boxcar(ed) and consolidate it with the rest, which would be a pretty good offer.

. . .

THE STATE: If he would want to accept that today and be done with it, the State wouldn't object.

THE COURT: The State wouldn't object.

DEFENDANT: I'm not going to–if y'all are going to give it to me, you're going to have to give it to me because I'm not going to ask that my probation be revoked.

THE COURT: Okay, and I don't have to give you one day off, you understand that.

DEFENDANT: I understand.

(the hearing began and defendant's parole officer began testifying)

> THE COURT: One moment. Let's get a waiver in the file. You indicated you didn't want an attorney, I'm going to let you sign a waiver that you don't want an attorney.

This exchange reveals that the trial judge made no inquiry as to whether defendant understood the "range of permissible punishments" pursuant to N.C. Gen. Stat. § 15A-1242(3). The State contends that defendant understood the range of permissible punishments because "the probation officer told the court that the State was seeking probation revocation." This is insufficient to satisfy N.C. Gen. Stat. § 15A–1242(3). As to defendant's underlying sentence, defendant was told only that, "[t]here's four, boxcar(ed), eight to ten." The trial judge then made defendant the "good offer" of having "one of those boxcar(ed)" consolidated. However, there was no discussion pertaining to the specific range of punishment.

We cannot assume that defendant understood the legal jargon "boxcared" and "eight to ten" as it related to his sentence. The phrase "eight to ten" is uncertain–is it in reference to eight to ten days, weeks, months, or years? Further, the trial judge had an unequivocal duty to ask defendant whether he understood the nature of the charges and proceedings and disclose the range of permissible punishments. *State v. Pruitt*, 322 N.C. 600, 604, 369 S.E.2d 590, 593 (1988) (citations omitted). He neglected to do so. The foregoing is clearly inadequate to constitute the "thorough inquiry" necessary to satisfy N.C. Gen. Stat. § 15A–1242(3). *See State v. Taylor*, 187 N.C. App. 291, 294, 652 S.E.2d 741, 743 (2007) (holding that the trial court failed to properly inform the defendant regarding the range of permissible punishments when it correctly informed defendant of the maximum 60–day imprisonment penalty, but failed to inform defendant that he also faced a maximum $1,000.00 fine for each of the charges).

Although we recognize that defendant signed a written waiver of his right to assistance of counsel, the trial court was not abrogated of its responsibility to ensure the requirements of N.C. Gen. Stat. § 15A-1242 were fulfilled. *Whitfield*, *supra*. We need not discern whether the first two subparts of the statute were satisfied—all three must be met to ensure that a defendant's waiver was made knowingly, intelligently, and voluntarily. Accordingly, we reverse the trial court's judgment revoking defendant's probation and remand for a new probation revocation hearing.

Reversed and remanded.

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

STATE OF NORTH CAROLINA
v.
LAURENCE ALVIN LOVETTE, DEFENDANT

No. COA13-991

Filed 6 May 2014

1. Sentencing—first-degree murder—resentencing under new statute—motion for appropriate relief—due process

The trial court did not err in a first-degree murder case by overruling defendant's objection to resentencing under the new sentencing statute in N.C.G.S. § 15A-1340.19A *et. seq*. Defendant requested the very relief as to resentencing he was granted in his motion for appropriate relief. Thus, the Court of Appeals' prior opinion was the law of the case and defendant could not challenge his resentencing on the grounds of due process. To the extent defendant raised a facial challenge to the new sentencing statute, he failed to cite any authority in support of this argument.

2. Homicide—first-degree murder—findings of fact—sufficiency of evidence

The trial court did not err in a first-degree murder case by its findings of fact 3, 4, and 6. Capital sentencing statutes had no application in the context of this case. Further, the challenged findings of fact were supported by competent evidence.

3. Sentencing—life imprisonment without parole—failure to show abuse of discretion

The trial court did not err in a first-degree murder case by sentencing defendant to a term of life imprisonment without parole. Defendant failed to demonstrate an abuse of discretion in how the trial court chose to weigh any factors as compared to each other nor in how the trial court weighed all the circumstances of the offenses in light of them.

Appeal by defendant from judgment entered on or about 3 June 2013 by Judge R. Allen Baddour, Jr. in Superior Court, Orange County. Heard in the Court of Appeals 6 February 2014.

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

Cheshire Parker Schneider & Bryan, PLLC, by John Keating Wiles, for defendant-appellant.

STROUD, Judge.

This is defendant's second appeal to this Court arising from his conviction for the first degree murder of Eve Carson. Defendant was originally sentenced, as required by North Carolina law at that time, to life in prison without parole. In defendant's first appeal and based upon his motion for appropriate relief, this Court vacated defendant's sentence of life imprisonment without parole and sent his case back to the trial court for resentencing based upon North Carolina General Statute § 15A-1340.19A *et. seq.*, which is a new sentencing statute enacted by the North Carolina General Assembly in response to the United States Supreme Court's 2012 ruling in *Miller v. Alabama*, 567 U.S. ___, ___, 183 L.Ed. 2d 407, 421-24 (2012). On remand, the trial court held a new sentencing hearing, at which defendant presented evidence. The trial court then resentenced defendant under the new sentencing statute to life imprisonment without parole after making extensive findings of fact as to any potential mitigating factors revealed by the evidence. In this second appeal, defendant raises arguments as to the constitutionality of the new sentencing statute and as to the trial court's findings supporting its sentencing decision. We find no error, for the reasons as set forth more fully below.

I. Background

The facts of this case may be found in *State v. Lovette*, ___ N.C. App. ___, 737 S.E.2d 432 (2013) ("*Lovette I*"), and we will not repeat them in detail. In summary, defendant and/or his cohort kidnapped a young woman, Eve Carson, in the night, held her as a hostage in her own car with a gun to her head, fondled her as she screamed, robbed her, remained unmoved as she begged for her life, shot her multiple times, left her body in the street, and then used her bank card. *Lovette I* at ___, 737 S.E.2d at 434-35. In *Lovette I*, this Court found no error in defendant's trial, at which the jury convicted him of first degree murder, first degree kidnapping, felonious larceny, felonious possession of stolen goods, and robbery with a dangerous weapon, but vacated defendant's sentence for first degree murder and remanded for a resentencing hearing based upon North Carolina General Statute § 15A–1340.19A *et seq.* *See id.* at ___, 737 S.E.2d at 436-42.

After a rehearing, the trial court entered judgment sentencing defendant to life imprisonment without parole. The trial court made "additional findings pursuant to N.C.G.S. Sect. 15A-1340.19C, which . . . [were] incorporated as part of the judgment" (footnote omitted):

1. The defendant was born November 17, 1990, and therefore was seventeen years, three months old at the time of the commission of these offenses.

2. Dr. James Hilkey (hereinafter, "Hilkey") could identify no evidence that the defendant was irretrievably corrupted.

3. The defendant was, and is, immature, but not in any way substantially different from other teens.

4. Though adopted, the defendant's home life and family dynamics were not extremely unusual. He was adept at taking advantage of an overly permissive father and avoiding consequences from either his father or his mother, who was the more authoritarian parent. He was raised in a middle class household and did not lack resources.

5. Defendant's intelligence is above average. He excelled at school until about age 12. His father passed when defendant was 13, and his grades and attendance at school faltered significantly.

6. Defendant appears to have been influenced by his peers but not to an unusual degree.

7. Defendant suffered from no psychosis or other mental disorder.

8. There is no evidence that defendant failed to appreciate the risks or consequences of his actions.

9. Defendant suffered from no dependency on alcohol or illegal drugs.

10. After preparing his psychological profile of defendant, Hilkey concluded that there exists the possibility of rehabilitation for him, but could offer no certain prognosis.

11. Defendant has a lengthy juvenile record that exhibits a pattern of escalation of criminal activity.

12. In the events surrounding this conviction, defendant was an active participant in all phases, from procuring the vehicle used to drive to Chapel Hill, to the commission of the murder itself. Defendant appears

to have led his older co-defendant, Demario Atwater, through the commission of the crimes.

13. The active participation of the defendant in the act of murder in this case stands in stark contrast to the two juveniles in the *Miller* and *Jackson* cases, in which might be characterized as botched robberies in which the defendant either was not an active participant in the murder or was acting under the influence of impairing substances, among other distinctions. See Miller v. Alabama, 567 U.S. ___, 123 S. Ct. 2455, 183 L.Ed.2d 407 (2012).

14. This court has considered youth as a factor in assessing the proportionality of the punishment it imposes, and in an exercise of its informed discretion determines that any mitigating factors found above are substantially outweighed by the overwhelming absence of mitigating factors as well as the other factors found above. Based on that determination, the court concludes that the appropriate sentence in this case is life in prison without the possibility of parole.

15. Consistent with its prior orders, Court's Exhibit 1 (the pre-sentence investigation report), as well as Defendant's Exhibit 2 (Sentencing Memorandum of Hilkey) and Defendant's Exhibit 3 (raw data produced by Hilkey) shall be preserved under seal, to be opened only by order of the Court. Defendant's Exhibit 1 (Hilkey's CV) shall be made part of the file.

Defendant appeals.

II. Sentencing Statute

[1] When defendant's first appeal, addressed in *Lovette I*, was pending before this Court, defendant filed a motion for appropriate relief ("MAR") specifically requesting a resentencing hearing based upon the change in the law which had occurred since his trial:

> Our General Assembly has enacted a remedy to address the Supreme Court's ruling in *Miller v. Alabama* in Senate Bill 635, "An Act to amend the state sentencing laws to comply with the United States Supreme Court Decision in *Miller v. Alabama*, which was signed into law

by the Governor on July 12, 2012. S.L. 2012-148 (amending N.C. Gen. Stat. § 15A-1477(a)(1)).

In *Lovette I*, this Court discussed the United States Supreme Court's opinion in *Miller* and the North Carolina General Assembly's response:

> In his MAR, Defendant seeks a new sentencing hearing, citing *Miller*. In *Miller*, which was decided after Defendant was sentenced, the United States Supreme Court held that imposition of a mandatory sentence of life without the possibility of parole for a defendant who was under the age of eighteen when he committed his crime violates the Eighth Amendment's prohibition on cruel and unusual punishment. *Id.* at ___, 132 S.Ct. at 2460, 183 L.Ed.2d at 414–15. After noting scientific studies that reveal differences in brain function and other psychological and emotional factors between adults and juveniles, the Court held that "a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Id.* at ___, ___, 132 S.Ct. at 2475, 183 L.Ed.2d at 418–19, 430.
>
> In response to the *Miller* decision, our General Assembly enacted N.C. Gen.Stat. § 15A–1476 *et seq.* ("the Act"), entitled "An act to amend the state sentencing laws to comply with the United States Supreme Court Decision in *Miller v. Alabama*." N.C. Sess. Law 2012–148.[1]

Id. at ___, 737 S.E.2d at 441.

This Court then discussed the details of the new statutory sentencing scheme and its retroactive application to defendant:

> The Act applies to defendants convicted of first-degree murder who were under the age of eighteen at the time of the offense. N.C. Gen.Stat. § 15A–1340.19A. Section 15A–1340.19B(a) provides that if the defendant was convicted of first-degree murder solely on the basis of the felony murder rule, his sentence shall be life imprisonment with parole. N.C. Gen.Stat. § 15A–1340.19B(a)(1) (2012). In

1. As noted by footnote in *Lovette I*, "[t]he Act became effective when passed on 12 July 2012. N.C. Sess. Law 2012–148, Section 3. Session Law 2012–148 designated this Act as sections 15A–1476 *et seq.*, but the Act was later redesignated and renumbered at the direction of the Revisor of Statutes and is now found at N.C. Gen.Stat. § 15A–1340.19A *et seq. Lovette I* at ___, 737 S.E.2d at 441.

> all other cases, the trial court is directed to hold a hearing to consider any mitigating circumstances, *inter alia*, those related to the defendant's age at the time of the offense, immaturity, and ability to benefit from rehabilitation. N.C. Gen.Stat. §§ 15A–1340.19B, 15A–1340.19C. Following such a hearing, the trial court is directed to make findings on the presence and/or absence of any such mitigating factors, and is given the discretion to sentence the defendant to life imprisonment either with or without parole. N.C. Gen.Stat. §§ 15A–1340.19B(a)(2), 15A–1340.19C (a). "[N]ew rules of criminal procedure [such as the Act] must be applied retroactively 'to all cases, state or federal, pending on direct review or not yet final.' " *State v. Zuniga*, 336 N.C. 508, 511, 444 S.E.2d 443, 445 (1994) (quoting *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649, 661 (1987)).
>
> Here, as conceded by the State, the Act applies to Defendant, who was seventeen years old at the time of Eve Carson's murder and whose case was pending on direct appeal when the Act became law. In addition, Defendant's jury returned a verdict of guilty of first-degree murder on the basis of malice, premeditation, and deliberation, as well as the felony murder rule. Accordingly, we must vacate Defendant's sentence of life imprisonment without parole and remand to the trial court for resentencing as provided in the Act. Following a resentencing hearing, the trial court shall, in its discretion, determine the appropriate sentence for Defendant and make findings of fact in support thereof.

Id. at ___, 737 S.E.2d at 441-42 (footnote omitted). On remand the trial court then did just as defendant requested in his MAR and as this Court instructed in *Lovette I* when it sentenced defendant.

A. Due Process

Upon remand, at the resentencing hearing, defendant for the first time raised an objection to being sentenced under the new sentencing statute based upon a claim of denial of due process. Defendant now contends that "the court erred when it overruled the defendant's objection to resentencing under the *new* sentencing statute because its application to the defendant violated the constitutional guarantees of due process and the law of the land." (Emphasis added.) (Original in all caps.) The

State counters, *inter alia*, that defendant has waived his constitutional arguments by failure to raise them in his first appeal or in the MAR.

Despite the fact that defendant obtained the relief he requested in his prior appeal and MAR, in which he requested re-sentencing under what is now codified as North Carolina General Statute § 15A–1340.19A *et seq.*, defendant now argues that he was denied due process because during his trial, he was unaware of the new sentencing statute which did not yet exist. Defendant argues that when he was tried for first degree murder, the State proceeded upon theories of felony murder *and* murder with premeditation and deliberation; under the "old" sentencing statute, which was in effect when defendant was originally sentenced, a guilty verdict on either of those bases would inevitably lead to a sentence of life imprisonment without parole. However, according to defendant, under the "new" sentencing statute, if defendant had been convicted for first degree murder *only* upon a predicate felony, and not upon premeditation and deliberation, he would have been sentenced to life imprisonment with parole.[2] If defendant had known this, he argues he might have conceded guilt of his underlying felonies that served as the predicate felonies for the theory of felony murder and focused his efforts more heavily on defending against premeditation and deliberation as a basis for the murder, because if the jury believed him on this issue, he might have been convicted on the basis of felony murder only and not on the basis of murder with premeditation and deliberation, thus giving him the eligibility for parole.

Based upon defendant's speculation and arguments which seek to apply legal standards used in capital punishment cases to this non-capital case, defendant contends the "lack of notice resulted in a denial of procedural due process, and the State cannot show the error harmless beyond a reasonable doubt." Defendant proposes two possible remedies to this violation, both premised upon cases which address capital sentencing. Analogizing from *State v. Davis*, 290 N.C. 511, 227 S.E.2d 97 (1976), defendant claims that as the only sentence permitted

> by law at the time of the crime and trial in Mr. Lovette's case has been held unconstitutional and because the new statute cannot be applied retroactively consistent with the notice required by the federal Due Process Clause and the state Law of the Land Clause, U.S. Const., amend. XIV;

2. North Carolina General Statute § 15A-1340.19A provides that "'life imprisonment with parole' shall mean that the defendant shall serve a minimum of 25 years imprisonment prior to becoming eligible for parole." N.C. Gen. Stat. § 15A-1340.19A (2012).

> N.C. Const., art. I, § 19, the only sentence that was constitutionally possible to be imposed upon him for homicide with malice at the time of his trial was "a sentence authorized upon conviction of the lesser included offense of second degree murder committed on 5 March 2008."

In the alternative, defendant proposes this Court remand to the trial court again "with instructions to impose a sentence of life imprisonment with parole consistent with N.C. Gen. Stat. § 15A-1340.19B(a)(1)(2012), where 'life imprisonment with parole' means that he "shall serve a minimum of 25 years imprisonment prior to becoming eligible for parole.' N.C. Gen. Stat. § 15A-1340.[19]A (2012)."

Defendant's arguments are based upon a series of speculations and assumptions about potential trial strategies and hindsight, which is reputed to be 20/20, although in this instance even hindsight is a bit blurry since there are so many unknowns. Essentially, defendant argues that *if* defendant had known, he *may* have actually conceded guilt of his felonies upon which the theory of felony murder were predicated, argued more strenuously regarding murder with premeditation and deliberation, and the jury *may* not have convicted him on the grounds of murder with premeditation and deliberation,[3] and then he *could* have had the possibility of parole. We cannot base our decision on such speculation.

Defendant actually requested the very relief as to resentencing he was granted in his MAR to this Court. Even if defendant's speculative argument could have possibly had any legal merit, he could have raised it in his MAR. In other words, in his MAR in the prior appeal defendant argued that he should be sentenced under the new sentencing statute, but he could have also argued, although he did not, that even then sentencing him under the new sentencing statute would violate his constitutional due process rights because he was not aware of the new sentencing statute as the applicable law at the time of his trial, thus affecting his trial strategy. Defendant could have made an argument based on hindsight and speculation of this nature just as easily in the first appeal as this one as it is not dependent upon any findings or conclusions made by the trial court on remand. We conclude that because defendant did not challenge this Court's opinion granting him the relief sought in his MAR, this Court's prior opinion is the law of the case and defendant may not challenge his resentencing under the new sentencing

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3. We note that there was overwhelming evidence regarding defendant's premeditation and deliberation, and defendant did not challenge his conviction on the basis of error in the jury's determination of this issue in his first appeal. *See Lovette I*.

statute on the grounds of due process now. *See generally Wellons v. White*, ___ N.C. App. ___, ___, 748 S.E.2d 709, 720 (2013) ("The law of the case doctrine provides that when a party fails to appeal that order, the decision below becomes the law of the case and cannot be challenged in subsequent proceedings in the same case." (citation, quotation marks, and brackets omitted)). We overrule this argument.

B. Discretion of Trial Court in Sentencing

In *Lovette I*, we noted that under the new sentencing statute

> the trial court is directed to hold a hearing to consider any mitigating circumstances, *inter alia*, those related to the defendant's age at the time of the offense, immaturity, and ability to benefit from rehabilitation. N.C. Gen. Stat. §§ 15A–1340.19B, 15A–1340.19C. Following such a hearing, the trial court is directed to make findings on the presence and/or absence of any such mitigating factors, and is given the discretion to sentence the defendant to life imprisonment either with or without parole.

Lovette I at ___, 737 S.E.2d at 441. At the resentencing hearing, as directed by this Court as a result of *Lovette I*, the trial court heard evidence and made findings of fact.

Defendant argues that

> the sentence of life without parole for an offender who committed his offense before reaching the age of 18 is "likened" to the death penalty itself, *see Miller*, ___ U.S. at ___, 132 S. Ct. at 2463, 183 L. Ed. 2d 407; *cf. Graham*, 560 U.S. at ___, 130 S. Ct. at 2027, 176 L. Ed. 825. Thus, just as the guarantees of freedom from cruel and unusual punishment and due process, U.S. Const., amend. VIII, XIV; N.C. Const., art. I, §§ 19, 27, require provisions for "individualized sentencing" in death penalty cases for adults, *Woodson*, 428 U.S. at 304, 96 S. Ct. at 2991, 49 L. Ed. 2d 944 (1976) (Eight Amendment requires individualized sentencing, rather than mandatory sentencing, in death penalty proceedings), so *Miller* ultimately ruled against mandatory life imprisonment without parole for offenders convicted of homicide committed when under age 18.

Defendant then engages in a comparison of the new sentencing statute with capital punishment statutory sentencing, citing § 15A-2000, and concludes that "the new sentencing regime provides less guidance

for the exercise of discretion in sentencing a minor in jeopardy of life imprisonment without parole . . . than our State provides for an adult burglar or even a Class I felon." But our capital sentencing statutes have no application here. Although there is some common constitutional ground between adult capital sentencing and sentencing a juvenile to life imprisonment without parole, these similarities do not mean the United States Supreme Court has directed or even encouraged the states to treat cases such as this under an adult capital sentencing scheme.

Because the new sentencing statute grants the trial court more discretion than the capital sentencing statute, defendant argues that the new sentencing statute "unconstitutionally vests the sentencing judge with unbridled discretion, providing no standards for its exercise in violation of the constitutional guarantees of freedom from cruel and unusual punishment and of due process and the law of the land." (Original in all caps.) As in defendant's previous argument regarding due process, defendant had the opportunity to raise a facial challenge in his first appeal to the constitutionality of North Carolina General Statute § 15A-1340.19A *et. seq.* on the grounds that it fails to provide sufficient guidance for the exercise of the trial court's discretion, but he failed to do so. Again, in his first appeal, defendant requested that he be sentenced under the new sentencing statute without making any arguments that it was unconstitutional. This Court then granted defendant's request and defendant made no motions seeking relief from either this Court or our Supreme Court. The trial court followed the instructions provided by this Court in resentencing defendant pursuant to the new sentencing statute. We therefore conclude that defendant may not raise a facial constitutional challenge to North Carolina General Statute § 15A-1340.19A *et. seq.* at this point.

Although defendant does not make an as-applied constitutional argument in his brief, at oral argument and in his reply brief, defendant's counsel noted that defendant could not have made an as-applied constitutional challenge to the new sentencing statute before he was resentenced, since the statute had not yet been applied to him. We agree with defendant that he could not have made an as-applied challenge to the new sentencing statute before he was resentenced. Yet defendant's arguments are actually facial constitutional challenges, not as-applied challenges. Defendant contends that the new sentencing statute is erroneous as written because it "vests the sentencing judge with unbridled discretion providing no standards[.]" Thus, according to defendant's argument, no matter how the trial court applied the new sentencing statute, its discretion would be "unbridled" due to the lack of "standards"

provided by the legislature within the statute; this is a facial challenge because defendant is arguing that no matter what the trial court's ultimate determination was, the new sentencing statute is unconstitutional because of the amount of discretion given to the trial court in making its determination. *See State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 282 (1998) ("An individual challenging the facial constitutionality of a legislative act must establish that no set of circumstances exists under which the act would be valid." (citation, quotation marks, and brackets omitted)). Defendant does not argue that the trial court abused its discretion in either how it weighed or applied any mitigating factors as compared to each other or in light of the other facts of the case in coming to its ultimate decision to sentence defendant to life imprisonment without parole. Thus, to the extent defendant has raised a facial challenge to the new sentencing statute, he has failed to cite any authority in support of this argument. This argument is overruled.

III. Findings of Fact

[2] Defendant next challenges findings of fact 3, 4, and 6 based on sufficiency of the evidence to support the findings of fact.

A. Standard of Review

Defendant attempts to frame this argument under the standards of review applicable in capital sentencing of adults. Defendant argues that

> [b]ecause the sentence of life without parole for an offender who committed his offense before reaching the age of 18 is "likened" to the death penalty itself, *see Miller v. Alabama*, ___ U.S. ___, ___, 132 S. Ct. 2455, 2463, 183 L. Ed. 2d 407 (2012) ("*Graham* further likened life without parole for juveniles to the death penalty itself"); *cf. Graham v. Florida*, 560 U.S. ___, ___, 130 S. Ct. 2011, 2027, 176 L. Ed. 2d 825 (2010) ("life without parole sentences share some characteristics with death sentences that are shared by no other sentences"), the Defendant respectfully contends that, on analogy with our Supreme Court's review of a death penalty, this Court shall overturn the greater sentence of life without parole and impose in lieu thereof the lesser authorized sentence of life with parole "upon a finding that the record does not support the [trial court's] findings of any . . . circumstance or circumstances upon which the sentencing court based its sentence of [life without parole]." N.C. Gen. Stat. § 15A-2000(d)(2) (2012).

But again, capital sentencing statutes have no application in the context of this case. We see no reason to depart from our body of case law which has established that we review challenged findings of fact for competent evidence to support the finding. *See State v. Peterson*, 347 N.C. 253, 255, 491 S.E.2d 223, 224 (1997) ("[F]indings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." (citation and quotation marks omitted). Accordingly, we review each challenged finding of fact to see if it is supported by competent evidence; if so, such findings of fact "are conclusive on appeal[.]" *Id.*

B. Findings of Fact 3, 4 and 6

Finding of fact 3 stated, "The defendant was, and is, immature, but not in any way substantially different from other teens." Dr. James Hilkey, an expert in forensic psychology, testified that defendant's immaturity was "typical for his age[.]" The challenged portion of finding of fact 4 stated, "Though adopted, the defendant's home life and family dynamics were not extremely unusual." While Dr. Hilkey did state that defendant was perhaps "spoiled[,]" even to an "extreme[,]" and that his parents relationship may have been "highly dysfunctional" to an "extreme[,]" he did not testify that defendant's "home life" or "family dynamics" were "extremely unusual[,]" but rather that a particular area or two of defendant's "home life and family dynamics" were extreme. Defendant's argument takes certain words used by Dr. Hilkey out of context. Overall, Dr. Hilkey's testimony supported a finding that defendant's "home life and family dynamics" were not extremely unusual. Defendant grew up in a middle-class home with two parents, until his father died. Defendant's father had strongly disagreed with his mother on how to best care for him, with his father taking the route of "spoiler" and his mother that of "enforcer." Dr. Hilkey's testimony indicated that defendant's home life was not "perfect" but that is not unusual, as no one leads a perfect home life. Finding of fact 6 stated, "Defendant appears to have been influenced by his peers but not to an unusual degree." Dr. Hilkey testified that "*Like a lot of juveniles*, Mr. Lovett was quite and continues to be quite influenced by his peer group[,]" and "Mr. Lovett, *like many adolescents*, are highly susceptible to the influence of peers[.]" (Emphasis added.) We conclude that the challenged findings of fact were supported by competent evidence and overrule this argument.

IV. Findings as to "Irretrievable Corruption" and "Possibility of His Rehabilitation"

[3] Lastly, defendant contends that

> the court erred when it sentenced the defendant to a term of imprisonment for life without parole, in violation of the constitutional guarantees against cruel and unusual punishment,

> when the unrebutted evidence presented to the court did not show that the defendant was irretrievably corrupt and did show that the possibility of his rehabilitation existed.

(Original in all caps.) Defendant does not contend that a finding that he "was irretrievably corrupt" or had no "possibility of . . . rehabilitation" is required by the new sentencing statute for the trial court to sentence him to life imprisonment without parole, and in fact it is not. *See* N.C. Gen. Stat. §§ 15A-1340.19B; -1340.19C (2012) (stating that the trial court "shall consider any mitigating factors" but not providing that any particular factor beyond those defendant chooses to present are required for consideration by the trial court). But, defendant's argument read as a whole does seem to contend that without findings of irretrievable corruption and no possibility of rehabilitation the trial court should not have sentenced him to life imprisonment without parole. Thus, we consider *de novo* if the trial court's findings of fact, which we have already concluded are supported by competent evidence, support its conclusion of law. *See Peterson*, 347 N.C. at 255, 491 S.E.2d at 224 ("Conclusions of law that are correct in light of the findings are also binding on appeal.") (citations and quotation marks omitted); *State v. Simmons*, 201 N.C. App. 698, 701, 688 S.E.2d 28, 30 (2010) ("The trial court's conclusions of law are subject to *de novo* review on appeal.").

It is true that the trial court made findings regarding defendant *not* being "irretrievably corrupt" and the "possibility of [defendant's] rehabilitation[,]" but these findings of fact did not ultimately require the trial court to sentence defendant to a lesser sentence than life imprisonment without parole as the trial court could consider all of the factors and determine "whether, based upon all the circumstances of the offense and the particular circumstances of the defendant, the defendant should be sentenced to life imprisonment with parole instead of life imprisonment without parole." N.C. Gen. Stat. § 15A-1340.19C(a). Defendant has not demonstrated an abuse of discretion in how the trial court chose to weigh any factors as compared to each other nor in how the trial court weighed "all the circumstances of the offenses" in light of them. *See id.*

Defendant relies on *Miller v. Alabama* in arguing, "[T]he Supreme Court proceeded to make it clear that [life imprisonment without parole] should be 'uncommon' because of the difficulty of determining 'irreparable corruption' at a young age[.]" Defendant then quotes *Miller*:

> But given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions

> for sentencing juveniles to this *harshest penalty will be uncommon*. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age "between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the *rare juvenile offender whose crime reflects irreparable corruption*." *Roper*, 543 U.S. at 573, 125 S. Ct. 1183; *Graham*, 560 U.S. at ___, 130 S. Ct. at 2026-2027. Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison. *Miller*, ___ U.S. at ___, 132 S. Ct. at 2469, 183 L.Ed. 2d 407.

(Emphasis added.)

Defendant's argument takes the statement regarding "irreparable corruption" out of context and seemingly elevates it to a required finding, but this is simply one of the factors a trial court may consider. The findings of fact must support the trial court's conclusion that defendant should be sentenced to life imprisonment without parole, and a finding of "irreparable corruption" is not required, although it certainly may be a finding that a trial court might make, it did not in this case. What the Supreme Court actually required in *Miller* was that the trial court consider a defendant's age and its "hallmark features" and the circumstances of each case:

> To recap: Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

Miller, 567 U.S. at ___, 183 L.Ed. 2d at 423 (citations omitted).

Here, the trial court made findings of fact which are either not challenged on appeal, or which we have found to be supported by the evidence, as to each of the "hallmark features" noted by the Supreme Court. *Id.* Our only consideration is whether the findings support the trial court's conclusion of law that defendant should be sentenced to life imprisonment without possibility of parole. In *Miller*, in contrasting the cases of the two 14-year-old juveniles under consideration with juveniles in prior cases, the Supreme Court contrasted some of these characteristics of juveniles:

> In light of *Graham*'s reasoning, these decisions too show the flaws of imposing mandatory life-without-parole sentences on juvenile homicide offenders. Such mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it. Under these schemes, every juvenile will receive the same sentence as every other—the 17–year–old and the 14–year–old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one. And still worse, each juvenile (including these two 14–year–olds) will receive the same sentence as the vast majority of adults committing similar homicide offenses—but really, as *Graham* noted, a *greater* sentence than those adults will serve. In meting out the death penalty, the elision of all these differences would be strictly forbidden. And once again, *Graham* indicates that a similar rule should apply when a juvenile confronts a sentence of life (and death) in prison.
>
> . . . .
>
> Both cases before us illustrate the problem. Take Jackson's [in *Graham*] first. As noted earlier, Jackson did not fire the bullet that killed Laurie Troup; nor did the State argue that he intended her death. Jackson's conviction was instead based on an aiding-and-abetting theory; and the appellate court affirmed the verdict only because the jury could have believed that when Jackson entered the store, he warned Troup that we ain't playin, rather than told his friends that I thought you all was playin. To be sure, Jackson learned on the way to the video store that

> his friend Shields was carrying a gun, but his age could well have affected his calculation of the risk that posed, as well as his willingness to walk away at that point. All these circumstances go to Jackson's culpability for the offense. And so too does Jackson's family background and immersion in violence: Both his mother and his grandmother had previously shot other individuals. At the least, a sentencer should look at such facts before depriving a 14–year–old of any prospect of release from prison.
>
> That is true also in Miller's case. No one can doubt that he and Smith committed a vicious murder. But they did it when high on drugs and alcohol consumed with the adult victim. And if ever a pathological background might have contributed to a 14–year–old's commission of a crime, it is here. Miller's stepfather physically abused him; his alcoholic and drug-addicted mother neglected him; he had been in and out of foster care as a result; and he had tried to kill himself four times, the first when he should have been in kindergarten. Nonetheless, Miller's past criminal history was limited—two instances of truancy and one of second-degree criminal mischief. That Miller deserved severe punishment for killing Cole Cannon is beyond question. But once again, a sentencer needed to examine all these circumstances before concluding that life without any possibility of parole was the appropriate penalty.

Miller, 567 U.S. at ___, 183 L.Ed. 2d at 422-24 (citations, quotation marks, brackets, and footnote omitted). In this comparison, the Supreme Court demonstrates how a court might weigh the "hallmark features" in sentencing juveniles. *Id.* at ___, 183 L.Ed. 2d at 422-24. Here, the trial court, particularly in findings of fact 12 and 13, reflects that it was guided by this analysis in weighing the factors presented by defendant.

Defendant has not demonstrated that the trial court abused its discretion in weighing the factors regarding his characteristics or the circumstances of the case. *See State v. Westall*, 116 N.C. App. 534, 551, 449 S.E.2d 24, 34 ("We also decline to hold that the trial judge abused his discretion in imposing the sentence in this case. The trial judge may be reversed for abuse of discretion only upon a showing that his ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision. It is not the role of an appellate court to substitute its judgment for that of the sentencing judge as to the appropriate length of the sentence. [S]o long as the punishment rendered is within

the maximum provided by law, an appellate court must assume that the trial judge acted fairly, reasonably and impartially in the performance of his office. Furthermore, when the sentence imposed is within statutory limits it cannot be considered excessive, cruel or unreasonable. (citations omitted)), *disc. review denied*, 338 N.C. 671, 453 S.E.2d 185 (1994).

As noted by *Miller*, the "harshest penalty will be uncommon[,]" but this case is uncommon. *Miller*, 567 U.S. at ___, 183 L.E. 2d at 424. The trial court's findings support its conclusion. The trial court considered the circumstances of the crime and defendant's active planning and participation in a particularly senseless murder. Despite having a stable, middle-class home, defendant chose to take the life of another for a small amount of money. Defendant was 17 years old, of a typical maturity level for his age, and had no psychiatric disorders or intellectual disabilities that would prevent him from understanding risks and consequences as others his age would. Despite these advantages, defendant also had an extensive juvenile record, and thus had already had the advantage of any rehabilitative programs offered by the juvenile court, to no avail, as his criminal activity had continued to escalate. Defendant was neither abused nor neglected, but rather the evidence indicates for most of his life he had two parents who cared deeply for his well-being in all regards. *Miller* at ___, 183 L.Ed. 2d at 422 ("Just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in assessing his culpability."). The trial court's findings fully support its conclusion, and this argument is overruled.

V. Conclusion

For the reasons as stated above, we find no error.

NO ERROR.

Judges CALABRIA and DAVIS concur.

STATE v. POSEY

[233 N.C. App. 723 (2014)]

STATE OF NORTH CAROLINA
v.
JERRY DENARD POSEY, II

No. COA13-1342

Filed 6 May 2014

1. Criminal Law—restraints—defendant wore shackles at trial

The trial court did not abuse its discretion in a second-degree murder, possession of a firearm by a felon, and carrying a concealed gun case by requiring defendant to wear restraints at trial. The shackles were not visible to the jury.

2. Appeal and Error—preservation of issues—failure to make offer of proof

Although defendant argued in a second-degree murder, possession of a firearm by a felon, and carrying a concealed gun case that the trial court abused its discretion by precluding him from cross-examining the medical examiner regarding her preliminary report of death, defendant failed to preserve this issue for appellate review by failing to make an offer of proof.

3. Homicide—second-degree murder—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of second-degree murder. The State's evidence, including the testimony of the officer, was sufficient to convince a rational trier of fact that there was no quarrel or altercation between the victim and defendant prior to the shooting, and that defendant did not act in self-defense.

Appeal by Defendant from judgments entered 30 May 2013 by Judge William Z. Wood in Superior Court, Forsyth County. Heard in the Court of Appeals 7 April 2014.

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

Sharon L. Smith for Defendant.

McGEE, Judge.

Jerry Denard Posey, II ("Defendant") was indicted on 10 December 2012 for first-degree murder of Terrance Murchison ("Mr. Murchison"), possession of a firearm by a felon, and carrying a concealed gun. A jury found Defendant guilty of second-degree murder, possession of a firearm by a felon, and carrying a concealed gun. The facts relevant to the issues on appeal are discussed in the analysis section of this opinion. Defendant appeals.

I. Physical Restraints

[1] Defendant first argues the trial court abused its discretion in requiring Defendant to wear restraints at trial. We disagree.

A. Standard of Review

"We review the trial court's decision of whether to place [d]efendant in physical restraints for abuse of discretion." *State v. Stanley*, 213 N.C. App. 545, 548, 713 S.E.2d 196, 199 (2011). "A review for abuse of discretion requires the reviewing court to determine whether the decision of the trial court is manifestly unsupported by reason, or so arbitrary that it cannot be the result of a reasoned decision." *Id.*

B. Analysis

A defendant may be "physically restrained during his trial when restraint is necessary to maintain order, prevent the defendant's escape, or protect the public." *State v. Wright*, 82 N.C. App. 450, 451, 346 S.E.2d 510, 511 (1986). "What is forbidden—by the due process and fair trial guarantees of the Fourteenth Amendment to the United States Constitution and Art. I, Sec. 19 of the North Carolina Constitution—is physical restraint that improperly deprives a defendant of a fair trial." *Id.* In deciding whether restraints are appropriate, a trial court may consider, among other things, the following circumstances:

> "the seriousness of the present charge against the defendant; defendant's temperament and character; his age and physical attributes; his past record; past escapes or attempted escapes, and evidence of a present plan to escape; threats to harm others or cause a disturbance; self-destructive tendencies; the risk of mob violence or of attempted revenge by others; the possibility of rescue by other offenders still at large; the size and mood of the audience; the nature and physical security of the courtroom; and the adequacy and availability of alternative remedies."

Stanley, 213 N.C. App. at 550, 713 S.E.2d at 200 (quoting *State v. Tolley*, 290 N.C. 349, 368, 226 S.E.2d 353, 368 (1976)). "However, the ultimate

decision must remain with the trial judge, who may not resign his exercise of discretion to that of his advisors." *Tolley*, 290 N.C. at 368, 226 S.E.2d at 368.

The record in the present case shows Defendant objected to having to wear a "stiff knee brace[.]" At Defendant's request, the trial court held a hearing to determine whether Defendant should wear the knee brace during trial. A deputy testified that it was "standard operating procedure to place any inmate" being tried for "a murder offense in some sort of restraint at any time when [the inmate was] out of [the sheriff's] custody." Defendant contends that the trial court's ruling "was nothing more than an accommodation of Sheriff's Department policy[.]"

However, the trial court did not base its decision upon this testimony alone. The trial court considered Defendant's past convictions for common law robbery, misdemeanor possession of stolen goods, misdemeanor larceny, and two counts of assault on a female, along with Defendant's three failures to appear in 2012 and two failures to appear in 2011, which the trial court commented tended to show "some failure to comply with the [c]ourt orders[.]" The trial court also considered Defendant's pending charge for simple assault that arose while Defendant was in custody.

As in *State v. Simpson*, the trial court "was in the better position to observe [] [D]efendant, to know the security available in the courtroom and at the courthouse, to be aware of other relevant facts and circumstances, and to make a reasoned decision, in light of those factors, that restraint was necessary or unnecessary." *State v. Simpson*, 153 N.C. App. 807, 809, 571 S.E.2d 274, 276 (2002). Furthermore, where the "record fails to disclose that a defendant's shackles were visible to the jury, 'the risk is negligible that the restraint undermined the dignity of the trial process or created prejudice in the minds of the jurors,' and the defendant will not be entitled to a new trial[.]" *Id.* at 809-10, 571 S.E.2d at 276 (quoting *State v. Holmes*, 355 N.C. 719, 729, 565 S.E.2d 154, 163 (2002)).

In the present case, counsel for Defendant acknowledged that the restraint was "not visible" and, when the trial court commented that it "couldn't hear any jingling[,]" counsel for Defendant agreed. The trial court observed that the knee brace did not make noise or jingle and that the knee brace could not be seen by jurors or potential jurors. When Defendant later walked back into the courtroom, the trial court observed that Defendant "seems to be moving well." The trial court noticed "no problems, no sign of anything." Counsel for Defendant replied that he did not dispute the trial court's observations, but that the knee brace still

constituted a restraint. Furthermore, the trial court allowed Defendant to walk to the witness stand out of the sight of the jury.

The present case is analogous to *Simpson* and *Holmes*, in which the shackles were not visible to the jury. Holmes, 355 N.C. at 729, 565 S.E.2d at 163; *Simpson*, 153 N.C. App. at 809, 571 S.E.2d at 276. We conclude that the trial court did not abuse its discretion on this basis.

II. Cross-Examination of Medical Examiner

[2] Defendant next argues the trial court abused its discretion by "precluding [Defendant] from cross-examining medical examiner McLemore regarding her preliminary report of death[.]" However, in "order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record." *State v. Jacobs*, 363 N.C. 815, 818, 689 S.E.2d 859, 861 (2010). Our Supreme Court also held that "the essential content or substance of the witness' testimony must be shown before we can ascertain whether prejudicial error occurred." *Id.* "Absent an adequate offer of proof, we can only speculate as to what a witness's testimony might have been." *Id.* at 818, 689 S.E.2d at 861-62.

At trial, the State objected when counsel for Defendant approached the witness with "a document called a preliminary report of death[.]" After the jury exited the courtroom, the State argued that the handwritten note on the report that read "fighting in a club earlier" constituted hearsay. Following a brief *voir dire* examination of the witness, counsel for Defendant argued to the trial court that "it's admissible under the expert rules of testimony." It appears that counsel for Defendant was referring to the preliminary report of death. The trial court stated: "I think under Rule 403 it would be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."

Defendant made no offer of proof as to the questions Defendant's counsel would have asked of the medical examiner. Defendant also made no offer of proof as to what the medical examiner's response to the questions would have been. Defendant "has failed to preserve this issue for appellate review under the standard set forth in" N.C. Gen. Stat. § 8C-1, Rule 103(a)(2) (2013). *State v. Braxton*, 352 N.C. 158, 184, 531 S.E.2d 428, 443 (2000).

III. Sufficiency of the Evidence of Second-Degree Murder

[3] Defendant next argues the trial court erred in denying Defendant's motion to dismiss the charge of second-degree murder. Defendant

contends there was insufficient evidence that Defendant acted with malice and not in self-defense.

A. Standard of Review

We review the trial court's denial of a motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). The "trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." *State v. Bradshaw*, 366 N.C. 90, 93, 728 S.E.2d 345, 347 (2012) (internal quotation marks omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.*

The "trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor." *Id.* at 92, 728 S.E.2d at 347. "All evidence, competent or incompetent, must be considered. Any contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered." *Id.* at 93, 728 S.E.2d at 347 (internal citations and quotation marks omitted).

B. Analysis

Defendant presents two different arguments in this section. First, as to malice, the "intentional use of a deadly weapon proximately causing death gives rise to the presumption that (1) the killing was unlawful, and (2) the killing was done with malice." *State v. Myers*, 299 N.C. 671, 677, 263 S.E.2d 768, 772 (1980). "Evidence raising an issue on the existence of malice and unlawfulness causes the presumption to disappear, leaving only a permissible inference which the jury may accept or reject." *State v. Weeks*, 322 N.C. 152, 173, 367 S.E.2d 895, 907-08 (1988) (internal quotation marks omitted).

If "there is any evidence of heat of passion on sudden provocation, either in the State's evidence or offered by the defendant, the trial court must submit the possible verdict of voluntary manslaughter to the jury." *Id.* at 173, 367 S.E.2d at 908. In the present case, the trial court did submit the charge of voluntary manslaughter to the jury. Defendant has not shown error on this basis.

Second, Defendant argues that the State failed to show that Defendant did not act in self-defense. "A person who kills another is not guilty of murder if the killing was an act of self-defense." *State v. Hamilton*, 77 N.C. App. 506, 513, 335 S.E.2d 506, 511 (1985). To survive a motion to dismiss, the State must present "evidence which, when

taken in the light most favorable to the State, is sufficient to convince a rational trier of fact that [the] defendant did not act in self-defense." *Id.*

Officer Geddings testified that he was monitoring the crowds exiting from a club shortly after 2:00 a.m. when he noticed "a muzzle flash of a gun" and heard a gunshot. He looked in the direction of the gunshot and saw Defendant lower a gun. Officer Geddings was about twenty to twenty-five yards away from Defendant. Officer Geddings saw no fight or altercation before the gunshot. He did not see anyone running or hear any yelling before the gunshot. Officer Geddings allowed Defendant to make calls from his cell phone while in the back seat of the patrol vehicle. Defendant told his mother on the phone that he "shot somebody." When his mother asked why, Defendant answered: "Disrespect." Officer Geddings also did not find any other firearms in the parking lot.

Tommy Murchison, the brother of Mr. Murchison, testified that he and his brother went to the club with their girlfriends. Tommy Murchison exited the club at 2:00 a.m., with his brother behind him, but he was parted from his brother on the way to the vehicle. Tommy Murchison testified that he heard a gunshot and later saw his brother lying on the ground. At that time, Tommy Murchison thought his brother was on the ground because he was simply intoxicated. An officer helped Mr. Murchison into the vehicle. Tommy Murchison testified that they went to get something for his brother to eat. He then noticed that his brother was injured and went directly to a hospital. Tommy Murchison testified that he did not see his brother with a gun that night, nor did he see a weapon in the vehicle.

Tiara Stowe ("Ms. Stowe"), the driver of the vehicle, also testified that no one in her vehicle had a gun. Mr. Murchison's shirt and pants were "fitted tight on him, so you would be able to see" if there was a weapon in his pockets. Ms. Stowe testified that, from her position in the club, she kept an eye on her group. She saw "a little fight break out" near Mr. Murchison around closing time, but Mr. Murchison was not involved in the fight.

Officer Bullard testified that he was about seventy-five feet away from where he thought he heard the gunshot originate. When he approached, he saw an individual staggering and falling to his knees. The individual told Officer Bullard that he had been shot. Officer Bullard testified that he called an ambulance, and that the individual would not speak further to him. Officer Bullard saw no weapon on the individual.

Dedrick Springs ("Mr. Springs") testified for Defendant that he saw "one guy" approach Defendant and say "something like, I'm going to get

you after the club." He further testified that this individual and Defendant were "in each other's faces." When Mr. Springs exited the club at closing time, he saw the same individual "pull his gun out on" Defendant. Mr. Springs testified that the individual pulled the gun from his pocket.

Defendant testified that, as he walked to the bathroom, Mr. Murchison asked him "what the f--- [Defendant] was looking at." Defendant further testified that Mr. Murchison approached him aggressively, and Tommy Murchison pulled Mr. Murchison away. When Defendant exited the club at closing time, Mr. Murchison walked up to Defendant, "looked [Defendant] in the eyes, g[a]ve [him] a[n] evil look and said he was going to f---ing kill [Defendant]." Defendant testified that he kept walking, trying to avoid Mr. Murchison, but Mr. Murchison came toward him again and pulled a weapon. Defendant testified that he shot at the ground to scare Mr. Murchison, but when he shot, "the gun lifted up, like recoiled like that[.]"

Although Defendant contends on appeal that "[a]ll of the evidence in the record supported a finding that the shooting occurred during a sudden quarrel between" Mr. Murchison and Defendant, the transcript belies this assertion. Officer Geddings testified that he was outside the club to provide security, and he testified that he saw no fight or altercation before the gunshot.

As previously stated, the "trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor." *Bradshaw*, 366 N.C. at 92, 728 S.E.2d at 347. "Any contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered." *Id.* at 93, 728 S.E.2d at 347 (internal citations and quotation marks omitted).

The State's evidence in the present case, particularly the testimony of Officer Geddings, is sufficient to convince a rational trier of fact that there was no quarrel or altercation between Mr. Murchison and Defendant prior to the shooting, and that Defendant did not act in self-defense. The discrepancy between the testimony of Officer Geddings and the testimony of Defendant presented a conflict in the evidence, which was for the jury to resolve. *Hamilton*, 77 N.C. App. at 514, 335 S.E.2d at 511. The trial court did not err in denying Defendant's motion to dismiss and in submitting the charge of second-degree murder, along with the charge of voluntary manslaughter, to the jury.

No error.

Chief Judge MARTIN and Judge CALABRIA concur.

STATE OF NORTH CAROLINA
v.
CHAUNCEY LAJARVIS STERLING, DEFENDANT

No. COA13-1191

Filed 6 May 2014

1. Evidence—photographs—no plain error

The trial court did not commit plain error in a first-degree murder and attempted robbery with a dangerous weapon case by allowing the State to introduce and publish photos of defendant and his friends when they were juveniles posing for Facebook photos. None of the photos had a probable impact on the jury's finding that the defendant was guilty.

2. Homicide—first-degree murder—denial of requested second-degree murder instruction

The trial court did not err in a first-degree murder case by denying defendant's request for a second-degree murder instruction. Defendant's testimony alone established the elements of attempted robbery, and his further testimony that he then shot the victim twice, whether he had changed his mind about committing the robbery or not, established the elements of first-degree murder.

3. Sentencing—life imprisonment without parole—defendant's developmental age

The trial court did not err in a first-degree murder case by failing to consider defendant's developmental age before imposing a life sentence without parole. Defendant's age fell past the bright line drawn by *Miller*, which applied only to those who committed crimes prior to the age of 18.

Appeal by defendant from judgments entered 13 June 2013 by Judge Lisa C. Bell in Superior Court, Mecklenburg County. Heard in the Court of Appeals 20 February 2014.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Daniel P. O'Brien, for the State.

Marilyn G. Ozer, for defendant-appellant.

STROUD, Judge.

Defendant appeals his convictions of first degree murder and attempted robbery with a dangerous weapon. For the following reasons, we find no error.

I. Background

Defendant was indicted for murder and attempted robbery with a dangerous weapon. During defendant's trial he testified that on 22 April 2011, he "got the feeling" that he "need[ed] money." Defendant had spent the night in his sister's apartment and after she had left for work he went into her room and got her gun. Defendant left the apartment and saw Mr. Robert Barber leave a coffee shop. Defendant followed Mr. Barber thinking he could "try to take some money from him." Defendant then pulled out his gun. According to defendant, Mr. Barber attempted to take the gun away from him. Defendant then shot Mr. Barber twice. Mr. Barber died from a gunshot wound to the chest. The jury found defendant guilty of first degree murder based upon the felony murder rule and attempted robbery with a firearm. The trial court entered judgment sentencing defendant to life imprisonment without parole for the conviction of first degree murder and arrested judgment on the conviction for attempted robbery with a dangerous weapon. Defendant appeals.

II. Photographs

[1] Defendant turned 18 years old on 22 March 2011, a month before the crimes committed in this case. During defendant's trial, the State admitted photos of defendant and/or his friends which defendant claims portray him as a juvenile "pretending to be [a] rapper[.]" Defendant argues the photos were irrelevant and used only to create an impression in the jury that defendant was a gang member. Defendant did not object to the photos at trial but now argues that "the trial court committed plain error by allowing the State to introduce and publish photos of the defendant and his friends when they were juveniles posing for Facebook photos." (Original in all caps.)

> 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). We have reviewed the photos portraying defendant and others making various hand gestures that the State questioned defendant about regarding gang activity. Although we are uncertain of the relevance of these photos, in light of defendant's own testimony that he pulled a gun on Mr. Barber because he wanted to "try to take some money from him" and then shot Mr. Barber twice, we do not believe any of the photos we have viewed of defendant or his friends "had a probable impact on the jury's finding that the defendant was guilty." *Id.*; *see generally State v. Davis*, 340 N.C. 1, 12, 455 S.E.2d 627, 632 (noting that "[t]he two elements of attempted robbery with a dangerous weapon are: (1) an intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation but falls short of the completed offense"), *cert. denied*, 516 U.S. 846, 133 L.Ed. 2d 83 (1995); *State v. Gibbs*, 335 N.C. 1, 51, 436 S.E.2d 321, 350 (1993) (noting that "felony murder is committed when a victim is killed during the perpetration or attempted perpetration of certain enumerated felonies or a felony committed or attempted with the use of a deadly weapon"), *cert. denied*, 512 U.S. 1246, 129 L.Ed. 2d 881 (1994). This argument is overruled.

III. Second Degree Murder Instruction

[2] Defendant requested the trial court to instruct the jury on second degree murder, which the trial court denied. Defendant contends that "the trial court erred by denying [his] request to instruct on second degree murder including lesser offenses." (Original in all caps.)

> An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater. The trial court should refrain from indiscriminately or automatically instructing on lesser included offenses. Such restraint ensures that the jury's discretion is channelled so that it may convict a defendant of only those crimes fairly supported by the evidence.
>
> The standard for determining whether the trial court must instruct on second-degree murder as a lesser included offense of first-degree murder is as follows:
>
> > If the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree . . .

> and there is no evidence to negate these elements other than defendant's denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of a conviction of second degree murder.
>
> Stated differently, the trial court must determine whether the State's evidence is positive as to each element of first-degree murder and whether there is any conflicting evidence relating to any of these elements.

State v. Taylor, 362 N.C. 514, 530-31, 669 S.E.2d 239, 256 (2008) (citations, quotation marks, ellipses, and brackets omitted), *cert. denied*, 558 U.S. 851, 175 L.Ed. 2d 84 (2009).

"First-degree murder by reason of felony murder is committed when a victim is killed during the perpetration or attempted perpetration of certain enumerated felonies or a felony committed or attempted with the use of a deadly weapon." *Gibbs*, 335 N.C at 51, 436 S.E.2d at 350. Defendant's underlying felony to the murder was attempted robbery with a dangerous weapon.

> The two elements of attempted robbery with a dangerous weapon are: (1) an intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation but falls short of the completed offense. Thus, an attempted robbery with a dangerous weapon occurs when a person, with the specific intent to unlawfully deprive another of personal property by endangering or threatening his life with a dangerous weapon, does some overt act calculated to bring about this result.

Davis, 340 N.C. at 12, 455 S.E.2d at 632 (citations, quotation marks, and brackets omitted).

Defendant contends that his testimony established that he changed his mind about committing the robbery and thus there was evidence contradicting the underlying felony of his murder conviction. But defendant admitted that he had an intent to commit robbery when he confessed his goal was to "try to take some money from [Mr. Barber]." Defendant also admitted to an overt act when he stated that he pulled out the gun in furtherance of his intent to rob Mr. Barber. Thus, defendant's testimony alone establishes the elements of attempted robbery, *see id.*, and his further testimony that he then shot Mr. Barber twice, whether he had

changed his mind about committing the robbery or not, establishes the elements of first degree murder. *See Gibbs*, 335 N.C. at 51, 436 S.E.2d at 350. The State's evidence satisfied the requirements for an instruction on first degree murder, according to *Taylor*:

> If the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree . . . and there is no evidence to negate these elements other than defendant's denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of a conviction of second degree murder.

Taylor, 362 N.C. at 530-31, 669 S.E.2d at 256. As such, the trial court did not err in not instructing the jury on the charge of second degree murder, and this argument is overruled.

IV. Sentencing

[3] Lastly, defendant contends that the trial court committed error because of the trial court's "failure to consider the defendant's developmental age before imposition of a sentence of life without parole violates a defendant's constitutional right to freedom from cruel and unusual punishment." (Original in all caps.) Defendant bases his argument on the United States Supreme Court case of *Miller v. Alabama*, 567 U.S. ___, 183 L.Ed.2d 407 (2012), which determines that a sentencing court must take into consideration a juvenile defendant's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences" before imposing a sentence of life imprisonment without the possibility of parole. *Id.*, 567 U.S. at ___, 183 L.Ed. 2d at 423. But the holding in *Miller* has no application to a person who has attained the age of 18 when the crime is committed: "We therefore hold that mandatory life without parole for those *under the age of 18 at the time of their crimes* violates the Eighth Amendment's prohibition on cruel and unusual punishments." *Id.* at ___, 183 L.Ed. 2d at 414-15 (emphasis added) (quotation marks omitted). Defendant's argument is based on common sense but not on the law, since it is true that there was likely not a substantial difference between defendant's level of maturity and understanding on the day before his 18th birthday as compared to one month later, when he committed these crimes.

Yet the law must draw bright-line distinctions based on age in many areas. We find it instructive that the same age-based bright line applies to capital punishment. *See State v. Garcell*, 363 N.C. 10, 678 S.E.2d 618, *cert. denied*, 558 U.S. 999, 175 L.Ed. 2d 362 (2009). Where a defendant

who was just five months beyond his 18th birthday when he committed murder argued that he should not be subject to capital punishment based on *Roper v. Simmons*, our Supreme Court rejected this argument and noted that

> [d]efendant's reliance on *Roper v. Simmons* is misplaced. The Supreme Court of the United States held in *Roper* that the Eighth and Fourteenth Amendments to the United States Constitution forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed. The Court created a bright line, categorical rule. Furthermore, the Court was very clear that the issue before it concerned a defendant's age at the time he committed a capital crime, not when his case was tried and he was sentenced.

Id. at 53, 678 S.E.2d at 645. Defendant's age falls past the bright line drawn by *Miller*, which applies only to those who commit crimes prior to the age of 18. *Miller* at ___, 183 L.Ed. 2d at 414-15. Accordingly, this argument is overruled.

V. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Judges CALABRIA and DAVIS concur.

THOMAS v. THOMAS

[233 N.C. App. 736 (2014)]

JOEL W. THOMAS, PLAINTIFF
v.
HERLENE THOMAS, DEFENDANT

No. COA13-655

Filed 6 May 2014

1. Child Custody and Support—custody modification—substantial change in circumstances

The trial court did not err in a child custody modification case by concluding that there had been a substantial change in circumstances affecting the parties' minor child, thereby warranting a modification of the 2006 and 2007 California custody orders. Although the trial court's finding of fact regarding the parties' stipulation to a substantial change in circumstances was invalid and ineffective, the trial court's findings were adequate to support its conclusion of law.

2. Child Custody and Support—custody modification—best interests of child

The trial court did not err in a child custody modification case by making conclusion of law number 6. It was based on findings that illustrated that it would be in the best interest of the minor child for the parties to successfully co-parent and that plaintiff was the party most likely to facilitate a relationship between the minor child and the other parent based on defendant's past interference with the minor child and plaintiff's relationship.

3. Child Custody and Support—custody modification—parenting coordinator

The trial court did not err in a child custody modification case by failing to appoint a parenting coordinator. N.C.G.S. § 50-91 governs what findings must be made only if the trial court, in its discretion, appoints a parenting coordinator. There was no authority imposing an affirmative duty on the trial court to require parties to produce evidence of their ability to pay for a parenting coordinator if one was not appointed.

Appeal by defendant from order entered 17 December 2012 by Judge Debra S. Sasser in Wake County District Court. Heard in the Court of Appeals 6 January 2014.

Gailor, Hunt, Jenkins, Davis, & Taylor, P.L.L.C., by Cathy C. Hunt and Jonathan S. Melton, for plaintiff-appellee.

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

McCULLOUGH, Judge.

Defendant Herlene Thomas seeks review of a child custody order, granting plaintiff Joel W. Thomas and defendant joint legal custody, granting plaintiff primary physical custody, and granting defendant secondary physical custody of their minor child. For the reasons stated herein, we affirm the order of the trial court.

I. Background

Plaintiff Joel W. Thomas and defendant Herlene Thomas were married on 31 August 2001 and divorced on 31 July 2007. One child was born of their marriage in 2004 (hereinafter "minor child").

The parties' first custody order was entered in California on 27 April 2006 ("the 2006 Order") and a second, supplementary order was entered in California on 18 July 2007 ("the 2007 Order"). Both orders were registered in North Carolina on 21 October 2010 and 19 May 2011, respectively.

On 14 July 2011, plaintiff filed a "Motion to Modify Custody Order, Motion for Psychological Evaluation and Motion for Custody Evaluation Pursuant to N.C. Gen. Stat. § 50-13.1 et seq.; Rule 35." Plaintiff alleged that since the entry of the 2006 Order, defendant had "refused to facilitate the minor child's visitation with Plaintiff," resulting in a substantial change in circumstances affecting the best interest and welfare of the minor child. Furthermore, plaintiff alleged that "[d]efendant has shown an unwillingness to take reasonable measures to foster a feeling of affection between the minor child and Plaintiff and not to estrange the child from Plaintiff or impair the [minor] child's regard for Plaintiff."

On 10 October 2011, the trial court entered an "Order For Custody Evaluation And Clarification of Existing Child Custody Order." The trial court found that "[g]iven the currently [SIC] level of acrimony between the parties, the Court finds that a good cause exists for ordering a custody evaluation."

On 14 November 2011, defendant filed a "Motion to Modify Custody; Motion for Contempt; Motion in the Cause for Attorney's Fees; Motion to Appoint Parenting Coordinator." Defendant argued that since the 2006 Order, a substantial change in circumstances affecting the welfare of the minor child had occurred and that modification of custody served

the minor child's best interest. Defendant alleged, *inter alia*, that plaintiff fails to communicate with defendant in a collaborative way that promotes the best interest of the minor child, plaintiff makes false or empty promises to the minor child, plaintiff and his current wife demean and disparage defendant in the presence of the minor child, and that the terms of the 2006 Order and the 2007 Order were "vague, ambiguous, confusing, and did not serve the minor child's best interest[.]"

Following a hearing held from 11 until 17 October 2012 on each party's motion to modify custody and several other motions filed by both parties, the trial court entered a custody order on 17 December 2012. The custody order included 226 findings of fact. The trial court concluded that there had been a substantial change in circumstances affecting the minor child, warranting a modification of the 2006 and 2007 Orders. The trial court further concluded that it would be in the best interest of the minor child and would best promote the interest and general welfare of the minor child if the parties had joint legal custody, with plaintiff "having final decision making authority if the parties are unable to timely agree as to a decision, and with [p]laintiff exercising primary physical custody of the minor child, and with [d]efendant exercising secondary physical custody[.]"

Defendant appeals.

II. Standard of Review

> In a child custody case, the trial court's findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Unchallenged findings of fact are binding on appeal. The trial court's conclusions of law must be supported by adequate findings of fact.

Peters v. Pennington, 210 N.C. App. 1, 12-13, 707 S.E.2d 724, 733 (2011) (citations omitted).

"The trial court is vested with broad discretion in child custody cases, and thus, the trial court's order should not be set aside absent an abuse of discretion." *Dixon v. Gordon*, __ N.C. App. __, __, 734 S.E.2d 299, 304 (2012) (citation omitted).

III. Discussion

Defendant presents the following issues on appeal: whether the trial court (A) failed to make sufficient findings of fact to support its

conclusion of law that a substantial change in circumstances had occurred; (B) erred in concluding that it was in the best interest of the minor child to modify custody; and (C) erred in denying the motion to appoint a parenting coordinator.

A. Substantial Change in Circumstances

[1] Defendant argues that the trial court erred by failing to make sufficient findings of fact to support its conclusion of law that there had been substantial change in circumstances affecting the minor child, thereby warranting a modification of the 2006 and 2007 California custody orders. Specifically, defendant contends that (i) the parties' stipulation to a substantial change in circumstances was invalid and ineffective, and (ii) the trial court failed to make specific findings about what circumstances had changed and what effect, if any, such changed circumstances had on the minor child. We address each argument in turn.

i. Stipulation as to "Substantial Change in Circumstances"

Defendant argues that the trial court erred by making the following finding of fact: "[t]he parties stipulate that there has been a substantial change of circumstances since entry of the California Orders for custody on April 27, 2006 and July 18, 2007."

At the beginning of the hearing, the following exchange occurred:

> THE COURT: All right. Thank you. Um, before we get started, since each party has a Motion to Modified [sic] Custody on the calendar, are you interested in just having a stipulation that there has been a substantial change in circumstances that would warrant a modification, such that I can focus my energies on best interests as opposed to, um, keeping tabs on whether there's evidence of a substantial change?
>
> [Plaintiff:] We would stipulate to that, Your Honor.
>
> [Defendant:] Uh, yes, Your Honor, I think it's clear.
>
> THE COURT: All right. All right. And I'm certain we'll identify what those changes are.

It is well established that a "determination of whether changed circumstances exist is a conclusion of law." *Head v. Mosier*, 197 N.C. App. 328, 334, 677 S.E.2d 191, 196 (2009) (citing *Brooker v. Brooker*, 133 N.C. App. 285, 289, 515 S.E.2d 234, 237 (1999)). Our Court has held that "[s]tipulations as to questions of law are generally held invalid and

ineffective, and not binding upon the courts, either trial or appellate." *In re A.K.D.*, __ N.C. App. __, __, 745 S.E.2d 7, 9 (2013) (citation omitted).

Based on the foregoing, we agree with defendant's contention that the parties' stipulation as to a substantial change in circumstances was invalid and ineffective.

ii. Findings to Support a Substantial Change in Circumstances

Next, defendant argues that the trial court failed to make sufficient findings of fact to support its conclusion that "[t]here has been a substantial change in circumstances affecting the minor child which warrants a modification of the 2006 and 2007 California Custody Orders." We are not persuaded by defendant's arguments.

"It is well established in this jurisdiction that a trial court may order a modification of an existing child custody order between two natural parents if the party moving for modification shows that a 'substantial change of circumstances affecting the welfare of the child' warrants a change in custody." *Shipman v. Shipman*, 357 N.C. 471, 473, 586 S.E.2d 250, 253 (2003) (citations omitted). The modification of a custody decree must be supported by findings of fact reflecting the fulfillment of this burden. *See Tucker v. Tucker*, 288 N.C. 81, 87, 216 S.E.2d 1, 5 (1975). "[T]he evidence must demonstrate a connection between the substantial change in circumstances and the welfare of the child, and flowing from that prerequisite is the requirement that the trial court make findings of fact regarding that connection." *Shipman*, 357 N.C. at 478, 586 S.E.2d at 255 (citation omitted).

> In determining whether a substantial change in circumstances has occurred[, c]ourts must consider and weigh all evidence of changed circumstances which effect or will affect the best interests of the child, both changed circumstances which will have salutary effects upon a child and those which will have adverse effects upon the child.

Hibshman v. Hibshman, 212 N.C. App. 113, 121, 710 S.E.2d 438, 443 (2011) (citations and quotation marks omitted).

In the present case, the primary disputed issues regarding the minor child's welfare were plaintiff's allegation that defendant was refusing to facilitate the minor child's visitation with plaintiff, plaintiff's allegation that defendant was unwilling to take reasonable measures to foster a feeling of affection between the minor child and plaintiff, defendant's allegation that plaintiff failed to communicate with defendant in a collaborative way, defendant's allegations that plaintiff makes empty promises

to the minor child and makes disparaging comments about defendant in the presence of the minor child, and defendant's allegation that the terms of the 2006 Order and the 2007 Order were confusing and ambiguous. Upon a review of the 226 unchallenged findings of fact made by the trial court, which are binding on appeal, we find that the trial court sufficiently resolved the issues at hand and demonstrated the existence of a substantial change in circumstances and its effect on the minor child, with those findings including the following:

> 78. For the most part, from 2006 until 2010, Defendant consulted with Plaintiff and kept Plaintiff informed about education and healthcare issues. Plaintiff did not question Defendant's decisions as to these issues, and he deferred to her about decisions in these areas.
>
> 79. However, after Plaintiff married Katrina [in November 2009], Defendant's ability to emotionally divorce herself from Plaintiff became a barrier in Plaintiff's attempts to communicate with [the minor child]. For the first few months following Plaintiff's marriage to Katrina, Plaintiff could not get in touch with [the minor child].
>
> 80. While the parties' relationship had been dysfunctional for years, Defendant's refusal to follow through on the Christmas 2009 visit with Plaintiff and Plaintiff's marriage to Katrina marked the beginning of a pattern of disruption in Plaintiff and the minor child's relationship.
>
> . . . .
>
> 105. Following Social Services involvement with the family [in 2011], Defendant engaged in a pattern of vindictive behavior with Plaintiff.
>
> 106. On February 4, 2011, Defendant was willfully hours late in having [the minor child] available for pick-up, and her communication with Plaintiff about this was spiteful and vindictive. Due to Defendant's purposeful tardiness to the custody exchange, Plaintiff was unable to exercise visitation with the minor child.
>
> 107. On March 18, 2011, Plaintiff let Defendant know that he would be about 20 minutes late for a pick-up, but Defendant did not have [the minor child] there for a

late pickup. Although Defendant told Plaintiff that she took [the minor child] to church, this was not true. Again, due to Defendant's behavior Plaintiff was unable to exercise visitation with the minor child.

. . . .

110. Defendant has called Katrina a "b**ch" in front of [the minor child] . . . . Defendant lets her negative feelings toward Katrina interfere with [the minor child's] relationship with Plaintiff and Katrina. . . .

. . . .

112. Defendant has created the situation for a hostile relationship between [the minor child] and Katrina.

. . . .

121. By the terms of the 2011 [Order for Custody Evaluation and Clarification of Existing Child Custody Order], the Court sought to reduce conflict between the parties, especially conflict in front of the minor child.

. . . .

126. Despite the "clarifying" North Carolina custody order, Defendant continued to interfere with Plaintiff's custodial time with [the minor child] throughout 2012.

. . . .

137. Defendant has put a premium on the minor child's activities to the detriment of Plaintiff's relationship with the minor child. Defendant has used things such as a "pumpkin picking" trip at school as an excuse to limit Plaintiff's visitation with [the minor child]. She has conditioned visits, requiring Plaintiff to agree to take [the minor child] to work with him during a visit instead of [the minor child] being allowed to stay at Plaintiff's home with Katrina. . . .

. . . .

150. Defendant's interference with [the minor child's] contact with Plaintiff is having a detrimental impact on [the minor child] evidenced by the difficulties at custodial exchanges.

. . . .

155. Defendant either intentionally ignores the plain language of a Court Order or she is not capable of understanding plain language in a Court Order.

. . . .

196. [The minor child] can be very manipulative. He has likely developed this personality trait as a response to the intense negative emotions that his mother feels toward his father and that his father feels toward his mother. He does not feel that he can express love for a parent except directly to that parent.

. . . .

199. Defendant has, either intentionally or inadvertently, engaged in conduct that is alienating [the minor child] from Plaintiff. . . .

. . . .

215. Defendant's feelings of hurt and anger toward Plaintiff interfere with her ability to effectively co-parent with Plaintiff. The level of acrimony between the parties has interfered in their ability to co-parent [the minor child].

These numerous findings illustrate the fact that since the entry of the 2006 Order and the 2007 Order, plaintiff's marriage to Katrina in 2009 has marked the beginning of a "pattern of disruptive behavior" by defendant involving the relationship between plaintiff and the minor child, significantly interfering with the parties' ability to co-parent, and detrimentally affecting the welfare of the minor child.

Accordingly, we hold that although the trial court's finding of fact regarding the parties' stipulation to a substantial change in circumstances was invalid and ineffective, the trial court's findings of fact were adequate to support its conclusion of law that a substantial change in circumstances affecting the minor child warranted a modification of the 2006 Order and the 2007 Order.

B. Best Interest of the Minor Child

[2] Next, defendant challenges the trial court's conclusion of law number 6:

> 6. It is in the best interest of the minor child, and would best promote the interest and general welfare of the minor child, that the parties have joint legal custody, with Plaintiff having final decision making authority if the parties are unable to timely agree as to a decision, and with Plaintiff exercising primary physical custody of the minor child, and with Defendant exercising secondary physical custody with the minor child as set out hereinafter with more specificity.

Specifically, defendant argues that the foregoing conclusion of law is not supported by the findings of fact. We disagree.

Once the trial court concludes that there has been a substantial change in circumstances affecting the minor child "it may modify the order if the alteration is in the best interests of the child." *Peters*, 210 N.C. App. at 13, 707 S.E.2d at 734.

> [A] custody order is fatally defective where it fails to make detailed findings of fact from which an appellate court can determine that the order is in the best interest of the child, and custody orders are routinely vacated where the "findings of fact" consist of mere conclusory statements that the party being awarded custody is a fit and proper person to have custody and that it will be in the best interest of the child to award custody to that person. A custody order will also be vacated where the findings of fact are too meager to support the award.

Carpenter v. Carpenter, __ N.C. App. __, __, 737 S.E.2d 783, 787 (2013) (citing *Dixon v. Dixon*, 67 N.C. App. 73, 76-77, 312 S.E.2d 669, 672 (1984) (citations omitted)). Findings of fact "may concern physical, mental, or financial fitness or any other factors brought out by the evidence and relevant to the issue of the welfare of the child." *Steele v. Steele*, 36 N.C. App. 601, 604, 244 S.E.2d 466, 468 (1978).

After thoroughly reviewing the trial court's 17 December 2012 Custody Order, we observe that the following pertinent findings of fact allow our Court to determine whether a change in custody is in the best interest of the minor child, and adequately support the trial court's conclusion of law number 6:

> 111. It would be in [the minor child's] best interest for Plaintiff, Defendant, and Katrina to positively co-parent [the minor child]

. . . .

150. Defendant's interference with [the minor child's] contact with Plaintiff is having a detrimental impact on [the minor child] as evidenced by the difficulties at custodial exchanges.

. . . .

154. Defendant is in need of therapy to address deep seated, long-term unresolved issues arising from her relationship with Plaintiff and her failure to emotionally divorce herself from this relationship, and it is in [the minor child's] best interest for Defendant to engage in such therapy.

. . . .

181. It would not be in [the minor child's] best interest for either parent to exit [the minor child's] life. However, neither is maintaining the status quo in [minor child's] best interest.

182. If [the minor child] were to live primarily with Plaintiff, [the minor child] would be moving to Suffolk, Virginia, where Plaintiff has lived since 2010. Plaintiff is established in this community and has an appropriate home for [the minor child]. [The minor child] is comfortable in this home. . . .

. . . .

184. If [the minor child] were to live primarily with Plaintiff, Katrina would assist with [the minor child's] care if Plaintiff was away for his military duties. Plaintiff's parents are also in close proximity to Plaintiff.

. . . .

188. Plaintiff would likely facilitate an ongoing relationship between [the minor child] and Defendant, but the extent of Plaintiff's efforts would depend on whether Defendant was engaged in therapy.

. . . .

204. Plaintiff is the parent most likely to encourage and support a relationship between [minor child] and the other parent.

. . . .

> 207. If [the minor child] is left in Defendant's primary care, it is unlikely that the dynamics between Plaintiff and Defendant, between Defendant and Katrina, or between Plaintiff and [the minor child] will change, and it is possible that Plaintiff, in an effort to shield [the minor child] from the conflict, will sever his ties to [the minor child], which would likely be devastating to [the minor child's] emotional development. . . .

. . . .

> 216. Given the parties' dysfunctional relationship history and the current level of conflict between the parties, unless one parent is given final decision making authority on important issues, joint legal custody is not in [the minor child's] best interest in light of the risk of delay in making timely decisions[.]

Thus, we hold that the trial court's conclusion number 6 is based on findings that clearly illustrate that it would be in the best interest of the minor child for the parties to successfully co-parent and that plaintiff is the party most likely to facilitate a relationship between the minor child and the other parent based on defendant's past interference with the minor child and plaintiff's relationship. Accordingly, we uphold the conclusion of the trial court.

C. Motion to Appoint a Parenting Coordinator

[3] In her last argument, defendant argues that the trial court erred by failing to appoint a parenting coordinator. Defendant's argument is based on the assumption that the trial court "had the responsibility to require the parties to produce evidence of their ability to pay a parenting coordinator if that would be in the best interests of the child." We disagree.

On 14 November 2011, defendant filed a motion to appoint a parenting coordinator arguing that the current custody action constituted a "high conflict" case pursuant to N.C. Gen. Stat. § 50-90(1), which defines a high-conflict case as:

> [a] child custody action involving minor children brought under Article 1 of this Chapter where the parties demonstrate an ongoing pattern of any of the following:

a. Excessive litigation.

b. Anger and distrust.

c. Verbal abuse.

d. Physical aggression or threats of physical aggression.

e. Difficulty communicating about and cooperating in the care of the minor children.

f. Conditions that in the discretion of the court warrant the appointment of a parenting coordinator.

N.C. Gen. Stat. § 50-90(1) (2013). Pursuant to section 50-91 of the North Carolina General Statutes, a parenting coordinator may be appointed only if

> the [trial] court . . . makes specific findings [1] that the action is a high-conflict case, [2] that the appointment of the parenting coordinator is in the best interests of any minor child in the case, and [3] that the parties are able to pay for the cost of the parenting coordinator.

N.C. Gen. Stat. § 50-91(b) (2013).

On 17 December 2012, the trial court denied defendant's motion, finding the following: "[t]his is a high conflict custody action. However, there was insufficient evidence concerning the parties' present ability to pay a parenting coordinator."

Our review reveals that N.C. Gen. Stat. § 50-91 governs what findings must be made *only* if the trial court, in its discretion, *appoints* a parenting coordinator. In the case before us, the trial court did not appoint a parenting coordinator and defendant does not cite to any authority, nor can we find any, imposing an affirmative duty on the trial court to require parties to produce evidence of their ability to pay for a parenting coordinator if one is not appointed.

Furthermore, unchallenged findings suggest that the parties more than likely lacked the ability to pay for a coordinator. Particularly, the trial court found that plaintiff had not been able to pay his attorneys' fees on his own and owed in excess of $70,000.00 toward his attorneys' fees. Defendant, unable to afford paying her legal fees, received funds from a church in excess of $90,000.00.

IV. Conclusion

Because we hold that the trial court made sufficient findings of fact to support its conclusions of law that a substantial change in circumstances had occurred, that modification of custody was in the best interest of the minor child, and that the trial court did not err by denying defendant's motion to appoint a parenting coordinator, we affirm the 17 December 2012 Custody Order of the trial court.

Affirmed.

Chief Judge MARTIN and Judge ERVIN concur.

SANTOS TINAJERO, EMPLOYEE, PLAINTIFF
v.
BALFOUR BEATTY INFRASTRUCTURE, INC., EMPLOYER, ZURICH AMERICAN INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA13-9

Filed 6 May 2014

1. Appeal and Error—workers' compensation—intermediate opinion and award—appeal timely

Defendants' appeal from an opinion and award in a workers' compensation case was timely under N.C.G.S. § 1-278 where defendant timely objected to the order; the order was interlocutory and not immediately appealable; and the order involved the merits and necessarily affected the final judgment.

2. Workers' Compensation—rental cost—handicapped accessible housing—required

The Full Industrial Commission did not err in a workers' compensation case by requiring defendants to pay the rental cost of reasonable handicapped accessible housing for plaintiff. The Commission acted within its authority as set out in *Derebery v. Pitt Cnty. Fire Marshall*, 76 N.C. App. 67, *Timmons v. N.C. Dep't of Transp.*, 123 N.C. App. 456, and *Espinosa v. Tradesource, Inc.*, 752 S.E.2d 153, in determining that because defendants had previously been willing to pay the full cost for plaintiff's housing in a skilled nursing facility, which was not in plaintiff's medical best interests, they were

obligated to pay the rental cost of reasonable handicapped accessible housing, which was in plaintiff's medical best interests.

3. Workers' Compensation—introduction of new evidence—opportunity to rebut evidence—deposition

The Full Industrial Commission erred in a workers' compensation case by refusing to allow plaintiff to depose the individual who submitted a life care plan to the court at defendants' expense and upon which the Commission based its ruling. Where the Commission allows a party to introduce new evidence which becomes the basis for its opinion and award, it must allow the other party the opportunity to rebut or discredit that evidence. The Commission did not err by denying plaintiff's request to take a deposition of an individual for the sole purpose of asking the Commission to reconsider a prior ruling. However, the decision was without prejudice to plaintiff filing a new motion to take the deposition following remand of the case.

4. Workers' Compensation—adaptive transportation—defendants not required to purchase vehicle

The Full Industrial Commission did not err in a workers' compensation case by refusing to order defendants to provide plaintiff with the use of an adaptive van. The Commission's finding that plaintiff's access to transportation was satisfactory at the time was supported by competent evidence and under *Derebery v. Pitt Cnty. Fire Marshall*, 76 N.C. App. 67, the Commission was not required to mandate that defendants purchase a vehicle for plaintiff.

5. Workers' Compensation—attorneys' fees—costs

The Full Commission erred in a workers' compensation case by determining that plaintiff was not entitled to attorneys' fees under N.C.G.S. § 97-88.1. On remand, following the taking of a certain deposition, the Commission must revisit whether such an award is appropriate and, if so, what the amount of any award should be. Furthermore, following that deposition, the Commission must revisit whether a previous life care plan report constituted a valid rehabilitative service and whether defendants should pay for the cost of the preparation of that report. Finally, plaintiff's argument that defendants should be assessed attorneys' fees for pursuing the prior interlocutory appeal was without merit where the Court of Appeals had already implicitly denied that request.

Judge DILLON concurring in part and dissenting in part.

Appeal by plaintiff and defendants from opinions and awards entered by the North Carolina Industrial Commission on 13 September 2010 and 16 October 2012. Heard in the Court of Appeals 9 May 2013.

R. James Lore, Attorney at Law, by R. James Lore, for plaintiff.

Stiles, Byrum & Horne, L.L.P., by Henry C. Byrum, Jr., for defendants.

GEER, Judge.

Plaintiff Santos Tinajero and defendants Balfour Beatty Infrastructure, Inc. and Zurich American Insurance Company each appeal from opinions and awards entered by the North Carolina Industrial Commission arising out of Mr. Tinajero's admittedly compensable injury by accident that resulted in Mr. Tinajero's being a quadriplegic. The primary issue on appeal is whether the Commission properly required defendants to pay the rental cost of reasonable handicapped accessible housing for Mr. Tinajero.

Applying *Derebery v. Pitt Cnty. Fire Marshall*, 318 N.C. 192, 347 S.E.2d 814 (1986), and *Espinosa v. Tradesource, Inc.*, 231 N.C. App. 174, 752 S.E.2d 153 (2013) *disc. review denied*, ___ N.C. ___, 763 S.E.2d 391 (2014), we hold that the Commission did not abuse its discretion in making this award given that (1) Mr. Tinajero had no dwelling of his own that could be renovated to provide handicapped accessible housing, (2) defendants had continuously paid the full cost of housing for Mr. Tinajero since his injury by accident so long as he resided in a skilled nursing home or long-term care facility, and (3) the Commission found that living in such facilities was not in Mr. Tinajero's medical best interest. The Commission was free to conclude that defendants should not be allowed to condition their payment of Mr. Tinajero's housing costs on his agreeing to live in a facility that the Commission had found, based on competent evidence, was harmful to him physically and mentally and not in his medical best interests.

Facts

On 11 August 2008, Mr. Tinajero, an undocumented worker from Mexico, was employed by Balfour Beatty Infrastructure, Inc. While Mr. Tinajero was working on a barge, a crane cable broke and knocked him into the water. Immediately following the accident, Mr. Tinajero was

transported to Pitt County Memorial Hospital where he was treated surgically for his injuries. Mr. Tinajero, who was 26 years old at the time of the hearing before the deputy commissioner, had suffered a C4-5 fracture dislocation, leaving him an ASIA A-B quadriplegic.

On 15 August 2008, Mr. Tinajero was transferred to Shepherd Center in Atlanta, Georgia for continuing treatment and rehabilitation. The Shepherd Center provides rehabilitative services for patients with significant neurologic injuries and illnesses, predominately spinal cord and brain injuries. Mr. Tinajero's condition required attendant care 24 hours per day, seven days per week.

Mr. Tinajero remained at the Shepherd Center until 5 December 2008. Mr. Tinajero's nurse case manager was unable to locate an appropriate apartment, but recommended against Mr. Tinajero's being placed in a nursing home upon his discharge from Shepherd Center because, in her experience, such a setting reinforces a "sick" mentality and leads to depression. A subsequent nurse case manager ultimately found one assisted living facility willing to accept someone his age, Briarcliff Haven. Mr. Tinajero was then placed in the sub acute rehabilitation unit at Briarcliff Haven beginning on 5 December 2008.

On 27 February 2009, Mr. Tinajero filed an "Emergency Motion for Medical Treatment" with the Commission. In the motion, Mr. Tinajero asserted that his placement at Briarcliff Haven was not a suitable living environment and that any delay in relocating him would unjustifiably jeopardize his health. Mr. Tinajero requested that the Commission order defendants to pay for his placement in a suitable apartment with 24-hour attendant care.

In response to Mr. Tinajero's motion, the Commission issued an order on 20 March 2009 in which it referred the case to the regular docket for an expedited evidentiary hearing. Before the scheduled hearing date, the parties submitted a "Pre–Trial Agreement guided by Rule 16 of the North Carolina Rules of Civil Procedure." In the pre-trial agreement, the parties set forth a number of issues to be determined at the subsequent hearing. Included among these issues, Mr. Tinajero requested a determination whether defendants were obligated to provide adaptive housing, as well as what type of housing and attendant care were required. On 10 April 2010, Mr. Tinajero, on his own, located an apartment across the street from Shepherd Center and moved into that apartment.

In the hearing before the deputy commissioner, Mr. Tinajero submitted a life care plan created by Michael Fryar. After reviewing Mr. Fryar's credentials, experience, and life care plan, the deputy commissioner

determined that the report prepared by Mr. Fryar was not an objective and unbiased assessment of Mr. Tinajero's needs.

The deputy commissioner concluded that Mr. Tinajero was entitled to lifetime workers' compensation benefits. However, the deputy commissioner also determined that "[d]efendants [were] not obligated to purchase, construct or lease adaptive housing for [Mr. Tinajero] . . . ." According to the deputy commissioner, defendants were already providing Mr. Tinajero with suitable housing at Briarcliff Haven, and the medical evidence presented at the hearing failed to establish that it was necessary for Mr. Tinajero to leave the Briarcliff Haven facility.

Mr. Tinajero appealed to the Full Commission. On 13 September 2010, the Commission entered an opinion and award affirming in part, reversing in part, and modifying in part the deputy commissioner's opinion and award. With respect to Mr. Tinajero's housing, the Full Commission determined that Mr. Tinajero's placement at Briarcliff Haven was not appropriate in that it endangered his physical and psychological health.[1] The Full Commission found that the evidence supported Mr. Tinajero's concerns about infections due to inadequate medical care, including medical orders not being followed regarding the timeliness of required intermittent catheterizations. Because of Briarcliff Haven's inability to assure that they could properly follow Mr. Tinajero's medical orders and timely perform the catheterizations, defendants had to contract with outside nurses to provide necessary nursing care.

The Full Commission further found that the greater weight of the lay and medical evidence established that living in Briarcliff Haven was having a negative impact on Mr. Tinajero's mental health. Based on the medical evidence, the Full Commission found that "it was in plaintiff's medical best interest for defendants to provide housing suitable for the maximum possible level of independence, which means someplace other than a skilled nursing home or long-term care facility."

The Full Commission found that at the time of his injury by accident, Mr. Tinajero did not own a dwelling, but rather shared a rented apartment with two other people in New Bern, North Carolina. Mr. Tinajero, therefore, owned no property that could be made handicapped accessible for

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1. The Commission found that Mr. Tinajero's nurse case manager had specifically advised defendants that she did not recommend a nursing home because it would not optimize his learning and rehabilitation, would expose him to infections, and leads to depression. The Commission further noted that the case manager, when deposed, expressed her expert opinion that the best housing environment for plaintiff would be an apartment with 24-hour caregivers.

use by him in his post-injury condition. The Full Commission noted, however, that a 27 May 2010 progress report by his nurse case manager indicated he was living in an apartment. The Full Commission observed that defendants contended "that they provided suitable accommodations for plaintiff at Briarcliff Haven and that they are not obligated to pay for the lease of plaintiff's handicapped accessible apartment," but pointed out "*that for many years defendants have in effect paid for the entire cost of plaintiff's housing at both Shepherd Center and Briarcliff Haven.*" (Emphasis added.)

The Full Commission, therefore, found:

> [B]ecause plaintiff has no dwelling that can be renovated to provide handicapped accessible housing, defendants are responsible for providing handicapped accessible housing for plaintiff. In this case, the greater weight of the evidence shows that plaintiff should be placed in housing that will allow him to have as much independence as possible. Reasonable handicapped accessible housing for plaintiff at this time is an apartment which can accommodate the necessary 24-hour daily attendant care for plaintiff. Although defendants are obligated to pay for the lease of such apartment, the selection of an apartment must be reasonable under the circumstances. An assessment by a certified life care planner of plaintiff's current living quarters is necessary to ascertain whether the apartment is appropriate handicapped accessible housing to accommodate plaintiff's physical needs.

With respect to Mr. Tinajero's request that defendants be required to provide adaptive transportation, the Full Commission found that Mr. Tinajero had never possessed a driver's license or owned a motor vehicle. Since his discharge from Shepherd Center, defendants had provided transportation through a private company for medical visits, therapy, recreation at the Shepherd Center, and social activities. In addition, defendants had assisted Mr. Tinajero in obtaining a pass for the public transportation system in Atlanta. The Full Commission found that two of Mr. Tinajero's doctors considered these transportation options to be reasonable for Mr. Tinajero. The Full Commission, therefore, determined that "[d]efendants are not obligated to purchase a vehicle for plaintiff, but would be obligated to modify any vehicle plaintiff purchases for his own transportation to make it accessible to plaintiff's needs. The Full Commission finds that the transportation services currently being provided plaintiff by defendants are reasonable."

Based on the findings of fact, the Full Commission concluded that Mr. Tinajero was totally disabled and entitled to total disability compensation as well as medical treatment for his lifetime. The Full Commission also ordered that Mr. Tinajero receive attendant care 24 hours per day, seven days per week to be provided by qualified nursing personnel.

With respect to housing, the Full Commission concluded, citing *Derebery* and *Timmons v. N.C. Dep't of Transp.*, 123 N.C. App. 456, 473 S.E.2d 356 (1996), *aff'd per curiam*, 346 N.C. 173, 484 S.E.2d 551 (1997) (*Timmons I*):

> In this case, because plaintiff owns no dwelling that can be renovated to provide handicapped accessible housing, defendants are responsible for providing handicapped accessible housing for plaintiff. While the case law has held that the provision of ordinary housing is an expense of daily life to be paid from an injured worker's disability compensation, the additional cost of renting handicapped accessible housing is not an ordinary expense and should be borne by defendants, *who have up to this point continuously provided accommodated housing for plaintiff at Shepherd Center and Briarcliff Haven since plaintiff's compensable injury by accident.* Therefore, defendants shall pay the rental cost of reasonable handicapped accessible housing for plaintiff, which at this time is an apartment which can accommodate the necessary 24-hour daily attendant care for plaintiff.

(Emphasis added.)

The Full Commission concluded that "[d]efendants are not required to purchase or lease adaptive transportation for plaintiff or for his use. *McDonald v. Brunswick Elec. Membership Corp.*, 77 N.C. App. 753, 336 S.E.2d 407 (1985)." Instead, the Full Commission concluded that defendants had already provided reasonable transportation, although if Mr. Tinajero purchased a vehicle, defendants were obligated to modify it to accommodate his disability.

The Full Commission agreed with the deputy commissioner that the "life care plan prepared by Michael Fryar in this case was not an unbiased, objective, fair, and balanced assessment." The Full Commission concluded that defendants were not required to pay for Mr. Fryar's report because it did not constitute a valid " 'rehabilitative service' " within the meaning of N.C. Gen. Stat. § 97-2(19). The Full Commission concluded,

however, that Mr. Tinajero was entitled to have defendants pay for the preparation of a life care plan "by a well-qualified and certified life care planner with long-standing experience dealing with catastrophic life care planning. Plaintiff is also entitled to an assessment by the life care planner of his current housing arrangements and whether the apartment is appropriate to accommodate plaintiff's physical needs."

Finally, the Full Commission concluded that "[d]efendants did not defend this claim in an unreasonable manner or without reasonable grounds and, therefore, plaintiff is not entitled to attorney's fees pursuant to N.C. Gen. Stat. §97-88.1; *Sparks v. Mountain Breeze Restaurant*, 55 N.C. App. 663, 286 S.E.2d 575 (1982)."

Defendants filed notice of appeal from the opinion and award of the Full Commission, and Mr. Tinajero cross-appealed. This Court dismissed the appeal as interlocutory since complete resolution of the medical issues in the case required, as the Full Commission had concluded, completion of a satisfactory life care plan for Mr. Tinajero. *See Tinajero v. Balfour Beatty Infrastructure, Inc.*, 214 N.C. App. 563, 714 S.E.2d 867, 2011 N.C. App. LEXIS 1832, 2011 WL 3570046 (2011) (unpublished).

On remand, the parties agreed to have Susan Caston assess Mr. Tinajero's needs although she was not a certified life care planner. Ms. Caston completed her report on 21 May 2012. Ms. Caston's rehabilitation plan addressed Mr. Tinajero's housing, transportation, and vocational/employment status. Mr. Tinajero filed a motion to depose Ms. Caston on 28 June 2012.

Mr. Tinajero also sought to take the deposition of V. Robert May, III, Chief Executive Officer of the International Commission on Health Care Certification, the international organization that provides accreditation for life care planners. Mr. Tinajero asserted that after the Full Commission had found that Mr. Fryar's life care plan did not conform to industry standards, that life care plan had been submitted to the International Commission on Health Care certification for peer review. According to the motion, the blind evaluation of Mr. Fryar's plan had resulted in its being used as "'one of our preferred examples'" in Mr. May's presentations. Mr. Tinajero sought Mr. May's deposition for the limited purpose of authenticating the report reviewing Mr. Fryar's life care plan. The Full Commission denied Mr. Tinajero's motion to depose Ms. Caston and Mr. May in its opinion and award entered on 16 October 2012.

Pertinent to this appeal, the Full Commission's 16 October 2012 opinion and award found, based on Ms. Caston's evaluation, that "the

geographical location of [Mr. Tinajero's] current apartment adequately [met] his needs to access the community." With respect to parking, the Commission found that "[i]nasmuch as plaintiff cannot legally drive in the United States and does not now own a handicap-accessible vehicle, it is presently irrelevant whether his apartment provides a parking space for him."

As for Mr. Tinajero's housing, the Full Commission found:

> Placing plaintiff in a position which maximizes his independence is a goal repeatedly expressed throughout the medical evidence in this case. While plaintiff's current living situation is preferable to a skilled nursing home or long-term care facility, plaintiff cannot reach the maximum possible level of independence in a housing situation in which he cannot maneuver or fully access the kitchen, bathroom, and laundry room. Therefore, it is reasonable and medically necessary that an occupational therapist with experience in addressing accessibility issues for the catastrophically injured be consulted to identify and make recommendations to the parties regarding accessibility options for plaintiff given his current functional status.

Mr. Tinajero filed a notice of appeal of the 16 October 2012 opinion and award on 18 October 2012 and of the interim 13 September 2010 order in a supplemental notice of appeal on 19 November 2012. Defendants filed notice of appeal of the 16 October 2012 order on 30 October 2012, and supplemental notice of appeal of the 13 September 2010 order on 30 November 2012.

Discussion

Our review of a decision of the Industrial Commission "is limited to determining whether there is any competent evidence to support the findings of fact, and whether the findings of fact justify the conclusions of law." *Cross v. Blue Cross/Blue Shield*, 104 N.C. App. 284, 285-86, 409 S.E.2d 103, 104 (1991). "The findings of the Commission are conclusive on appeal when such competent evidence exists, even if there is plenary evidence for contrary findings." *Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 353, 524 S.E.2d 368, 371 (2000). As the fact-finding body, " '[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.' " *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552 (2000) (quoting *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998)).

I. Defendants' Appeal

A. Timeliness of Appeal

[1] As a preliminary matter, we address Mr. Tinajero's contention that defendants did not timely appeal the entry of the 13 September 2010 opinion and award and, therefore, this Court lacks jurisdiction to consider defendants' arguments regarding the Commission's requirement that they pay for Mr. Tinajero's housing. Mr. Tinajero points out that defendants' 30 October 2012 notice of appeal stated only that defendants were appealing from the 16 October 2012 opinion and award.

Defendants' timely first notice of appeal did not mention the 13 September 2010 opinion and award. Defendants' supplemental notice of appeal, indicating that they were also appealing the 13 September 2010 opinion and award, was filed more than 30 days after defendants' receipt of the final opinion and award of the Commission. *See* N.C.R. App. P. 3(c)(1), (2) (providing that in order to be timely, notice of appeal must be filed either within 30 days of entry of judgment if the judgment was served with three days, or within 30 days of service to a party if service was not effected within three days).

We note that while Rule 3(d) of the Rules of Appellate Procedure provides that the notice of appeal "shall designate the judgment or order from which appeal is taken," N.C. Gen. Stat. § 1-278 (2013) provides: "Upon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment." This Court has held that even when a notice of appeal fails to reference an interlocutory order, in violation of Rule 3(d), appellate review of that order pursuant to N.C. Gen. Stat. § 1-278 is proper under the following circumstances: (1) the appellant must have timely objected to the order; (2) the order must be interlocutory and not immediately appealable; and (3) the order must have involved the merits and necessarily affected the judgment. *Brooks v. Wal-Mart Stores, Inc.*, 139 N.C. App. 637, 641, 535 S.E.2d 55, 59 (2000). All three conditions must be met. *Id.* at 642, 535 S.E.2d at 59.

Here, defendants immediately objected to the 13 September 2010 opinion and award by appealing it. *See Sellers v. FMC Corp.*, 216 N.C. App. 134, 139, 716 S.E.2d 661, 665 (2011) (holding, in workers' compensation case, that claim in reply brief that Commission's prior ruling was in error was sufficient objection to meet first requirement of N.C. Gen. Stat. § 1-278). In addition, this Court already concluded, when dismissing defendants' appeal, that the order was interlocutory and not immediately appealable. *Tinajero*, 214 N.C. App. 563, 714 S.E.2d 867, 2011 N.C. App. LEXIS 1832, 2011 WL 3570046 (2011).

Finally, the 13 September 2010 opinion and award involved the merits and necessarily affected the final opinion and award because the 13 September 2010 opinion and award substantially decided the primary issues in contention, including Mr. Tinajero's housing and transportation. Since defendants' appeal of the 13 September 2010 opinion and award meets the requirements of N.C. Gen. Stat. § 1-278, this Court has jurisdiction to consider defendants' arguments. *See*, *e.g.*, *Yorke v. Novant Health*, *Inc.*, 192 N.C. App. 340, 348, 666 S.E.2d 127, 133 (2008) (holding that even though notice of appeal referenced only final judgment and post-trial order denying motion for new trial, Court had jurisdiction to review denial of motion for directed verdict under N.C. Gen. Stat. § 1-278 when defendant objected at trial and denial of directed verdict involved merits and affected final judgment); *Brooks*, 139 N.C. App. at 642-43, 535 S.E.2d at 59 (finding requisites of N.C. Gen. Stat. § 1-278 satisfied when directed verdict dismissing all counterclaims against co-defendants was objected to at trial, was implicated by motion specifically appealed, was interlocutory, and order deprived defendant of potential claims).

B. Commission's Requirement that Defendants Pay for Plaintiff's Housing

[2] Defendants first contend that the Commission erred in ordering that defendants "provide handicapped accessible housing for [Mr. Tinajero], which at [that] time [was] a handicapped accessible apartment that [could] accommodate the necessary 24-hour daily attendant care for plaintiff. Defendants shall pay for the lease of such apartment, but the selection of an apartment must be reasonable under the circumstances." Defendants contend that rent is an ordinary expense of life required to be paid from wages.

Because Mr. Tinajero is totally and permanently disabled, N.C. Gen. Stat. § 97-29 (2007) controls, and "compensation, including medical compensation, shall be paid for by the employer during the lifetime of the injured employee." Medical compensation, in turn, was defined in N.C. Gen. Stat. § 97-2(19) (2007) as:

> medical, surgical, hospital, nursing, and rehabilitative services, and medicines, sick travel and *other treatment*, including medical and surgical supplies, as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability . . . .

(Emphasis added.)

In *Derebery*, our Supreme Court, in applying a prior version of N.C. Gen. Stat. § 97-29, construed what compensation falls within the scope of "other treatment." 318 N.C. at 199-200, 347 S.E.2d at 819. The plaintiff in *Derebery* had presented evidence that he had lived with his parents in their rented home and that the owner of the home refused to allow the plaintiff's family to modify the house structurally to accommodate the plaintiff's wheelchair. *Id.* at 198, 347 S.E.2d at 818. The Commission had ordered the defendants, pursuant to N.C. Gen. Stat. § 97-29, to provide the plaintiff with a wheelchair-accessible place to live. *Id.* at 195-96, 347 S.E.2d at 816-17.

This Court reversed, holding that the provision requiring payment for "'other treatment or care'" could not "be reasonably interpreted to extend the employer's liability to provide a residence for an injured employee." *Derebery v. Pitt Cnty. Fire Marshall*, 76 N.C. App. 67, 72, 332 S.E.2d 94, 97 (1985). The Supreme Court reversed this Court, holding "that the employer's obligation to furnish 'other treatment or care' may include the duty to furnish alternate, wheelchair accessible housing." 318 N.C. at 203-04, 347 S.E.2d at 821. Specifically, "an employer must furnish alternate, wheelchair accessible housing to an injured employee where the employee's existing quarters are not satisfactory and for some exceptional reason structural modification is not practicable." *Id.* at 203, 347 S.E.2d at 821.

Defendants, in this case, however, urge this Court to follow Justice Billings' dissent in *Derebery*, in which she concluded that housing is an ordinary necessity of life that the employee is required to pay for out of his disability compensation. *Id.* at 205-06, 347 S.E.2d at 822 (Billings, J., dissenting). Defendants contend that this Court previously adopted that dissent in *Timmons I*.

The plaintiff in *Timmons I* was a paraplegic who initially lived with his parents. 123 N.C. App. at 458, 473 S.E.2d at 357. The defendant paid to modify the plaintiff's parents' home to make it accessible for the plaintiff's use. *Id.* Subsequently, the plaintiff moved to a handicapped-accessible apartment where he lived for approximately eight and a half years. *Id.* When the rent increased, the plaintiff moved back to his parents' home. *Id.* Ultimately, however, unlike the plaintiff in *Derebery* or Mr. Tinajero in this case, the plaintiff in *Timmons I* returned to full-time employment with the defendant. *Id.* He was able to purchase land and requested that the Commission order the defendant to finance the construction of a new, handicapped-accessible home on that land. *Id.* at 458-59, 473 S.E.2d at 357-58. The Commission, however, refused to order that the defendant pay for the construction of a new house, but rather

ordered only that the defendant pay the expense of making the plaintiff's new home handicapped accessible. *Id.* at 459, 473 S.E.2d at 358.

Both the plaintiff and the defendant appealed to this Court. On appeal, the defendant argued that it should not be required to provide any assistance in constructing the plaintiff's residence. *Id.* at 460, 473 S.E.2d at 358. The plaintiff in turn contended that the defendant should be required to bear the entire cost of constructing his residence. *Id.* This Court affirmed the Commission, concluding based on *Derebery*, that "the Commission's finding that the accommodations at plaintiff's parents' home are no longer suitable supports its conclusion that plaintiff is entitled to have defendant pay for adding to plaintiff's new home those accessories necessary to accommodate plaintiff's disabilities." *Id.* at 461, 473 S.E.2d at 359 (internal quotation marks omitted).

However, the Court rejected the plaintiff's argument that *Derebery* required the defendant to pay the entire cost of constructing the plaintiff's residence:

> As pointed out by Justice (later Chief Justice) Billings in her dissent in *Derebery*, the expense of housing is an ordinary necessity of life, to be paid from the statutory substitute for wages provided by the Worker's Compensation Act. The costs of modifying such housing, however, to accommodate one with extraordinary needs occasioned by a workplace injury, such as the plaintiff in this case, is not an ordinary expense of life for which the statutory substitute wage is intended as compensation. Such extraordinary and unusual expenses are, in our view, properly embraced in the "other treatment" language of G.S. § 97-25, which the basic costs of acquisition or construction of the housing is not.

Id. at 461-62, 473 S.E.2d at 359. Accordingly, the Court affirmed the Commission's opinion and award that defendant only " 'pay for adding to plaintiff's new home those accessories necessary to accommodate plaintiff's disabilities.' " *Id.* at 462, 473 S.E.2d at 359.

From that unanimous decision of this Court, the defendant filed a petition for discretionary review, asking the Supreme Court to consider "[w]hether an employer [was] required by G.S. 97-25 to pay the cost of construction of a house, in whole or in part, for an employee who is a paraplegic due to a work related injury where the employee has returned to full-time employment and the employer has previously modified one

house for employee's use." After the Supreme Court allowed the petition, *Timmons v. N.C. Dep't. of Transp.*, 344 N.C. 739, 478 S.E.2d 13 (1996), the defendant urged the Court to overturn *Derebery* or to "consider the well reasoned dissent of Justice Billings in *Derebery* and perhaps now adopt it as the rule of law." The plaintiff, however, argued that *Derebery* mandated payment for the cost of the entirety of the construction of his home.

The Supreme Court affirmed this Court's order in a per curiam decision. *Timmons v. N.C. Dep't of Transp.*, 346 N.C. 173, 484 S.E.2d 551 (1997). " '*Per curiam* decisions stand upon the same footing as those in which fuller citations of authorities are made and more extended opinions are written.' " *Total Renal Care of N.C., LLC v. N.C. Dep't of Health & Human Servs.*, 195 N.C. App. 378, 386, 673 S.E.2d 137, 143 (2009) (quoting *Bigham v. Foor*, 201 N.C. 14, 15, 158 S.E.2d 548, 549 (1931)). Although defendants urge us to adopt a reading of *Timmons* by which Justice Billings' dissent in that case has been adopted as the governing rule of law in North Carolina, our Supreme Court's rejection of that argument on discretionary review in *Timmons I* precludes such a reading of the case.

This Court has since addressed both *Derebery* and *Timmons I* in a case in which the parties both made arguments nearly identical to those in this case:

> As a preliminary point, we note that the parties' arguments assume rules that are rigid and broadly applicable in the cases discussed above. A reading of section 97–25[2] makes it clear, however, that an award of "other treatment" is in the discretion of the Commission. 2005 N.C. Sess. Laws ch. 448, § 6.2 ("[T]he [Commission] may order such further treatments as may in the discretion of the Commission be necessary."). Section 97–2(19), as written at the time of Plaintiff's injury, further explained that the type of medical compensation the employer must pay is "*in the judgment of the Commission*" as long as it is "reasonably . . . required to effect a cure or give relief." 1991 N.C. Sess. Laws Ch. 703, § 1. The Supreme Court's decision in *Derebery* and our own decision in *Timmons* represent the outer limits of the Commission's authority

2. This Court noted in *Espinosa* that *Derebery*'s construction of the phrase "other treatment" applies equally to cases under N.C. Gen. Stat. § 97-29 and to cases under N.C. Gen. Stat. § 97-25. 231 N.C. App. at 183 n.6, 752 S.E.2d at 159 n.6

> under those statutes, not entirely new rules to be followed in place of or in addition to the statutes created by our legislature.

Espinosa, 231 N.C. App. at 186, 752 S.E.2d at 160-61.

In *Espinosa*, the Commission had determined that the defendants should pay the pro rata difference between the rent required for the plaintiff's new, handicapped-accessible home and the rent the plaintiff had to pay as an ordinary expense of life before his injury. *Id.* 752 S.E.2d at 161. In upholding the Commission's decision, this Court explained:

> The Commission sensibly reasoned that living arrangements constitute an ordinary expense of life and, thus, should be paid by the employee. The Commission also recognized, however, that a change in such an expense, which is necessitated by a compensable injury, should be compensated for by the employer. Because Plaintiff did not own his own home in this case, he was required to find new rental accommodations that would meet his needs. In this factual circumstance, it was appropriate for the Commission to require the employer to pay the difference between the two.
>
> While circumstances may occur in which an employer is required to pay the entire cost of the employee's adaptive housing, neither the Supreme Court's opinion in *Derebery* nor our holding in *Timmons* support Plaintiff's assertion that such a requirement is necessary *whenever* an injured worker does not own property or a home. Such a ruling would reach too far.

Id.

In this case, in contrast, the Commission concluded that defendants should pay the full cost of Mr. Tinajero's adaptive house. Consistent with *Derebery*, *Timmons I*, and *Espinosa*, the Commission noted first that "because plaintiff owns no dwelling that can be renovated to provide handicapped accessible housing, defendants are responsible for providing handicapped accessible housing for plaintiff. While the case law has held that the provision of ordinary housing is an expense of daily life to be paid from an injured worker's disability compensation, the additional cost of renting handicapped accessible housing is not an ordinary expense . . . ."

While defendants urge that they should only have to pay that portion of the rent that exceeds the amount Mr. Tinajero was paying prior to his injury -- the approach adopted by the Commission in *Espinosa* -- the Commission, in this case, although acknowledging that Mr. Tinajero, prior to his injury, had shared the cost of an apartment with two other people, rejected defendants' contention. The Commission pointed out that defendants were fully willing to pay "for many years . . . the entire cost of plaintiff's housing at both Shepherd Center and Briarcliff Haven." Moreover, while Mr. Tinajero was housed at Briarcliff Haven, defendants also had to pay for outside nursing care to supplement the care provided by the facility because the facility was consistently unable to "properly follow plaintiff's medical orders and timely perform his intermittent catheterizations." Thus, as the Commission found, defendants were completely willing to pay the cost of a skilled nursing home or long-term care facility, even if they had to also pay for additional outside nursing care, but they were unwilling to pay the cost of leasing an apartment.

The Commission expressly found that the housing chosen by defendants, Briarcliff Haven, was not suitable in that (1) living in that facility was "having a negative impact on [Mr. Tinajero's] mental health"; (2) the medical care he was receiving in the facility was inadequate; and (3) moving Mr. Tinajero from the nursing facility to an apartment served the interests of the repeatedly stated medical priority of "[p]lacing [Mr. Tinajero] in a position to maximize his independence . . . ." Although defendants argue with the Commission's findings that Mr. Tinajero needed to leave Briarcliff Haven, those findings are supported by ample evidence in the record.

Consequently, defendants' position before the Commission was that they would pay fully for housing that the Commission determined was not in Mr. Tinajero's best medical interests and was not suitable, but they would not pay for housing -- in the form of an apartment with attendant care -- that the Commission found, based on competent evidence, was in Mr. Tinajero's best medical interests. In other words, defendants conditioned their full payment of housing costs on Mr. Tinajero's accepting housing contrary to his medical interests.

Under the particular circumstances of this case, we hold that the Commission properly exercised its discretion in concluding that defendants should not be allowed to force such a choice on an injured employee. Rather, under the circumstances found by the Commission, the Commission acted within its authority as set out in *Derebery*, *Timmons I*, and *Espinosa*, in determining that because defendants had

previously been willing to pay the full cost for Mr. Tinajero's housing in a skilled nursing facility, which was not in Mr. Tinajero's medical best interests, they were obligated to "pay the rental cost of reasonable handicapped accessible housing," which was in Mr. Tinajero's medical best interests. We, therefore, affirm the Commission's ruling on Mr. Tinajero's housing.[3]

II. Plaintiff's Appeal

A. Denial of Mr. Tinajero's Request for Depositions

[3] Mr. Tinajero contends that the Commission erred in refusing to allow him to depose Ms. Caston and Mr. May. Under N.C. Gen. Stat. § 97-85(a) (2013), the Full Commission may, upon application by a party, "receive further evidence." However, a party "does not have a substantial right to require the Commission to hear additional evidence, and the duty to do so only applies if good ground is shown." *Allen v. Roberts Elec. Contractors*, 143 N.C. App. 55, 65-66, 546 S.E.2d 133, 141 (2001). " '[T]he question of whether to reopen a case for the taking of additional evidence rests in the sound discretion of the Industrial Commission, and its decision will not be disturbed on appeal in the absence of an abuse of discretion.' " *Porter v. Fieldcrest Cannon, Inc.*, 133 N.C. App. 23, 29, 514 S.E.2d 517, 522 (1999) (quoting *Schofield v. Tea Co.*, 299 N.C. 582, 596, 264 S.E.2d 56, 65 (1980)).

1. Susan Caston

With respect to Ms. Caston, Mr. Tinajero argues more specifically that his due process rights and the Rules of the Industrial Commission were violated when the Full Commission admitted Ms. Caston's report, but denied Mr. Tinajero's motion to depose Ms. Caston. Our courts have long held, based on principles of due process and court procedure, that "[w]here the Commission allows a party to introduce new evidence which becomes the basis for its opinion and award, it must allow the other party the opportunity to rebut or discredit that evidence." *Goff v. Foster Forbes Glass Div.*, 140 N.C. App. 130, 134-35, 535 S.E.2d 602, 605-06 (2000).

In *Allen v. K-Mart*, 137 N.C. App. 298, 302, 528 S.E.2d 60, 63 (2000), the defendants argued that the Commission had abused its discretion in

3. Defendants also argue that Mr. Tinajero could not lawfully lease an apartment in Atlanta because he is undocumented. Defendants contend that they cannot legally pay rent for an apartment that Mr. Tinajero cannot lawfully lease. Defendants cite no legal authority for this position and, therefore, we do not address it.

considering two independent medical examinations as evidence without permitting the defendants to depose or cross-examine either physician. This Court agreed, holding that "[d]efendants should have been allowed the opportunity to discredit the doctors' reports." *Id.*

This Court observed that "[t]he opportunity to be heard and the right to cross-examine another party's witnesses are tantamount to due process and basic to our justice system." *Id.* at 304, 528 S.E.2d at 64. Based on these principles, the Court "agree[d] with defendants that the Commission manifestly abused its discretion by allowing significant new evidence to be admitted but denying defendants the opportunity to depose or cross-examine the physicians, or requiring plaintiff to be examined by experts chosen by defendants." *Id.* The Court, therefore held "that where the Commission allows a party to introduce new evidence which becomes the basis for its opinion and award, it must allow the other party the opportunity to rebut or discredit that evidence." *Id.*, 528 S.E.2d at 64-65.

Here, the Commission specifically ordered that the parties agree on a person to prepare a life care plan and conduct an assessment of Mr. Tinajero's current living arrangements at defendants' expense. This Court concluded that the prior appeal was interlocutory and dismissed it so that additional proceedings related to the life care plan could take place. The parties ultimately agreed upon Susan Caston as the person to conduct the further assessment. In denying Mr. Tinajero's motion to depose Ms. Caston following completion of her report, the Commission found "that her report provides sufficient information for the Full Commission to rule upon the remaining issues in the case, and therefore, that a deposition at this point would only serve to further delay the entry of a final Opinion and Award."

The Commission then ordered that "plaintiff's motion to depose Ms. Caston is hereby DENIED, and Ms. Caston's report is received into evidence." In the opinion and award that followed this ruling, the Commission repeatedly referenced Ms. Caston's report as the support for various findings of fact. Further, even though Ms. Caston had not addressed all of the recommendations made by Mr. Tinajero's life care planner, Mr. Fryar, and Mr. Tinajero, in his motion to depose Ms. Caston, had indicated that a deposition was necessary to obtain her opinion regarding the appropriateness of those recommendations, the Commission denied those recommendations. Mr. Tinajero was given no opportunity to establish through Ms. Caston that those recommendations were appropriate.

This case is indistinguishable from *Allen* and *Goff*. Defendants, however, argue that Mr. Tinajero waived his request for a deposition and agreed to the Commission's proceeding without deposition of the experts in the case. Defendants point to an 8 August 2012 letter from Mr. Tinajero's counsel to the Full Commission that highlighted Mr. Tinajero's need for a speedy resolution of his case and requested a ruling from the Commission on the motion for depositions to further the final resolution of the case:

> *What the Plaintiff prays for now is the most expeditious ruling possible*. We respectfully request that you promptly enter an order allowing us to notice the defense with the depositions outlined in our motion. Having more information and an expanded opinion from Caston can only help the Commission make a better ruling without causing further delays. . . . We were disappointed that Caston's report did not have the quality and depth that a quadriplegic plaintiff deserves -- given the large number of spinal cord injury protocols to be followed -- so our intention was to flesh out those opinions through an expedited deposition.
>
> *Otherwise, we respectfully request that our motion be denied and that the Commission rule on the balance of the case as expeditiously as possibl*e. We venture to guess that Zurich American Insurance Co. will continue to appeal the case back to the Court of Appeals, and we would like to get that process underway as soon as possible. We do not want any further delay to be experienced by this very young man who suffers the consequences of this drawn out legal proceeding.

(Emphasis added.)

We hold that this letter -- essentially simply asking the Commission to allow or deny the motion as soon as possible -- cannot reasonably be read as a waiver of Mr. Tinajero's request to take the deposition of Ms. Caston. Although the language of the letter suggests frustration with the delay, it does not suggest that Mr. Tinajero was acquiescing in the admission of the contents of Ms. Caston's report without objection.

In sum, Mr. Tinajero properly requested leave to take Ms. Caston's deposition once he received Ms. Caston's report. Under *Allen* and *Goff*, the Commission erred in admitting Ms. Caston's report without allowing

Mr. Tinajero an opportunity to depose Ms. Caston. We, therefore, reverse the 16 October 2012 opinion and award and remand for further proceedings, including the entry of a new opinion and award following the deposition of Ms. Caston.

2. V. Robert May

Mr. Tinajero also argues that the Commission erred in denying his request to depose Mr. May. As to this request, Mr. Tinajero's motion asked that Mr. May's deposition be taken "for the limited purpose of authenticating the attached submissions and resulting report of the peer review of [Mr. Tinajero's] life care plan [created by Mr. Fryar] by the International Commission on Health Care Certification." The Commission found as to that motion that Mr. Tinajero sought "to rehabilitate Mr. Fryar and his life care plan, an issue that has already been ruled upon by the Commission."

We cannot conclude that the Commission abused its discretion in denying a request to take a deposition for the sole purpose of asking the Commission to reconsider a prior ruling. Nevertheless, because we acknowledge that it is possible Ms. Caston's testimony may provide a basis for renewing the motion, our holding is without prejudice to Mr. Tinajero's filing a new motion to take Mr. May's deposition following Ms. Caston's deposition.

B. Transportation

[4] We next address Mr. Tinajero's contention that the Commission erred in refusing to order defendants to provide Mr. Tinajero with the use of an adaptive van. The Commission made the following conclusion of law regarding Mr. Tinajero's transportation needs:

> Defendants are not required to purchase or lease adaptive transportation for plaintiff or for his use. *McDonald v. Brunswick Elec. Membership Corp.*, 77 N.C. App. 753, 336 S.E.2d 407 (1985). Defendants have provided reasonable transportation for plaintiff through a private transportation service, access to public transportation, and a motorized wheelchair and shall continue to do so. N.C. Gen. Stat. § 97-2(19). Should plaintiff purchase his own vehicle, defendants are obligated to modify the same to accommodate plaintiff's disability. *McDonald v. Brunswick Elec. Membership Corp.*, *supra*, at 753, 336 S.E.2d at 407.

Mr. Tinajero argues that the Commission improperly relied upon *McDonald*. While we agree with Mr. Tinajero that *McDonald* can no longer stand for the proposition that an employer may never be required to provide a plaintiff with a specially-equipped van, we do not agree that the Commission applied such a rigid rule.

In *McDonald*, 77 N.C. App. at 753, 336 S.E.2d at 407, the plaintiff suffered a compensable injury by accident arising out of his employment that resulted in the amputation of both of his legs and his left arm. The Commission concluded that the defendants were required to provide the plaintiff with a specially-equipped van on the grounds that it was a reasonable and necessary rehabilitative service within the meaning of N.C. Gen. Stat. § 97-29. 77 N.C. App. at 754, 366 S.E.2d at 407.

On appeal, this Court reversed. Relying solely on *Derebery v. Pitt Cnty. Fire Marshall*, 76 N.C. App. 67, 332 S.E.2d 94 (1985), this Court "conclude[d] that neither the phrase 'other treatment or care' nor the term 'rehabilitative services' in G.S. 97-29 can reasonably be interpreted to include a specially-equipped van. This language in the statute plainly refers to services or treatment, rather than tangible, non-medically related items such as a van; thus, it would be contrary to the ordinary meaning of the statute to hold that it includes the van purchased by plaintiff." *McDonald*, 77 N.C. App. 756-57, 336 S.E.2d at 409.

Of course, subsequently, our Supreme Court reversed this Court's decision on which *McDonald*'s holding was founded and expressly rejected the reasoning adopted by *McDonald*. Following the Supreme Court's decision in *Derebery*, there can no longer be a black letter rule that a defendant cannot be required to provide a specially-adapted van and can only be required to modify a van already owned by a plaintiff. This Court subsequently recognized that *McDonald* was superseded by *Derebery* in *Grantham v. Cherry Hosp.*, 98 N.C. App. 34, 39-40, 389 S.E.2d 822, 825 (1990).

Under the Supreme Court's decision in *Derebery*, an employer may be required to provide adaptive transportation, including use of a specially-adapted van, if the plaintiff's existing access to transportation is not satisfactory and "for some exceptional reason" modification of those modes of transportation to make it satisfactory "is not practicable." 318 N.C. at 203, 347 S.E.2d at 821. Our review of the Commission's opinion and award indicates that the Commission made the findings required by *Derebery* even though it cited *McDonald* as support for its conclusion.

The Commission found regarding Mr. Tinajero's transportation needs:

> Plaintiff has never possessed a driver's license or owned a motor vehicle. Since his discharge from Shepherd Center, defendants have provided transportation for plaintiff through a private company for medical visits, therapy, and recreation at Shepherd Center, and social activities. Defendants also assisted plaintiff in obtaining his MARTA pass for the public transportation system in Atlanta. He has an electric wheelchair he uses for local trips. Dr. Bilsky and Dr. Scelza considered these reasonable transportation options for plaintiff. Defendants are not obligated to purchase a vehicle for plaintiff, but would be obligated to modify any vehicle plaintiff purchases for his own transportation to make it accessible to plaintiff's needs. The Full Commission finds that the transportation services currently being provided plaintiff by defendants are reasonable.

In other words, the Commission found that Mr. Tinajero's access to transportation is satisfactory at this time. This finding is supported by competent evidence and, therefore, is binding. Under *Derebery* and given this finding, the Commission was not required to mandate that defendants purchase a vehicle for Mr. Tinajero. We, therefore, affirm this portion of the Commission's opinion and award.[4]

C. Taxation of Attorneys' Fees and Costs

[5] Mr. Tinajero next contends that the Full Commission erred by failing to tax defendants with attorneys' fees for unreasonably pursuing their defense of this action before the Commission pursuant to N.C. Gen. Stat. § 97-88.1 (2013). Under that statute, "[i]f the Industrial Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it may assess the *whole cost* of the proceedings including reasonable fees for defendant's attorney or plaintiff's attorney upon the party who has brought or defended them." *Id.* (emphasis added).

The purpose of N.C. Gen. Stat. § 97-88.1 is to prevent " 'stubborn, unfounded litigiousness' which is inharmonious with the primary purpose of the Workers' Compensation Act to provide compensation to injured employees." *Beam v. Floyd's Creek Baptist Church*, 99 N.C. App.

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4. We note that on remand, the Commission's decision regarding transportation may be affected by Mr. Tinajero's deposition of Ms. Caston since her report specifically addressed transportation.

767, 768, 394 S.E.2d 191, 192 (1990) (quoting *Sparks*, 55 N.C. App. at 664, 286 S.E.2d at 576). The statute's reference to the Commission's assessing "the whole cost" reveals the legislature's intent that the Commission would decide this issue at the end of the litigation when "the whole cost" would be known.

Here, the Commission concluded in its interlocutory order of 13 September 2010 with regard to defendants' liability under N.C. Gen. Stat. § 97-88.1:

> Defendants did not defend this claim in an unreasonable manner or without reasonable grounds and, therefore, plaintiff is not entitled to attorney's fees pursuant to N.C. Gen. Stat. §97-88.1; *Sparks v. Mountain Breeze Restaurant*, 55 N.C. App. 663, 286 S.E.2d 575 (1982).

Especially since the Commission's 13 September 2010 opinion and award ordered the preparation of a life care plan, the Commission should not, at that stage, have decided whether Mr. Tinajero was entitled to attorneys' fees under N.C. Gen. Stat. § 97-88.1. Instead, the proper point in the proceedings for the Commission to address this issue was in the Commission's final disposition of the case in its 16 October 2012 order.

We, therefore, reverse the Commission's determination that Mr. Tinajero is not entitled to fees under N.C. Gen. Stat. § 97-88.1. On remand, following the taking of Ms. Caston's deposition, the Commission shall revisit whether such an award is appropriate and, if so, what the amount of any award should be, in its final opinion and award.

Mr. Tinajero further argues that the Commission erred by failing to tax all costs against defendants, including the costs related to Mr. Tinajero's certified life care plan. The Commission concluded in its 13 September 2010 opinion and award:

> The report and life care plan prepared by Michael Fryar in this case was not an unbiased, objective, fair, and balanced assessment and is not accepted by the Full Commission as such. . . . Defendants are not required to pay for Mr. Fryar's report, because the same does not constitute a valid "rehabilitative service" within the meaning of N.C. Gen. Stat. § 97-2(19).

Because we have remanded for the taking of Ms. Caston's deposition and Mr. Tinajero has indicated his intent to question Ms. Caston regarding various components of Mr. Fryar's plan, the Commission should,

following that deposition, revisit whether Mr. Fryar's report constituted a valid "rehabilitative service" and whether defendants should pay for the cost of the preparation of that report.

Finally, Mr. Tinajero argues that defendants should be assessed attorney's fees for pursuing the prior interlocutory appeal. As Mr. Tinajero acknowledges, he requested in his motion to dismiss filed with this Court in the prior appeal that this Court instruct the Commission on remand to determine what amount of attorneys' fees and costs should be taxed against defendants as sanctions. Although this Court granted the motion to dismiss, it did not address Mr. Tinajero's request for attorneys' fees and costs and, therefore, implicitly denied that request. We are bound by the prior panel's failure to award attorneys' fees and costs based on the interlocutory appeal and cannot, in this later appeal, determine that fees and costs should have been awarded.

Conclusion

In sum, we affirm the Commission's determination that defendants were required to provide Mr. Tinajero with handicapped accessible housing and affirm its determination that defendants currently are providing reasonable transportation for Mr. Tinajero. We reverse the Commission's 16 October 2012 opinion and award for failure to allow Mr. Tinajero to take the deposition of Ms. Caston and remand to allow the taking of that deposition and entry of a new opinion and award taking into account not only Ms. Caston's report but also her deposition.

Finally, we reverse the Commission's determination that Mr. Tinajero was not entitled to attorneys' fees under N.C. Gen. Stat. § 97-88.1 and was not entitled to have defendants pay for the cost of the preparation of Mr. Fryar's life care plan and remand for a determination of those two issues at the completion of the proceedings on remand.

Affirmed in part; reversed in part.

Judge ELMORE concurs.

DILLON, Judge, concurring in part and dissenting in part.

I agree with the majority on all issues except with regard to the issue addressed in Section II.B. of its opinion, which addresses the Full Commission's requirement that Defendants pay for Plaintiff's housing. Accordingly, I concur, in part, and dissent, in part.

On the housing issue, Defendants contend, in part, that the Commission erred by ordering Defendants to pay for the entire lease expense of Plaintiff's handicapped accessible apartment. The Commission ordered Defendants to pay, *inter alia*, weekly, wage-replacement benefits of "$496.77 for the remainder of Plaintiff's lifetime as provided by N.C. Gen. Stat. § 97-31(17)" ***and*** the full amount of Plaintiff's lease payments for a handicapped accessible apartment as "other treatment" under N.C. Gen. Stat. § 97-25. The majority concluded that the Commission did not err. I agree with the majority that Defendants are, indeed, obligated to provide benefits to cover Plaintiff's lease payment in this case. However, I believe a *portion* of the lease payment is being provided through the weekly benefits Defendants are paying to cover Plaintiff's ordinary expenses of life; and, therefore, I believe the Commission erred by classifying Plaintiff's *entire* lease payment as "other treatment" under G.S. 97-25.

It is certainly within the discretion of the Commission to make an award for "other treatment" under G.S. 97-25. *Espinosa v. Tradesource, Inc.*, __ N.C. App. __, __, 752 S.E.2d 153, 159 (2013). However, the Commission's discretion to make such an award is limited to that which is reasonably "required to effect a cure or give relief[.]" *Id.* at __, 752 S.E.2d at 163 (citations omitted). In this case, Plaintiff's accident required his housing arrangement to be modified. Prior to the accident, he rented an apartment, living with two other people. Now, he requires a more expensive apartment that is handicapped accessible and which allows for 24-hour attendant care. I believe in this case that some portion of Plaintiff's lease payments is an ordinary expense of life and some portion is an expense designed to "effect a cure and give relief." By classifying the entire amount as "other treatment," the Commission is, in effect, providing Plaintiff a double recovery of that portion of his lease expense which represents an ordinary expense of life, since he is already being compensated for this portion from the weekly benefits. I believe this is unreasonable and is not a result that was intended by our General Assembly or required by decisions of our appellate courts.

The majority differentiates this case from *Espinosa*, *supra*, in which we affirmed the Full Commission's approach to classify a portion of the injured worker's adaptive housing as an ordinary expense of life. Specifically, the majority points out that, unlike *Espinosa*, Defendants in this case were paying Plaintiff's entire housing expenses while Plaintiff was housed at a long-term care facility and were willing to continue paying his entire housing costs if he remained at the long-term care facility,

rather than move into an apartment. Whether Defendants were, in fact, legally obligated to pay the entire housing cost of a nursing home or long-term care facility for Plaintiff is not before this Court, since the Commission has determined that Plaintiff should live in an apartment. However, I do not believe that Defendants' prior willingness to pay the entire cost for Plaintiff's housing while he remained in a long-term care facility is dispositive on the issue of whether Defendants are *legally obligated* to pay the entire rental expense of Plaintiff's apartment as "other treatment" under G.S. 97-25.

MARK WILLARD, Deceased-Employee, Plaintiff
v.
VP BUILDERS INC., Employer, Self-Insured, and SEDGWICK CMS, Third-Party Administrator, Defendants

No. COA13-413

Filed 6 May 2014

1. Workers' Compensation—offer of proof—opportunity must be afforded

The Full Industrial Commission erred in a workers' compensation case by failing to allow defendants the opportunity to make an offer of proof. While the rules of procedure and evidence governing proceedings in our general courts of justice do not generally apply in hearings before the Industrial Commission, upon request, the Commission must afford a party in a workers' compensation proceeding the opportunity to make an offer of proof regarding the substance of evidence that has been excluded unless the substance of the evidence and its significance are readily apparent.

2. Workers' Compensation—denial of motions—reopen evidence—receive additional testimony—no abuse of discretion

The Full Industrial Commission did not err in a workers' compensation case by denying defendants' motions to reopen the record to receive rebuttal testimony from three doctors and to reconsider its opinion and award in light of this rebuttal testimony. The Commission did not abuse its discretion in denying defendants' motions and the rulings did not prevent them from effectively and meaningfully cross-examining a witness.

Appeal by defendants from opinion and award entered 18 December 2012 and order entered 29 January 2013 by the North Carolina Industrial Commission. Heard in the Court of Appeals 12 September 2013.

Oxner Thomas + Permar, by Kristin P. Henriksen, for plaintiff-appellee.

Teague Campbell Dennis & Gorham, L.L.P., by George H. Pender, Megan B. Baldwin, and Brian M. Love, for defendants-appellants.

DAVIS, Judge.

VP Builders, Inc. and its third-party administrator Sedgwick CMS (collectively "Defendants") appeal from the opinion and award of the North Carolina Industrial Commission awarding death benefits to Connie Willard ("Ms. Willard"), the widow of Mark Willard ("Plaintiff"), and the Commission's subsequent order denying Defendants' motion for reconsideration. After careful review, we affirm.

Factual Background

On 24 September 2008, Plaintiff suffered an admittedly compensable injury to his left hand. Plaintiff was examined by Dr. Andrew Koman ("Dr. Koman") and diagnosed with post-trauma complex regional pain syndrome and a crush injury involving the left thumb. Dr. Koman performed surgery on Plaintiff's left hand on 2 June 2009. Dr. Koman's physician's assistant, Randy Parks ("Mr. Parks"), prescribed Vicodin to Plaintiff from 6 May 2009 to 20 July 2009 in order to manage his pain symptoms.

On 5 August 2009, Mr. Parks, pursuant to Dr. Koman's directive, prescribed methadone to Plaintiff. The prescription instructed Plaintiff to take ten milligrams, three times per day as needed to manage his pain. Plaintiff's medical records indicate that Dr. Koman intended "to transition [Plaintiff] from Vicodin to Methadone as part of the treatment plan to control [Plaintiff's] pain." Plaintiff's medical treatment by Dr. Koman and Mr. Parks was authorized through his workers' compensation coverage and paid for by Defendants. Plaintiff was also receiving weekly disability compensation from Defendants as a result of his compensable injury.

On the morning of 6 August 2009, Ms. Willard drove Plaintiff to Dr. Koman's office and then to the Rite Aid Pharmacy to pick up and fill his methadone prescription. Plaintiff received 90 ten-milligram tablets

of methadone from the pharmacist. Plaintiff took one of the pills during the car ride home from the pharmacy. Ms. Willard returned home with Plaintiff and then departed alone to visit her mother between 12:00 p.m. and 1:00 p.m.

While she was away, Ms. Willard spoke to Plaintiff twice on the telephone. When she called him at 1:15 p.m., Plaintiff "sounded fine." When Ms. Willard called the second time at approximately 3:00 p.m., he told her that he was doing some research on the computer regarding possible trips to take with their granddaughter. During this telephone conversation, Plaintiff stated that he had taken a second ten-milligram tablet of methadone. Ms. Willard stated that he was speaking at a lower volume and speed than usual.

At 3:30 p.m., Plaintiff received a phone call from his brother. Plaintiff's brother told Ms. Willard that Plaintiff's speech was very slow and that when he asked Plaintiff if he was okay, Plaintiff responded, "I don't know. . . . My throat feels funny."

Ms. Willard called Plaintiff at 4:00 p.m. to inform him that she was on her way home, and Plaintiff did not answer the telephone. As she approached their house, Ms. Willard saw Plaintiff through the window "slumped over the kitchen table." When she reached him, he was unresponsive. Emergency personnel arrived and confirmed that Plaintiff was dead.

On 27 July 2010, Ms. Willard filed a Form 18 seeking death benefits pursuant to N.C. Gen. Stat. § 97-38. In response, Defendants filed a Form 61, denying the claim on the basis that (1) Plaintiff's death "[was] not related to the compensable left thumb injury"; and (2) N.C. Gen. Stat. § 97-12 — which provides that compensation shall not be paid if the employee's injury or death was proximately caused by "[h]is being under the influence of any controlled substance listed in the North Carolina Controlled Substances Act, G.S. 90-86, et. seq., where such controlled substance was not prescribed by a practitioner" — barred any recovery of workers' compensation benefits.

The matter came on for hearing before Deputy Commissioner Phillip A. Holmes ("Deputy Commissioner Holmes") on 18 November 2011. Before the hearing commenced, the parties came to an agreement regarding the scheduling of certain medical depositions. The parties agreed that Dr. Andrew Mason ("Dr. Mason"), a toxicologist serving as an expert witness for Plaintiff, would be deposed after the parties conducted "some of the key depositions in this case, particularly the medical examiner's office witnesses," consisting of Dr. Deborah Radisch ("Dr.

Radisch"), the Chief Medical Examiner of the North Carolina Office of the Chief Medical Examiner ("OCME"), and Dr. Ruth Winecker ("Dr. Winecker"), the Chief Toxicologist of the OCME. Pursuant to the agreement, if Dr. Mason's testimony "attack[ed] the toxicology report," then Defendants would have the opportunity to redepose Drs. Radisch and Winecker and, if necessary, designate and introduce testimony from a rebuttal toxicologist. This agreement was entered into to address Defendants' earlier contention that Dr. Mason's testimony should be excluded because Plaintiff had failed to promptly and fully disclose the substance of his opinions in various discovery responses.

Following the hearing, the parties took several medical depositions, including those of Drs. Radisch and Winecker (Defendants' witnesses) followed by the deposition of Plaintiff's expert witness, Dr. Mason. On 13 March 2012, Defendants filed a motion to extend the record, seeking to introduce into evidence rebuttal testimony from Dr. Winecker, Dr. Radisch, and Dr. Brian McMillen ("Dr. McMillen") — a toxicologist who was designated to serve as Defendants' rebuttal expert witness. Defendants' motion alleged that (1) Dr. Mason had offered deposition testimony that was "substantially different than what was represented in plaintiff's discovery responses"; and (2) because Dr. Mason's opinions were in conflict with those testified to by the OCME, Defendants were entitled to offer rebuttal testimony pursuant to the parties' pre-hearing agreement. Deputy Commissioner Holmes denied the motion that same day.

On 14 March 2012, Defendants filed a motion requesting the opportunity to make an offer of proof. Specifically, Defendants — incorporating by reference their 13 March 2012 motion to extend the record — sought to present the rebuttal deposition testimony of Drs. Winecker, Radisch, and McMillen as an offer of proof to preserve their challenge to Deputy Commissioner Holmes' ruling for purposes of appellate review. Deputy Commissioner Holmes denied this motion on 15 March 2012. He subsequently entered an opinion and award on 26 April 2012 (1) concluding that Defendants had failed to prove their affirmative defense under N.C. Gen. Stat. § 97-12 because the evidence did not establish that Plaintiff took the methadone in a manner contrary to the prescribed use; and (2) awarding Ms. Willard death benefits for a minimum total of 400 weeks and ordering Defendants to reimburse her for funeral expenses and to pay the costs of this action, including expert witness fees.

Defendants appealed to the Full Commission and filed a motion to reopen the record to include rebuttal testimony from Drs. Winecker, Radisch, and McMillen. Defendants requested, in the alternative, that

they be permitted to submit this deposition testimony as an offer of proof. The Full Commission concluded that Defendants "ha[d] not shown good grounds to receive further evidence" and issued an opinion and award on 18 December 2012 affirming, with some minor modifications, the opinion and award of Deputy Commissioner Holmes.

Defendants filed a motion for reconsideration on 18 January 2013, requesting that the Commission grant their earlier motion to reopen the record or, alternatively, allow them to make an offer of proof. Defendants further asked the Commission to reconsider its opinion and award once the requested depositions had occurred, "taking into account this additional medical and toxicological evidence." On 29 January 2013, the Commission entered an order denying Defendants' motion for reconsideration, motion to reopen the record, and request for leave to make an offer of proof. Defendants appealed to this Court.

On 5 December 2013, this Court entered an order remanding this matter to the Commission for the sole purpose of allowing Defendants to make an offer of proof consisting of the anticipated rebuttal testimony of Drs. Winecker, Radisch, and McMillen. Defendants' appeal was held in abeyance pending this Court's receipt of the offer of proof. Defendants submitted their offer of proof to this Court on 17 February 2014.

Analysis

I. Offer of Proof

[1] Defendants first contend that the Full Commission erred in failing to allow them the opportunity to make an offer of proof. We agree.

> The offer-of-proof requirement is imposed for the benefit of two different audiences. First, when the proponent makes the offer of proof, the trial [tribunal] may reconsider and change the ruling. . . . Second, the offer is also essential if there is an appeal. If there were no offer of proof, the appellate court would have a difficult time evaluating the propriety and effect of the trial [tribunal's] ruling. With an offer of proof in the trial record, the appellate court can make much more intelligent decisions as to whether there was error . . . [and] whether the error was prejudicial . . . .

Robert P. Mosteller et. al., *North Carolina Evidentiary Foundations* § 3-6, at 3-15 (2d. ed. 2006). An offer of proof is generally essential to appellate review of a lower court's decision to exclude evidence because "[a]bsent an adequate offer of proof, we can only speculate as to what a

witness's testimony might have been." *State v. Jacobs*, 363 N.C. 815, 818, 689 S.E.2d 859, 861-62 (2010). As we recently explained,

> in order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record. The essential content or substance of the witness' testimony must be shown before we can ascertain whether prejudicial error occurred.

State v. Walston, ___ N.C. App. ___, ___, 747 S.E.2d 720, 723-24 (2013) (internal citations, quotation marks, and alterations omitted), *disc. review denied*, ___ N.C. ___, 753 S.E.2d 667 (2014).

As set out above, Defendants sought to introduce rebuttal deposition testimony from Drs. Winecker, Radisch, and McMillen and requested that Deputy Commissioner Holmes allow the rebuttal testimony to be included in the record. When Defendants' motion was denied, they sought leave to make an offer of proof with regard to this rebuttal testimony. This motion was also denied.

After Deputy Commissioner Holmes entered his opinion and award, Defendants appealed to the Full Commission and sought to reopen the record to include the rebuttal testimony. Defendants again requested, in the alternative, the opportunity to make an offer of proof regarding the rebuttal testimony. The Commission concluded that Defendants "ha[d] not shown good grounds to receive further evidence" and proceeded to enter its opinion and award without allowing Defendants to make an offer of proof.

Defendants then filed a motion for reconsideration, arguing that they had been prejudiced by Plaintiff's failure to fully disclose Dr. Mason's opinions in his discovery responses and by the Commission's denial of their request to reopen the record to receive the testimony of Dr. McMillen and the rebuttal testimony of Drs. Winecker and Radisch. Defendants asserted that the anticipated testimony from Dr. McMillen would "substantially contradict Dr. Mason's opinions" and that "his opinions could change the outcome in this case." Once again, Defendants sought leave to make an offer of proof to fully preserve this issue for appellate review. However, Defendants' motion was denied.

Because the Workers' Compensation Act requires that processes, procedures, and discovery under the Act "be as summary and simple as reasonably may be," N.C. Gen. Stat. § 97-80(a) (2013), we have held that

the rules of procedure and evidence that govern in our general courts of justice generally do not apply to the Industrial Commission's administrative fact-finding function. *Handy v. PPG Indus.*, 154 N.C. App. 311, 316, 571 S.E.2d 853, 857 (2002). However, "this Court has consistently held that the Commission must conform to court procedure and evidentiary rules where required to preserve justice and due process." *Id.* at 317, 571 S.E.2d at 857.

In *Allen v. K-Mart*, 137 N.C. App. 298, 528 S.E.2d 60 (2000), we concluded that despite the general principle that workers' compensation proceedings are not subject to the rules of procedure and evidence that govern our general courts, "[t]he opportunity to be heard and the right to cross-examine another party's witnesses are tantamount to due process and basic to our justice system" and must be observed by the Industrial Commission in such proceedings. *Id.* at 303-04, 528 S.E.2d at 64.

We believe that — like the right to cross-examine the opposing party's witnesses — the right to make a record sufficient for appellate review through an offer of proof is also necessary "to preserve justice and due process." *See Handy*, 154 N.C. App. at 317, 571 S.E.2d at 857; *see also State v. Brown*, 116 N.C. App. 445, 447, 448 S.E.2d 131, 132 (1994) ("It is fundamental that trial counsel be allowed to make a trial record sufficient for appellate review [by submitting an offer of proof.]").

We fail to see why the same notions of fundamental fairness requiring the general courts of justice to accept offers of proof should not likewise apply in workers' compensation proceedings.[1] Accordingly, while we reiterate that the rules of procedure and evidence governing proceedings in our general courts of justice do not generally apply in hearings before the Industrial Commission, we hold that, upon request, the Commission must afford a party in a workers' compensation proceeding the opportunity to make an offer of proof regarding the substance of evidence that has been excluded unless the substance of the evidence and its significance are readily apparent.[2]

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1. Indeed, this Court has indicated that in administrative hearings — where, as with hearings before the Industrial Commission, evidentiary procedures "are not so formal as litigation conducted in superior courts" — administrative law judges should permit a party to make an offer of proof to demonstrate the substance of the excluded evidence where its significance is not readily apparent. *Eury v. N.C. Employment Sec. Comm'n*, 115 N.C. App. 590, 602-03, 446 S.E.2d 383, 390-91, *appeal dismissed and disc. review denied*, 338 N.C. 309, 451 S.E.2d 635 (1994).

2. We note that offers of proof can take different forms with varying degrees of formality. See Kenneth S. Broun, 1 *Brandis & Broun on North Carolina Evidence* § 18, at 76-80 (7th ed. 2011) (explaining various methods of making offer of proof).

II. Denial of Motion to Reopen Record and Motion for Reconsideration

[2] We now turn our attention to the question of whether the Commission committed reversible error in denying Defendants' motions to (1) reopen the record to receive the rebuttal testimony of Drs. Winecker, Radisch, and McMillen; and (2) reconsider its opinion and award in light of this rebuttal testimony.

Motions to receive additional evidence and motions for reconsideration are both reviewed by this Court for abuse of discretion. *Beard v. WakeMed*, ___ N.C. App. ___, ___, 753 S.E.2d 708, 712 (2014); *see Moore v. Davis Auto Serv.*, 118 N.C. App. 624, 629, 456 S.E.2d 847, 851 (1995) ("The Commission's power to receive additional evidence is a plenary power to be exercised in the sound discretion of the Commission . . . . and the Commission's determination in that regard will not be reviewed on appeal absent a showing of manifest abuse of discretion." (citation and quotation marks omitted)).

> 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.

Beard, ___ N.C. App. at ___, 753 S.E.2d at 712-13 (citation omitted).

"In determining whether to accept new evidence, the Commission must consider the relative prejudices to the parties, the reasons for not producing the evidence at the first hearing, the nature of the testimony, and its probable effect upon the conclusion reached." *Andrews v. Fulcher Tire Sales and Serv.*, 120 N.C. App. 602, 606, 463 S.E.2d 425, 428 (1995) (citation and quotation marks omitted). However, when deciding whether to receive additional evidence, the Commission is not required to make specific findings of fact regarding its decision. *Keel v. H & V, Inc.*, 107 N.C. App. 536, 542, 421 S.E.2d 362, 366-67 (1992).

After carefully reviewing the excluded rebuttal testimony of Drs. Winecker, Radisch, and McMillen that we received in response to our 5 December 2013 order, we conclude that the Commission did not abuse its discretion in denying Defendants' motion to reopen the record and

reconsider its opinion and award. Defendants' offer of proof revealed that Dr. McMillen — Defendants' rebuttal toxicologist — would have testified that (1) making a dosage determination of methadone from tissue samples is scientifically reliable; and (2) he could opine with a reasonable degree of medical certainty that Plaintiff had consumed four to eight 10-milligram tablets of methadone based on the concentration levels found during the autopsy.

However, with regard to the rebuttal testimony of Drs. Winecker and Radisch, Defendants' offer of proof reveals that they would merely have reaffirmed their opinions that neither could state to a reasonable degree of medical certainty that Plaintiff consumed more than two ten-milligram tablets of methadone (the prescribed dosage). Moreover, Dr. Winecker would have critiqued the methodology that Dr. McMillen — Defendants' rebuttal toxicologist — utilized to arrive at his dosage determination range of four to eight tablets on the ground that Dr. McMillen used standard median textbook values derived from controlled clinical studies, which, in her opinion, were not appropriate in the present case given that Plaintiff's body was embalmed and then autopsied six months after his death.

Defendants contend that because of the pre-hearing agreement between the parties, Defendants were entitled to offer this rebuttal testimony and that, as a result, the Commission erred by denying their motion to reopen the record, consider the rebuttal testimony, and reconsider its opinion and award. As explained above, Defendants and Plaintiff entered into a pre-hearing agreement regarding the order in which medical depositions were to be scheduled and under what circumstances Defendants would be allowed to offer rebuttal testimony. Specifically, the parties agreed that if Dr. Mason attacked the toxicology report issued by the OCME, then Defendants could offer rebuttal testimony from Drs. Winecker and Radisch, and, if necessary, designate and offer testimony from a rebuttal toxicologist.

However, because Dr. Mason's testimony did not attack the toxicology report itself, the pre-hearing agreement was not triggered. In his deposition, Dr. Mason did not dispute the calculations of the methadone concentration levels found in Plaintiff's tissue samples. Nor did he contradict or criticize any other information contained within the toxicology report prepared by the OCME. Instead, Dr. Mason offered his opinion as to what information could be *extrapolated* from tissue concentration data contained in the report. Specifically, he opined that methadone dosage could not be accurately determined from tissue samples because

methadone is highly variable. This opinion did not attack the toxicology report itself, and as such, the Commission's denial of the motion to reopen the record and motion for reconsideration was not inconsistent with the parties' pre-hearing agreement.

Moreover, given that the overwhelming weight of the evidence — both in the record and in Defendants' offer of proof — indicates that methadone is highly variable and that tissue concentrations do not provide scientifically reliable determinations of methadone dosage, we cannot conclude that Defendants were prejudiced by the Commission's denial of their motions to reopen the record and to reconsider its opinion and award. This Court has repeatedly held that we will not find an abuse of discretion in the denial of a motion to consider additional evidence where the party has failed to show that it was actually prejudiced by the denial. *See Andrews*, 120 N.C. App. at 606, 463 S.E.2d at 428 (holding that defendants were not prejudiced by denial of their motion to consider new evidence in workers' compensation proceeding because such evidence would "probably not affect the outcome" of the hearing, and, therefore, Commission did not abuse its discretion); *Moore*, 118 N.C. App. at 629, 456 S.E.2d at 851 (ruling that because additional evidence defendants sought to introduce in workers' compensation proceeding was cumulative, defendants were not prejudiced by denial of motion and failed to show manifest abuse of discretion). Here, we believe that Defendants have failed to show actual prejudice because their offer of proof demonstrates that had Defendants been allowed to submit rebuttal toxicology testimony from Dr. McMillen, their two primary witnesses — Drs. Winecker and Radisch — would have nevertheless reaffirmed their opinions that tissue concentrations do not provide scientifically reliable determinations of methadone dosage and that, as such, they could not state with a reasonable degree of medical certainty that Plaintiff consumed methadone in a manner contrary to his prescription.

Finally, Defendants contend that the Commission's rulings prevented them from effectively and meaningfully cross-examining Dr. Mason. In making this argument, Defendants primarily rely on this Court's decision in *Allen*.

In *Allen*, the plaintiff sustained an injury while moving a box of stationary and placing it in a shopping cart. *Allen*, 137 N.C. App. at 298-99, 528 S.E.2d at 61. The plaintiff's treating physician diagnosed her with a cervical and lumbar muscle strain and noted that she had also been suffering from panic attacks and depression for some time. *Id.* at 300, 528 S.E.2d at 62. As treatment of the plaintiff continued, the physician

eventually diagnosed the plaintiff with fibromyalgia as well. *Id.* The doctor testified that her diagnosis of fibromyalgia was "sort of by exclusion because all of the other tests . . . looked pretty normal." *Id.* The plaintiff did not seek out a specialist familiar with fibromyalgia prior to her hearing before the deputy commissioner, and on 22 July 1997, the deputy commissioner entered an opinion and award determining that she was no longer disabled and awarding her medical expenses incurred as a result of the muscle strain but not for the treatment of fibromyalgia. *Id.*

The plaintiff appealed to the Full Commission and filed a motion "for independent psychiatric and fibromyalgia specialist examinations." *Id.* at 301, 528 S.E.2d at 62. The Commission granted the motion, and over the defendants' numerous objections, the Commission allowed the plaintiff to submit reports from a psychiatrist and a general practitioner who had experience in treating and diagnosing fibromyalgia. *Id.* at 301, 528 S.E.2d at 63. The Commission relied on these reports in entering its opinion and award in which it concluded that the plaintiff's panic attacks, depression, and fibromyalgia "were caused or significantly aggravated by her injury by accident." *Id.* at 302, 528 S.E.2d at 63. This Court reversed, concluding that the Commission erred "by allowing significant new evidence to be admitted but denying [the] defendants the opportunity to depose or cross-examine the physicians, or [failing to require the] plaintiff to be examined by experts chosen by [the] defendants." *Id.* at 304, 528 S.E.2d at 64.

In so holding, we noted that (1) the defendants filed five separate objections to the admission of this evidence to which the Commission failed to respond; and (2) "[t]he evidence offered by [the psychiatrist and the practitioner experienced in diagnosing fibromyalgia] was completely different from any other evidence admitted up to then." *Id.* We thus concluded that "where the Commission allows a party to introduce new evidence which becomes the basis for its opinion and award, it must allow the other party to rebut or discredit that evidence." *Id.* at 304, 528 S.E.2d at 64-65.

Here, conversely, Defendants were able to extensively cross-examine Dr. Mason. Indeed, we note that Defendants were able to specifically question him concerning both (1) his opinion that methadone dosage could not be accurately determined using tissue concentrations; and (2) Dr. McMillen's opinion that Plaintiff's recorded levels of methadone could not have been reached by ingesting only two ten-milligram tablets of methadone. As such, *Allen* is distinguishable from the present case, and Defendants' argument on this issue is overruled.

Conclusion

For the reasons stated above, we affirm the Commission's 18 December 2012 opinion and award and its 29 January 2013 order denying Defendants' motion for reconsideration.

AFFIRMED.

Judges HUNTER, JR. and ERVIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 6 May 2014)

ALLEN INDUS., INC. v. KLUTTZ No. 13-1032-2	Guilford (13CVS5637)	Dismissed
BELL v. CITY OF NEW BERN No. 13-817	Craven (12CVS1410)	Affirmed in part; dismissed in part
COSTON v. UNIV. OF N.C. AT CHARLOTTE No. 13-1020	Mecklenburg (11CVS22954)	Reversed
DAVIS v. DAVIS No. 13-1168	Onslow (12CVS4163)	Affirmed
EVANS v. EVANS No. 13-1305	Durham (90CVD123)	Vacated
HENSEL v. XEROX BUS. SERVS., LLC No. 13-1073	Guilford (13CVS4734)	Affirmed
HUNT v. HUNT No. 13-1153	New Hanover (10CVD5691)	Affirmed in part; Remanded in part
IN RE A.L.E. No. 13-999	Wake (11JT241-242)	Affirmed
IN RE B.M. No. 13-1354	Durham (12JA32-34)	Affirmed
IN RE C.B. No. 13-1349	Durham (12JB127)	Affirmed
IN RE E.W.P. No. 13-1114	Brunswick (11JA125-126)	Reversed and Remanded
IN RE ECHOLS No. 13-804	Bertie (10SP78)	Affirmed
IN RE H.M. No. 13-1031	Buncombe (12JA44)	Affirmed
IN RE J.A. No. 13-832	Mecklenburg (12JA382) (12JA383) (12JA384)	Affirmed
IN RE J.D.V. No. 13-1061	Onslow (12JA38)	Reversed and Remanded

IN RE J.L. No. 13-539	Orange (12JB99)	Dismissed in part; Affirmed in part; Vacated and Remanded in part.
IN RE J.R. No. 13-1019	Mecklenburg (10JT305-306)	Affirmed
IN RE J.W. No. 13-1346	Buncombe (11JA110)	Affirmed
IN RE J.W.A.M. No. 13-973	New Hanover (09JT226) (11JT81)	Affirmed
IN RE K.A.F. No. 13-1270	Guilford (12JA532)	AFFIRMED in Part; REVERSED and REMANDED in Part.
IN RE K.I. No. 13-1403	Catawba (09JA22-23)	Affirmed
IN RE K.L.C. No. 13-1365	Davidson (12JT98)	Affirmed
IN RE S.B.A. No. 13-1029	Greene (11JT3-4)	Affirmed
IN RE S.H. No. 13-1037	Davidson (10JT133-134) (11JT134)	Affirmed
IN RE S.M. No. 13-1241	Wake (12JT45)	Affirmed
McGRAW v. McGRAW No. 13-1195	Johnston (08CVD985)	Reversed and Remanded
MURRELLE v. MURRELLE No. 13-1264	Carteret (10CVD1713) (12CVD133)	Affirmed
N.C. HUM. REL. COMM'N v. CARRIAGES AT ALLYNS LANDING OWNERS ASS'N, INC. No. 13-823	Wake (13CVS75)	Reversed
NORRIS v. WAL-MART ASSOCS., INC. No. 13-798	N.C. Industrial Commission (562529)	Affirmed

PAREDONES v. WRENN BROS. No. 13-910	N.C. Industrial Commission (W60905)	Affirmed
PURYEAR v. PURYEAR No. 13-1014	Wake (09CVS825)	Dismissed
ROANOKE COUNTRY CLUB, INC. v. TOWN OF WILLIAMSTON No. 13-756	Martin (10CVS374)	Affirmed
SHACKELFORD v. LUNDQUIST No. 13-960	Guilford (07CVD12047)	No Error
SMITH v. AM. NAT'L INS. CO. No. 13-943	N.C. Industrial Commission (X20253)	Affirmed
STATE v. ANDERSON No. 13-1105	Onslow (11CRS55657-61)	No Plain Error
STATE v. ANTHONY No. 13-982	McDowell (12CRS51028)	No Error
STATE v. BARKLEY No. 13-1025	Wake (11CRS218802) (11CRS9216)	No Error
STATE v. BENNETT No. 13-1058	Haywood (12CRS1115) (12CRS52488)	No Error
STATE v. BOOTHE No. 13-1233	Stokes (13CRS50761-66) (13CRS50768)	Remanded for redetermination of restitution
STATE v. DAVIS No. 13-1108	Scotland (11CRS50535)	Reversed and Remanded
STATE v. DILWORTH No. 13-856	Guilford (11CRS69355)	No prejudicial error
STATE v. EWART No. 13-782	Jackson (11CRS1364)	No Error
STATE v. FINCH No. 13-1212	Johnston (11CRS4362-63) (11CRS54753-54) (11CRS55107-08) (11CRS55109-110) (11CRS55111)	Dismissed

STATE v. FOWLKES No. 13-1319	Wake (11CRS223948) (11CRS223961-63) (11CRS224370-71)	No Error
STATE v. GLOVER No. 13-1141	Henderson (10CRS53859)	No Error
STATE v. GLOVER No. 13-1079	Forsyth (12CRS60503)	Affirmed
STATE v. GRADY No. 13-958	New Hanover (06CRS52283)	Affirmed
STATE v. HOFFMAN No. 13-540	Lincoln (11CRS51150)	No Error
STATE v. HORTON No. 13-1012	Forsyth (12CRS17180) (12CRS56767)	No Error
STATE v. INYAMA No. 13-666	Wake (11CRS219377)	Affirmed
STATE v. JANDREAU No. 13-735	Currituck (10CRS50796) (10CRS50914)	No prejudicial error
STATE v. JOHNSON No. 13-1206	Cumberland (11CRS66293)	Affirmed
STATE v. KING No. 13-1118	Union (10CRS50358-60)	No Error in Part; Vacated and Remanded in Part.
STATE v. KORNEGAY No. 13-1011	Johnston (10CRS53554) (11CRS3596)	No Error
STATE v. LOPEZ-PESINA No. 13-1047	Martin (10CRS50633) (10CRS605-610)	No Error
STATE v. LUKE No. 13-966	Mecklenburg (11CRS207253)	No Error
STATE v. MANN No. 13-819	Rockingham (10CRS54259)	No error in part; Remanded for resentencing

STATE v. MARTIN No. 13-1218	Edgecombe (13CRS324)	Affirmed
STATE v. MICKENS No. 13-1165	Johnston (02CRS52867)	Affirmed
STATE v. MILLER No. 13-1024	Cabarrus (09CRS53721)	Remanded for redetermination of restitution
STATE v. MOORE No. 13-1351	Person (12CRS50508-11)	No error in part; no prejudicial error in part.
STATE v. RAY No. 13-949	Mecklenburg (12CRS214702)	No Error
STATE v. SHINE No. 13-1183	Person (13CRS329) (13CRS330)	Affirmed
STATE v. SMITH No. 13-965	Buncombe (09CRS301) (09CRS53119)	No plain error; No error
STATE v. STRAYHORN No. 13-924	Sampson (11CRS53251-52)	No Error
STATE v. THOMPSON No. 13-1198	Alamance (11CRS56118)	No error in part; reversed and remanded in part.
STATE v. WEST No. 13-959	Onslow (11CRS53063-64)	No Error
STATE v. WASH No. 13-1152	Rowan (06CRS57896-97) (07CRS51270)	No Error

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR—Continued

since it dismissed one but not all parties, that order was properly certified under N.C.G.S. § 1A-1, Rule 54(b) and defendant Baker's appeal from the trial court's denial of a motion to dismiss for insufficient service of process was allowed in order to prevent fragmentary appeals. **Washington v. Cline, 412.**

Issues not litigated before trial court—remand—Plaintiffs' argument that the "Execution Procedure Manual for Single Drug Protocol (Pentobarbital)" must be promulgated through rule-making under the Administrative Procedure Act was remanded for proper determination by the trial court. Plaintiffs' arguments before the Court of Appeals were not considered by the trial court when the court entered the order from which plaintiffs' appealed because these issues stemmed entirely from subsequent changes to N.C.G.S. § 15-188 and the execution protocol made during pendency of this appeal. **Robinson v. Shanahan, 34.**

Preservation of issues—conclusion in final decision—not raised below—The plaintiffs in a tort claims case were not barred from contesting on appeal the validity of the Industrial Commission's conclusion in its decision and order regarding the standard of care where plaintiffs did not raise the issue before the Commission. It would have been impossible for plaintiffs to challenge the legal principle articulated by the Commission before it was actually stated and plaintiffs could not be barred by the "swap horses" doctrine. **Rolan v. N.C. Dep't of Agric. & Consumer Servs., 371.**

Preservation of issues—failure to cite authority—Although defendant Baker contended that the trial court erred by denying his motion to dismiss an action for failure of the summonses to contain the "title of the cause," he failed to cite any authority for this proposition. **Washington v. Cline, 412.**

Preservation of issues—failure to make offer of proof—Although defendant argued in a second-degree murder, possession of a firearm by a felon, and carrying a concealed gun case that the trial court abused its discretion by precluding him from cross-examining the medical examiner regarding her preliminary report of death, defendant failed to preserve this issue for appellate review by failing to make an offer of proof. **State v. Posey, 723.**

Preservation of issues—failure to object at trial—By not objecting at trial to the trial court joining for trial defendant's charges of robbery with a dangerous weapon and possession of a firearm by a felon, defendant failed to preserve the issue for appellate review. **State v. Alston, 152.**

Preservation of issues—failure to object at trial—failure to allege plain error on appeal—Defendant failed to preserve for appellate review his argument that the trial court erred in a child abuse case by admitting unfavorable character evidence. Defendant failed to object to the evidence at trial and failed to specifically allege plain error on appeal. **State v. Dinan, 694.**

Preservation of issues—issue not raised at trial—right to appeal waived—review under Rule 2—Defendant waived his right to appellate review of whether the trial court erred by failing to arrest judgment on two convictions on double jeopardy grounds where he failed to raise the double jeopardy issue at trial. However, the Court of Appeals elected to review the issue under Rule 2 of the Rules of Appellate Procedure. **State v. Mulder, 82.**

Preservation of issues—proper objection made at trial—Respondent mother properly preserved for appellate review her argument that the trial court erred in an

APPEAL AND ERROR—Continued

EQUITY—Continued

unclean hands. It was unclear from the record on which basis the trial court entered the directed verdicts. Further, fraud was not required to preclude equitable relief on the basis of unclean hands. The judgment was reversed and the case was remanded on this issue. **Brissett v. First Mount Vernon Indus. Loan Ass'n, 241.**

EVIDENCE

Cross-examination—statements defendant denied making—egregious disregard for trial court's ruling—curative instruction—no prejudice—The trial court erred in a second-degree murder and possession of a firearm prosecution by allowing the State to cross-examine defendant on the basis of statements he denied making that were contained in a police report. Although the prosecutor showed a marked and egregious disregard for the trial court's ruling that the police report was inadmissible by continuing to ask questions about the contents of that report, the instruction given by the trial court not to consider the prosecutor's questions cured any prejudice to defendant. **State v. Gayles, 173.**

Cross-examination of defendant—details of prior convictions—defendant opened door to questions—The trial court did not err in a second-degree murder and possession of a firearm by a felon case by permitting the prosecutor to cross-examine defendant on the details of his prior convictions. By minimizing his criminal record on direct examination and then denying that he had been convicted of carrying a concealed weapon when asked on cross-examination, defendant opened the door to the prosecutor's questions concerning the type of weapon involved with his prior crimes. **State v. Gayles, 173.**

Defendant impeached—prior convictions—defendant testified—The trial court did not err in a second-degree murder and possession of a firearm by a felon case by allowing the State to impeach defendant using prior convictions when he had stipulated that he was a convicted felon for purposes of the possession of a firearm by a felon charge. Because defendant testified, he was subject to impeachment on the basis of his prior convictions, even though he had already stipulated to being a convicted felon for purposes of the firearm possession charge. **State v. Gayles, 173.**

Deposition—confusion—misapprehension of law—The trial court abused its discretion in excluding the offered portions of a deposition as confusing. The only possible confusion raised by defendants was that the evidence given might have been used against defendant Corinna Freeman by co-defendants, but such use is explicitly permitted under N.C.G.S. § 1A-1, Rule 32 when the co-defendant was represented at the deposition which an adverse party seeks to admit. It was clear that the trial court made its decision under a misapprehension of the applicable law and not based upon the actual content of the portions of the deposition which plaintiffs sought to admit. **Green v. Freeman, 109.**

Deposition—exclusion not prejudicial—Although the trial court erred by excluding a deposition under Rule 32 of the North Carolina Rules of Civil Procedure and under Rule 403 of the North Carolina Rules of Evidence in an action involving agency, that error was not prejudicial because the inclusion of this deposition would have had no effect on the agency theory of liability. **Green v. Freeman, 109.**

First-degree murder—civil pleadings and judgment—proof of fact alleged—danger of unfair prejudice—outweighed probative value—The trial court

EVIDENCE—Continued

SEARCH AND SEIZURE—Continued

Scope of stop—hunting license check—voluntary conversation—The trial court erred by granting defendant's motion to dismiss a charge of possession of a firearm by a felon based on the trial court's conclusion that a Wildlife Enforcement Officer exceeded the scope of a stop to check defendant's driver's license by asking defendant if he was a convicted felon. Nothing in the record indicated that defendant had an objective reason to believe that he was not free to end the conversation once he produced his driver's license and he was not "seized" in the constitutional sense when the officer asked him about his criminal history. The officer had the authority to seize defendant's rifle under the plain view doctrine. **State v. Price, 386.**

Traffic stop—amount of time—routine check of relevant documentation—The trial court did not err by denying defendant Perez's motion to suppress cocaine seized based upon his argument that the traffic stop was unconstitutionally extended. Perez provided no citation to authority to support the proposition that the purpose of the stop was completed once the citation for the infraction justifying the stop had been given to the person who committed the infraction. Further, law enforcement officers routinely check relevant documentation while conducting traffic stops. **State v. Velazquez-Perez, 585.**

SENTENCING

Aggravating factor—found by court—improper—The trial court improperly found an aggravating factor in a prosecution for reckless driving by making the finding itself instead of submitting the aggravating factor to the jury. That aggravating factor increased the penalty for the crime beyond the prescribed maximum. **State v. Geisslercrain, 186.**

Aggravating factors—notice—The State's failure to provide proper notice that it intended to seek aggravating factors in a prosecution for reckless driving, as required by N.C.G.S. § 20-179(a1)(1), was error, and the State's contention that the error was harmless because defendant received a "presumptive" sentence failed because the sentence given was not appropriate. **State v. Geisslercrain, 186.**

Attempted first-degree felony murder—crime non-existent—The trial court erred in a first-degree murder case by entering judgment on the jury's guilty verdict of attempted murder. The trial court's instruction concerning the attempted murder offense was based solely upon a theory of attempted felony murder and the offense of attempted first-degree felony murder does not exist under our law. **State v. Marion, 195.**

Discretion—reckless driving—no aggravating factors—The trial court had no discretion in the sentence given in a reckless driving case where no aggravating factors were properly found. The rationale in *State v. Green*, 209 N.C. App. 669, did not apply. **State v. Geisslercrain, 186.**

Failure to arrest judgment—felony murder—underlying felonies—The trial court erred in a first-degree murder case by failing to arrest judgment on one of defendant's felony convictions because defendant's first-degree murder convictions were exclusively premised on a felony murder theory. As multiple felonies supported a felony murder conviction, the merger rule only required the trial court to arrest judgment on at least one of the underlying felony convictions. The matter was remanded with instructions that the trial court arrest judgment with respect to at least one of defendant's felony convictions in such a manner that would not subject defendant to a greater punishment. **State v. Marion, 195.**

WORKERS' COMPENSATION—Continued

ZONING—Continued